

Final Business and Regulatory Impact Assessment

Title of Proposal

The Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2021

1. Purpose and intended effect

Background

Early Learning and Childcare Eligibility and School Deferral

- 1.1. The overall objective of the Scottish Government's policy on funded early learning and childcare (ELC) is to provide high quality, flexible ELC that is accessible and affordable for all families.
- 1.2. In Scotland, all three and four year olds and eligible two year olds – those we believe will benefit most - have a statutory entitlement of up to 600 hours a year of funded ELC from the relevant start dates¹.
- 1.3. Some children are also eligible for an additional year of funded ELC when they defer their entry to Primary 1 (P1) for a year. All parents have the legal right to defer their child's entry to primary school if they are not yet five years old at the beginning of the school year. In the current system, the youngest children (those with a January or February birth date) are eligible for an additional year of funded ELC when their parent has exercised their statutory right to delay their child's school entry to P1 for a year.
- 1.4. Children who turn five years old between the August and December after the school commencement date can also be deferred, however, they do not have an automatic entitlement to funded ELC in that deferred year. Local authorities have discretion over a further year of funded ELC for these children. In the current system, the Scottish Government expects local authorities to make the decision about additional funded ELC for these children, based on an assessment of wellbeing, as set out in the Early Learning and Childcare statutory guidance² that accompanied the Children and Young People (Scotland) Act 2014.

Early Learning and Childcare Expansion

- 1.5. In a joint agreement with local government, the Scottish Government has committed to almost double the entitlement to funded ELC to 1140 hours per year. The expanded statutory entitlement was due to come into force from

¹ Children and Young People (Scotland) Act 2014: <http://www.legislation.gov.uk/asp/2014/8/section/48>

² Early Learning and Childcare Statutory Guidance: <https://www.gov.scot/publications/early-learning-childcare-statutory-guidance/>

August 2020, however, the coronavirus (COVID-19) pandemic necessitated a delay to the full roll-out. We have jointly agreed with Local Government to review readiness later this year, with a view to reintroducing the duty as early as possible.

- 1.6. Quality is at the heart of the ELC expansion, and a key commitment of the ELC expansion is Funding Follows the Child. Funding Follows the Child allows parents to access their child's funded ELC entitlement from any provider in the public, private or third sector including childminders, who meets the National Standard, has a place available and is willing to enter a contract with the local authority. The National Standard focuses on what children and their families can expect from their ELC experience, regardless of where they access their funded entitlement.
- 1.7. Despite the legal duty to deliver 1140 not being introduced from August 2020, following the publication of the Interim Guidance³ on 30 July, it is expected that local authorities will continue to use the principles and criteria of Funding Follows the Child and the National Standard as a framework to shape local funded ELC delivery.

Objective

- 1.8. The objective of The Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2020 is to entitle all children to funded ELC whose parents have decided to defer their entry to P1 for a year.
- 1.9. This means that children who turn five years old between the August and December after the school commencement date, are entitled to an additional year of funded ELC automatically when their parent defers their school entry for a year. This brings the entitlement for these children in line with the entitlement that already exists for deferred children who turn five years old in January or February.

Rationale for Government intervention

- 1.10. There has been considerable interest and parental concern about the discretion over the funding of the additional year of ELC for children born between August and December who defer school entry, including a parent-led campaign (Give Them Time Campaign) which argues that parents are best placed to make this decision, in the best interests of their children, and that funding is a potential barrier. It has also been raised that the parental experience locally can be variable.
- 1.11. The aim of amending the eligibility criteria as currently drafted is to ensure that parents decisions on whether to defer their child's P1 entry can be based on the best interests of the child and not whether they automatically qualify for

³ Funding Follows the Child and the National Standard for early learning and childcare providers. Interim Guidance: <https://www.gov.scot/publications/funding-follows-the-child-and-the-national-standard-for-early-learning-and-childcare-providers-interim-guidance/>

access to funded ELC. This was first set out by the Minister for Children and Young People, during a parliamentary debate in October 2019:

“The decision to defer school for their child is not one that parents take easily. It is essential that that decision is based on the wellbeing of the individual child and not based on their access to early learning and childcare. For that reason, we intend to introduce legislation to entitle all children whose school start is deferred to access funded early learning and childcare in their deferred year.”⁴

1.12. This policy, as part of the wider programme to expand funded ELC entitlement to 1140 hours, contributes to the following National Outcomes:

- We grow up loved, safe and respected so that we realise our full potential.
- We live in communities that are inclusive, empowered, resilient and safe
- We are well educated, skilled and able to contribute to society.
- We tackle poverty by sharing opportunities, wealth and power more equally

2. Consultation

2.1. The Scottish Government had planned to carry out a formal consultation on this policy however, the ELC Directorate’s work was prioritised to the COVID-19 response, meaning this could not be carried out.

2.2. Despite not carrying out a formal consultation, the Scottish Government has discussed the introduction of the legislation to entitle all deferred children to funded ELC with a range of stakeholders, as outlined below:

- Convention of Scottish Local Authorities (COSLA)
- Individual local authorities
- Association of Directors of Education in Scotland (ADES) Early Years Network
- ADES Resources Network
- Working Group on ELC and Childcare Sector Recovery
- Give Them Time Campaign
- Scottish Government Policy Units and Education Scotland

2.3. Since the Minister for Children and Young People made the commitment to extend eligibility for all deferred children to have access to funded ELC, it was made clear that it would be implemented in partnership with education authorities, who hold the statutory duty to ensure provision of funded ELC. Prior to the pandemic and before full roll out of the 1140 hours ELC expansion was delayed, both COSLA and ADES Early Years Network advised that commencing this change at the same time as when local authorities statutory duty to provide 1140 hours begins, would put their successful delivery of the ELC expansion at risk as removing local authority discretion over funded ELC

⁴ Meeting of the Scottish Parliament 2 October 2019:

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12292&i=111119>

for deferred children born between August and December could lead to an increase in the number of children each year with a statutory entitlement to funded ELC places that has not been accounted for in current ELC expansion plans.

2.4. In our discussions with COSLA, and with local authorities directly, we have therefore explored the implications of this policy change, mindful of the need to ensure that full rollout does not put delivery of the 1140 hours ELC expansion at risk.

2.5. The Working Group on ELC and Childcare Sector Recovery membership is drawn from the representative bodies from across the childcare sector (CALA, EYS, NDNA, SCMA and SOSCN) together with the Care Inspectorate, COSLA and Scottish Government. This group raised no significant concerns on the Order. Written feedback from one of the childcare sector membership organisations who had asked for comments from their members, supported the introduction of this legislation. They noted that the change will offer choice and continuity for families, and will mean there is a consistent policy nationally.

2.6. Since the Give Them Time campaign group launched in 2018, they have called for a further year of ELC funding for all children whose parents have a statutory right to defer their child's P1 entry. They also have called for more consistent and transparent information from local authorities in relation to parents legal rights on deferral and asked that decisions on a discretionary funding for children with an August to December birth date who are deferred, are consistently child-centred. They have received official support from the following organisations:

- Connect
- Play Scotland
- The National Parent Forum of Scotland
- Children in Scotland
- Upstart Scotland
- Reform Scotland
- Home-start

2.7. Before the COVID-19 outbreak, draft statutory guidance⁵ was published for public consultation between December 2019 and March 2020. This included updated sections on school deferral and ELC eligibility, based on the current legislative framework. This consultation received feedback on the current legislation for ELC eligibility for deferred children, with many responses calling for the current legislation to change so that all deferred children can access funded ELC in their deferred year. An independent analysis of the consultation responses is currently being produced and will be published in the coming months.

⁵ Draft Statutory Guidance for ELC: <https://consult.gov.scot/children-and-families/early-learning-and-childcare-statutory-guidance/>

3. Options

3.1. Two options are considered:

- **Option 1** - amend current funded ELC eligibility criteria to entitle children who turn five years old between the August and December after the school commencement date, to funded ELC in the deferred year.
- **Option 2** – Do nothing.

Option 1 – amend current funded ELC eligibility criteria to entitle children who turn five years old between the August and December after the school commencement date, to funded ELC in a deferred year.

Sectors and groups affected – Option 1

3.2. The following are likely to be affected by the amendment to ELC eligibility for Aug-Dec born children: parents, carers and children; private and third sector childcare providers, including childminders; and local authorities.

Benefits – Option 1

Parents, carers and children

3.3. Allowing parents to defer their child's entry to school is a longstanding feature of the Scottish schools system and gives parents and carers greater flexibility and choice. Currently, all parents of children who are still 4 years old on school commencement are able to defer their child's entry for a year, however the child's eligibility to funded ELC in the deferred year is based on their birth date. This means ELC access in the deferred year may impact on the parent's decision-making. Removing the ELC eligibility distinction based on birth date will support parents to make decisions based on the best interest of their child and not on access to funded ELC. This will reduce adverse outcomes and promote a healthy learning environment for children whose parents may have felt pressured to enrol them in Primary School before they were ready.

3.4. Extending ELC eligibility in a deferred year to families of August to December born children can also have an impact on household budgets. In the current system, in instances where funding is not granted on a discretionary basis for August to December deferred children, some families may choose to pay for an additional year of ELC for their child themselves. The provision of funded ELC is estimated to be worth around £4,500 per annum if all 1140 hours are taken. We do not have information about how many families currently pay for the additional year of ELC themselves, or how many families choose to defer their child but do not use ELC for that deferred year. For families who could not otherwise afford the costs of childcare, funded ELC will improve caregivers access to the labour market, potentially providing some low-income families with an even larger boost to household income.

Private and Third Sector childcare providers, including childminders

3.5. Switching ELC access for deferred children with an August to December birth date from the local authority's discretion to a statutory entitlement, means it will be delivered on a 'provider neutral' basis, as Funding Follows the Child underpins delivery of statutory ELC in Scotland. For children who are deferred and are entitled to funded ELC for an additional year, it is expected that parents will typically choose for their child to access their entitlement in the same setting(s) they received their previous year of funded ELC. We would therefore expect these providers will continue to play an important role in the delivery of the funded hours for deferred children. Option 1 is very likely to result in an increased number of deferred children remaining in ELC for an additional year. If settings have capacity for additional children - and on the basis that the rate at which local authorities fund ELC provision through private providers is sustainable – there will be financial benefits for these businesses. In the longer term, this increased demand may lead to creation of jobs in the childcare sector, paid at or above the real Living Wage.

Local authorities

3.6. In the current system, local authorities may have costs associated with local processes to receive, review, and reach a decision for applications for an additional year of ELC for August to December deferrals. We are aware that some local application processes, can include panels of relevant professionals and have significant review processes for families who are unhappy with the original decision. Switching ELC access for deferred children with an August to December birth date from the local authority's discretion to a statutory entitlement may reduce the bureaucratic burden that some local authorities may currently face under the current system.

Costs – Option 1

3.7. This legislative amendment will have a financial impact for local authorities, who hold the statutory duty to ensure provision of funded ELC. The Scottish Government will incorporate this additional duty and associated cost into discussions with Local Government on funding for early learning and childcare beyond the current multi-year agreement (which runs up to and including the 2021-22 financial year). There is significant uncertainty over the rate of uptake and annual additional revenue expenditure could range from £33m to £82.5m as a result. These estimates will continue to be refined to inform a future funding agreement with Local Government.

3.8. Where childcare providers currently receive a higher rate for private customers than they will under local authority rates, there is potential for loss of revenue if such provision is displaced by deferred children. This would be the case where customers who would have deferred their child even in the absence of this policy would have paid for private childcare. However, for new customers who would not have otherwise deferred their child, where there is capacity for additional children, then such costs should not materialise. In the long run, and

if the private sector is able to respond to increased demand, capacity for private provision could be unaffected.

3.9. Providers may already provide funded ELC in a deferred year on behalf of the local authority, e.g. for January and February deferrals who have a statutory entitlement, or for August to December deferrals who the local authority has granted funded ELC on a discretionary basis. Private and third sector childcare providers, including childminders, could also provide ELC to children in a deferred year whose parents are paying privately if the child has not been granted a discretionary funded placement from their local authority. In some cases the sustainable rate paid by Local Authorities will be lower than parents were paying for private childcare. If there is a shortage of supply, additional deferred children may displace non-funded provision with an uncertain impact on revenues. Based on the small number of self-funded deferrals, we expect this would represent a very small proportion of a setting's private income from fees paid by parents and carers outside of funded hours.

3.10. Removing local authority discretion over funded ELC for deferred children born between August and December will lead to an increase in the number of children each year with a statutory entitlement to funded ELC places. However, the scale of the increase in funded ELC uptake as a result of the change is difficult to predict, as it is based on individual parents' decisions and it is difficult to predict the extent and speed of parental response. For most August to December born children, we expect that even when they do have access to funded ELC in a deferred year, that they would continue to start primary school when they are first eligible and therefore not take up their additional year of ELC entitlement.

3.11. We have been working with COSLA, local authorities and other stakeholders to consider implementation of the policy and we plan to continue to work with partners to consider any further learning e.g. from authorities that are already delivering this policy in part or in full, or those who adopt the policy in advance of August 2023 as a result of local policy decision. We are considering opportunities to work with any authorities participating in early adoption of the obligation, including potential data collection and evaluation of the implementation process.

3.12. The assumed intention behind this policy change is to allow parents and carers who feel that their child is not ready for school, to be able to access funded ELC in a deferred year. There is an expectation that the deferral rate for those who become eligible will increase. There is a risk that deferral for this age group becomes 'the new norm', as more and more families take it up. Families who do not have concerns about their child attending school may choose to defer as they don't want their child to be the youngest in the year. This could lead to a higher deferral rate than we see currently.

Option 2 – do nothing

Benefits – Option 2

3.13. Under option 2 there may be some benefits to the discretionary model which allows local authorities to make a decision about funded ELC based on an assessment of the child's wellbeing. However, concerns have been raised about the implementation of this model (as outlined above) and the limits it places on families' ability to defer a child where they feel it is in the best interests of that child.

Costs – Option 2

3.14. There are no direct additional financial costs to the Scottish Government associated with this option as funding has already been provided to local authorities for implementation of the ELC provisions in the Children and Young People (Scotland) Act 2014.

3.15. Local authorities would however continue to have a statutory discretionary power to offer funded ELC to children with a birth date between August and December whose school entry is deferred for a year. We expect they would continue to fund places for these children at the same rate they do now, meaning this option would be cost neutral. If the rate of applications local authorities needed to process were to increase, this would have an impact on local authority resources. We do not have nationally held data on the number of applications for a further year of funded ELC for August to December born children.

4. Scottish Firms Impact Test

4.1. As noted above, the Scottish Government has not undertaken extensive consultation with businesses in the ELC sector on this issue.

4.2. We did engage with the Working Group on ELC and Childcare Sector Recovery and their members. This group raised no significant concerns on the Order. However, written feedback from one of the childcare sector membership organisations did note that they had received feedback from one provider where a child's deferred year was required to be taken in a local authority setting, as opposed to staying in the setting they were already attending, against the parents' wishes. As discussed further under 'Competition Assessment', Funding Follows the Child, which underpins the statutory ELC delivery in Scotland is 'provider neutral' and is underpinned by a National Standard that all funded providers will have to meet. As well as ensuring that the funded hours are delivered in high quality settings it will also place choice in parents' and carers' hands by allowing them to access their child's entitlement from any setting that meets the National Standard, has a place available and is willing to enter a contract with the local authority.

4.3. Currently, relatively few children born in August – December are deferred, and it is likely the number of children deferred who are born in these months will

increase under Option 1. Childcare providers are therefore likely to experience an increase in demand as a result of the policy. Businesses catering to the currently relatively small number of private customers with deferred children born in August- December could lose income from these customers, should the Local Authority payment rate offered be less than these customers are currently charged.

5. Competition Assessment

5.1. Funding Follows the Child, which underpins the statutory ELC delivery in Scotland should support competition in the sector. The approach is 'provider neutral' and is underpinned by a National Standard that all funded providers will have to meet. As well as ensuring that the funded hours are delivered in high quality settings it will also place choice in parents' and carers' hands by allowing them to access their child's entitlement from any setting that meets the National Standard, has a place available and is willing to enter a contract with the local authority. The move towards Funding Follows the Child has also been supported by clear and accessible information for families to ensure that parents and carers know what their child is entitled to and how the new approach will operate. The National Standard, for example, provides reassurance to families that any provider delivering the funded entitlement is a high quality setting and our pages on the Parent Club website and parental communication campaign is designed to help parents and carers to understand the range of settings where funded ELC can be accessed.

5.2. For children who are deferred and are entitled to funded ELC for an additional year, it is expected that parents will choose for their child to access their entitlement in the same setting(s) they received their previous year of funded ELC. We would therefore expect these providers will continue to play an important role in the delivery of the funded hours for deferred children.

6. Consumer Assessment

6.1. Option 1 outlines the potential impact on parents and carers as consumers of ELC.

6.2. The impact on consumers is expected to be largely positive. Under the current system, we are aware that for children who turn five years old between the August and December after the school commencement date whose P1 entry is deferred that are not offered local authority funded ELC, some families choose to pay privately for an additional year themselves.

6.3. The amendment enables access automatically to ELC in the deferred year to entitle children who turn five years old between the August and December after the school commencement date which is free at the point of access, reducing the need to purchase unfunded provision.

6.4. If take up is high, the additional demand for ELC might have a negative impact on the choice available to other families if capacity for other, private provision is adversely effected.

6.5. The amended duty will be supported by clear and accessible information for families to ensure that parents' and carers' know what their child is entitled to and how the new approach will operate.

7. Test run of business forms

7.1. The Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2020 will not create any new forms for businesses.

8. Digital Impact Test

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

8.2. The Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2020 may have marginal impacts on internal systems within local authorities and ELC settings which need to be updated to reflect the new statutory eligibility for children who turn five years old between the August and December after the school commencement date whose P1 entry is deferred.

8.3. A new digital management information system for funded ELC provision is currently being developed. This system should ease the monitoring and management of funded ELC use. The system can be made available to all funded providers including childminders, and aims to allow all funded provision for a child to be recorded in one place. Local authorities and providers are involved in the design of the system to ensure it meets the needs of users.

8.4. There may also be marginal impacts on ensuring web content information regarding the eligibility criteria for deferred children are updated to reflect the modified statutory eligibility.

9. Legal Aid Impact Test

9.1. The Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2020 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.

10. Enforcement, sanctions and monitoring

10.1. Education authorities (i.e. local authorities) have a statutory duty to provide the 'mandatory amount' of ELC to eligible children within their local area. From 1 August 2023, this will include a responsibility to provide funded ELC to children who turn five years old between the August and December after the school commencement date whose P1 entry is deferred.

10.2. The Scottish Government is developing an ELC Data Transformation Project, a long-term data development project, which will improve the

robustness of the census data and expand the analysis that will be possible for this sector, allowing us to monitor access to funded ELC, including children who are accessing funded ELC in a deferred year.

11. Implementation and delivery plan

11.1. It is intended that the Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2020 will come into force from 1 August 2023.

11.2. It is recognised that delivery may be impacted by the COVID-19 Pandemic and any imposition of significant restrictions imposed at regional or national level, would require timescales to be reviewed.

12. Summary and recommendation

12.1. Based on analysis of the associated costs and benefits, implementing the Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2020 (Option 1) is the preferred option.

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
<p><u>Option 1:</u> Amend current funded ELC eligibility criteria to entitle children who turn five years old between the August and December after the school commencement date, to funded ELC in a deferred year.</p>	<p>Summary of benefits:</p> <ul style="list-style-type: none"> • <u>Children and families</u> - parents are supported to make a decisions on deferral based on the best interest of their child and not on access to funded ELC. Total estimated saving of around £4,500, for families who might have self-funded an additional year themselves (if 1140 hours of ELC are taken in that year). • <u>Providers</u> – provider neutral approach for funded ELC in a deferred year, potential financial benefits for providers. • <u>Local authorities</u> – fewer resources required to process applications for discretionary places. 	<ul style="list-style-type: none"> • Estimated recurring additional revenue cost of £30m - £82.5m per annum from 2023-24. The range on this estimate reflects uncertainty over the unit cost of provision and, in particular, the rate of uptake of deferral following this change.

<p>Option 2: Do nothing.</p>	<ul style="list-style-type: none"> • No additional benefits identified. 	<ul style="list-style-type: none"> • No direct financial costs to Scottish Government. • If the rate of applications local authorities needed to process were to increase, processing these could result in increased costs for the local authority.
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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: Maree Todd

Date: 4th December 2020

Minister's name: Maree Todd

Minister's title: Minister for Children and Young People

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