



Joint Committee on Human Rights

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From Dr Hywel Francis MP, Chair

Rt Hon Edward Davey MP,
Secretary of State for Energy and Climate Change,
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3 Whitehall Place,
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Tuesday 26 March 2013

Energy Bill

The Joint Committee on Human Rights is scrutinising the compatibility of the Energy Bill with the requirements of human rights law. I would be grateful if you could provide me with the answers to the following questions which would assist the Committee with its work.

Proposed use of secondary legislation in relation to powers of the Secretary of State

The Bill contains powers for the Secretary of State to require information from various persons, and to permit sharing of that information between public sector and private sector bodies. The human rights memorandum outlines the Government's intention to provide safeguards in secondary legislation for the use of such information.

It is the Committee's view, however, that, where there is a need to legislate to require information and to permit data sharing, the Government's intentions should be set out clearly in primary legislation. This would enable Parliament to scrutinise the Government's proposals more effectively and, bearing in mind that secondary legislation cannot usually be amended, would increase the opportunity for Parliament to hold the executive to account.

Q1: Does the Government accept that, without sufficient safeguards set out on the face of the Bill, there is a risk that the information powers could be exercised in a way that is incompatible with Article 8 ECHR?

Decision of the system operator to order capacity incentives – right of appeal

The Bill contains provisions which enable the Secretary of State to provide for a system operator to administer the electricity capacity market. In particular, the Secretary of State may provide that the system operator must decide, on a case by case basis, whether a particular capacity provider must pay a "capacity incentive" to an electricity supplier. The human rights memorandum sets out that the incentive is a

form of compensation for failing to deliver a product which the capacity provider had agreed to deliver. In its human rights memorandum, the Government states that a decision as to whether a capacity provider is liable to pay a capacity incentive in a particular case could, depending on how the incentive regime is designed, involve the determination of a person's civil obligations.

Q2: Can the Government provide more information on how the incentive regime will be designed?

The Government's human rights memorandum sets out its view that judicial review will be a sufficient appeal mechanism against any decision by the system operator as to whether a particular capacity provider must pay a capacity incentive in a particular situation. The Government relies on a general justification that judicial review is sufficient on the basis that the decision concerns the exercise of administrative discretion based on complex policy considerations and expert knowledge of the electricity market. However, this justification was given in relation to modification of licence conditions, and not specifically in relation to the system operator's decision to impose a capacity incentive.

Q3: Can the Government provide further analysis as to why, in its view, judicial review would be sufficient to meet Article 6(1) requirements with specific reference to the system operator's decision to impose capacity incentives?

Q4: Can the Government outline the considerations that the systems operator will take into account when deciding whether to require a capacity provider to impose a capacity incentive?

The Government also states in the human rights memorandum that, if it appears necessary to the Secretary of State to provide for an alternative mechanism by which a decision by the system operator can be challenged, the Secretary of State could provide for an appeal mechanism in regulations, or through amendments to an industry code. It is the Committee's view that where provisions for appeal are necessary to satisfy the right of access to an independent and impartial tribunal guaranteed by Article 6(1) ECHR, these safeguards should be expressly provided for on the face of the Bill.

Q5: Does the Government accept that if Article 6(1) is engaged by the system operator's decision to impose capacity incentives, the right of appeal should be explicit in the Bill?

I would be grateful if you could reply by **15 April 2013** and if an electronic copy of your reply, in Word, could be emailed to jchr@parliament.uk.

Dr Hywel Francis
Chair