

Final Business and Regulatory Impact Assessment

**The Provision of Early Learning and
Childcare (Specified Children) (Scotland)
Amendment Order (No. 2) 2021**

June 2021



Scottish Government
Riaghaltas na h-Alba
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Final Business and Regulatory Impact Assessment

Title of Proposal

The Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order (No. 2) 2021

Purpose and intended effect

Background

The overall objective of the Scottish Government's policy on funded early learning and childcare (ELC) is to provide high quality, flexible and affordable ELC that is accessible for families in order to improve outcomes for both children and families.

Currently, local authorities have a duty to provide up to 600 hours a year of funded early learning and childcare to all 'eligible children' in Scotland¹. The Scottish Government and the Convention of Scottish Local Authorities (COSLA) committed to nearly double this entitlement to up to 1140 hours a year and to introduce a National Standard, underpinned by a 'Funding Follows the Child' approach which will increase choice and flexibility for families.

As a result of the COVID-19 pandemic, the implementation date for the expansion of funded ELC was amended from August 2020 to August 2021.

Many local authorities across Scotland are already providing the expanded hours. The full delivery of this programme will now play a key role in the COVID-19 recovery process.

Local authorities are required to provide access to statutory funded ELC for any 'eligible...pre-school child belonging to their area'. This includes all 3 and 4 year olds (from a relevant start date) and some 2 year olds².

The definition of an 'eligible pre-school child' is set out in section 47(2) of the Children and Young People (Scotland) Act 2014 ('the 2014 Act') and in Regulations made under that section: the Provision of Early Learning and Childcare (Specified Children) (Scotland) Order 2014 ('the 2014 Order').

Local authorities also have a discretionary power to provide access to funded ELC to any other child as they see fit.

Funded ELC for 2 year olds

Evidence from both UK and international evaluations and studies of early learning and childcare programmes support the fact that all children, and especially those from disadvantaged backgrounds, can benefit in terms of social, emotional and educational outcomes from attending high quality ELC.

¹ [Children and Young People \(Scotland\) Act 2014 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2014/22/section/47)

² [Children and Young People \(Scotland\) Act 2014 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2014/22/section/47)

This is the basis for the Scottish Government's investment in ELC for all 3 and 4 year olds and some 2 year olds. The specific link to improved outcomes for those children facing the most socio-economic disadvantage is the rationale for targeting investment in early access to high quality ELC for 2 year olds who meet the criteria set out in legislation and policy. We estimate that around 14,500³ 2 year olds meet these criteria, that they:

- Are care experienced themselves (currently 'looked after', subject to a kinship care or guardianship order)
- Have a care experienced parent

- Or if they have a parent in receipt of a 'qualifying benefit' which are as follows³:
 - Income Support
 - Job Seeker's Allowance (income based)
 - any income related element of Employment and Support Allowance
 - Incapacity or Severe Disablement Allowance
 - State Pension Credit
 - Child Tax Credit, but not Working Tax Credit with annual income of £16,480 or less
 - both maximum Child Tax Credit and maximum Working Tax Credit and income of £7,320 or less
 - support under Part 6 of the Immigration and Asylum Act 1999
 - Universal Credit with household take-home pay of £610 a month or less (equivalent to £7,320 annual income)

We estimate that over 90% of eligible 2 year olds meet criteria relating to their parent receiving a qualifying benefit.

Changes to eligibility

Through 2 previous amendments to regulations, we introduced an income threshold for those families in receipt of Universal Credit and aligned the Working Tax Credit threshold to this. These amendments had the effect that a child is eligible when a parent receives:

- maximum Child Tax Credit and maximum Working Tax Credit, with an annual household income of £7,320 or under⁴.

- Universal Credit, and take home pay is £610 a month or less.

A combination of UK Government policy changes to the National Living Wage (NLW), effective from 1 April 2021, means that it is now not possible for a parent

³ Using October 2016 data from HMRC, it was estimated that there were around 14,500 eligible 2 year olds in Scotland.

⁴ [The qualifying benefits are set out in The Provision of Early Learning and Childcare \(Specified Children\) \(Scotland\) Order 2014](#)

aged 23 and over to meet the combined working tax credit and child tax credit criterion or the universal credit criterion. These policy changes are:

- to increase the National Living Wage annually ⁵(the legal minimum wage for those age 23 and over, not to be confused with the 'real' living wage);
- to reduce the age that the National Living Wage is payable from those aged 25 and over to those aged 23 and over.

In order to be in receipt of Working Tax Credit, a claimant must work at least 16 hours per week. From 1 April 2021 the annual income for a person aged 23 and over working 16 hours per week is around £7,413.

It is worth noting for the purpose of the BRIA that any child currently registered for the 2 year old offer will remain eligible. If the circumstances of the parent/carer changes, the child is still entitled to the 2 year old funded ELC provision.

Objective

This Order will amend the income threshold to £7,500 for those in receipt of both Working Tax Credit and Child Tax Credit. The monthly threshold for Universal Credit will be amended to £625 (an equivalent annual income threshold of £7,500).

If we make no changes to the threshold, we estimate the eligible population could decrease by around 1,000 children. Given that we estimate around 14,500 2 year olds are eligible for the offer, this represents around 7% of those we hope can benefit from the policy falling out of eligibility. It is important to note however that no 2 year old currently accessing the funded entitlement will lose out, as eligibility is only assessed before the child begins provision. Once the child is accessing their funded place they will retain it, even if their family's circumstances change.

The NLW increased from 1 April 2021 and as we understand it is intended to increase annually until at least 2024. This is based on the UK Government's policy aim for the rate of the NLW to reach a target of two thirds of UK median earnings by 2024. The Low Pay Commission published their Low Pay Commission Report in December 2020, which sets out the methodology and rationale for up-ratings over the next 3 years: National Minimum Wage (publishing.service.gov.uk⁶).

The purpose of this amendment is to maintain eligibility for those 2 year olds we would expect to be eligible as a result of their parents or carers being in receipt of those affected qualifying benefits. Household circumstances for these families will not have materially changed as a result of the increase in the NLW, as a small increase such as this is necessary for low-income households to maintain living standards while the cost of living increases across the country. Labour market trends show that the distribution of low paid jobs has been broadly stable with a similar percentage of workers earning at and just above the NLW.

⁵ [National Minimum Wage and National Living Wage rates - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

⁶ [National Minimum Wage \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

We do not expect there to be a significant increase in the number of 2 year olds who are likely to become newly eligible as a result of these changes. The changes are solely required to maintain eligibility and to keep in pace with the standard of living. We anticipate that this will be a necessary annual requirement to uprate thresholds in line with future increases to the National Living Wage.

It is worth noting for the purpose of the BRIA that although we do not anticipate an increase in eligibility, uptake rates in the population vary as a result of a number of factors including when the child's 2nd birthday is and the relevant start date for their entitlement. We also expect that as more families migrate over to Universal Credit from other legacy benefits that the number of eligible children and families will reduce over time. As parental confidence in the safety of sending children to nursery increases during the recovery from COVID-19 take-up of the policy may also increase, relative to 2020/21.

Future policy on access to funded ELC will be guided by the Government's policy priorities due to be set out in the Programme for Government after summer recess. We anticipate longer term to keep the eligibility criteria for the 2 year old entitlement under review and responsive to any future changes in policy.

Rationale for Government intervention

Evidence⁷ shows that there are benefits to children attending high quality early learning and childcare. All children have the potential to benefit from high quality ELC, however the most significant impact is among children from the most disadvantaged backgrounds.

The eligibility criteria for 2 year olds include looked after children and children whose family are in receipt of a 'qualifying benefit'⁸. The entitlement is based on international evidence and evidence from our own Growing Up in Scotland Study that shows that all children, but especially those experiencing the most economic disadvantage, benefit from access to high quality ELC.

Amending the eligibility criteria as currently drafted will protect eligibility for a similar profile of 2 year old children who currently qualify for access to funded early learning and childcare as a result of their parent or carer's receipt of Working Tax Credits and Child Tax Credits or Universal Credit. This will ensure that those children who are among those most likely to experience disadvantage will continue to have the opportunity to benefit from earlier access to high quality ELC. It will also ensure that we are keeping pace with the standard of living for those families who have seen a slight increase in their earnings due to the increase in the NLW.

Consultation

This amendment is being brought forward in response to changes in UK Government policies and is intended to largely maintain the status quo to ensure

⁷<http://www.healthscotland.scot/publications/rapid-evidence-review-childcare-quality-childrens-outcomes>

⁸ <https://www.mygov.scot/childcare-costs-help/funded-early-learning-and-childcare/>

that a similar profile of children remain eligible for the entitlement whilst keeping in pace with the standard of living. It does not introduce a significant change in policy.

The original legislative provisions in the 2014 Act were designed to enable the expansion of early learning and childcare to wider cohorts of children. There is a wide consensus around the desire to expand the entitlement to some 2 year olds who would benefit the most from earlier access to funded, high quality ELC, as evidenced through the passage of the 2014 Act. The Scottish Government engaged and consulted with key stakeholders and delivery partners at that time to ensure that implementation of the duties under the 2014 Act was manageable and affordable and that eligible children would receive high quality services.

We have reviewed the previous impact assessments done for the Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2019 and reviewed new evidence via the evidence tracker. We have also liaised with analytical colleagues across various portfolios within Scottish Government to evaluate and interpret available sources.

We have not consulted on the increased income thresholds as the aim is to protect eligibility rather than change policy, however we have discussed this with COSLA who agree that these changes are necessary in order to maintain eligibility.

We have also written to local authorities to make them aware of this change initially through our monthly policy update. This was followed up by a letter from the Director of Early Learning and Childcare, Alison Cumming who wrote to all local authorities to confirm that legislation would be amended; and that authorities should use their discretionary powers to allow families who have seen a slight increase in their income as a result of this change, to be considered eligible.

COSLA have advised that they understand why these changes are being proposed to the secondary legislation and that they are necessary due to circumstances outwith the control of Scottish Government to ensure the policy intent is met. They also recognise that this will be a necessary annual requirement to uprate thresholds in line with future increases to the National Living Wage.

Scottish Government does not anticipate there being a significant increase in the number of 2 year olds who become newly eligible as a result of the increase to those impacted income thresholds. The amendment is required to reflect changes as a result of the National Living Wage and keep pace with the standard of living. We do not expect there to be a potential financial impact as a result of these new income thresholds. We appreciate that there may be a very minimal number of families who will become eligible for the entitlement. However due to the current uptake rates of the targeted 2 year old offer and the assumptions underpinning the multi-year financial settlement with local government, which exceed current levels of uptake, there is not expected to be any immediate financial impact. The Scottish Government and COSLA have agreed to monitor ongoing financial impacts on local authorities closely as part of the review arrangements for the multi-year funding settlement for the expansion to 1140 hours, detailed further below.

Future policy on access to funded ELC will be guided by the Government's policy priorities due to be set out in the Programme for Government after summer recess. We anticipate longer term to keep the eligibility criteria for the 2 year old entitlement under review and responsive to any future changes in policy.

Options

Option 1 – Amend current eligibility criteria to protect eligibility for 2 year old children who qualify for access to funded early learning and childcare (ELC)

Benefits

This option responds to changes in UK Government policy which would indirectly restrict access to funded ELC for 2 year olds whose parents or carers may qualify due to their receipt of both Working Tax Credits and Child Tax Credits; or their receipt of Universal Credit. This option protects the eligibility for a similar profile of 2 year old children that are currently eligible, ensuring that the 2 year old offer remains appropriately targeted.

We do not expect there to be a significant increase in the number of 2 year olds who are likely to become newly eligible as a result of these changes. The changes are solely required to maintain eligibility and to keep in pace with the standard of living.

Costs

As the purpose of this amendment is to maintain eligibility we do not expect there to be a significant increase in the number of 2 year olds who become newly eligible to access funded ELC. We do not foresee a potential increase of additional children accessing a funded place at age 2. We also do not envisage that there will be a financial impact for local authorities if total uptake exceeds current projections. We have agreed with COSLA that this and any future amendments are necessary. We will therefore consider future increases to the National Living Wage or UK Government policy changes that negatively impact on our qualifying criteria. We anticipate that there is no significant impact on local authorities' ability to fund this provision within the current financial settlement. As such there is no evidence that additional funding is required to support implementation of the amendment. The impact on uptake will be closely monitored by both Scottish Government and COSLA through the ELC Finance Working Group and appropriate arrangements will be made if uptake is significantly above the level expected and local authority costs increase as a result.

Sectors and Groups affected

Impact on Private & Voluntary providers

We anticipate no material impact on private, voluntary or independent providers as a result of this option.

Impact on the public (parents/children)

We do not anticipate any significant increase in the number of children who become newly eligible as a result of amending the eligibility criteria.

No current recipient, or future recipient eligible on other current criteria, will be impacted. It is worth noting for the purpose of the BRIA that any child currently registered for the 2 year old offer will remain eligible. If the circumstances of the parent/carer changes, the child is still entitled to the 2 year old funded ELC provision.

Impact on Local Authorities

Due to the current uptake rates for 2 year olds and the model of funding for the expansion, we anticipate minimal impact on local authorities' ability to fund any additional provision.

Option 2 – Do Nothing

Benefits

If we were to do nothing, we estimate that as a result of these changes to UK Government policy, the eligible 2 year old population will decrease by around 1,000 children. This would have a detrimental impact upon those eligible children who would benefit the most from early access to high quality ELC, and undermine the Scottish Government's commitment to closing the poverty-related attainment gap.

In this scenario, local authorities would be able to choose whether to use their discretionary power to continue offering funded ELC to children who are no longer eligible due to household income slightly exceeding the threshold, without the statutory underpinning.

There are no benefits to eligible 2 year olds associated with this option.

Costs

We estimate that if local authorities were to adhere strictly to the eligibility criteria as drafted in secondary legislation, this would mean around 1,000 fewer 2 year olds being eligible for funded ELC annually from 1 April 2021. This would mean that the benefits associated with extending funded ELC to eligible 2 year olds would not be realised for a significant proportion of the eligible population.

Local authorities would however continue to have a statutory discretionary power to offer funded ELC to 2 year olds out-with the defined eligibility criteria. We expect they would continue to want to support children in the lowest income households, meaning this option would be cost neutral.

If the eligibility criteria for 2 year olds accessing ELC is not amended, there will be no additional costs to the Scottish Government as funding for Local Authorities has been agreed for 2021-22, and includes the full funding for broader definition of eligible 2 year olds.

Sectors and Groups affected

Impact on Private & Voluntary providers

Should Local Authorities choose to exercise discretionary powers to offer funded ELC to the affected group, we do not anticipate any impact on private and voluntary providers as the number of children eligible for funded childcare is not expected to increase. However, should local authorities decide not to offer discretionary funded ELC to 2 year olds who dropped out of eligibility, this could potentially reduce demand for ELC, resulting in lost revenue for private and voluntary providers.

Impact on the public (parents/children)

We anticipate a decrease of around 1,000 in the number of children eligible for the 2 year old offer. This impact may be mitigated if local authorities use their discretionary power to continue supporting 2 year olds in lower income households.

Impact on Local Authorities

The costs associated with providing childcare to eligible 2 year olds may reduce as fewer children become eligible. However, Local Authorities may find they receive more referrals or requests for 2 year old ELC placements as a result, and may choose to use their discretionary power to continue supporting children in lower income households. This would increase the administration burden on Local Authorities, but would not have any implications for the costs of providing ELC in 2021-22 as they are already funded in full by Scottish Government to provide ELC to this number of eligible 2 year olds.

Scottish Firms Impact Test

As noted above, the Scottish Government has not undertaken extensive consultation with businesses in the ELC sector on this issue as the order is intended to largely maintain the effect of current eligibility criteria rather than significantly modifying them.

We anticipate no material impact on private and voluntary providers as a result of the order.

Competition Assessment

The Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order (No. 2) 2021 will not have a direct impact on competition with the ELC sector.

Consumer Assessment

The Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order (No. 2) 2021 will not have a direct impact on consumers in terms of their access to goods and services, namely the purchase of early learning and childcare which is not currently funded.

Test run of business forms

The Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order (No. 2) 2021 will not create any new forms for businesses.

Digital Impact Test

The Scottish Government recognises that ELC settings and local authorities face a number of digital impacts with the administration of funded ELC.

The Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order (No. 2) 2021 may have marginal impacts on internal systems within local authorities which need to be updated to reflect the new income threshold. There may also be marginal impacts on ensuring web content information regarding the 2 year old eligibility criteria are updated to reflect the modified income threshold.

Legal Aid Impact Test

The Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order (No. 2) 2021 will not create any new offences. It does not create any new decision-making powers to either be exercised by Scottish Ministers or on their behalf that could lead to appeals. There are therefore no impacts on the legal aid fund.

Enforcement, sanctions and monitoring

Local authorities will remain under a statutory duty to provide the 'mandatory amount' of early learning and childcare for eligible children under the Children and Young People (Scotland) Act 2014.

Local authorities will be responsible for ensuring the amended eligibility criteria is applied to children within their local area.

Implementation and delivery plan

It is intended that the Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order (No. 2) 2021 will come in to force from Autumn 2021, subject to Parliamentary approval. However Scottish Government have informed local authorities of their intention to amend legislation through the ELC policy update. The Director for Early Learning and Childcare, Alison Cumming will also write out to local authorities to advise them when legislation has been laid and to ask that they use their discretionary powers until the amendment is approved by Parliament to mitigate any effects of the UK Government policies on funded ELC. The letter will also outline our future approach to uprating annual

changes in order to mitigate any issues as a result of further increases to the NLW. This is a similar approach to the letters issued to Local Authorities in August 2018 and June 2019 where we asked them to use their discretionary powers to mitigate any effects of the UK Government policies on funded ELC as a result of increase the National Living Wage and income thresholds being frozen.

The Scottish Government will review the income threshold set out in the order in the future if it is considered necessary, for example if local authorities report a significant financial impact as a result of this change.

Summary and recommendation

Based on analysis of the associated costs and benefits, implementing the Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order (No. 2) 2021, option 1 is the preferred option.

The Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order (No. 2) 2021 will protect eligibility for those 2 year old children who qualify for access to funded early learning and childcare (ELC) due to their parents' receipt of both Working Tax Credit and Child Tax Credit; or Universal Credit.

The amendment is required to maintain eligibility and to keep in pace with the standard of living. This will ensure that those children who are among those most likely to experience disadvantage will continue to have the opportunity to benefit from high quality ELC.

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Clare Haughey

Date: 17/06/2021

Minister's name: Clare Haughey

Minister's title: Minister for Children and Young People

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