

# CHILDCARE PAYMENTS BILL

## Memorandum for the House of Lords Delegated Powers and Regulatory Reform Committee

### Introduction

1. This memorandum has been prepared by Her Majesty's Revenue and Customs ("HMRC") for the purposes of the House of Lords Delegated Powers and Regulatory Reform Committee. It identifies the provisions in the Childcare Payments Bill ("the Bill") which confer powers to make delegated legislation. It explains the purpose of the delegated power proposed; why the matter is to be dealt with in delegated legislation; and the nature and justification for any parliamentary procedures which apply.
2. All of the delegated powers in the Bill are to be exercised by regulations made by statutory instrument either by the Treasury or, where the matters concerned relate to operational matters, the Commissioners for HMRC ("the Commissioners"). This division is set out in clause 68.
3. In deciding whether the Bill ought to delegate legislative powers, whether to the Treasury or the Commissioners, the starting point has been that the primary legislation ought to make clear the overall structure of the new scheme and the way in which the new system will operate.
4. At the same time, however, we are conscious of the need for flexibility to amend the detailed rules in the light of operational experience and other developments. This will allow the system to be kept under review and improved over time, in consultation with interested groups, without having to occupy a disproportionate amount of Parliamentary time with minor amendments to primary legislation. Such flexibility will also allow the provision of support to be varied over time as our understanding of the needs of working households grows and as those needs and patterns of work and family life change.

## **Overview of the Bill**

5. The Bill takes forward the Government's new scheme to assist working families by giving support equivalent to basic rate tax relief on money spent on childcare.
6. The scheme will operate through the use of childcare accounts, held by eligible individuals. The Government will top up any payments made into the account at a rate of 25%, capped at a maximum government contribution of £2,000 a year for each child.
7. The scheme is targeted at working families and will be available for children under 12 (or disabled children under 17). To be eligible, a person must meet criteria which include being responsible for a child; being in qualifying work; meeting a minimum and maximum income level; and not being in receipt of Universal Credit, tax credits or other childcare support provided by the state.
8. The new scheme will replace the existing Employer-Supported Childcare ("ESC") scheme (except in relation to workplace nurseries) which is delivered through a tax and National Insurance exemption. Once this scheme is implemented, the Bill provides powers which will be used to close ESC to new entrants.

## **Extent**

9. The Bill makes provision for the whole of the United Kingdom.

## **Analysis of delegated powers by clause**

### **Clause 1 – Entitlement to receive money towards costs of childcare**

- **Powers conferred on: the Treasury**
- **Parliamentary procedure: affirmative**

10. Clause 1 sets out when a person is entitled to receive top-up payments. Subsection (4) provides that the rate of the top-up payment is 25% of the qualifying payment (which is defined in clause 19). Subsection (5) enables regulations to be made to substitute a different percentage.
11. The rate is set against the background of current economic considerations and the Government may wish to amend it to reflect changing circumstances. The Government does not consider that primary legislation solely to change the rate would be justified, but wants to ensure that Parliament has the opportunity to debate any change in its level. Accordingly, it considers that the appropriate degree of scrutiny is provided for by the affirmative procedure.

**Clause 2(3)(a) – Qualifying childcare: registered or approved childcare**

- **Powers conferred on: the Commissioners**
- **Parliamentary procedure: negative**

12. Clause 2 defines “qualifying childcare” for the purposes of the Bill as any form of care or supervised activity for a child that is not provided in the course of the child’s compulsory education. Subsection (2)(a) provides that childcare is “qualifying childcare” if it is registered or approved childcare.
13. Subsection (3)(a) provides a power exercisable by the Commissioners to make regulations about what is, or is not to be regarded as registered or approved childcare.
14. Subsection (4) permits regulations made under subsection (3)(a) to provide that childcare provided outside the United Kingdom is registered or approved childcare if it is provided by a person approved by an organisation that is accredited by a person or body under an enactment.

15. The regulation or approval of childcare providers is not a matter for the Treasury or HMRC, and nothing in clause 2 is intended to empower either the Treasury or the Commissioners to assume regulatory functions in relation to childcare providers.

16. The intention is that support with childcare costs should be limited to particular types of regulated or approved childcare, so that help with childcare costs is not linked to inappropriate or unsafe childcare. The same approach has been taken in tax credits,<sup>1</sup> Universal Credit<sup>2</sup> and Employer Supported Childcare,<sup>3</sup> where help is available only in respect of prescribed types of childcare. It is not intended to define eligible childcare more narrowly than these regimes do, and it may be that, over time, it becomes appropriate to broaden the definition. This will ensure consistency between the schemes so that people who move between them do not have to change their childcare provider. The negative procedure provides an appropriate level of scrutiny for these regulations.

**Clause 2(3)(b) to (d) – Qualifying childcare: definition of work**

- **Powers conferred on: the Treasury**
- **Parliamentary procedure: affirmative**

17. Subsection (2)(b) of clause 2 provides that childcare is “qualifying childcare” if the main reason, or one of the main reasons, for incurring the costs of the childcare is to enable the person or, where they have a partner, both them and their partner to work.

18. Subsection (3)(b) to (d) enable the Treasury to make regulations to define what is meant by work and specify cases where the condition is to be treated as met or does not need to be met.

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<sup>1</sup> See regulation 14 of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 (S.I. 2002/2005) made under section 12 of the Tax Credits Act 2002.

<sup>2</sup> See regulation 35 of the Universal Credit Regulations 2013 (S.I. 2013/376) made under section 12 of the Welfare Reform Act 2012.

<sup>3</sup> Section 318C of the Income Tax (Earnings and Pensions) Act 2003.

19. This power will be used to specify that a person will be treated as in work when they are in receipt of statutory payments such as sick pay, maternity pay, paternity pay and adoption pay. The power will also be used to specify that where a person's partner is in receipt of carer's allowance, short-term incapacity benefit, contributory employment and support allowance or national insurance credits on the grounds of limited capability for work, the person will still be eligible for the scheme even though their partner is not in work.

20. These provisions will require a level of detail that would be inappropriate in primary legislation, and they will need to be sufficiently flexible to reflect changing social circumstances. As a result it is appropriate to deal with them in regulations. The requirement that individuals are in work is central to the scheme, and it is therefore considered appropriate that the regulations should be made under the affirmative procedure.

### **Clause 3 – Eligible persons**

- **Power conferred on: the Treasury**
- **Parliamentary procedure: affirmative (first use), negative (subsequent)**

21. Clause 3 provides that a person is an eligible person if they meet the conditions in clauses 6 to 13 and, if they have a partner, their partner meets the conditions in clauses 9 to 13. Subsection (4) allows for regulations to provide for exceptions to any of the basic conditions set out in clauses 6 to 13.

22. The purpose of this power is to allow for persons to be entitled to receive support in particular circumstances where they do not meet a basic condition. This power is intended to give the scheme sufficient flexibility to respond to changes in economic and social circumstances, in order to reflect variations in the diverse range of situations covered by the Bill.

23. Clause 3(5) provides the power to make provision about when a person is, or is not, to be regarded as another person's partner for the purposes of the Bill. The definition of partner will be based on the relationship between the two people and the fact that they share a household.
24. These regulations will provide for specific circumstances where a person is not to be regarded as a person's partner. Examples of these situations include where a person's partner lives outside the UK, is temporarily absent from the household or is detained in legal custody. It is considered that this level of detail is more appropriately dealt with in regulations so that it can reflect changes in family arrangements and practices.
25. The first set of regulations made under clause 3 will be subject to the affirmative procedure, with adjustments to the regulations being subject to the negative procedure. This recognises the importance of the basic principles contained in these regulations, whilst ensuring further adjustments that are likely to be necessary as the scheme develops can be dealt with proportionately.

#### **Clause 4 – Declarations of eligibility**

- **Power conferred on: the Commissioners**
- **Parliamentary procedure: negative**

26. When a person applies for support they will be required to make a declaration of eligibility. This is a statement made by a person for an entitlement period which states that they are an eligible person for the entitlement period. A declaration of eligibility made by a person is valid if HMRC are satisfied that the person is an eligible person for an entitlement period, on the day the declaration is made there is no other person holding or seeking to hold an active childcare account in relation to the child and the declaration is made in accordance with regulations. Clause 4(2)(c) enables the Commissioners to make regulations about when a declaration is valid.

27. Clause 4(6) provides the power to make regulations:

- a. Specifying, or enabling HMRC to specify, information which a person making a declaration of eligibility is required to provide to HMRC;
- b. Specifying, or enabling HMRC to specify, the form and manner in which declarations of eligibility may be made;
- c. Specifying the times when declarations of eligibility may be made;
- d. About the consequences of making a declaration of eligibility after the beginning of the entitlement period for which it is made or at another specified time;
- e. For any specified consequence not to apply in specified circumstances or if specified conditions are met;
- f. Specifying circumstances in which a person, or a person of a specified description, may make a declaration of eligibility on a person's behalf, including provision enabling HMRC to appoint a person for that purpose; and
- g. Treating anything done, or omitted to be done, in relation to the making of a declaration of eligibility on behalf of another person in those circumstances to be treated as done, or omitted, by that other person.

28. These are matters of detail which go to how the scheme will operate in practice. As such, it is thought that they should be dealt with in regulations, particularly as this will allow the Commissioners to make changes based on their experience of operating the scheme. The negative procedure provides an appropriate level of scrutiny for these operational issues.

#### **Clause 5(2) – Entitlement periods**

- **Power conferred on: the Treasury**
- **Parliamentary procedure: affirmative**

29. Clause 5(1) provides that the length of an entitlement period is 3 months. This is subject to regulations, which may amend subsection (1) so as to alter the length of an entitlement period and, as a consequence of any such amendment, amend any reference in the Bill to a period which begins

on the day on which a declaration of eligibility is made and is the same length as an entitlement period. This power is necessary to ensure flexibility in the scheme, for example if the government wants it to be a monthly scheme rather than a quarterly one. As it is a power to amend primary legislation in respect of a fundamental aspect of the scheme, it is considered that the affirmative procedure is appropriate

### **Clause 5(3) – Entitlement periods**

- **Power conferred on: the Commissioners**
- **Parliamentary procedure: negative**

30. Clause 5(3) provides a power on the Commissioners to make further provisions about the entitlement periods, including determining when entitlement periods are to begin or end and enabling HMRC, in specified circumstances, to vary the length of entitlement periods in particular cases. This provision is limited by subsection (4), which provides that HMRC may not vary the length of an entitlement period by more than a month.

31. This clause provides for an entitlement period to be 3 months, but there may be circumstances where HMRC needs to make this longer or shorter. This power will be used, for example, to ensure that siblings' renewal dates fall within the same period or to prevent large numbers of renewals falling on the same day, which would result in a disproportionate administrative burden.

32. These are operational matters of detail which it would not be appropriate to deal with on the face of the Bill. As they only relate to technical matters the negative procedure will, therefore, provide the appropriate level of scrutiny.

### **Clause 7 – The person must be responsible for the child**

- **Power conferred on: the Treasury**



- **Parliamentary procedure: affirmative (first use), negative (subsequent)**

33. Clause 7 provides that, at the date of declaration, the person must be responsible for the child. Regulations may make provision as to the circumstances in which a person is, or is not, to be regarded as responsible for a child.

34. The intention is to use the power to define responsibility for a child by reference to whether that child normally lives with the person. The regulations can also provide for exceptions where a person is not regarded as being responsible for a child, for example, where the person is absent from the household for a period of time, the person is in prison or the child is being looked after by the local authority or placed for adoption.

35. This is an important part of the scheme, but equally will contain a level of detail that changes in response to social circumstances. As a result, the appropriate level of scrutiny is for the first regulations to be made using the affirmative procedure, with subsequent changes made using the negative procedure.

#### **Clause 8 – The person must be in the UK**

- **Power conferred on: the Treasury**
- **Parliamentary procedure: affirmative (first use), negative (subsequent)**

36. Clause 8 requires a person to be in the United Kingdom in order to be eligible for support under the Bill. Subsection (2) provides a power for the Treasury to:

- a. Specify circumstances in which a person is to be treated as being, or not being, in the United Kingdom;
- b. Specify circumstances in which temporary absence from the United Kingdom is disregarded;

- c. Modify the application of the Act in relation to persons of a specified description who are treated as being in the UK for the purposes of the Act.

37. This provision is similar to provisions relating to tax credits<sup>4</sup> and Universal Credit<sup>5</sup> which require not only that the person is physically present in the United Kingdom, but also that the United Kingdom is their normal place of residence. This latter requirement is imposed by the use of a "habitual residence" or an "ordinary residence" test, and it is intended to follow the same approach for this scheme.

38. The requirement to be physically present in the United Kingdom is generally tempered by rules that allow entitlement to continue for the first few weeks of a temporary absence abroad; we intend to follow a similar approach under this Bill, allowing claims to be made and entitlement to continue during periods of short-term, temporary absence.

39. Regulations will also provide that in certain circumstances people will be treated as being in the UK. This will include Crown servants and members of HM forces posted overseas, and residents of an EEA state who are working in the UK.

40. Dealing with this matter in regulations will ensure that the rules are able to remain in step with changes to European law and international agreements, and that they can be adapted over time, if necessary, as patterns of travel and immigration change. No new principle is introduced by this power, which will be subject to the negative procedure, as are equivalent powers in other legislation.<sup>6</sup> However, in recognition that it will be important to establish the principles on which this power is exercised,

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<sup>4</sup> Regulation 3 of the Tax Credits (Residence) Regulations 2003 (S.I. 2003/654), made under section 3(7) of the Tax Credits Act 2002.

<sup>5</sup> Regulation 9 of the Universal Credit Regulations 2013 (S.I. 2013/376), made under section 4 of the Welfare Reform Act 2012.

<sup>6</sup> See sections 3(7) and 66 of the Tax Credits Act 2002 and sections 4(5) and 43 of the Welfare Reform Act 2012.

the first regulations under this power will be subject to the affirmative procedure.

**Clause 9 – The person and his or her partner must be in qualifying paid work**

- **Power conferred on: the Treasury**
- **Parliamentary procedure: affirmative (first use), negative (subsequent)**

41. To be eligible under clause 9 a person must be in qualifying paid work on the date of the declaration. Subsection (2) provides a power for the Treasury to make regulations setting out what is, or is not, qualifying paid work and the circumstances in which a person is, or is not, to be regarded as in such work.

42. Subsection (3) provides that regulations may, in particular:

- a. Provide for calculating a person's expected income from any work for a period specified in the regulations;
- b. Provide that a person is in qualifying paid work only if their expected income is greater than or equal to an amount that is specified or determined in accordance with the regulations; and
- c. Specify conditions in which the minimum income condition does not need to be met.

43. The intention is that there should be two limbs to the definition of remunerative work and the circumstances in which a person is, or is not, engaged in it: the first limb is the definition of "work" itself; the second limb is concerned with a person's expected income from that work. The regulations will also make provision for calculating a person's expected income from any work.

44. So far as the definition of work itself is concerned, it is proposed that the regulations should provide that, to be qualifying work, work must be done for payment or in expectation of payment. Some people will be deemed to

satisfy this requirement, for example if their partner works and they receive contribution-based Employment and Support Allowance. This is similar to the exercise of the power referred to in paragraph 19, but that power deals with the making of payments rather than eligibility for the scheme.

45. The definition of qualifying paid work is one of the more difficult technical issues to be dealt with under the Bill. The definition needs to take account of people's actual working patterns, which may change over time. We therefore consider that the provisions that set out what is to be taken to constitute qualifying remunerative work and the circumstances in which a person is to be treated as engaged in it are properly a matter for delegated legislation.

46. In relation to this power, we consider that the importance of the principles involved means that the first regulations should be made under the affirmative procedure. However, any subsequent changes are likely to be technical and so the negative procedure will be appropriate for them.

**Clause 10 – The income of the person and his or her partner must not exceed limit**

- **Power conferred on: the Treasury**
- **Parliamentary procedure: affirmative (first use), negative (subsequent)**

47. Clause 10 provides that a person is eligible if their expected income for the relevant tax year is less than a specified amount. Regulations made under clause 10 may:

- a. Set the upper income limit for eligibility purposes or provide for how it is to be determined (subsection (1));
- b. Provide for calculating a person's expected income for a tax year (subsection (2));
- c. Provide that a person is to be treated as being below the upper income limit if they do not expect to pay income tax at the additional rate or the

dividend additional rate for the relevant tax year, irrespective of whether any provision has been made under subsection (1) (subsection (3)).

48. Under subsection (4), regulations may provide that a person is treated as not meeting the upper income limit if they:

- a. Have made or expect to make a claim under section 809B of the Income Tax Act 2007 (claim for remittance basis to apply) for the relevant tax year;
- b. Expect section 809E of that Act (application of remittance basis in certain cases without claim) to apply to them for the relevant tax year;
- c. Meet any other condition specified in the regulations.

49. There are a number of reasons for taking a power to deal with this in regulations rather than attempting to include a full definition of the upper income limit in primary legislation. Any definition of income is, by its nature, technically complex, and it is therefore prudent to allow scope for that definition to be refined and adapted. Moreover, the nature of income changes over time - for example, as new savings or investment vehicles are developed. In addition, the intention is that the measure of income for purposes of this scheme should be closely aligned with the measure of income for tax purposes because it will be administratively easier for parents and the Department (although it may not always be appropriate to follow the tax rules in their entirety), and the measure of income for tax purposes is constantly evolving as the Taxes Acts are amended by annual Finance Acts. We consider it to be essential that the measure of income for these purposes is able to take account of these developments.

50. The income thresholds are to be set by regulations made by the Treasury. It is likely that they will need to be adjusted from time to time, according to public finances, decisions about the targeting of resources, practical experience of the new system and changing prices.

51. The first use of this power is subject to the affirmative procedure, with subsequent uses subject to the negative procedure. This is appropriate because the determination of income is key to the scheme's operation, but once the principles have been established any subsequent changes are likely to be technical in nature.

**Clause 11 – Neither the person nor his or her partner may be claiming universal credit**

- **Power conferred on: the Treasury**
- **Parliamentary procedure: negative**

52. Clause 11 provides that a person is eligible to receive support if, at the time they make their declaration of eligibility, they are not receiving Universal Credit and there is no subsisting claim that would lead to Universal Credit being paid to them during the entitlement period. Subsection (5) provides for regulations which may specify other circumstances in which a person is to be treated as meeting, or not meeting, the condition in this section.

53. This is a reserve power which is intended for use as Universal Credit is implemented. This is a complex and evolving process and it may be necessary for regulations to be made which ensure that the eligibility criteria of this scheme remain appropriate. As this is a matter of technical detail, the negative procedure is appropriate.

**Clause 13 – Neither the person nor his or her partner may be receiving other childcare support**

- **Power conferred on: the Treasury**
- **Parliamentary procedure: negative**

54. Clause 13 provides that a person cannot receive support under this scheme if they are in receipt of, or intend to make a claim for, other childcare support. Subsection (2) defines other childcare support as any

payments towards the costs of childcare, other than payments under this Bill, which are paid out of funds provided by a Minister of the Crown, the Scottish Ministers, the Welsh Ministers or a Northern Ireland department.

55. Subsection (2)(b) enables regulations to provide that certain forms of childcare support can be excluded from this condition. This will be used for certain free entitlements which will not lead to double recovery of parents' childcare costs. However, as these schemes vary over time and, because of devolution, between areas of the United Kingdom, it is necessary for this to be done in regulations. As this is a technical matter the negative procedure provides an appropriate degree of parliamentary scrutiny.

#### **Clause 14 – Qualifying child**

- **Power conferred on: the Treasury**
- **Parliamentary procedure: affirmative (first use), negative (subsequent)**

56. Clause 14 provides that support under the scheme will be available only for qualifying children, and enables the Treasury to make regulations to specify who is a qualifying child. Subsection (2) enables different descriptions to be specified for different periods.

57. It is proposed that a child will normally be someone aged under twelve, with eligibility continuing until 1 September following their eleventh birthday (or sixteenth birthday if the child is disabled); this will provide a single date on which support ceases and takes the same approach as Universal Credit, tax credits and Employer-Supported Childcare.

58. The regulations will set out when a child is disabled. This will include children in receipt of Disability Living Allowance or Personal Independence Payment. However, this provision will relate to a wide range of personal circumstances and it will be necessary to modify it if there are

developments in social security provision. This means that it is necessary to deal with the matter in regulations.

59. These regulations will establish one of the principles of eligibility, but may require subsequent technical adjustment. As a result the first regulations are subject to the affirmative procedure with any amendments being subject to the negative procedure.

#### **Clause 15 – Childcare accounts**

- **Power conferred on: the Commissioners**
- **Parliamentary procedure: negative**

60. Once a person has made a valid declaration of eligibility a childcare account will be opened for them. The Government will top up payments which are made into such an account. Clauses 15 to 25 deal with opening and closing childcare accounts, making payments into and out of the accounts, calculating the top-up element and imposing restrictions on accounts.

61. Clause 15 defines what a childcare account is. Subsection (3) enables regulations to be made imposing other requirements which must be satisfied in relation to childcare accounts and make provision about the way in which payments may be made into or from childcare accounts. This power will allow for HMRC to make provisions which it finds to be necessary as its operational experience develops. It will also enable HMRC to specify the manner in which people may make payments to or withdrawals from childcare accounts so that where possible everything is dealt with electronically.

62. Subsection (4) enables regulations to provide that a person, or a person of a specified description, may, or may in specified circumstances, manage a childcare account on behalf of the account holder. Subsection (5) allows this to include provisions enabling HMRC to appoint a person for the



purpose of managing a childcare account on an account-holder's behalf and specifying functions in relation to the management of a childcare account which persons, or persons of a specified description, may not perform on an account holder's behalf. Such regulations will ensure that, where a person is unable to act for themselves, it is still possible for them to receive support under the scheme.

63. These provisions will involve a level of technical detail which it is not appropriate to set out in primary legislation, and a suitable level of scrutiny would be provided for them under the negative procedure.

#### **Clause 17 – Opening a childcare account**

- **Power conferred on: the Commissioners**
- **Parliamentary procedure: negative**

64. Clause 17 deals with opening a childcare account. It provides that a person who wishes to open a childcare account must make an application to HMRC. Subsection (4) enables regulations to be made which:

- a. Make provision about the making of applications to open an account, including enabling HMRC to specify the form and manner in which the applications may be made;
- b. Specify or enable HMRC to specify, information which applicants must provide to specified persons or to persons of a specified description;
- c. Specify the circumstances in which a person, or a person of a specified description, may make an application to open a childcare account on behalf of an applicant, including provision enabling HMRC to appoint a person for that purpose;
- d. Make provision requiring HMRC to provide specified information to specified persons or to persons of a specified description.

65. This power will be used to deal with the technical detail of the account opening process, for example in relation to the design and content of forms. It would be impractical to make this provision in the Bill and it will

not require intense scrutiny. As a result, it is appropriate for the matter to be dealt with in regulations made under the negative procedure.

**Clause 19(6) – Payments into childcare accounts: power to vary the relevant maximum**

- **Power conferred on: the Commissioners**
- **Parliamentary procedure: negative**

66. Clause 19(6) allows regulations to provide, or enable HMRC to provide, that in specified circumstances the maximum amount of top-up payments for an entitlement period is an amount specified in, or determined in accordance with, the regulations or determined by HMRC in accordance with powers conferred by the regulations.

67. This power will enable HMRC to make regulations which allow them to apportion top-up payments to match the longer or shorter entitlement periods provided for by clause 5. Again, this will be a matter of technical detail that is best dealt with in negative procedure regulations.

**Clause 19(7) – Payments into childcare accounts: power to amend the relevant maximum**

- **Power conferred on: the Treasury**
- **Parliamentary procedure: affirmative (if lowering)/negative (if raising)**

68. Clause 19(5) provides that the maximum amount of top up is £2,000 per child per year. Subsection (7) enables regulations to be made to substitute a different amount.

69. The rate is set against the background of current economic considerations and the Government may wish to amend it to reflect changing circumstances. The Government does not consider that primary legislation solely to change the amount is justified but wants to ensure that

Parliament has the opportunity to debate any change in the amount of the top-up payment. If this power was not included in the Bill there would need to be additional primary legislation solely to cater for any change in the amount.

70. The power is exercisable by the Treasury. A heightened degree of scrutiny, through the affirmative procedure, will apply to any reduction in the amount, as this would have an adverse effect on individuals. The same degree of scrutiny is not necessary for increases in the amount, which will instead be subject to the negative procedure.

#### **Clause 20 – Payments that may be made from childcare accounts**

- **Power conferred on: the Commissioners**
- **Parliamentary procedure: negative**

71. Clause 20 provides that payments can only be made from a childcare account if they are withdrawals or are made in respect of qualifying childcare for the child in respect of which the account is held.

72. Subsection (6) provides that where not all the payment is in respect of qualifying childcare so much of the payment properly attributable to the costs of qualifying childcare is to be treated as a permitted payment and the remainder is to be treated as a prohibited payment. Subsection (7) enables regulations to be made for determining the amount of a payment that is properly attributable to the costs of qualifying childcare provided for the relevant child.

73. This is a reserve power, which will be used (if it proves to be necessary) to allow HMRC to deal realistically with cases where the precise amount of a prohibited payment is difficult to calculate. As any regulations will be technical in nature, the negative procedure provides the appropriate level of scrutiny.

## **Clause 24 – Imposing restrictions on accounts**

- **Power conferred on: the Commissioners**
- **Parliamentary procedure: negative**

74. Clause 24 provides that, if specified conditions are met, HMRC may make an account restriction order on a childcare account. These conditions will be set out in regulations, which may include provision that allows HMRC to make an order where a person wishes to open a childcare account in respect of a child, or to make a declaration of eligibility in relation to a childcare account held in respect of a child, and another person already holds an active childcare account in respect of the child.

75. Regulations may make further provision about account restriction orders including, in particular:

- a. Provision about the procedure for making an account restriction order;
- b. Provision enabling an account restriction order to impose a restriction for a period specified in the order (which may be unlimited);
- c. Provision enabling an account restriction order to provide that a restriction does not apply in such cases as may be specified in the order;
- d. Provision enabling a person who wishes to open a childcare account or make a declaration of eligibility to apply to HMRC for an account restriction order to be made in relation to another person who holds a childcare account;
- e. Provision enabling an account restriction order to be revoked, including provision for the account-holder to apply for its revocation;
- f. Provision specifying the circumstances in which such an application may be granted.

76. These provisions are necessary to prevent abuse of the scheme. Setting out the conditions for these orders in regulations will provide HMRC with the necessary level of flexibility to prevent this abuse. The remainder of the provisions will set out the technical detail of making a restriction order,

which it is more appropriate to deal with in regulations. As these matters relate to the technical detail of the scheme's operation, the negative procedure provides the appropriate level of scrutiny.

#### **Clause 25 – Closure of childcare accounts**

- **Power conferred on: the Commissioners**
- **Parliamentary procedure: negative**

77. Clause 25 enables HMRC to make regulations about closing childcare accounts. These regulations may, in particular, include provisions requiring a childcare account to be closed in specified circumstances or if specified conditions are met, setting out what will happen to the funds in the account and requiring repayment to HMRC of a proportion of the funds.

78. This power will be used to ensure that funds are not left unused in childcare accounts for long periods after the account-holder has ceased to be eligible for the scheme. As this is a technical area which may require adjustment as operational experience develops, it is felt to be appropriate to deal with this matter in regulations subject to the negative procedure.

#### **Clause 26 – Power to obtain information or documents**

- **Power conferred on: the Commissioners**
- **Parliamentary procedure: negative**

79. Clause 26 gives HMRC the power to obtain information or documents for the purposes of carrying out its functions under the Bill. Regulations made under this clause may:

- a. Specify descriptions of people who HMRC can require to supply information;
- b. Require a notice to contain specified information;
- c. Require, or enable a notice to require, information or documents to be provided in a form or manner specified in the regulations or the notice;

- d. Require, or enable a notice to require, information or documents to be provided at a time, or within a period, specified in regulations or the notice;
- e. Require, or enable a notice to require, information or documents to be provided in respect of a period specified in the regulations or the notice;
- f. Specify descriptions of information or documents which a notice may not require a person to provide;
- g. Provide for determining in specified cases whether information or documents are of such a description, including providing for that determination to be made by a person or body specified in the regulations.

80. It is important that the Commissioners have the power to require information from third parties, since this is necessary for effective checks to be carried out. However, the imposition of such requirements on third parties is a matter that needs to be handled carefully. It is for this reason that there is no general power for the Commissioners to require any information from any person.

81. Instead, information may only be required in accordance with regulations. These regulations will specify the information that can be required and the people from whom it can be required. These limits are to be imposed by delegated rather than primary legislation because the exact nature of the information required is likely to change over time, as the way in which people conduct their affairs develops and methods of communication change. It may also be necessary to alter the scope of the Commissioners' powers over time to allow them effectively to tackle areas where a particular risk of fraud or non-compliance is identified.

82. The powers are part of the administration of this scheme to ensure that it can be administered efficiently and fairly, and as a result, the negative procedure offers the appropriate level of scrutiny.

### **Clause 29 – Termination of tax credit awards**

- **Power conferred on: the Treasury**
- **Parliamentary procedure: negative**

83. Clause 29 provides for a person's claim for tax credits to be terminated by a valid declaration of eligibility under this Bill, so that they are not able to claim support under both schemes at the same time. Subsection (8) provides that the tax credits legislation will apply to the person subject modifications made in regulations and the amount of tax credit that they are entitled to will be calculated accordingly. Subsection (9) allows regulations to be made that make further provision to ensure that the person or their partner's entitlement to tax credits ceases. These regulations may include, in particular, provision that, where a person's claim is terminated under this clause, the tax credits legislation applies to them with such modifications as may be made in regulations and provision that applies any provision of clause 29 with specified modifications.

84. This is necessary to ensure that the person's tax credits claim is calculated correctly, as the termination process introduced by this Bill is not dealt with in tax credits legislation. As this will involve a significant level of technical detail which may be subject to change, especially as the tax credits regime is phased out, it is appropriate to deal with the matter in regulations made under the negative procedure.

### **Clause 30 – Power to provide for automatic termination of universal credit**

- **Power conferred on: the Treasury**
- **Parliamentary procedure: affirmative**

85. As Universal Credit develops we intend that any claim under this scheme will automatically terminate any award or claim to Universal Credit. However, as Universal Credit is not yet fully operational, it is not possible to make this provision entirely in the Bill.

86. As a result, clause 30 allows the Treasury to make regulations to amend this Bill in order to ensure that where a claim is made under this scheme, any award of Universal Credit is terminated and any claim is not proceeded with. These regulations can include provision amending or repealing clause 11 and making consequential amendments to the Bill. They can also confer power on the Secretary of State or a Northern Ireland department to make regulations:

- a. Containing provision about calculating the amount of Universal Credit to which the person is entitled;
- b. Modifying the application of the Social Security Administration Act 1992, the Social Security Act 1998, Part 1 of the Welfare Reform Act 2012, their Northern Ireland equivalents and any legislation made under them.

87. The power to amend or repeal clause 11 is required as, when regulations are made so that a valid declaration of eligibility terminates a universal credit award, clause 11 will no longer be required. The powers conferred on the Secretary of State and Northern Ireland departments are required so that consequential amendments and regulations can be made to, for example, ensure that any final Universal Credit award is calculated correctly on termination of the claim.

88. As this is a power to amend primary legislation, it is appropriate for it to be subject to the affirmative procedure.

**Clause 31 – Power to disqualify tax credit claimants from obtaining top-up payments**

**Clause 32 – Power to disqualify universal credit claimants from obtaining top-up payments**

- **Power conferred on: the Treasury/the Commissioners**
- **Parliamentary procedure: negative/affirmative**



89. A person claiming support under this Bill is not entitled to claim tax credits or Universal Credit, and may be disqualified from this scheme if they do so. Subsection (1) of both clauses provides that this will apply if the person or their partner is receiving support under the Bill when they make a claim for tax credits or Universal Credit without their circumstances having changed. If they then, within 12 months of making the other claim, make a declaration of eligibility under this Bill, they will be given a warning notice and, if they repeat this behaviour, will be disqualified.

90. However, this does not apply if they claim tax credits or Universal Credit following a change to their circumstances. Clauses 31 and 32 allow individuals to move to the alternative schemes if their circumstances change, and subsection (5) of both clauses enables the Treasury to make regulations about what is, or is not, to be regarded as a change of circumstances and specifying cases in which something which would otherwise be a change of circumstances is not to be treated as such. As this is a matter which may change over time, regulations made under the negative procedure will provide the appropriate level of scrutiny.

91. Subsection (6) of both clauses allows the Commissioners to make regulations which substitute a different period for the 12 months within which an individual must not make a valid declaration of eligibility under this Bill. It may be necessary to use this power if HMRC's operational experience leads it to conclude that this is not the correct period, but the Government does not consider that primary legislation solely to alter this provision would be justified. Accordingly, it is considered that regulations under the affirmative procedure will provide the appropriate level of scrutiny.

**Clause 42 – Penalties for failure to comply with information notice**

**Clause 43 – Penalties for providing inaccurate information or documents**

**Clause 45 – Penalties for dishonestly obtaining top-up payments, etc**

- **Power conferred on: the Treasury**

- **Parliamentary procedure: affirmative**

92. Clause 42 provides the penalty for failing to comply with an information notice issued under clause 26. Subsection (4) provides that the penalty may not exceed £300. Subsection (5) enables regulations to substitute a different amount.

93. Clause 43 provides the penalty for providing inaccurate information and documents to HMRC where the inaccuracy is careless, deliberate or the person knows that it is inaccurate. Subsection (5) provides that the penalty may not exceed £3,000. Subsection (6) enables regulations to substitute a different amount.

94. Clause 45 provides the penalty for dishonestly obtaining top-up payments or payments from a childcare account. Subsection (3) provides that the penalty may not exceed the greater of £3,000 or the amount that was obtained. Subsection (5) enables regulations to replace £3,000 with a different amount.

95. Regulations are needed to ensure flexibility as to the amount of penalty and to allow for its adjustment in the future, particularly to take account of changes in the value of money. In order to reflect the importance of any such adjustment, the regulations will be subject to the affirmative procedure.

#### **Clause 48 – Disqualification orders**

- **Power conferred on: the Commissioners**
- **Parliamentary procedure: negative**

96. Clause 48 enables HMRC to make an order disqualifying a person from the scheme in certain circumstances which are set out in the Bill. One of the conditions is that the person has obtained a relevant benefit through dishonesty and has been convicted of an offence or had a penalty

imposed. A relevant benefit is a benefit or other payment of a description specified in regulations made under subsection (6).

97. It is necessary for relevant benefits to be defined in regulations as this will enable these provisions to keep pace with any changes in social security provision. As this is a technical matter, the negative procedure provides the appropriate level of scrutiny.

#### **Clause 49 – Power to exclude childcare from being qualifying childcare**

- **Power conferred on: the Treasury**
- **Parliamentary procedure: affirmative**

98. Clause 49 allows HMRC to direct that childcare provided by a person is not qualifying childcare if they have dishonestly done or omitted to do an act for the purpose of obtaining a payment from a childcare account and have, as a result, either been convicted of an offence or been notified of a penalty under section 45. Subsection (3) provides that such a direction has effect for 12 months. Subsection (4) allows this figure to be changed in regulations.

99. It may be necessary to use this power if HMRC's operational experience leads it to conclude that the period specified in subsection (3) is either longer or shorter than is necessary to protect public funds as such it is considered appropriate that this power is exercised by the Treasury. However, the Government does not consider that primary legislation solely to alter this provision would be justified. Accordingly, it is felt that regulations under the affirmative procedure will provide the appropriate level of scrutiny.

#### **Clause 58 – Exercise of right of appeal**

- **Power conferred on: the Commissioners**
- **Parliamentary procedure: negative**

100. Clause 58(1) provides that an appeal under section 55 against a decision of HMRC must be in the form and manner specified in regulations. Clause 58(6) allows regulations to provide for any provision of Chapter 2 of Part 1 of the Social Security Act 1998, its Northern Ireland equivalent or section 54 of the Taxes Management Act 1970 to apply to these appeals, with such modifications as specified in the regulations.

101. These regulations will deal with matters of detail which it is not appropriate to address in primary legislation, and which may need to change as experience of dealing with these cases in the tribunal develops. As these provisions relate to matters of detail which have already been subject to Parliamentary scrutiny it is felt that the negative procedure is appropriate.

#### **Clause 61 – Compensatory payments**

- **Power conferred: by subsection (6) on the Treasury; other powers on the Commissioners**
- **Parliamentary procedure: subsection (6) affirmative; other powers negative**

102. Clause 61 provides for HMRC to compensate a person who has, in circumstances specified in regulations, been deprived of the opportunity to receive top-up payments in respect of a child for a period. The amount is to be 20% of the qualifying childcare costs the person has incurred during the period. This percentage may be varied by regulations made by the Treasury under subsection (6), which would be subject to the affirmative procedure.

103. Subsection (2) provides for a maximum amount payable as compensation to be set in, or determined in accordance with, regulations. Subsection (3) provides that the circumstances which may be specified include, in particular, where an appealable decision is varied, cancelled or

quashed on a review or appeal. Subsection (5) permits regulations to make further provision about making payments under this clause.

104. These regulations will enable HMRC to ensure that people are dealt with fairly. This power may be used, for example, where a person is waiting for contribution-based Employment and Support Allowance to come into payment. These situations are technical, and it is likely that they will change over time. Regulations offer the flexibility necessary to ensure that the aim of the legislation is delivered and, in the circumstances, the negative procedure offers the appropriate level of scrutiny.

**Clause 62 – Restrictions on claiming tax exemption for childcare vouchers**

**Clause 63 – Restrictions on claiming tax exemption for employer-contracted childcare**

- **Power conferred on: the Treasury**
- **Parliamentary procedure: none**

105. The scheme introduced under this Bill will replace the Employer Supported Childcare scheme provided for by sections 270A and 318A of the Income Tax (Earnings and Pensions) Act 2003. As a result, clauses 62 and 63 contain provisions which will prevent individuals from entering that scheme from the relevant day.

106. The relevant day will be specified in regulations made by the Treasury, and is in essence a commencement provision. It is appropriate for this to be done in regulations to ensure that there is a smooth transition between the schemes. As with commencement orders generally, there is no Parliamentary procedure for these powers.

**Clause 71 – Power to make consequential amendments**

- **Power conferred on: the Treasury**
- **Parliamentary procedure: affirmative**

107. Clause 71 permits regulations to be made which amend, repeal, revoke or apply with modifications any enactment which is passed or made before the passing of the Bill or on or before the last day of the session in which this Bill is passed, if the Treasury considers this necessary or expedient in consequence of any provision made by or under this Bill.

108. This power is necessary to allow the scheme to commence smoothly. The provisions of the Bill potentially affect a wide range of areas, and it may be necessary to adjust them in order to commence provisions in the manner discussed in relation to clause 74. In particular, this will be used to ensure that individuals who cease claiming support under this Bill do not have the support they have received deducted from their entitlement under other schemes. As this is a power to amend primary legislation, it is appropriate for it to be subject to the affirmative procedure.

#### **Clause 74 – Commencement and short title**

- **Power conferred on: the Treasury**
- **Parliamentary procedure: none**

109. This clause provides powers for the commencement of the Bill. The following provisions come into force on Royal Assent: clause 64 (functions of Commissioners for Revenue and Customs); clause 67 (amendment to Northern Ireland Act 1998); clause 68 (regulations: general); clause 69 (regulations: Parliamentary control); clause 70 (interpretation); clause 71 (power to make consequential amendments); clause 72 (financial provisions); clause 73 (extent); clause 74; and any power to make regulations under the Bill.

110. The remaining provisions of the Bill will come into force in accordance with regulations. Subsection (3) allows these regulations to make different provision for different purposes or in relation to different areas, or to make such transitory, transitional or saving provision as the Treasury consider

necessary or expedient, including (in particular) such adaptations of provisions of the Act brought into force as appear to be necessary or expedient in consequence of other provisions of the Bill which have not yet been brought into force.

111. This is a standard provision. It is necessary to ensure that the detailed provisions of the Bill can be brought into force smoothly and to deal with any transitional matters that are not covered directly by the Bill. It also permits the Bill to be implemented in relation to different age groups at different times. The Government intends all children under 5 (and all disabled children under 17) to be eligible initially, which it will increase to the age of 12 within the first year of the scheme's operation. As with commencement orders generally, there is no Parliamentary procedure for these powers.

HM Revenue and Customs

4<sup>th</sup> June 2014