

CONSULTATION RESPONSE

Consultation: Extending protections for domestic customers who may have prepayment meters installed under warrant (Electricity and Gas Supply Standard Licence Condition 28B)

To: Ofgem

From: Nucleus, 298 Old Brompton Road, London SW5 9JF

Question: Do you agree with our proposal to extend these protections until 30 June 2025?

Nucleus is a legal advice charity operating in West London, in Earl's Court specialising in housing, debt, welfare benefits, employment and civil law advice for the community. We have extensive experience of dealing with vulnerable consumers going back many years.

In answer to the Consultation question, we consider:

- (i) the current protection should be maintained after 31 December 2020 and until 25 June 2025;

and

- (ii) because we have serious concerns about whether the current legislative provisions and the way in which it is applied are actually lawful, and consider the issue needs to be fully reviewed.

The warrant and disconnection process in practice

The disconnection application proceeds under the Rights of Entry (Gas and Electricity Boards) Act 1954. Although the application is dealt with through the magistrates' court, the application is a civil matter, not a criminal matter.

To get the warrant, the supplier must apply to the magistrates' court or, in Scotland, to a Justice of the Peace, a magistrate or a sheriff.

The warrant is granted if the court is satisfied that:

- * entry to the premises is reasonably required by the supplier;
- * the supplier has a right of entry, but that right is subject to getting consent to enter;
- * any conditions the supplier is supposed to meet in order to exercise the right of entry (e.g., to give notice) have been met.

Also, the magistrates' court must be satisfied that:

- if the right of entry does not itself have a requirement for notice, 24 hours' notice has been given after which entry was refused; *or*
- there is an emergency and entry has been refused; *or*
- the purpose of entering would be defeated by asking for consent – e.g., if tampering is suspected.

However, for at least a decade in our experience, the practice has been to use the warrant system for homes to fit prepayment meters rather than actually disconnect a supply.

Furthermore, the process is questionable since we are doubtful the current system actually has a lawful basis, at least as regards the change in supply terms and conditions if no consent is given.

In summary this is because:

- the 1954 Act never envisaged that anything other than disconnection would be attempted; there being no such thing as a pre-payment meter or any other kind of modern energy meter system in place when enacted; consequently, the current practice is outside the scope of the legislation.
- There is no proper opportunity to dispute or challenge the energy company figures in the magistrates' court and the imposition of a pre-payment meter amounts to changing the terms and conditions upon which fuel is supplied, potentially without the agreement of the other

party to the contract (the consumer or debtor). This appears to raise human rights considerations on the right to a fair trial.

Certainly, there have been improvements over the last 15 years as regards disconnection policies. From the national figures, we understand in 2017, the total number of actual disconnections for gas/electricity debt in England and Wales was 17 and, in Scotland zero; however, these figures alone do not present a full picture as it leaves out the issue of disconnection where a person is unable to pay through lack of means.

Today the system of safeguards for energy consumers originally established with Energywatch has been eroded and the protection of the position of consumers, particularly vulnerable ones has become more difficult than in the past. In this regard the measures adopted by energy companies, the winter disconnection moratorium and other developments have improved the handling of cases.

However, the number of persons in fuel poverty has risen, and in practice this is often linked to the operation of the benefit system for means-tested benefits. Many persons who become energy debtors are on low incomes, and often suffer the imposition of sanctions by the DWP (who have shown on occasion a marked reluctance to arrange and apply third party deductions). These sanctions cut benefits, in some cases to zero, creating further debt and income issues.

At the same time there has been an increased use of automated policies and the internet which makes it harder for vulnerable consumers to engage (e.g., sufferers of Parkinson's disease and persons with physical brain impairment and injury).

Whilst it is understandable to an extent that fuel suppliers might not wish third party deductions to be pursued (because of this DWP sanctioning of benefits) this alternative ought to be pursued rather than by way of disconnection).

Given the rise in unemployment and the growing number of people falling into poverty a rise in fuel poverty and persons unable to pay fuel bills can be predicted.

Consequently, we think that the current protection needs to be maintained at the very least, and consideration given to improving the system.

ii) We have concerns about the lawfulness of the system. It is nearly 70 years old and operates in a radically different energy market with wholly altered technology. Altogether, our view is that there is a need for legislative change to actually update the disconnection system. In our view, it even lacks a clear legal basis for a system of fuel supply under contract and the fitting of pre-payment mechanisms. There is no mandate under the 1954 warrant legislation for effectively changing the terms of conditions of supply under contract or imposing a different charging regime. Furthermore, this is arguably not a matter that can be properly determined in the magistrates' court as it is a summary and statutory process.

One problem is that the CPR rules do not apply in the magistrates' court as they do in the ordinary civil courts.

There is no legal aid provision and few debtors in our experience are capable of representing themselves or explaining their case and situation without assistance.

The scope of any warrant issued does not extend to changing terms and conditions. In short, the warrant system amounts to unilaterally changing the terms and conditions of fuel supply and the only right of challenge (i.e., attending the warrant application) does not allow for the matter to be explored and adjudged by the court. If, for instance, you do not want a prepayment meter imposed there is little scope for arguing or giving the reasons why. The right to enter the home on such a basis – to replace a meter rather than remove it and impose another – is not within the scope of the Act.

This appears to be contrary to human rights jurisprudence. Under the Human Rights Act 1998 it may be possible to argue that a person affected by the warrant should be notified of the hearing and given an opportunity to make representations to the magistrates' court. This point has yet to be tested, but Article 6 of the European Convention on Human Rights ensures the right to a fair trial and representation in legal proceedings which affect the rights of a person, including determining civil obligations. (see ECHR Article 6; *Rommelfanger v Germany* (1989) 62 DR 151 and *Diennert v France* (1996) 21 EHRR 554).

The State is under a duty to ensure the effective protection of rights and this procedure gives no scope for determining civil rights concerning the contract.

The imposition of a pre-payment or smart meter as a result of a warrant application results in a unilateral alteration of civil rights and obligations in a

forum where there is no proper right to be heard for the determination of those rights

Accordingly, we believe that protections under the Licence Condition should remain in force after 31 December 2020 and that attention is given to updating both the legislation and the associated safeguards for consumers. A system based upon 1954 provisions can hardly be deemed suitable or appropriate for today in a radically different energy market and environment.

We hope this is of assistance.

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