



## BRIEFING PAPER

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# Childcare Bill 2015-16: Analysis for Commons Report Stage (Bill 107)

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### Inside:

1. Background
2. Announcement of the policy
3. House of Lords Second Reading
4. The Bill's reliance on delegated legislation: a "skeleton" Bill?
5. Funding the proposals
6. The funding rate for free childcare
7. Parliamentary debate on proposals for an independent funding review
8. The amount of the extended entitlement and responsibility for delivering it
9. Who would be eligible for extended entitlement
10. Other provisions relating to eligibility
11. Information sharing and local authority school budget
12. Publication of information (Clause 5 of Bill 107)
13. Territorial extent
14. Implementation timetable



# Contents

<b>Summary</b>	<b>5</b>
<b>1. Background</b>	<b>7</b>
1.1 Introduction of the free childcare policy	7
1.2 What will the <i>Childcare Bill</i> add?	7
1.3 Other childcare support	8
Tax Free Childcare	8
Existing support for childcare	8
<b>2. Announcement of the policy</b>	<b>9</b>
2.1 Conservative Party manifesto and Queen’s Speech	9
<b>3. House of Lords Second Reading</b>	<b>10</b>
3.1 General support for the Bill	10
<b>4. The Bill’s reliance on delegated legislation: a “skeleton” Bill?</b>	<b>11</b>
4.1 Summary	11
4.2 Points raised during Second Reading	11
4.3 Justification by the Department for Education	12
4.4 Report of the Delegated Powers and Regulatory Reform Committee	13
4.5 Report of the Constitution Committee	14
4.6 Government response at the start of Lords Committee Stage, and debate	15
4.7 Further report of the Delegated Powers and Regulatory Reform Committee before Report Stage	16
4.8 Amendments at Lords Report Stage – any regulations to be subject to affirmative resolution	18
4.9 Government amendments at Commons Committee Stage – affirmative resolution only when first introduction	20
<b>5. Funding the proposals</b>	<b>22</b>
5.1 Expected availability and take-up	22
Expected availability	22
Expected take-up	22
5.2 How the policy will be funded	23
5.3 Estimates of the cost of the policy	23
Conservative Party and Government estimates	23
Estimates by others	25
<b>6. The funding rate for free childcare</b>	<b>27</b>
6.1 Independent research	27
The sufficiency of current funding rates for the universal 15 hours of free childcare and the issue of cross-subsidisation	27
6.2 The possible impact if the extended entitlement’s funding rate is lower than the private rate currently paid	29
6.3 The DfE’s funding review	30
The call for evidence from childcare providers	30
6.4 Outcome of the funding review	32
6.5 Reaction to the outcome of the funding review	33

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### 3 Childcare Bill 2015-16: Analysis for Commons Report Stage (Bill 107)

6.6	Government proposal to review the early years funding formula	34
<b>7.</b>	<b>Parliamentary debate on proposals for an independent funding review</b>	<b>36</b>
7.1	Summary	36
7.2	Lords Committee Stage	36
7.3	Lords Report Stage and addition of a new clause 1	37
7.4	Reaction to the inclusion of new clause 1	39
7.5	Analysis of new clause 1 of the Bill as introduced to the Commons (Bill 84)	40
7.6	Removal of new clause 1 at Commons Committee Stage	40
<b>8.</b>	<b>The amount of the extended entitlement and responsibility for delivering it</b>	<b>42</b>
8.1	The number of hours of the current universal 15 hours entitlement	42
8.2	The number of hours under the proposed extended entitlement	42
8.3	The duty on the Secretary of State to secure the extended entitlement	43
8.4	Requirements on local authorities including flexible childcare provision	44
8.5	Will the extended entitlement create extra demand for places?	46
8.6	Parliamentary debate on capital funding to create additional places in nurseries	47
	Lords Committee Stage	47
	Lords Report Stage	48
8.7	Government announcement of additional capital funding and reaction	48
8.8	Analysis of clauses 1(1), 2(2)(a-c and k), 2(3) and 2(8) of Bill 107	49
<b>9.</b>	<b>Who would be eligible for extended entitlement</b>	<b>50</b>
9.1	A “qualifying child of working parents”	50
	Original definition	50
	Government amendments made at Report Stage to broaden the definition	50
9.2	Introduction of an upper income limit, and revised lower income limit	51
	Lower limit – equivalent to working 16 hours (previously 8 hours ) a week at the NMW or NLW	51
	Upper limit – £100,000 per parent per annum	52
	Expected savings from the revised eligibility criteria	52
	Reaction to the changes	52
9.3	Disabled children and children with special educational needs	53
9.4	Consideration of the eligibility of specified groups	54
9.5	Analysis of clause 1(2–4, 7–9) of Bill 107	56
	Definition of a “qualifying child of working parents”	56
	Definition of a “young child”	57
	Definition of a parent	58
	Circumstances in which a child is, or is not, in England	58
<b>10.</b>	<b>Other provisions relating to eligibility</b>	<b>59</b>
10.1	Checking eligibility and associated criminal penalties	59
10.2	Appealing an eligibility decision	60
10.3	Penalties for false or misleading declarations of eligibility	60
10.4	Analysis of paragraphs e to j of clause 2(2) and clauses 2(4–6) of Bill 107	61
	Checking eligibility and associated criminal penalties for unauthorised, onward disclosure of information	61
	Appealing an eligibility decision	62
	Financial penalties for false or misleading declarations of eligibility	62
<b>11.</b>	<b>Information sharing and local authority school budget</b>	<b>63</b>
11.1	Amendments moved at Lords Report Stage	63
11.2	Analysis of clause 3 of Bill 107	63
<b>12.</b>	<b>Publication of information (Clause 5 of Bill 107)</b>	<b>64</b>
<b>13.</b>	<b>Territorial extent</b>	<b>65</b>

<b>14. Implementation timetable</b>	<b>66</b>
14.1 Implementation timetable for the Bill	66
14.2 The Government's intended timetable	66

## Summary

The *Childcare Bill [HL]* had its Second Reading in the Commons on 25 November 2015, and its Committee Stage on 8 and 10 December 2015. It had already been debated in the House of Lords. This legislation applies to England only.

The Bill is scheduled to have its Report Stage and Third Reading in the Commons on 25 January 2016.

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.

In contrast, there has been considerable debate in the Lords and Commons about the provisions relating to extended entitlement. Key issues and changes to the Bill during its passage through Parliament to date include:

- 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). This was subsequently changed by the Government during Commons Committee Stage so that such regulations (relating to the duty to secure the extended entitlement or discharging the duty) would be subject to the affirmative when first introduced, and subject to the negative procedure thereafter;
- 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 in excess of £1 billion per year by 2019–2020.

The Bill was amended by the Opposition during Lords Report Stage through the insertion of a new clause, the effect of which would have been 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.

The Government subsequently reported the findings of its funding review at the time of Commons Second Reading of the Bill, which provided 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. During Commons Committee Stage, the new clause requiring the independent funding review was deleted without a division;

- 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 Lords 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). During Common Second Reading, the Government announced changes to the eligibility criteria for parents:
  - the equivalent of 16 (previously eight) hours per week working at the National Living Wage (or National Minimum Wage for under 25s);
  - an income cap was introduced, set at £100,000 per parent per annum;

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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup>

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

## 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.

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

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

<sup>3</sup> 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]

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

<sup>5</sup> [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.<sup>6</sup> The policy is expected to take effect from early 2017, having been delayed due to a legal challenge.<sup>7</sup>

### 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.<sup>8</sup>

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

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

<sup>8</sup> [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".<sup>9</sup>

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".<sup>10</sup>

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.<sup>11</sup>

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<sup>9</sup> Conservative Party, *The Conservative Party Manifesto 2015*, April 2015, p27

<sup>10</sup> [HL Deb 27 May 2015 c5](#)

<sup>11</sup> 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%".<sup>12</sup>

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.<sup>13</sup>

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".<sup>14</sup>

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.<sup>15</sup>

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".<sup>16</sup>

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<sup>12</sup> [HL Deb 16 June 2015 c1082](#)

<sup>13</sup> [HL Deb 16 June 2015 cc1082–1083](#)

<sup>14</sup> [HL Deb 16 June 2015 c1083](#)

<sup>15</sup> [HL Deb 16 June 2015 c1085](#)

<sup>16</sup> [HL Deb 16 June 2015 c1087](#)

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

### 4.1 Summary

When the Bill was introduced to the Lords, Peers were concerned about the lack of substance on the face of the Bill – the Government said that detailed provisions would be set out separately in secondary legislation.

Following criticism from the Delegated Powers and Regulatory Reform and the Constitution Committees of the House of Lords, the Government proposed that the affirmative procedure should be used for only the first regulations relating to the duty to secure 30 hours free childcare available for working parents and the discharge of this duty.<sup>17</sup>

However, the Opposition argued that those regulations should be subject to the affirmative resolution procedure not only when first introduced but also subsequently (e.g. when amended or withdrawn).

The matter was put to a division, and the Opposition's amendment was accepted.

However, at Committee Stage in the Commons, the Government repeated the proposal it had made in Lords Report Stage, and on this occasion it was accepted without a division of the Committee.

### 4.2 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.<sup>18</sup>

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",<sup>19</sup> and that "this Second Reading debate has had one key characteristic: an almost endlessly repeated request for more information".<sup>20</sup>

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<sup>17</sup> The Government also proposed that the affirmative resolution procedure be used on every occasion when regulations were made, amended or withdrawn in regard to changing the financial penalty or any regulations that amended or repealed provision made by an Act.

<sup>18</sup> [HL Deb 16 June 2015 c1087](#)

<sup>19</sup> [HL Deb 16 June 2015 c1123](#)

<sup>20</sup> [HL Deb 16 June 2015 c1124](#)

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”.<sup>21</sup>

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.<sup>22</sup>

**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.

### 4.3 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:

<sup>21</sup> [HL Deb 16 June 2015 c1104](#)

<sup>22</sup> [HL Deb 16 June 2015 c1130](#)

- 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.<sup>23</sup>

#### 4.4 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".<sup>24</sup> 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".<sup>25</sup> 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.<sup>26</sup>

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

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<sup>23</sup> 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

<sup>24</sup> Delegated Powers and Regulatory Reform Committee, [\*Childcare Bill \[HL\] etc.\*](#), 2015–16 HL 12, 26 June 2015, p3, para 1

<sup>25</sup> *Ibid*, p3, paras 2 and 3

<sup>26</sup> *Ibid*, 26 June 2015, p5, para 6

finalising a delivery model’’.<sup>27</sup> 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). 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 “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.<sup>28</sup>

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”.<sup>29</sup>

## 4.5 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.

<sup>27</sup> Delegated Powers and Regulatory Reform Committee, *Childcare Bill [HL] etc.*, 2015–16 HL 12, 26 June 2015, p5, para 7

<sup>28</sup> *Ibid*, p6, para 11

<sup>29</sup> *Ibid*, p6, paras 12 and 13

[...]

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.<sup>30</sup>

## 4.6 Government response at the start of Lords 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 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.<sup>31</sup>

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”.<sup>32</sup>

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”.<sup>33</sup>

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”.

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

<sup>31</sup> [HL Deb 1 July 2015 c2074](#)

<sup>32</sup> [HL Deb 1 July 2015 cc2074–2075](#)

<sup>33</sup> [HL Deb 1 July 2015 c2075](#)

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.<sup>34</sup>

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".<sup>35</sup>

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".<sup>36</sup>

#### 4.7 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.<sup>37</sup> 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.<sup>38</sup>

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<sup>34</sup> [HL Deb 1 July 2015 cc2075–2077](#)

<sup>35</sup> [HL Deb 1 July 2015 c2077](#)

<sup>36</sup> [HL Deb 1 July 2015 c2083](#)

<sup>37</sup> 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

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



In its June 2015 report, the Committee had recommended that the regulations be subject to the affirmative procedure.<sup>39</sup> The Government had responded by proposing the affirmative procedure for most powers on first exercise only, except for some limited circumstances,<sup>40</sup> 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.<sup>41</sup>

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”.<sup>42</sup> 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.**<sup>43</sup>

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”] will be subject to a public consultation before final regulations are brought before Parliament for approval”,<sup>44</sup> 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”.<sup>45</sup>

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<sup>39</sup> Delegated Powers and Regulatory Reform Committee, *Childcare Bill [HL] etc.*, 2015–16 HL 12, 26 June 2015, p6, para 13

<sup>40</sup> 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]

<sup>41</sup> 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

<sup>42</sup> Delegated Powers and Regulatory Reform Committee, *Childcare Bill [HL]: Government Amendments*, 2015–16 HL 37, 13 October 2015, p3, para 4

<sup>43</sup> *Ibid*, p4, para 8 (original emphasis)

<sup>44</sup> 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

<sup>45</sup> Delegated Powers and Regulatory Reform Committee, *Childcare Bill [HL]: Government Amendments*, 2015–16 HL 37, 13 October 2015, p6, para 15

## 4.8 Amendments at Lords Report Stage – any regulations to be subject to affirmative resolution

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”.<sup>46</sup>

### Box 3: What does “affirmative resolution” mean?

As the [www.parliament.uk](http://www.parliament.uk) website explains, there are two types of Statutory Instrument (SI):

- Affirmative instruments: Both Houses of Parliament must expressly approve them
- Negative instruments: become law without a debate or a vote but may be annulled by a resolution of either House of Parliament

In both cases, Parliaments room for manoeuvre is limited. Parliament can accept or reject an SI but cannot amend it.<sup>47</sup>

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

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.<sup>48</sup>

Amendments 12 and 18 were agreed.<sup>49</sup>

The Government also tabled amendments at Report Stage requiring the affirmative procedure to be applied to “the first regulations” relating to

<sup>46</sup> [HL Deb 14 October 2015 c238](#)

<sup>47</sup> UK Parliament, [Statutory Instruments](#), webpage [taken on 20 January 2015]

<sup>48</sup> [HL Deb 14 October 2015 c258](#)

<sup>49</sup> Amendment 18 as amended by amendment 20A was agreed.

the duty to secure 30 hours free childcare available for working parents and the discharge of this duty; as the Delegated Powers and Regulatory Reform Committee noted, the affirmative procedure would not apply if regulations already made were being amended (or withdrawn).

Only regulations made under new clause 2(6) (regarding financial penalties),<sup>50</sup> 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 clause 1 or new clause 2 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 Governments 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 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.<sup>51</sup>

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.<sup>52</sup>

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<sup>50</sup> This is now clause 2(5) of Bill 107 as being considered at Commons Report Stage.

<sup>51</sup> [HL Deb 14 October 2015 cc289-290](#)

<sup>52</sup> [HL Deb 14 October 2015 cc290-291](#)

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”.<sup>53</sup>

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.

## 4.9 Government amendments at Commons Committee Stage – affirmative resolution only when first introduction

Following the amendments made in the Lords, the extended entitlement regulations would have been subject to the affirmative resolution each time they are laid. As the explanatory notes to the Bill as it was introduced to the Commons from the Lords (Bill 84) stated:

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.<sup>54</sup>

At Committee Stage in the Commons, Mr Gyimah sought to amend the Bill to remove the requirement for the affirmative procedure to apply whenever regulations relating to the duty to secure 30 hours free childcare available for working parents and the discharge of this duty were made, amended or repealed.<sup>55</sup>

Instead, as originally put forward by Lord Nash for the Government during Lords Report Stage, Mr Gyimah proposed that regulations made under clause 1 or clause 2(1) of Bill 107 should only be subject to the affirmative resolution on the first occasion. However, as with the proposals tabled by Lord Nash at Lords Report Stage, regulations made under clause 2(5) of Bill 107 (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. All other

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<sup>53</sup> [HL Deb 14 October 2015 c292](#)

<sup>54</sup> [Bill 84-EN](#), p7, para 32

<sup>55</sup> Although the Government also proposed that the affirmative resolution procedure be used on every occasion when regulations were made, amended or withdrawn in regard to changing the financial penalty or any regulations that amended or repealed provision made by an Act.

regulations made under the Act would be subject to the negative resolution procedure.

Pat Glass said that the concerns of Peers had been addressed by Mr Gyimah's assurances during Committee Stage.<sup>56</sup>

The Committee agreed the amendment without division.

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<sup>56</sup> [PBC Deb 10 December 2015 c119](#)

## 5. Funding the proposals

### 5.1 Expected availability and take-up

#### Expected availability

The Government originally stated in June 2015 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”.<sup>57</sup>

The figure of 600,000 has been revised by the DfE – on 26 November 2015, the Department stated that: “the extended entitlement will be available to up to 390,000 families. This is adjusted for three and four year-olds who are in reception [year at school]”.<sup>58</sup>

#### Expected take-up

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.<sup>59</sup>

The Government set in the December 2015 version of its *Policy Statement* on the Bill:

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.<sup>60</sup>

More details might be expected 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”.<sup>61</sup>

<sup>57</sup> GOV.UK, [Government brings forward plans to double free childcare for working families](#), Press release, 1 June 2015

<sup>58</sup> Facebook (Department for Education), [Mythbuster on childcare and Early Years Pupil Premium](#), 28 November 2015

<sup>59</sup> [“Exclusive interview with Childcare Minister Sam Gyimah: France, funding and the 30 hours”](#), *Nursery World*, 19 October 2015

<sup>60</sup> Department for Education, [Childcare Bill: policy statement](#), December 2015, p17

<sup>61</sup> [HL Deb 14 October 2015 c290](#)

## 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”.<sup>62, 63</sup> 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”.<sup>64</sup>

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”.<sup>65</sup>

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).<sup>66</sup> 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:

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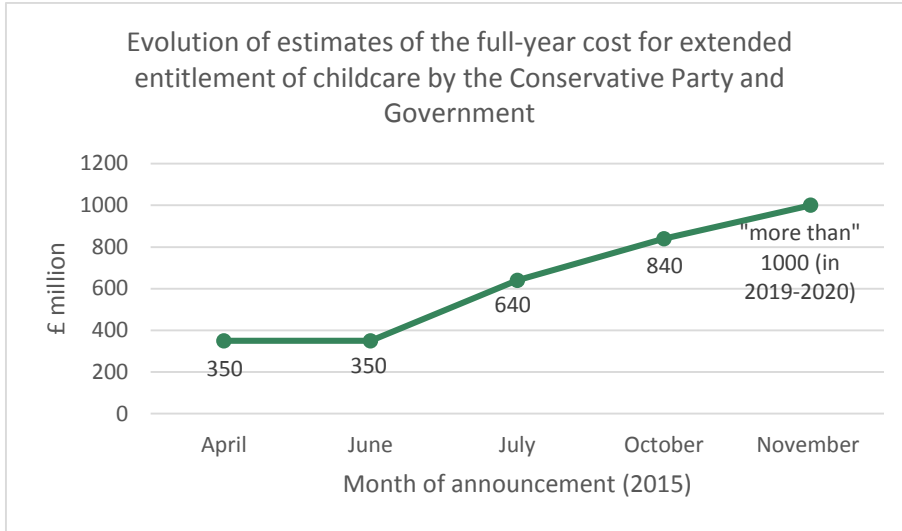
<sup>62</sup> Twitter (CCHQ Press Office @CCHQPress), [14 April 2015](#)

<sup>63</sup> 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]

<sup>64</sup> [“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

<sup>65</sup> [HL Deb 3 June 2015 c412](#)

<sup>66</sup> [Bill 84-EN](#), p8, para 40



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”.<sup>67</sup>

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”.<sup>68</sup> He did not indicate which year the figure related to.

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.<sup>69</sup>

The *Budget 2015* Red Book, published in July 2015, provided a more detailed costing for the policy:<sup>70</sup>

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

<sup>67</sup> [“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

<sup>68</sup> [HL Deb 3 June 2015 c412](#)

<sup>69</sup> [HL Bill 009–EN](#), p5, para 24

<sup>70</sup> HM Treasury, [Budget 2015](#), 2015–16 HC 264, July 2015, p72, Table 2.1



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”,<sup>71</sup> although this estimate was also based on the current hourly rate paid to providers – the Government has committed to increasing the rate of funding.<sup>72</sup> 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.<sup>73</sup>

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.<sup>74</sup>

The announcement of the increase to the average funding rate for free childcare, made in the Spending Review, would, the Government estimated, cost “nearly” £300 million, meaning that the cost of the extended entitlement policy had increased to “more than £1 billion a year ... by 2019-20”.<sup>75</sup> Of this, Mr Gyimah told the House the costs were “£700 million for the core entitlement and £300 million to uplift the rates”.<sup>76</sup>

Changes to the eligibility criteria (equivalent to 16, rather than eight, hours working at the National Living Wage (NLW) or National Minimum Wage (NMW), and the introduction of the £100,000 means test) would be expected to reduce the number of eligible parents and so lower the cost of the policy. However, the Government has not quantified the savings of these changes specifically for the extended entitlement policy.

## 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 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

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<sup>71</sup> 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](#).

<sup>72</sup> [HL Deb 14 October 2015 c245](#)

<sup>73</sup> [HL Deb 14 October 2015 c288](#)

<sup>74</sup> [Bill 84-EN](#), p8, para 40

<sup>75</sup> [HC Deb 25 November 2015 c1416](#)

<sup>76</sup> [PBC Deb 8 December 2015 c29](#)

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.<sup>77</sup>

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”.<sup>78</sup>

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<sup>77</sup> [HL Deb 14 October 2015 c237](#)

<sup>78</sup> Institute for Public Policy Research, [\*Extending The Early Years Entitlement – Costings, Concerns And Alternatives\*](#), October 2015, pp3 and 9

## 6. The funding rate for free childcare

### 6.1 Independent research

#### 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.<sup>79</sup>

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 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.<sup>80</sup>

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

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<sup>79</sup> LaingBuisson, *Children's Nurseries – UK Market Report*, 13<sup>th</sup> edition, October 2014, p93

<sup>80</sup> *Ibid*, p92

subsidised places, authorities choose to provide places in-house at council-run nurseries as a first preference".<sup>81</sup>

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.<sup>82</sup>

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.<sup>83</sup>

The Lords Select Committee on Affordable Childcare reported on the 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 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

<sup>81</sup> LaingBuisson, *Children's Nurseries – UK Market Report*, 13<sup>th</sup> edition, October 2014, p93

<sup>82</sup> Ceeda, *Counting the cost*, October 2014, pp4–5

<sup>83</sup> 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

education entitlement is delivered without additional cost to parents.<sup>84</sup>

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.<sup>85</sup>

In evidence to the Education Select Committee, the Secretary of State acknowledged that "providers tell us—not just schools—that they are either having to cross-subsidise the funding they are getting or it does not meet their needs", and added "we understand that".<sup>86</sup>

## 6.2 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".<sup>87</sup>

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".<sup>88</sup>

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

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<sup>84</sup> Lords Select Committee on Affordable Childcare, [Affordable Childcare](#), 2014–15 HL 117, 24 February 2015, p11, paras 18–19

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

<sup>86</sup> Education Committee, [Oral evidence: Role and Responsibilities of the Secretary of State](#), 2015–16 HC 402, 9 September 2015, p14, Q36

<sup>87</sup> Department for Education, [Childcare Bill: Policy statement](#), October 2015, p16

<sup>88</sup> ["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.<sup>89</sup>

### 6.3 The DfE's funding review

The announcement of the review of the funding rate for the free childcare provision 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".<sup>90</sup>

The terms of reference of the review (which were only published in October 2015)<sup>91</sup> 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?
- 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?<sup>92</sup>

### 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\*](#):

<sup>89</sup> IPPR, [\*Extending The Early Years Entitlement – Costings, Concerns And Alternatives\*](#), October 2015, p9

<sup>90</sup> [HC Deb 15 June 2015 c7](#)

<sup>91</sup> [HL Deb 14 October 2015 c239](#)

<sup>92</sup> Department for Education, [\*Terms of Reference: Review of the cost of providing childcare in England\*](#), October 2015, p1

[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”.<sup>93</sup>

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.<sup>94</sup>

### **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”.<sup>95</sup>

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 provision for children with additional needs, including children with special educational needs and disability.<sup>96</sup>

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.<sup>97</sup>

The DfE also noted that “while we have been able to identify what providers perceive to be their main areas of expenditure, we were

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<sup>93</sup> Department for Education, [Call for evidence: review of the cost of providing childcare](#), 15 June 2015, p5, para 1.4

<sup>94</sup> *Ibid*, p6, para 2.1

<sup>95</sup> Department for Education, [Analysis of responses to the call for evidence on the cost of providing childcare](#), October 2015, p4, para 7

<sup>96</sup> *Ibid*, p6, para 15

<sup>97</sup> *Ibid*, p6, para 12

unable to determine from the responses what providers' unit costs were".<sup>98</sup>

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),<sup>99</sup> 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".<sup>100</sup>

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",<sup>101</sup> and Mr Leitch described the call for evidence as "an exercise in futility".<sup>102</sup>

One concrete finding was that "some respondents" reported a funding shortfall of the funding they received for the existing 15 hours of free childcare.<sup>103</sup>

## 6.4 Outcome of the funding review

The DfE published [Review of childcare costs: the analytical report](#) on the day of the Commons Second Reading debate, alongside the Spending Review 2015.

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.<sup>104</sup>

During the Second Reading debate, 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,<sup>105</sup> and said that the DfE was "confident, based

<sup>98</sup> Department for Education, [Analysis of responses to the call for evidence on the cost of providing childcare](#), October 2015, p6, para 13

<sup>99</sup> Department for Education, [Call for evidence: review of the cost of providing childcare](#), 15 June 2015, p6, para 2.2

<sup>100</sup> ["Baffling" DfE report raises fears over free childcare expansion](#), *Children and Young People Now*, 12 October 2015 (subscription required)

<sup>101</sup> *Ibid*

<sup>102</sup> ["DfE 'unable to understand' cost of childcare following review](#)", *Children and Young People Now*, 2 October 2015

<sup>103</sup> Department for Education, [Analysis of responses to the call for evidence on the cost of providing childcare](#), October 2015, p6

<sup>104</sup> Department for Education, [Review of childcare costs: the analytical report](#), DfE-00295-2015, 25 November 2015, p1

<sup>105</sup> Department for Education, [Childcare Bill: policy statement](#), December 2015, p6



on the evidence we have gathered, that that increase will provide high-quality childcare for children in ... the country".<sup>106</sup>

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.<sup>107</sup>

The cost of this change was estimated by the Government to be "nearly" £300 million, meaning that the cost of the extended entitlement policy had increased to "more than £1 billion a year ... by 2019-20".<sup>108</sup>

## 6.5 Reaction to the outcome of the funding review

In evidence submitted by the Public Bill Committee prior to the Bill's consideration at Commons Committee Stage, a number of comments were received on the outcome of the funding review:

- 4Children – "The Spending Review announced £300 million of funding to increase the average rate paid to providers, which is welcome. In order for the extended offer to be sustainable, it will be vital to ensure that funding for places enables providers to cover the costs of delivery";<sup>109</sup>
- Polly Anna's Nursery in York – "The current proposal to up lift by the meagre amounts as announced in the second reading in the House on 25th November will fail to attract many providers of the current 15 hours to offer these additional hours. The consequences of large numbers of providers not being prepared to offer these hours will result in the policy failing";<sup>110</sup>
- Family and Childcare Trust – "[The Trust] welcomes the Government's commitment of new funding to free early education and childcare. However, this new funding is unlikely to be sufficient to address the strategic challenge the 30 hour offer present of moving from an inflexible part-time model to a flexible full-time model, nor prevent at least some providers continuing to opt out of either the free two-year-old offer or the three- and four-year-old offer";<sup>111</sup>
- Professional Association for Childcare and Early Years – "[the] uplift [in funding rates] is welcome and likely to make it more financially viable for a larger number of providers to deliver the entitlement".<sup>112</sup>

The Pre-school Learning Alliance's analysis of the funding review argued that the DfE had "underestimated the cost of delivery, and is based on

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<sup>106</sup> [HC Deb 25 November 2015 c1417](#)

<sup>107</sup> [HC Deb 25 November 2015 c1452](#)

<sup>108</sup> [HC Deb 25 November 2015 c1416](#)

<sup>109</sup> Public Bill Committee (Childcare Bill), *Written Evidence*, PBC (Bill 084) 2015–2016, p1

<sup>110</sup> *Ibid*, p2

<sup>111</sup> *Ibid*, p11, para 19

<sup>112</sup> *Ibid*, p40, para 5

outdated data and unrealistic childcare business models".<sup>113</sup> On the point about "outdated data", the Alliance said that:

the 'Review of childcare costs' report predominantly bases its modelling, not on the responses to the call for evidence, but rather, on outdated departmental research. The report appendix reveals that data on overheads and on-costs including staff costs; rent/mortgages/cost of premises; business rates; insurance; utilities; maintenance costs; interests on loans and others several key data were sourced from the DfE's 'Childcare Provider Finances Survey 2012', while the number of available places; proportion of attendees by age of child; staff to child ratios for 0-1 year olds; and two-year-olds were based on the 'Provider Survey 2013'. This means that the government's childcare cost modelling is based, in significant part, on data that is already two to three years out of date, and will be four to five years out of date by the time the offer is rolled out. We believe this is in no way an appropriate or adequate basis for such an important scheme.<sup>114</sup>

The Alliance concluded that "we do not believe that the published funding review is a strong enough basis on which to base funding and rate decisions ahead of the roll-out of the 30-hours offer", and called for an independent review of funding to be conducted.<sup>115</sup>

## 6.6 Government proposal to review the early years funding formula

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.<sup>116</sup>

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.<sup>117</sup>

<sup>113</sup> Public Bill Committee (Childcare Bill), *Written Evidence*, PBC (Bill 084) 2015–2016, p17, para 1.1

<sup>114</sup> *Ibid*, p18, para 2.2.3

<sup>115</sup> *Ibid*, p19, para 2.2.6

<sup>116</sup> [HC Deb 25 November 2015 c1416](#)

<sup>117</sup> [HC Deb 25 November 2015 c1418](#)

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”.<sup>118</sup>

The new national funding formula for early years would be introduced in 2017–18.<sup>119</sup>

The Local Government Association (LGA), in its written evidence submitted to the Public Bill Committee, contested that the current funding formula was “no longer fit for purpose”, and said that the new formula “must enable councils to persuade providers to meet the needs of working parents and provide high quality places for every child that needs one”.<sup>120</sup>

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<sup>118</sup> [HC Deb 25 November 2015 cc1414 and 1417](#)

<sup>119</sup> Department for Education, [Childcare Bill: policy statement](#), December 2015, p7

<sup>120</sup> Public Bill Committee (Childcare Bill), [Written Evidence](#), PBC (Bill 084) 2015–2016, p27, para 3.5

## 7. Parliamentary debate on proposals for an independent funding review

### 7.1 Summary

As noted above in section 6, the DfE undertook a review of childcare costs and published, in November 2015, the outcome of the review and announced new higher average rates for the free childcare for 3 and 4 year olds (both the universal 15 hours and the proposed extended entitlement).

However, during the Lords consideration of the Bill, the outcome of the funding review was not available, leading to debate in the Lords on this issue and, at Report Stage, the addition of a new clause 1 which required an independent funding review to be conducted.

Following the publication of the Government's review of the funding rate, the Government proposed that clause 1 should be removed during Commons Committee Stage – its removal was agreed to without a division.

### 7.2 Lords 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”.<sup>121</sup> 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”.<sup>122</sup> The amendment was withdrawn.

Baroness Jones also tabled an amendment (amendment 14) to the existing 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”.<sup>123</sup>

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”.<sup>124</sup>

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<sup>121</sup> [HL Deb 1 July 2015 c2084](#)

<sup>122</sup> [HL Deb 1 July 2015 c2093](#)

<sup>123</sup> [HL Deb 1 July 2015 c2158](#)

<sup>124</sup> [HL Deb 1 July 2015 c2161](#)

With the opportunity to discuss the findings of the review at Report Stage, Baroness Jones withdrew the amendment.<sup>125</sup>

### 7.3 Lords Report Stage and addition of a new clause 1

However, despite the assurances of the Minister, the funding review was not produced by Report Stage, prompting Baroness Jones to say 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.<sup>126</sup>

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

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<sup>125</sup> [HL Deb 1 July 2015 c2163](#)

<sup>126</sup> [HL Deb 14 October 2015 cc237-238](#)

funding does not support an increase in the number of places that will be required?<sup>127</sup>

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”.<sup>128</sup>

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”.<sup>129</sup>

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”.<sup>130</sup>

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”.<sup>131</sup>

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”.<sup>132</sup>

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”.<sup>133</sup>

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<sup>127</sup> [HL Deb 14 October 2015 c240](#)

<sup>128</sup> [HL Deb 14 October 2015 cc247–248](#)

<sup>129</sup> [HL Deb 14 October 2015 c245](#)

<sup>130</sup> [HL Deb 14 October 2015 cc245 and 246](#)

<sup>131</sup> [HL Deb 14 October 2015 c246](#)

<sup>132</sup> [HL Deb 14 October 2015 c247](#)

<sup>133</sup> [HL Deb 14 October 2015 cc249–250](#)

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:

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.<sup>134</sup>

The amendment was withdrawn by Baroness Pinnock.

## 7.4 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

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<sup>134</sup> [HL Deb 14 October 2015 cc286–289](#)

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 deliver on its promise to improve children’s early development, while helping busy families remain in work.’<sup>135</sup>

## 7.5 Analysis of new clause 1 of the Bill as introduced to the Commons (Bill 84)

For Bill 84, as presented to the Commons for Second Reading, clause 1 had 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 were met:

- 1 an independent review of the free childcare entitle funding system, “including a large-scale analysis of the cost of delivering funded places”, had been established and
- 2 a “comprehensive and sustainable funding solution” had 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”.<sup>136</sup>

Clause 1(2) of Bill 84 set out who the independent review would consult, and clause 1(3) required 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 was to be laid before each House of Parliament under clause 1(4).

## 7.6 Removal of new clause 1 at Commons Committee Stage

Having voted against the addition of clause 1 during Lords Report Stage, it was unsurprising that during Commons Second Reading the Government stated its desire to remove clause 1 from the Bill.<sup>137</sup>

During Committee Stage, Pat Glass spoke for the Opposition in support of the new clause, arguing that despite the proposed increases in the funding rate for the free childcare there remained “a major funding gap”,<sup>138</sup> and added that:

At the moment, nurseries are delivering the free 15 hours by charging beyond the 15 hours for parents who want more than 15, so anybody who gets more than 15 hours is basically subsidising the Government’s 15 hours. If the ability to extend

<sup>135</sup> [“Lords vote for independent funding review ahead of 30-hours roll-out”](#), *Nursery World*, 15 October 2015

<sup>136</sup> [Bill 84](#), clause 1(1)

<sup>137</sup> [HC Deb 25 November 2015 c1419](#)

<sup>138</sup> [PBC Deb 8 December 2015 c35](#)



that is taken away because nurseries have to offer 30 hours, the only way in which they can deliver is by charging substantially more for babies, one-year-olds and two-year-olds. There is a real concern that if the provision goes through without the adequate funding, the Government will be putting us in a position whereby women returning to work after maternity leave will not be able to afford childcare because the costs for younger children will rise sharply and dramatically.<sup>139</sup>

Speaking against new clause 1, Mr Gyimah said that it “was introduced in the other place [the Lords] in response to concerns about a lack of detail about how the Government would fund their commitment to provide 30 hours of free childcare for three and four-year-olds. Critically, it was also about the opportunity to scrutinise how that would be done”.

Following the commitment to review the funding rates, Mr Gyimah said that the Government had now “firmly delivered on those commitments, as promised, and we have done so in time to inform the scrutiny of the Bill”, adding:

We have completed the review of the cost of childcare. The final report has been published, and we have confirmed the generous financial settlement for the delivery of the 30-hour entitlement announced by the Chancellor. Clause 1 proposes that a review be completed and a funding solution put in place. We have addressed those points extensively in the last few months, and the outcome is now clear. On that basis, and as we have now addressed the concerns raised in the other place, we believe that clause 1 is no longer needed.<sup>140</sup>

Citing the need for the Government announce funding rates for local authorities in 2017-18 by the summer of 2016, Mr Gyimah said that an independent review would take a “significant time” just to set up and that “having to carry out a review again would delay implementation”, and rejected proposals by the Opposition that the review could be conducted in parallel.<sup>141</sup>

Following the debate, clause 1 was removed from the Bill without division.<sup>142</sup>

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<sup>139</sup> [PBC Deb 8 December 2015 c12](#)

<sup>140</sup> [PBC Deb 8 December 2015 c33](#)

<sup>141</sup> [PBC Deb 8 December 2015 cc33 and 34](#)

<sup>142</sup> [PBC Deb 8 December 2015 c46](#)

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

### 8.1 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”.<sup>143</sup> 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”.<sup>144</sup>

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.<sup>145</sup>

### 8.2 The number of hours under the proposed extended entitlement

Clause 1 of the Bill as introduced into the Lords made a similar provision in respect of the extended entitlement:

<sup>143</sup> Department for Education, [Early education and childcare – Statutory guidance for local authorities](#), September 2014, pp8 and 9, Section A2 and para A2.4

<sup>144</sup> [HL Deb 1 July 2015 c2113](#)

<sup>145</sup> 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”.<sup>146</sup>

### 8.3 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”.<sup>147</sup>

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”.<sup>148</sup>

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

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<sup>146</sup> [“Exclusive interview with Childcare Minister Sam Gyimah: France, funding and the 30 hours”, \*Nursery World\*, 19 October 2015](#)

<sup>147</sup> [HL Deb 1 July 2015 c2111](#)

<sup>148</sup> [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.<sup>149</sup>

## 8.4 Requirements on local authorities including flexible childcare provision

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).<sup>150</sup>

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”.<sup>151</sup>

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

<sup>149</sup> [HL Deb 14 October 2015 cc257 and 258](#)

<sup>150</sup> [Bill 84](#), clause 3(2)

<sup>151</sup> [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".<sup>152</sup>

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.<sup>153</sup> This inserted the requirement that regulations making 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:

must ensure that the times at which childcare is to be made available provide sufficient flexibility—

- a) for parents who work outside the hours of 9am to 5pm, Monday to Friday; and
- b) to ensure that childcare is available during school holidays within the local authority area of the relevant childcare provider.<sup>154</sup>

However, at Commons Committee Stage, the Government deleted the change that Peers had agreed to. Mr Gyimah said that while he "completely agree[s] with the principle ... that the extended entitlement should be delivered flexibly to support working parents", "delivering flexible provision is not simply about ensuring that childcare is available outside the hours of nine to five, as the amendment made in the other place suggests, or during the school holidays, as suggested in this debate", arguing that "each parent has different needs".<sup>155</sup>

The Minister added: "I feel strongly that setting out in primary legislation a requirement for local authorities to secure provision to meet each parent's individual needs will not work in practice ... It is also important to note that local authorities, rightly, cannot require private providers to deliver the free entitlement. Therefore it is simply not right to give them a legal duty to secure flexible provision for every parent in their area". He said that:

the previous Government changed the statutory guidance to enable local authorities to fund providers to allow parents to access places between 7 am and 7 pm, so that parents can drop off their children earlier in the day or collect them later. Providers can also stretch their entitlement across the full year rather than limiting them to term-time only provision, and a number already do that.<sup>156</sup>

Mr Gyimah also made reference to the Government announcement on 7 December 2015 that it was "proposing that parents should have the 'right to request' that their child's school should consider establishing wraparound and / or holiday childcare, and that childcare providers

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<sup>152</sup> [HL Deb 14 October 2015 cc259-260](#)

<sup>153</sup> [HL Deb 14 October 2015 cc281-282](#)

<sup>154</sup> [Bill 84](#), clause 3(3)

<sup>155</sup> [PBC 10 December 2015 c103](#)

<sup>156</sup> [PBC 10 December 2015 cc103-104](#)

should have the 'right to request' the use of school facilities for such childcare at times when the school is not using them".<sup>157</sup> A [consultation was launched](#), open until 29 February 2016.

The decision to delete the provision made by the Lords was agreed without division.

## 8.5 Will the extended entitlement create extra demand for places?

As noted above, the DfE believes that the extended entitlement would, for "many children", simply pay for existing childcare places:

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.<sup>158</sup>

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.<sup>159</sup>

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".<sup>160</sup>

In its December 2015 policy statement on the Bill, the DfE said that it was "gathering more evidence of how many eligible parents are likely to take up the new entitlement, and how many hours they are likely to

<sup>157</sup> Department for Education, [Wraparound and holiday childcare – parents and childcare provider 'rights to request': Government consultation](#), 7 December 2015, p4

<sup>158</sup> Department for Education, [Childcare Bill: Policy statement](#), October 2015, p16

<sup>159</sup> ["Exclusive interview with Childcare Minister Sam Gyimah: France, funding and the 30 hours"](#), *Nursery World*, 19 October 2015

<sup>160</sup> Department for Education, [Childcare Bill: Policy statement](#), October 2015, p16

take up, through the national conversation that is underway with parents, providers and employers".<sup>161</sup>

The Government remained 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.<sup>162</sup>

## 8.6 Parliamentary debate on capital funding to create additional places in nurseries

### Lords 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?",<sup>163</sup> 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.<sup>164</sup>

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

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<sup>161</sup> Department for Education, [Childcare Bill: policy statement](#), December 2015, p17

<sup>162</sup> *Ibid*, December 2015, p18

<sup>163</sup> [HL Deb 1 July 2015 c2158](#)

<sup>164</sup> [HL Deb 1 July 2015 c2159](#)

funding for early education addresses their concerns. I therefore urge them not to press the amendments.<sup>165</sup>

The amendments were withdrawn.

## Lords 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”.<sup>166</sup>

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 taxpayer. Decisions on the level of funding, including any capital, will be made in the forthcoming spending review.<sup>167</sup>

The amendment was not moved.

## 8.7 Government announcement of additional capital funding and reaction

In the Treasury's *Spending Review and Autumn Statement 2015* document, published on the same day as the Commons Second Reading of the Bill, the Government announced “at least £50 million of capital funding to create additional places in nurseries”.<sup>168</sup>

The Local Government Association (LGA) said that it would “like councils to have freedom and flexibility over how this funding is invested, including maintained provision” as they needed “greater flexibility to expand maintained provision and secure additional capacity in the most cost-effective way”.<sup>169</sup>

The Family and Childcare Trust said that “the £50 million of capital funding allocated provides for around £3,400 per setting and seems unlikely to be adequate to meet the cost of new premises or significant building adaptations”.<sup>170</sup>

<sup>165</sup> [HL Deb 1 July 2015 cc2161–2162](#)

<sup>166</sup> House of Lords, [Revised marshalled list of Amendments to be moved on Report](#), 13 October 2015, p8, amendment 25

<sup>167</sup> [HL Deb 14 October 2015 cc287–288](#)

<sup>168</sup> HM Treasury, [Spending Review and Autumn Statement 2015](#), November 2015, Cm 9162, p44, para 1.161

<sup>169</sup> Public Bill Committee (Childcare Bill), [Written Evidence](#), PBC (Bill 084) 2015–2016, pp 26 and 27, paras 2.4 and 3.5

<sup>170</sup> *Ibid*, p10, para 10



## 8.8 Analysis of clauses 1(1), 2(2)(a-c and k), 2(3) and 2(8) of Bill 107

Clause 1(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 clause 2(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));  
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.<sup>171</sup>

Further, under clause 2(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 2(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.<sup>172</sup>

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<sup>171</sup> [Bill 84-EN](#), p5, para 20

<sup>172</sup> *Ibid*, p5, para 21

## 9. Who would be eligible for extended entitlement

### 9.1 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.<sup>173</sup>

Peers tabled a number of amendments to the definition, which were debated at Committee Stage.<sup>174</sup> 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.<sup>175</sup>

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

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<sup>173</sup> [HL Deb 16 June 2015 c1083](#)

<sup>174</sup> [HL Deb 1 July 2015 cc2116–2126](#)

<sup>175</sup> [HL Deb 14 October 2014 cc274 and 275](#)

additional groups,<sup>176</sup> which were also stated in the Government's *Policy Statement* on the Bill (see section 9.5 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.<sup>177</sup>

## 9.2 Introduction of an upper income limit, and revised lower income limit

### Lower limit – equivalent to working 16 hours (previously 8 hours ) a week at the NMW or NLW

The Education Secretary 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 [NLW]—or national minimum wage [NMW] 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

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<sup>176</sup> [HL Deb 14 October 2014 cc274–275](#)

<sup>177</sup> [HL Deb 14 October 2015 c276 and c279](#)

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.<sup>178</sup>

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. This includes those parents on zero contract hours who meet the criteria.<sup>179</sup>

### Upper limit – £100,000 per parent per annum

In regard to the new income cap, which is to be set at £100,000 per annum per parent,<sup>180</sup> 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.<sup>181</sup>

### Expected savings from the revised eligibility criteria

The Government's revised eligibility criteria for the extended entitlement were announced alongside similar revisions to the eligibility criteria for the Tax Free Childcare policy. The total savings from the changes to both these policies was estimated to be £215 million by 2019–20;<sup>182</sup> the Government did not separate out the expected savings from the changes to the extended entitlement eligibility.

### Reaction to the changes

The Low Incomes Tax Reform Group (LITRG) said that it was "concerned about the potential impact of increases ... in minimum income limits for ... [the] extended provision of free childcare".<sup>183</sup>

The Family and Childcare Trust argued that the revised lower eligibility criteria was "too restrictive" and would "exclude many parents with 'mini-jobs' or zero hours contracts".<sup>184</sup>

The Pre-School Learning Alliance said that it "question[ed] the logic" of entitlement being based on a weekly minimum income:

During Second Reading, the childcare minister stressed that eligibility for the 30-hour offer will be judged on earnings, not hours worked, stating that "*If someone earns £107 in half a day, that gets them 30 hours of childcare*". We would question the

<sup>178</sup> [HC Deb 25 November 2015 c1421](#)

<sup>179</sup> Department for Education, [Childcare Bill: policy statement](#), December 2015, p8

<sup>180</sup> HM Treasury, [Spending Review and Autumn Statement 2015](#), November 2015, Cm 9162, p44, para 1.160

<sup>181</sup> [HC Deb 25 November 2015 c1421](#)

<sup>182</sup> HM Treasury, [Spending Review and Autumn Statement 2015](#), November 2015, Cm 9162, p44, para 1.160

<sup>183</sup> Public Bill Committee (Childcare Bill), [Written Evidence](#), PBC (Bill 084) 2015–2016, p6, para 1.4.1

<sup>184</sup> *Ibid*, p8

logic of eligibility criteria that would entitle a parent working (to use the given example) four hours a week at a very high hourly wage rate to 30 hours of funded early years provision, but not someone working 15 hours a week a[t] minimum wage (who might be volunteering or studying for the remainder of that week).<sup>185</sup>

In regard to the new upper income limit, Early Education noted that “the cap of £100,000 at the upper end of the earning scale is welcome, but still allows families earning nearly £200,000 a year to qualify”.<sup>186</sup>

### 9.3 Disabled children and children with special educational needs

Although there is no specific provision on the face of the Bill, the DfE’s October 2015 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”.

This point was borne out by evidence received by the Public Bill Committee considering the Bill: for example, the charity Contact a Family highlighted that its recent report “indicates that parents face issues of cost, availability and discriminatory exclusion. This, along with an inability to access top-up funding from local authorities and a lack of confidence in the quality and safety of care, contributes to undermining many families access to their free childcare offer”.<sup>187</sup>

The Government therefore proposed that “in the ‘expressions of interest’ process the government will seek to encourage innovative approaches to providing flexible childcare for working parents whose children are disabled or have special educational needs”.<sup>188</sup>

In the December 2015 version of the *Policy Statement* document, the DfE added that “as part of early implementation of 30 hours from September 2016, we are encouraging innovative approaches to providing flexible childcare for working parents whose children are disabled”, and added that the Government was “pleased to say we have had overwhelming interest to participate”.<sup>189</sup>

During Commons Committee Stage, the Opposition tabled a number of amendments to the Bill in relation to children with Special Educational Needs and Disability (SEND):

- citing figures that “some 40% of families with disabled children are not able to access the current free childcare offer of 15 hours

<sup>185</sup> Public Bill Committee (Childcare Bill), [Written Evidence](#), PBC (Bill 084) 2015–2016, p20, para 3.1

<sup>186</sup> *Ibid*, p33

<sup>187</sup> *Ibid*, p14, para 2.2

<sup>188</sup> Department for Education, [Childcare Bill: Policy statement](#), October 2015, p17

<sup>189</sup> Department for Education, [Childcare Bill: Policy statement](#), December 2015, p21

a week”,<sup>190</sup> Pat Glass proposed that the proposed statutory independent review of childcare funding clause (now deleted from the Bill) “look at the additional childcare costs for those families and reflect them in the funding provided”.<sup>191</sup> Mr Gyimah said “it is not acceptable for children with disabilities to be unable to access their entitlement” and noted the current statutory obligations in this regard on local authorities under the *Childcare Act 2006*.<sup>192</sup> The amendment was withdrawn;

- require the DfE to set out the qualifications for childcare staff providing the extended entitlement in respect of disabled children. The Minister noted that where it is “necessary for staff to undertake specific training to support a disabled child in their care ... a childcare provider can ask their local authority for funding to support such training”, but contested that “as the individual needs of children may differ greatly, I do not think it is appropriate to set out qualification requirements for all staff working with disabled children”.<sup>193</sup> The amendment was withdrawn;
- to create a criminal offence where a disabled child was “unreasonably” refused an extended entitlement childcare place. The Minister said: “Although I agree with the principle behind the amendment, and agree that all children should be able to access childcare, I do not agree that would be the right approach. I have been clear in our debates so far that local authorities are already required by law to secure free entitlement places”.<sup>194</sup> The amendment was withdrawn;
- three new clauses were proposed to require child providers of a specified size delivering the extended entitlement (to be specified in regulations) to have a SEND coordinator, while local authorities would have to secure sufficient SEND coordinators to provide advice and guidance to childcare providers. It would also have required local authorities to produce a “childcare inclusion plan” setting out how disabled children would access the extended entitlement. Mr Gyimah described it as a “practical, rather than a legal, problem”, and told the Committee it would “be a priority in the early implementers. We will also put in place an evaluation system to ensure we are learning the right lessons, not only from that but afterwards, to improve the system ... We have got to work with local authorities to ensure this works for parents, and I assure her that that is our priority”. The clauses were not added to the Bill.<sup>195</sup>

## 9.4 Consideration of the eligibility of specified groups

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

<sup>190</sup> [PBC Deb 8 December 2015 cc13 and 14](#)

<sup>191</sup> [PBC Deb 8 December 2015 c16](#)

<sup>192</sup> [PBC Deb 8 December 2015 cc28 and 29](#)

<sup>193</sup> [PBC Deb 8 December 2015 c81](#)

<sup>194</sup> [PBC Deb 10 December 2015 c112](#)

<sup>195</sup> [PBC Deb 10 December 2015 c128](#)

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 they earned the minimum income required;
- 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”.<sup>196</sup>
- 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*.<sup>197</sup> 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”.<sup>198</sup>
- 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 1996 places a duty on authorities to co-operate with social services where children may be homeless intentionally or threatened with homelessness intentionally”.<sup>199</sup>
- parents of disabled or critically ill children – amendment 12 tabled by the Opposition because, as Pat Glass told the Public Bill Committee, “access to good-quality childcare is particularly significant, because their families are far more vulnerable to living in poverty than most”.<sup>200</sup> Mr Gyimah said that “it is our intention that that will include households where one parent is

<sup>196</sup> [HL Deb 14 October 2015 cc275–276](#)

<sup>197</sup> [HL Deb 1 July 2015 c2124 and c2126](#)

<sup>198</sup> Department for Education, [Childcare Bill: Policy Statement](#), October 2015, p11

<sup>199</sup> [HL Deb 1 July 2015 c2123](#)

<sup>200</sup> [PBC Deb 10 December 2015 c48](#)

working and one parent is being paid carer's allowance or the carer element of universal credit. That includes parents caring for their own three or four-year-old child where the child is in receipt of disability living allowance or is certified blind".<sup>201</sup> The amendment was not called.

## 9.5 Analysis of clause 1(2–4, 7–9) of Bill 107

### Definition of a "qualifying child of working parents"

Subsection 2 of clause 1 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 1(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 1(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 way 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).

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<sup>201</sup> [PBC Deb 10 December 2015 c60](#)



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.<sup>202</sup>

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”.<sup>203</sup>

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.<sup>204</sup>

Additionally, under clause 1(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 1(2), see above] are satisfied”. Regulations made under clause 1(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”.<sup>205</sup>

### 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”.

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<sup>202</sup> Department for Education, [Childcare Bill: Policy Statement](#), October 2015, p10

<sup>203</sup> [HL Deb 14 October 2015 c275](#)

<sup>204</sup> Department for Education, [Childcare Bill: Policy Statement](#), October 2015, pp10–11 and 12

<sup>205</sup> [HL Deb 14 October 2015 c276](#)

Clause 1(7) 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 1] subsection (1) at the start of the school term following which they turn three”.<sup>206</sup>

However, the DfE has stated that “where a four-year-old is attending a school reception class, they will not access the entitlement to 30 hours free childcare in addition”.<sup>207</sup>

### **Definition of a parent**

A parent is defined in clause 1(9) as being anyone with parental responsibility for the child (as defined in the *Children Act 1989* as amended),<sup>208</sup> or who has care of the child.

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

Further to clause 1(2)(b), clause 1(8) 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.

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<sup>206</sup> [Bill 84-EN](#), p4, para 14

<sup>207</sup> Department for Education, [Childcare Bill: Policy statement](#), December 2015, p17

<sup>208</sup> For more information, see the Library briefing [Parental Responsibility](#).

## 10. Other provisions relating to eligibility

### 10.1 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”.<sup>209</sup>

This broad power was criticised by the Delegated Powers and Regulatory Reform Committee in its June 2015 report,<sup>210</sup> and at Lords Report Stage the Government tabled amendments to reduce the scope of the power. Lord Nash explained that the effect of the amendments were 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 amendments were 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”.<sup>211</sup> 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.<sup>212</sup>

During Commons Committee Stage, the Government introduced an amendments that “confers on HMRC [HM Revenue and Customs] the power to make a determination as to a child’s eligibility for the extended entitlement and carry out associated functions”, and that “enables the Secretary of State to set conditions to be met by a person making a declaration as to a child’s eligibility for the extended entitlement”;<sup>213</sup> as Mr Gyimah explained:

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<sup>209</sup> [HL Bill 009-EN](#), p3, para 13

<sup>210</sup> Delegated Powers and Regulatory Reform Committee, [Childcare Bill \[HL\] etc.](#), 2015–16 HL 12, 26 June 2015, p4, para 5

<sup>211</sup> [HL Deb 14 October 2015 c258](#)

<sup>212</sup> [HL Deb 14 October 2015 c259](#)

<sup>213</sup> Public Bill Committee, [Childcare Bill \[Lords\] – Tuesday 8 December 2015](#), p3, amendments 2 and 3

For example, to be consistent with tax-free childcare, the person making the declaration will need to be the person responsible for the child. It is crucial that we are able to provide clarity for parents about the declaration they will have to make, and that we can ensure that HMRC will be provided with the information it needs to make decisions about whether a child is eligible for the extended entitlement.

The conditions that the person making the declaration will need to meet will be set out alongside the form and manner of the declaration. Regulations will say more about those matters in due course and will be subject to the highest degree of parliamentary scrutiny.<sup>214</sup>

The amendments were agreed without division.

## 10.2 Appealing an eligibility decision

At Lords 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 providing for a right of review in relation to a determination of eligibility with an onward right of appeal to the First-Tier Tribunal”.<sup>215</sup>

## 10.3 Penalties for false or misleading declarations of eligibility

The Bill as originally introduced (HL Bill 009) stated that, under clause 1(5), 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”.<sup>216</sup>

At Lords 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?”.<sup>217</sup>

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

<sup>214</sup> [PBC Deb 8 December 2015 cc64–65](#)

<sup>215</sup> [HL Deb 14 October 2015 c258](#)

<sup>216</sup> [HL Bill 009](#), clause 1(5)(j)

<sup>217</sup> [HL Deb 1 July 2015 c2164](#)

the First-tier tribunal against the imposition of the penalty or the amount of the penalty”.<sup>218</sup>

During Lords 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”.<sup>219</sup>

## 10.4 Analysis of paragraphs e to j of clause 2(2) and clauses 2(4–6) of Bill 107

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

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

- 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.<sup>220</sup>

Clause 2(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.<sup>221</sup>

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

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<sup>218</sup> Department for Education, *Childcare Bill: Policy Statement*, October 2015, p12

<sup>219</sup> [HL Deb 14 October 2015 c259](#)

<sup>220</sup> [Bill 84-EN](#), p5, paras 22–24

<sup>221</sup> *Ibid*, pp5–6, para 24

Under clause 2(4), 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 2(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”.<sup>222</sup>

### **Financial penalties for false or misleading declarations of eligibility**

Clause 2(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”.<sup>223</sup>

Under clause 2(5)(a), the maximum fine in relation to clause 2(2)(j) is £3,000, although clause 2(6) states that “the Secretary of State may by regulations substitute a different amount for the amount for the time being specified in subsection (5)(a)”.

Clause 2(5)(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”.<sup>224</sup>

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<sup>222</sup> [Bill 84-EN](#), p6, para 25

<sup>223</sup> *Ibid*, p6, para 26

<sup>224</sup> *Ibid*, p6, para 26

# 11. Information sharing and local authority school budget

## 11.1 Amendments moved at Lords 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”.<sup>225</sup>

The amendment was agreed to.

## 11.2 Analysis of clause 3 of Bill 107

Clause 3(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”.<sup>226</sup>

Under clause 3(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.<sup>227</sup>

Clause 3(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.<sup>228</sup>

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<sup>225</sup> [HL Deb 14 October 2015 c286](#)

<sup>226</sup> [Bill 84-EN](#), p6, para 29

<sup>227</sup> *Ibid*, p6, para 30

<sup>228</sup> *Ibid*, pp6-7, para 31

## 12. Publication of information (Clause 5 of Bill 107)

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 5, regulations may require local authorities to publish information of a prescribed description at prescribed intervals and in a prescribed manner.<sup>229</sup>

Clause 5 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).<sup>230</sup>

In its evidence to the Public Bill Committee prior to Commons Committee Stage (where the clause was not amended), the Family and Childcare Trust said that while it supported the clause, it observed that: “The Department has not set out in detail how it expects local authorities to publish information ... By clarifying what information local authorities should collect and publish, the Department can support parents to access and shape local provision”.<sup>231</sup>

<sup>229</sup> [Bill 84-EN](#), p7, para 33

<sup>230</sup> *Ibid*, p7, para 35

<sup>231</sup> Public Bill Committee (Childcare Bill), [Written Evidence](#), PBC (Bill 084) 2015–2016, p13, para 36



## 13. Territorial extent

Although the Bill extends to England and Wales (clause 6 of Bill 107), 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).<sup>232</sup> 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.<sup>233</sup> 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).<sup>234</sup>
- 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.<sup>235</sup>

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).

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<sup>232</sup> [HC Deb 22 October 2015 cc1159–1255](#)

<sup>233</sup> The Bill was introduced on 26 October 2015

<sup>234</sup> In the case of Finance Bills and certain financial instruments, the test is whether it extends to England, Wales and Northern Ireland.

<sup>235</sup> House of Commons, [Votes and Proceedings](#), 18 November 2015

## 14. Implementation timetable

### 14.1 Implementation timetable for the Bill

Under clause 7, sections 1(5), 6 (territorial extent) and 8 (short title) as well as clause 7 itself come into force on the day that the Bill becomes an Act, while the remaining provisions come into force on such day (or days) as the Secretary of State appoints.

### 14.2 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.<sup>236</sup>

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".<sup>237</sup>

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. The Education Secretary 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".<sup>238</sup>

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.<sup>239</sup>

<sup>236</sup> 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

<sup>237</sup> Department for Education, [Childcare Bill: Policy Statement](#), October 2015, p4

<sup>238</sup> [HC Deb 25 November 2015 c1419](#)

<sup>239</sup> Department for Education, [Childcare Bill: policy statement](#), December 2015, p19

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