

# Final Business and Regulatory Impact Assessment

## **Title of Proposal**

The Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2022

## **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 funded 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 1,140 hours per year of funded ELC to all 'eligible children' in Scotland<sup>1</sup>.

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 olds<sup>2</sup>.

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 ELC 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.

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. These criteria provide access to children who:

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

<sup>1</sup> [Children and Young People \(Scotland\) Act 2014 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/2014/26/section/47)

<sup>2</sup> [Children and Young People \(Scotland\) Act 2014 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/2014/26/section/47)

- Or they have a parent in receipt of a ‘qualifying benefit’ which are as follows <sup>3</sup>:
  - 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 £7,500 or less
  - support under Part 6 of the Immigration and Asylum Act 1999
  - Universal Credit with household take-home pay of £625 a month or less (equivalent to £7,500 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 previous amendments to regulations, we introduced an income threshold for those families in receipt of Universal Credit, which is aligned to the threshold for those receiving Working Tax Credit and Child Tax Credit.

Our most recent amendment was through the Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment (No.2) Order 2021 which had the effect that a child is eligible when a parent receives: Child Tax Credit and Working Tax Credit, with an annual household income of £7,500 or under<sup>3</sup>, or; Universal Credit, and take home pay is £625 a month or less.

The UK Government confirmed during their budget announcement on 25 October 2021 that the National Living Wage (NLW)<sup>4</sup> would increase from 1 April 2022, from £8.91 to £9.50<sup>5</sup>.

In order to be in receipt of Working Tax Credit, a claimant must work at least 16 hours per week. As a result, this will mean that, from 1 April 2022, it will no longer be possible for a parent aged 23 and over to meet the combined Working Tax Credit and Child Tax Credit criterion.

If a parent is aged 23 or over and works 16 hours per week at £9.50 per hour, their annual income would be £7,904 – which is above the current threshold.

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<sup>3</sup> [The qualifying benefits are set out in The Provision of Early Learning and Childcare \(Specified Children\) \(Scotland\) Order 2014](#)

<sup>4</sup> The ‘National Living Wage’ is the legal minimum wage for those aged 23 and over, not to be confused with the ‘real living wage’.

<sup>5</sup> [National Minimum Wage and National Living Wage rates - GOV.UK \(www.gov.uk\)](#)

It is worth noting for the purpose of this 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 £7,920 for those in receipt of both Working Tax Credit and Child Tax Credit. The monthly threshold for Universal Credit will be amended to £660 (an equivalent annual income threshold of £7,920).

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 would represent around 7% of those we hoped could 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 will increase from 1 April 2022 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 latest Low Pay Commission Report in December 2021. This set out their indicative NLW forecasts out to 2024, as well as their evidence and rationale for these recommendations<sup>6</sup>.

The purpose of these amendments 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.

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. We have agreed this approach is necessary with COSLA

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

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<sup>6</sup> [Minimum wage rates for 2022 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/minimum-wage-rates-for-2022)

nursery increases during the recovery from COVID-19 take-up of the policy may increase, relative to 2021/22.

### **Rationale for Government intervention**

Evidence<sup>7</sup> shows that there are benefits to children attending high quality ELC. 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'<sup>8</sup>. 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 ELC 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 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 ELC 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 prepared for the Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment (No.2) Order 2021 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.

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

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

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. They also recognise that thresholds will need to be updated annually in line with future increases to the National Living Wage.

We will make local authorities aware of this change through our usual channels, including our monthly policy update.

## **Options**

### **Option 1 – Amend current eligibility criteria to protect eligibility for 2 year old children who qualify for access to funded 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 as a result of the new threshold.

We do not therefore consider that additional funding is required to support implementation of the amendments.

The impact on uptake will be 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

We do not anticipate an impact on local authorities' ability to fulfil their statutory duties as a result of these amendments.

### **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.

In this scenario, local authorities could choose to use their discretionary power to continue offering funded ELC to a similar cohort of  
There are no benefits to eligible 2 year olds associated with this option.

#### **Costs**

With a reduction in the number of eligible children, the benefits associated with access to high quality funded ELC would not be realised for these children, including undermining the Scottish Government's commitment to closing the poverty-related attainment gap.

There would not be additional costs associated with this option.

### **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 under this option. 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 2022-23 as they are already funded 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 instrument 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 2022 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 2022 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 2022 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 2022 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 2022 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 are 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 2022 will come in to force from 1 April 2022, subject to Parliamentary approval. However Scottish Government have already informed local authorities of their intention to amend legislation through the ELC policy update.

### **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 2022, option 1 is the preferred option.

The Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2022 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: 27 January 2022**

**Minister's name: Clare Haughey**

**Minister's title: Minister for Children and Young People**

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