



The Scottish Parliament  
Pàrlamaid na h-Alba

## EDUCATION AND SKILLS COMMITTEE

### AGENDA

7th Meeting, 2016 (Session 5)

Wednesday 5 October 2016

The Committee will meet at 9.45 am in the Robert Burns Room (CR1).

1. **Subordinate legislation:** The Committee will take evidence on the Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016 [draft] from—

Joe Fitzpatrick, Minister for Parliamentary Business, Andrew Gunn, FOI Policy Officer, and Emily Williams, Solicitor, Scottish Government.

2. **Subordinate legislation:** Joe Fitzpatrick (Minister for Parliamentary Business) to move—

S5M-01751—That the Education and Skills Committee recommends that the Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016 [draft] be approved.

3. **Subordinate legislation:** The Committee will consider the following negative instruments—

Children's Services Planning (Specified Date) (Scotland) Order 2016 (SSI 2016/255);  
Education (Student Loans) (Scotland) amendment regulations 2016 (SSI 2016/261)

4. **Overview of Early Years:** The Committee will take evidence from—

Councillor Stephanie Primrose, Education, Children and Young People Spokesperson, COSLA;

Claire Schofield, Director of Membership, Policy and Communications, National Day Nurseries Association;

Maggie Simpson, Chief Executive, Scottish Childminding Association.

5. **Review of Evidence (in private):** The Committee will discuss the evidence heard earlier in the meeting.

Roz Thomson  
Clerk to the Education and Skills Committee  
Room T3.40  
The Scottish Parliament  
Edinburgh  
Tel: 85222  
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The papers for this meeting are as follows—

**Agenda item 1**

Paper from the Clerk ES/S5/16/7/1

**Agenda item 3**

Paper from the Clerk ES/S5/16/7/2

**Agenda item 4**

Written Submissions ES/S5/16/7/3

SPICe Briefing ES/S5/16/7/4

**Education and Skills Committee**

**7th Meeting, 2016 (Session 4), Wednesday, 5 October 2016**

**Subordinate Legislation**

**Introduction**

1. This paper seeks to inform the Committee's consideration of the Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016 [draft], which is subject to the [affirmative procedure](#). If approved by Parliament, they come into force on 1 December 2016.
2. The Regulations together with its policy note are attached to this paper at **Annexe A**.

**Procedure in Committee**

3. The lead committee must report to the Parliament with its recommendations on approval, or otherwise, no later than 40 days after the instrument is laid. This normally follows consideration of a motion from the Minister that the committee should recommend approval.
4. At the meeting, Members will have an opportunity to question the Minister for Parliamentary Business and his officials on the Regulations. Afterwards, the Minister will be invited to speak to the Regulations and move the motion recommending it be approved.

**Purpose**

5. The Regulations extend the period within which "independent special schools" and grant-aided schools are required to respond to requests for information (and requests for reviews of responses to such requests), under the Freedom of Information (Scotland) Act 2002. This is intended to take into account the impact of school holiday periods in responding to FOI requests and reviews.
6. An "independent special school" is a school which has as its sole or main purpose the provision of education specially suited to the additional support needs of children or young persons who are selected for attendance at the school.
7. Under the Regulations independent special schools and grant-aided schools must comply with requests under that Act within 20 working days (not including any working day which is not also a "school day") or within 60 working days, whichever is the earlier. This changes the position from within 20 working days.

8. Public authorities usually have 20 working days within which to reply to requests made under the Freedom of Information (Scotland) Act 2002 ('the Act').

### **Consultation**

9. The [Scottish Government consulted](#) in the spring on the proposed draft Regulations. A summary of the responses can be found in the Scottish Government's response to the consultation.
10. Organisations such as Capability Scotland and the Scottish Council of Independent Schools agreed that the proposals allow the appropriate flexibility for grant-aided school or independent special schools. The Scottish Information Commissioner agreed and noted the importance of information requests being responded to as quickly as possible. Some local authorities argued that the extended deadline should apply to all schools.
11. Others disagreed with the proposals such as the Children and Young People's Commissioner Scotland and the Campaign for Freedom of Information Scotland. The objections centred around an opposition to creating a different timescale for FOI requests and the negative impact this could have on those with an interest in grant-aided school or independent special schools.

### **Delegated Powers and Law Reform Committee**

12. The Delegated Powers and Law Reform Committee considered the instrument and determined that it did not need to draw the attention of the Parliament to the instrument on any grounds within its remit.

### **Action**

13. The Committee will debate and be asked whether it agrees to motion SM5-01751 lodged by Joe Fitzpatrick MSP:

That the Education and Skills Committee recommends that the Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016 [draft] be approved.

14. The Committee is required to report its decision to Parliament; these reports are normally very short and factual. The Committee is invited to agree to delegate signing off that report to the Convener.

Clerk to the Committee  
30 September 2016

**ANNEXE A**

*Draft Regulations laid before the Scottish Parliament under section 72(2)(b) of the Freedom of Information (Scotland) Act 2002, for approval by resolution of the Scottish Parliament.*

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**DRAFT SCOTTISH STATUTORY INSTRUMENTS**

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**2016 No.****FREEDOM OF INFORMATION****The Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016**

*Made* - - - -

*Coming into force* - -

*1st December 2016*

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 10(4), 10(5), 21(6) and 21(7) of the Freedom of Information (Scotland) Act 2002<sup>(1)</sup> and all other powers enabling them to do so.

In accordance with section 72(2)(b) of that Act a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

**Citation and commencement**

1. These Regulations may be cited as the Freedom of Information (Scotland) Act 2002 (Time for Compliance) Regulations 2016 and come into force on 1st December 2016.

**Grant-aided schools and independent special schools**

2.—(1) This regulation applies to a request for information that is received by—

- (a) a grant-aided school as defined in section 135(1) of the Education (Scotland) Act 1980<sup>(2)</sup>; or
- (b) an independent special school listed in the Register of Independent Schools kept pursuant to section 98 of the Education (Scotland) Act 1980 and which falls within paragraph (a) of the definition of “special school” in section 29(1) of the Education (Additional Support for Learning) (Scotland) Act 2004<sup>(3)</sup>.

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(1) 2002 asp 13.

(2) 1980 c.44. The definition of “grant-aided school” was amended by the Education (Scotland) Act 1981 (c.58), section 5(2); the Self-Governing Schools etc. (Scotland) Act 1989 (c.39), schedule 10, paragraph 8 and the Standards in Scotland’s Schools etc. Act 2000 (asp 6), schedule 3.

(3) 2004 asp 4.

(2) Where regulation 2(1) applies, subsections (1) and (3) of section 10 and section 21(1) of the Freedom of Information (Scotland) Act 2002 have effect as if references to the twentieth working day were references to either—

- (a) the twentieth working day disregarding any working day which, in relation to the school referred to in paragraph 1, is not a school day; or
- (b) the sixtieth working day,

whichever occurs first.

(3) For the purposes of this regulation, “school day” means in relation to a particular school a day on which the school is ordinarily open to its pupils for the purpose of their school education.

St Andrew’s House,  
Edinburgh  
Date

*Name*  
Authorised to sign by the Scottish Ministers

**EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations modify the period within which independent special schools and grant aided schools are required to respond to requests for information (and requests for reviews of responses to such requests for information) under the Freedom of Information (Scotland) Act 2002. Independent special schools and grant aided schools must comply with requests under that Act within twenty working days not including any working day which is not also a school day, or within sixty working days, whichever is the earlier.

**POLICY NOTE****THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 (TIME FOR COMPLIANCE) REGULATIONS 2016****SSI 2016/xxx**

These Regulations are laid in exercise of the powers conferred by sections 10(4) and (5), 21(6) and (7) of the Freedom of Information (Scotland) Act 2002 ('the Act'). The Order is subject to affirmative Parliamentary procedure, as set out at section 72(2)(b) of the Act.

**Policy Objectives**

Public authorities usually have 20 working days within which to reply to requests made under the Freedom of Information (Scotland) Act 2002 ('the Act'). The same time period is stipulated in respect of responding to a request for a review. Requests and reviews must be responded to promptly within the 20 working day time period.

Section 10(4) of the Act allows the Scottish Ministers to make regulations to extend the 20 day time period up to a maximum of 60 working days from the date of receipt, although requests should still be answered as promptly as possible. Section 10(5) allows such regulations to prescribe a different number of days in relation to different cases. Sections 21(6) and 21(7) make similar provision but in respect of a requirement for review.

From 1 September 2016, grant-aided and independent special schools are public authorities under the Act. The policy objective of these regulations is, in certain circumstances, to extend the time period within which a grant-aided school or an independent special school must respond to a request (or request for a review) made under the Act. This is intended to take into account the impact of school holiday periods in responding to FOI requests (and reviews).

The changes in these draft regulations will come into force on 1 December 2016.

**Consultation**

The Scottish Government consulted publicly in spring 2016 on draft regulations allowing for variation to be made in the standard 20 working day response period. The draft regulations are specific to grant-aided and independent special schools.

Twenty-two responses were received. The consultation paper, responses to the consultation (where the consultee gave consent for them to be published) and the Scottish Government's response to the consultation summarising the key points, are available on the Scottish Government's Citizen Space webpages<sup>4</sup>.

**Impact Assessments**

Consultation on these draft regulations invited further comment in respect of impact assessments undertaken as part of consultation in summer 2015 on extending coverage of the

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<sup>4</sup> See <https://consult.scotland.gov.uk/freedom-of-information/time-for-compliance-regulations>



Act to certain organisations, including grant-aided and independent special schools. In light of comments received an updated Equality Impact Assessment has been produced.

The earlier consultation and related documentation are also available via the Scottish Government's Citizen Space webpages<sup>5</sup>.

Scottish Government

Strategy and Constitution Directorate

September 2016

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<sup>5</sup> See <https://consult.scotland.gov.uk/freedom-of-information/foi-consultation/>

**Education and Skills Committee**

**7th Meeting, 2016 (Session 5), Wednesday, 5 October 2016**

**Subordinate Legislation**

1. This paper seeks to inform members' consideration of the following instruments which are subject to [negative procedure](#):
  - Children's Services Planning (Specified Date) (Scotland) Order 2016 (SSI 2016/255)
  - Education (Student Loans) (Scotland) Amendment Regulations 2016 (SSI 2016/261)

**Procedure in Committee**

2. Under the negative procedure, an instrument comes into force on the date specified on it unless a motion to annul is agreed by the parliament.

*Motions to annul*

3. Any MSP (whether a member of the lead committee or not) may lodge a motion recommending annulment of an instrument at any time during the 40-day period. If such a motion is lodged for consideration by the Committee then the relevant minister would come to a Committee meeting to answer issues raised by members and speak against the motion.

*Evidence from Government officials*

4. Should members wish to ask questions in relation to an instrument without necessarily lodging a motion to annul then Government officials can be invited to attend a meeting to answer questions on an instrument.

*Timetabling*

5. Wherever possible clerks will timetable negative instruments to allow time for consideration at two committee meetings if required. This would allow members the opportunity for evidence from officials at one meeting and formal consideration of the instrument at the next.
6. For timetabling purposes, if members want to hear from Government officials, lodge a motion to annul or undertake any other work on an instrument please let the clerks know as early as possible.

**Children's Services Planning (Specified Date) (Scotland) Order 2016 (SSI 2016/255)**

7. The Order and policy note are attached to this paper at **Annexe A** (page 4).

**Background**

8. Section 8(1) of the 2014 Act requires local authorities and relevant health boards to prepare a children's services plan for the area of the local authority in respect of each 3 year period.
9. This instrument specifies 1 April 2017 as the date on which the first '3 year period' begins under section 8 of the Children and Young People (Scotland) Act 2014 ("the 2014 Act").
10. The Policy Note explains that the children's services plan is a document that sets out the plans of local authorities and relevant health boards for the provision of all children's services and related services for the local authority area over a 3 year period.

**Delegated Powers and Law Reform Committee**

11. The Order has been considered by the Delegated Powers and Law Reform Committee (DPLR Committee) and agreed that it did not need to draw the Order to the attention of the Committee.

**Education (Student Loans) (Scotland) Amendment Regulations 2016 (SSI 2016/261)**

12. The Regulations and policy note are attached to this paper at **Annexe B** (page 7).

**Background**

13. These Regulations amend the Education (Student Loans) (Scotland) Regulations 2007 to increase the maximum age at which a person may be eligible for a loan towards their maintenance as a student attending a designated course of higher education. The effect of the Regulations is to increase the upper age limit from 55 to 60.
14. The impetus for bringing forward these regulations was a review of the existing upper age limit undertaken in light of the Equality Act 2010 and future increases in the state pension age. These Regulations are in part in response to a Judicial Review which found that "the current age limit of 55 is unjustifiably discriminatory on grounds of age." Specifically, the court found that regulation 3(2)(b)(ii) is incompatible with Article 14 ECHR which affords protection from discrimination, when read in the context of Article 2 Protocol 1 ECHR which protects the right to education.

**Delegated Powers and Law Reform Committee**

15. The DPLR Committee has taken the view that these Regulations do not raise a devolution issue in terms of the Committee's formal reporting grounds. However, the Convener of the DPLR Committee has written to this Committee to highlight a number of concerns with the instrument. This

is following a session with Government officials before that Committee on 28<sup>th</sup> September. The letter is attached at Annexe C (page 11). The relevant extract of the DPLR Committee report is at Annexe D (page 14).

16. The Committee raises three procedural issues and also highlights matters of policy for this Committee's consideration. They are summarised below:

- the Committee was not persuaded by the Government's arguments to use the negative procedure when the remedial order process was available which "would have allowed for greater scrutiny and would also have given the Parliament a chance to shape the Regulations"
- the Committee also questioned whether replacing one restriction on eligibility drawn by reference to age with another restriction also drawn solely by reference to age could be justified in terms of the ECHR, having regard to the [Judicial Review] judgement.
- the Committee highlights the Equality Impact Assessment (EQIA) has not been updated to reflect the increase to 60. The Committee states it "could be questioned what value this document now serves in informing the Scottish Government's judgement and why officials contend that no further EQIA is necessary to assess the equality impacts of an increased age cap of 60."
- Finally the Committee mentions policy issues for this Committee's consideration including what "seems to be a very significant" cost range for raising the age limit (£0.7 million - £16.5 million).

Clerk to the Committee  
30 September 2016

## Annexe A

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SCOTTISH STATUTORY INSTRUMENTS

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**2016 No. 255**

**CHILDREN AND YOUNG PERSONS**

**The Children's Services Planning (Specified Date) (Scotland)  
Order 2016**

*Made* - - - - *6th September 2016*

*Laid before the Scottish Parliament* *8th September 2016*

*Coming into force* - - *7th October 2016*

The Scottish Ministers make the following Order in exercise of the powers conferred by section 8(2)(a) of the Children and Young People (Scotland) Act 2014(a) and all other powers enabling them to do so.

**Citation and commencement**

**1.** This Order may be cited as the Children's Services Planning (Specified Date) (Scotland) Order 2016 and comes into force on 7th October 2016.

**Specified date**

**2.** The date specified for the purposes of section 8(2)(a) of the Children and Young People (Scotland) Act 2014 (requirement to prepare children's services plan) is 1st April 2017.

St Andrew's House,  
Edinburgh  
6th September 2016

*MARK McDONALD*  
Authorised to sign by the Scottish Ministers

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(a) 2014 asp 8.

**EXPLANATORY NOTE**

*(This note is not part of the Order)*

This Order specifies the date of 1st April 2017 as the date from which the first 3 year period begins for the purposes of local authorities and health boards preparing a children's services plan in accordance with the requirement placed on them by section 8(1) of the Children and Young People (Scotland) Act 2014.

This means that the first children's services plan which local authorities and health boards must prepare under Part 3 of the 2014 Act should plan the provision of children's services and related services in their areas during the period from 1st April 2017 to 1st April 2020.

**POLICY NOTE****THE CHILDREN'S SERVICES PLANNING (SPECIFIED DATE)  
(SCOTLAND) ORDER 2016****SSI 2016/255**

1. The above instrument is made in exercise of the powers conferred by section 8(2)(a) of the Children and Young People (Scotland) Act 2014 ("the 2014 Act"). The instrument comes into force on 7<sup>th</sup> October 2016 and is subject to negative procedure.

**Policy Objectives**

2. The objective of this instrument is to specify the date of 1 April 2017 as the date for the beginning of the first 3 year period mentioned in section 8(2)(a) of the 2014 Act. A local authority and the relevant health board are required by section 8(1) of the 2014 Act to prepare a children's services plan for each 3 year period. The first 3 year period will start on 1<sup>st</sup> April 2017 and the first children's services plan will cover the three year period from 1 April 2017 to 1 April 2020. Thereafter a children's services plan is required for each subsequent 3 year period.

3. The children's services plan is a document that sets out the plans of local authorities and relevant health boards for the provision of all children's services and related services for the local authority area over the three year period.

**Purpose of the SSI**

4. This SSI provides the date on which the first children's services plans require to be in place.

**Financial implications**

5. There are no financial implications for the Scottish Government.

**Scottish Government  
Children and Families Directorate  
September 2016**

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SCOTTISH STATUTORY INSTRUMENTS

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**2016 No. 261****EDUCATION****The Education (Student Loans) (Scotland) Amendment  
Regulations 2016**

<i>Made</i>	- - - -	<i>8th September 2016</i>
<i>Laid before the Scottish Parliament</i>		<i>9th September 2016</i>
<i>Coming into force</i>	- -	<i>8th October 2016</i>

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 73(f) and 74(1) of the Education (Scotland) Act 1980(a) and all other powers enabling them to do so.

**Citation and commencement**

1. These Regulations may be cited as the Education (Student Loans) (Scotland) Amendment Regulations 2016 and come into force on 8th October 2016.

**Amendment of the Education (Student Loans) (Scotland) Regulations 2007**

2. In regulation 3 (eligible students) of the Education (Student Loans) (Scotland) Regulations 2007(b), for paragraph (2)(b) substitute—

“(b) is under the age of 60 on the first day of the first academic year of the course;”.

*S SOMERVILLE*

Authorised to sign by the Scottish Ministers

St Andrew's House,  
Edinburgh  
8th September 2016

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- (a) 1980 c.44. Section 73(f) was amended by section 29(1) of the Teaching and Higher Education Act 1998 (c.30) and section 3(2) of the Education (Graduate Endowment and Student Support) (Scotland) Act 2001 (asp 6). Section 74(1) was amended by section 82(1) and paragraph 8(17) of schedule 10 of the Self-Governing Schools etc. (Scotland) Act 1989 (c.39). The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c.46).
- (b) S.S.I. 2007/154, Regulation 3 was amended by S.S.I. 2008/205, S.S.I. 2012/72 and S.S.I. 2015/212. The definition of an “eligible student” in regulation 3 cross refers to the list of persons in schedule 1 of those regulations which was amended by S.S.I. 2007/503, S.S.I. 2009/188, S.S.I. 2009/309, S.S.I. 2013/80 and S.S.I. 2016/82.



## **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations amend the Education (Student Loans) (Scotland) Regulations 2007 (“the 2007 Regulations”) to increase the maximum age at which a person may be eligible for a loan towards their maintenance as a student attending a designated course of higher education.

Regulation 2 amends regulation 3 (eligible students) of the 2007 Regulations to alter one of the requirements that determine eligibility of a student for a maintenance loan.

From 8th October 2016, to be eligible for a maintenance loan, a person must be under the age of 60 on the first day of the first academic year of the course. This replaces the requirement that the person must be either under the age of 50 or aged 50 to 54 and able to satisfy the Scottish Ministers that they intend to enter employment after the completion of the course.

The other requirements for eligibility in regulation 3 of the 2007 Regulations remain.

No business and regulatory impact assessment has been prepared for these Regulations as no impact upon business, charities or voluntary bodies is foreseen.

**POLICY NOTE****THE EDUCATION (STUDENT LOANS) (SCOTLAND) AMENDMENT REGULATIONS 2016****SSI 2016/261**

The above instrument was made in exercise of the powers conferred by sections 73(f) and 74(1) of the Education (Scotland) Act 1980. The instrument is subject to negative procedure.

**Policy Objectives**

The Scottish Government recently completed a review of the upper age limit applied to eligibility for student living-cost loans (“maintenance loans”). This review was undertaken in light of the Equality Act 2010 and future increases in the state pension age.

Informed by the findings of that review, Ministers decided to increase the upper age limit for eligibility for a student maintenance loan, from age 55 to age 60. This will bring Scotland into line with the age cap applied elsewhere in the of the UK.

**During conduct of the review, the current upper age limit was challenged by Judicial Review in the Outer House of the Court of Session. On 20 May 2016, Lady Scott issued her opinion in that Judicial Review. She found that the current age limit of 55 for eligibility for student maintenance loans is unjustifiably discriminatory on grounds of age and, as such, Regulation 3(2)(b)(ii) of the Education (Student Loans) (Scotland) Regulations 2007 (which contains the age limit)) is incompatible with the European Convention on Human Rights and is outwith the legislative competence of the Scottish Parliament. She stated that “A cut off on the basis of age is not justifiable unless it can be shown to be rationally connected to the legitimate aim of the decision maker or regulations involved”; she was not satisfied that such a rational connection was shown for the age limit of 55.**

In light of the review and Scottish Ministers’ intention to raise the age limit to 60, the Scottish Government took the decision not to appeal the court judgement which found the current age limit of 55 to be unlawful. Having carried out a thorough Equality Impact Assessment and careful financial modelling, the Scottish Government is clear that it is able to show a rational connection between the age limit of 60 and the policy of ensuring a fair and proportionate approach to the issue of student support which recognises the needs and desires of students of all ages to study courses of higher education as well as the financial constraints on the Scottish Government and the changing demographics and participation in the labour market.

At a hearing on 7 September 2016 to make orders under section 102 of the Scotland Act 1998, following the findings in her substantive opinion, Lady Scott agreed that the Scottish Government is best placed to assess the financial burden of her findings and, having been informed of the substance of this instrument, agreed to suspend the effect of her judgement until 31 October 2016 to allow the amendments in this instrument to take effect. Lady Scott also agreed to limit the retrospective effect of her judgement.

This instrument gives effect to the new policy to raise the age limit to 60 and corrects the defect identified in the Judicial Review. The instrument does this by amending the Education (Student Loans) (Scotland) Regulations 2007 (“the 2007 Regulations”) which currently prevent the award of a student maintenance loan to those persons who are aged 50 or over on the date that they commence a designated course of higher education (except where the person is under the age of 55 and the Scottish Ministers are satisfied that the person intends to enter employment after completion of the course which he or she is undertaking).

## **Agenda item 3**

**ES/S5/16/7/2**

**The instrument amends the 2007 Regulations so that a person who meets the other eligibility criteria in the 2007 Regulations and commences such a course prior to reaching the age of 60 will now be eligible for a student maintenance loan without any requirement to satisfy the Scottish Ministers of their intention to enter employment after completing their course.**

### **Consultation**

A consultation was not considered necessary due to the nature of the amendments.

### **Impact Assessments**

An Equality Impact Assessment has been carried out. It found limited evidence to demonstrate a positive or negative impact of the existing age limit on the protected characteristic of age and concluded that the policy of capping the age at which a student is eligible for a maintenance loan is a proportionate and justifiable position. The full EQIA will be available to view on the publication area of the Scottish Government website - <https://beta.gov.scot/publications/>.

### **Financial Effects**

A BRIA is not necessary as the instrument has no impact upon business, charities or voluntary bodies.

Scottish Government  
Directorate for Advanced Learning and Science  
9 September 2016

ANNEXE C

**Delegated Powers and Law Reform Committee - Correspondence**

James Dornan MSP  
Convener of the Education and Skills  
Committee

T1.01  
Chamber Office  
EDINBURGH  
EH99 1SP

Direct Tel: 0131-348-5212  
(RNID Typetalk calls welcome)  
Fax: 0131-348-5088  
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DPLR.Committee@scottish.parliament.uk

29 September 2016

Dear Convener

I am writing to you on behalf of the Delegated Powers and Law Reform Committee to make you aware of the Committee's outstanding concerns about the Education (Student Loans) (Scotland) Amendment Regulations 2016.

The Regulations were laid on 9 September 2016 and are due to come into force on 8 October 2016. These Regulations amend the Education (Student Loans) (Scotland) Regulations 2007 to increase the maximum age at which a person may be eligible for a loan towards their maintenance as a student attending a designated course of higher education. The effect of the Regulations is to increase the upper age limit from 55 to 60.

The Committee notes that the impetus for bringing forward these regulations was a review of the existing upper age limit undertaken in light of the Equality Act 2010 and future increases in the state pension age.

The policy note explains that, informed by the findings of that review, Ministers decided to increase the upper age limit from age 55 to age 60, bringing Scotland into line with the age cap applied elsewhere in the rest of the UK. The effect of the age cap is that a person aged over 60 when beginning a course of higher education is not eligible to apply for a maintenance loan.

To inform this review the Scottish Government undertook an Equality Impact Assessment (EQIA) and financial modelling.

The policy note advises that during the conduct of the policy review, the current upper age limit of 55 was challenged by judicial review in the Outer House of the Court of Session. On 20 May 2016, Lady Scott issued her opinion in that Judicial Review. She found that the current age limit of 55 is unjustifiably discriminatory on grounds of age and, as such, regulation 3(2)(b)(ii) of the Education (Student Loans) (Scotland) Regulations 2007 (which contains the age limit) is incompatible with the European Convention on Human Rights (ECHR) and is outwith the executive competence of the Scottish Ministers.

Specifically, the court found that regulation 3(2)(b)(ii) is incompatible with Article 14 ECHR which affords protection from discrimination, when read in the context of Article 2 Protocol 1 ECHR which protects the right to education.

Lady Scott stated in her judgement that “A cut off on the basis of age is not justifiable unless it can be shown to be rationally connected to the legitimate aim of the decision maker or regulations involved”; she was not satisfied that such a rational connection was shown for an age limit of 55. Furthermore she was “...not satisfied that there was no less intrusive measure than a blanket cut-off available.”

The policy note explains that, in light of the review and Scottish Ministers’ pre-existing intention to raise the age limit to 60, the Scottish Government took the decision not to appeal the judgement.

The Scottish Government contends that it is able to show a rational connection between the age limit of 60 and the policy of ensuring a fair and proportionate approach to the issue of student support that recognises the needs and desires of students of all ages to study courses of higher education as well as the financial constraints on the Scottish Government and the changing demographics and participation in the labour market.

The Committee felt that it had insufficient information to form a view on these Regulations and sought further information from the Scottish Government in writing and in oral evidence in order to understand why increasing the age limit to 60 addresses the defect identified by the court. Specifically, the Committee sought to explore with the Scottish Government the reasons why it considers that replacing one restriction on eligibility drawn by reference to age with another restriction also drawn solely by reference to age could be justified in terms of the ECHR, having regard to the judgement.

Having considered the evidence available to it, the Committee took the view that these Regulations do not raise a devolution issue in terms of the Committee’s formal reporting grounds. However, the Committee was left with outstanding concerns about the approach adopted by the Scottish Government to these Regulations.

Firstly, the Committee is concerned by the Scottish Government’s decision to correct the defect identified by the court by way of amending regulations which, by virtue of the provision in the Education (Scotland) Act 1980, are subject to the negative procedure. The Committee recognises that the remedial order process under the Convention Rights Compliance (Scotland) Act 2001 was also available to the Scottish Government as a means of resolving the defect identified. The Committee explored with Scottish Government officials in oral evidence why it had not considered using the remedial order process as this would have allowed for greater scrutiny and would also have given the Parliament a chance to shape the Regulations. Officials explained that it is normal practice to use a power appropriate to the particular subject matter where one is available, and that a remedial order would only be used in circumstances where a subject-specific power did not exist. Officials also noted that the court had not made any adverse comment on this approach. The Committee did not find these arguments persuasive.

The court judgement indicates that decisions about how the incompatibility with ECHR ought to be corrected must be left to the Parliament, guided by the Scottish Ministers. The Committee considers that the remedial order processes afford greater opportunities to Parliament as well as interested stakeholders and the public at large to be consulted and to scrutinise the Scottish Government’s proposed approach to correcting the defect. The Committee considers that such

an approach would have been more closely aligned with the direction given by the court as to the manner in which the defect identified should be resolved.

Secondly, while the Committee reached the view that the Regulations did not raise a devolution issue, it found the arguments lacked clarity as to why increasing the age limit to 60 addressed the incompatibility issue.

In oral evidence, officials argued that the approach taken meets the tests for determining compatibility with ECHR. That is to say, having weighed up all the relevant factors, the measure adopted achieves a fair and proportionate balance between the public interest being promoted and all of the other interests involved. I attach as an annex to this letter the arguments advanced by the Scottish Government in this regard.

The Committee found the evidence available to it to be sufficient to enable it to take the view that these Regulations do not raise a devolution issue. However, the Committee found it disappointing that it was only after considering the policy note, lengthy written evidence and oral evidence that it obtained sufficient information to enable it to reach this view. The Committee would also have welcomed a more compelling and clear case being presented to Parliament as to why simply increasing the age limit to 60, as opposed to choosing any other possible approach, addresses the incompatibility issue.

The Committee also expresses concern about the EQIA. The EQIA focuses on assessing the equality impacts of the existing policy, i.e. an age cap of 55, rather than 60. The choice of a cut-off at age 55 has now been found to be unjustifiably discriminatory by the Court of Session. Accordingly it could be questioned what value this document now serves in informing the Scottish Government's judgement and why officials contend that no further EQIA is necessary to assess the equality impacts of an increased age cap of 60. These questions have not been answered to the satisfaction of the DPLR Committee and as such these may be matters your committee would wish to explore with the Government.

Two further matters were raised in the evidence session, which do not fall within the remit of the DPLR Committee and its consideration of these Regulations, but which may be matters your Committee would wish to consider further.

The Committee was advised in oral evidence that modelling suggested that raising the age limit could cost between £0.7 million and £16.5 million. This seems to be a very significant range and your Committee may wish to explore this.

Finally, the Committee notes the Scottish Government's commitment to look again at this rise in the age cap for eligibility for student loans as part of a wider student support review that will be starting shortly. This may be another matter your Committee may wish to consider and in so doing, you may wish to consider the implications of the rise in the age cap on younger people too.

Yours sincerely,

Convener of the Delegated Powers and Law Reform Committee

**Annexe D****Argument presented by the Scottish Government to the DPLR Committee****DPLR Committee Meeting 28 September 2016 – OR Cols 11 to 12**

“There are two potential tests. The first is whether the measure taken by the Scottish Government and passed through the Parliament is manifestly without reasonable foundation. The other test is whether, weighing up all the relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest and the other interests involved.

As I mentioned earlier, the Supreme Court has considered which of those two tests would apply in this kind of case, and it has not reached a conclusion. We submit that the test of whether the measure is manifestly without reasonable foundation is the appropriate one. Nevertheless, I will take you through the other, closer test on the basis that that gives closer scrutiny.

The first question for the second test is whether the Education (Student Loans) (Scotland) Amendment Regulations 2016 have a legitimate aim. As I described, the aim of the regulations is “to prioritise support, in the form of tuition fee grants, bursaries and living-cost loans, for students entering the labour market, and ensuring that students taking out a loan have a reasonable chance to repay some or all of that loan prior to retirement.”

The latter part of that is very much about the sustainability of the scheme. Is that a legitimate aim? Well, we submit that it is a legitimate aim to have a scheme that is sustainable—one that can carry on from year to year.

The next question is whether the measure is rationally connected to the objective of prioritising support for students entering the labour market and ensuring that students who take out a loan have a reasonable chance to repay it prior to stopping work. Again, we submit that it is rationally connected to that objective; because the measure sets a cap on eligibility for student maintenance loans at the age of 60, it has a rational connection with ensuring that the system is sustainable by helping to ensure that loans are repaid in whole or in part. As I mentioned before, once people stop being part of the pay as you earn system—once they stop being employed—the maintenance loan repayments are no longer collected.

The next question would be, could a less intrusive measure have been used without unacceptably compromising the achievement of the objective? As I mentioned before, Wales and Northern Ireland have apparently found no suitable alternative. I understand that we have identified no alternative that was suitable and which would not unacceptably compromise achievement of the objective of having a sustainable system.

On the question of whether the measure strikes a fair balance, we would submit that it does. Given the wider considerations about the affordability of the student finance system and the decision of the Government to focus on providing free tuition for first-degree students, which benefits people of all ages, having an age cap is proportionate and justifiable.

A balance has to be achieved. If we consider the alternatives, one would be to have no age limit. However, that would clearly cost more and it would also put someone who is 25 years old when they enter college in a different repayment position from someone who is 75. That might

be thought not to strike a fair balance between the position of the person who is 25, who will have to pay for the system, and that of the person who is 75, who will not. I hope that that further explanation is useful to you.”



**Education and Skills Committee**

**7th Meeting, 2016 (Session 5), Wednesday, 5th October 2016**

**Overview panel on Early Years**

**Purpose**

1. The purpose of this paper is to highlight a number of submissions and other documents relevant to the panel on Early Years.

**Submissions**

2. Submissions have been received from three panel members. Links to those submissions can be found below:
  - [COSLA](#)
  - [National Day Nurseries Association](#)
  - [Scottish Childminding Association](#)
3. In addition a submission has been received from [Save the Children](#) to inform the session.

**Meet and Greet, Stirling 30 August 2016**

4. Members of the Committee met a number of stakeholders, teachers, support staff, pupils and people who work in the third sector with an interest in early years and school education on Tuesday 30 August 2016. A note of some of the themes and issues raised by those that attended to speak about Early Years is included in the Annexe to this paper.

**Chamber debate, 29<sup>th</sup> September 2016**

5. The [Official Report of the debate on Early Years and Childcare](#) is now available. The [Scottish Government financial review](#) detailed in the resulting resolution of Parliament is also available.

Clerk to the Committee  
30 September 2016

**ANNEXE**

**Meeting with teachers, parents, pupils and stakeholders  
Stirling, 30 August 2016**

**Members present**

- James Dornan MSP
- Johann Lamont MSP
- Jenny Gilruth MSP
- Colin Beattie MSP
- Fulton MacGregor MSP
- Gillian Martin MSP
- Ross Thomson MSP
- Daniel Johnson MSP
- Ross Greer MSP
- Tavish Scott MSP

**Discussion group: Early years**

**Building relationships with the whole family**

The attendees agreed that being family-centred is very important to delivering early years care as supporting and engaging with parents and/or carers is key to supporting the child. Attendees also agreed that valuing the relationship with the family is part of the culture in early years.

One of the issues identified was that some families do not take up the free nursery provision. The attendees agreed that it is important to link with key-workers and family-workers to help identify those families who may require support to enrol their children into nursery and taking up the available free provision. This requires working sensitively and dealing with a number of issues. It was noted that the more parents have confidence in the work of the nursery, the more their children will attend.

**Childminding**

There was recognition of the distinct role that childminding has to play in delivering child care and early years provision. It was noted, however, that parents cannot use their entitlement for free early years provision at a childminder, which means that parents are financially incentivised to move their children to a nursery once they become eligible for free hours and this can cause disruption.

Childminders can have weaker links to other support services for young children and their families and sometimes the only contact with those services is at drop off/pick at the child's school or nursery.

Attendees argued that childminders should be more valued within early years policy.

Flexibility

The attendees agreed that the most important thing about early years policy is that it should be flexible so that the providers are able to tailor their service to meet the needs of the children and their families.

Particularly, the attendees argued that there should be greater flexibility in the transition to primary, perhaps with a move to having two intakes to Primary 1. It was argued that while this is often to do with the age of the child, it is not always the case. However, there was no support for a suggestion that nursery staff should have any decision-making powers in this regard.

Additional support needs

There was some concern about the support available for children with additional support needs. Particularly there were concerns about the funding available and how funding is allocated. Access to funding support could be bureaucratic and potentially off-putting to parents who, for example, may not want to engage with social services or for their children to receive a diagnosis.

One organisation that specialised in services for families with children with special needs organised play groups for those children. Some of the benefits of these groups were that they created opportunities for play and socialising; gave parents respite; and signposted families to other support services.

Some argued that there was a lack of childcare provision for children with special needs and especially flexible wrap-around care. It was noted in this context that childminders are not always able to support children with additional support needs (although some do), they do not attract additional government funding nor do they have access to the wider support (e.g. educational psychologists) that would be available to a local authority nursery.



## **Education and Skills Committee**

**7th Meeting, 2016 (Session 4), Wednesday, 5 October 2016**

### **Early Learning and Childcare**

#### **Introduction**

This paper gives some background on early learning and childcare and suggests five possible topics for discussion.

#### **Background**

The Scottish Government has made a commitment to extend funded early learning and childcare to 1,140 per annum by the end of this Parliament. The Scottish Government states that:

The expansion to 1,140 hours per year will require substantial increases in the workforce and investment in infrastructure as well as new and innovative models of delivery ([SG online](#))

To progress this, the Scottish Government has established its Early Learning and Childcare Programme which consists of four projects.

1. Policy Design - responsible for developing ELC policy and refining delivery models
2. Infrastructure - responsible for expanding the number and capacity of ELC settings.
3. Workforce and Quality - responsible for the expansion of the workforce and securing quality delivery.
4. Evidence - responsible for undertaking analysis of the ELC sector and overseeing benefits realisation.

These projects are supported by three stakeholder groups, whose membership is available [here](#). The organisations that the Committee will be hearing from are represented on these groups.

- Maggie Simpson, (Scottish Childminding Association) is on the Workforce Quality Group, Strategic Evidence Group and the Strategic Forum.
- Jane Mair (National Day Nurseries Association) is on the Workforce Quality Group and Strategic Evidence Group.
- COSLA is represented on the Strategic Forum and the Strategic Evidence Group.

In its [Discussion Paper \(January 2016\)](#) the Scottish Government has said that:

This planned increase in entitlement will continue to cover all 3 and 4 year old children, and eligible 2 year olds; and to support families to secure sustainable employment or routes out of poverty. Providing more flexible provision will be a key element of the expansion to 1140 hours pa.

We will build on the work done through the “Scotland’s Schools for the Future Programme’ to support the expansion of local authority accommodation and the recent workforce review under taken by Professor Iram Siraj, to ensure that quality is at the heart of the forthcoming expansion of the workforce.

A consultation on a ‘policy blueprint’ is expected to be published on 7<sup>th</sup> October.

Specific pieces of work within this framework include:

- **Establishing Trials**

A discussion paper was published in January, and bids for projects are currently being considered. It is hoped that some trials will be start from January 2017 ([Scottish Government online](#)).

- **Financial Review of the Early Learning and Childcare sector.**

A [financial review](#) of provision by partner providers was published on 27<sup>th</sup> September. This found

- On average, local authorities spend £5.45 per hour per child to provide ELC to three and four year olds in their own nursery settings and £4.58 per hour if they procure the ELC from a partner provider.
- The cost to partner providers of providing ELC to 0-5 year olds are estimated at £3.70 per hour on average. Given different staff ratios by age, costs for three and four year olds could be up to 15 per cent lower than this and costs for 2 year olds up to 20 per cent higher
- The gap between local authority and partner provider costs is overwhelmingly explained by the relatively lower rates of pay in partner settings. We estimate that around 80 per cent of practitioners and 50 per cent of supervisors in partner settings are paid less than the Living Wage (£8.25 an hour)
- On average, partner providers receive £3.59 from local authorities for three and four year olds and £4.78 for two year olds
- Given current wage rates, local authority payments to partner providers appear to cover the costs of the great majority of partner providers

The review noted that the Scottish Government provided £329m to local authorities to fund the expansion from 475 to 600 hours over 2014/15 to 2016/17 but that local government finance returns indicated that local authorities planned to spend an additional £189m on pre-primary education (p.46 of financial review).

COSLA have queried the robustness of the financial estimates made (see [BBC 29<sup>th</sup> Sept 2016](#))

- **Workforce Developments**

A new training and induction programme for child minders is due to be developed by the Care Inspectorate by September 2017. Currently childminders register as a service with the Care Inspectorate but do not have to register with the SSSC as social care workers. The Scottish Government has said that: “childminders will be central to the delivery of the Scottish Government’s massive expansion of childcare in both nurseries and childminders” ([Scottish Government news release 18<sup>th</sup> November 2015](#))

The Scottish Government has made a commitment that: “there will be an additional degree qualified staff member, whether that is a teacher or a Childhood Practitioner, in nurseries in the most economically deprived areas, from 2018.” ([Scottish Government response to workforce review](#)). (It is already a requirement that all Early Learning and Childcare provision is led by a graduate, and all staff must be qualified and registered with the SSSC).

Informing this work are two independent reviews of early learning and childcare in addition to the financial review published on 27<sup>th</sup> September.

- [Review of the early learning and childcare and out of school care workforce](#) by Professor Iram Siraj, published 2015. Scottish Government [response](#) published December 2015.
- [Report of the Commission on Childcare Reform](#), published June 2015. This was not commissioned by the Scottish Government, but was organised through Children in Scotland. Scottish Government [response](#) published December 2015.

## **Current Provision**

In total, 46% of ‘children’s daycare’<sup>1</sup> services were run by local authorities, 29% by the private sector and 25% by not for profit organisations. When childminders are included the figures are 18% local authority services, 72% private sector and 10% not for profit ([Care Inspectorate, 2015 \(data for 2014\)](#)) This covers all provision – whether paid for by parents or funded by the government.

Local authorities have had a statutory duty to ensure provision of free pre-school education since 2002. If they wish, they can contract third sector and private sector providers to help meet this commitment. On average, around three quarters of children registered for funded provision are registered at a local authority run service. However, there is considerable variation across the country from 92% of registrations with the local authority in West Lothian to 41% in Moray ([Scottish Government early learning and childcare statistics 2015](#)).

In 2014 ‘pre-school education’ was re-defined as ‘early learning and childcare.’ [National Practice Guidance](#) (2014) for early learning and childcare describes the reasons for this:

Where children currently receive their pre-school entitlement in a nursery providing full daycare, we would not expect them to start education at some point for 2.5 hours a day, and then revert to care for the rest of the day. We would expect the same high quality interactions and experiences throughout the sessions, however long, within a caring and nurturing environment.

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<sup>1</sup> Care Inspectorate use the term ‘children’s day care’ and ‘childminding’ to describe the services they regulate which together make up ‘early learning and childcare’. Statutory funded ‘early learning and childcare’ is the government funded part of this.

Curriculum for Excellence starts from age 3, so Education Scotland inspect the educational aspects of the current statutory provision. The Care Inspectorate inspect all early learning and childcare whether or not it is part of the required statutory provision. The Care Inspectorate is currently [revising the 'National Care Standards'](#) including those for childcare. New standards are expected from 2017.

### **Hours Provided**

In 2002, when the statutory requirement was first introduced, the number of hours required was 412.5 per annum. It increased to 475 hours in 2007. Since August 2014, local authorities have been required to ensure provision of 600 hours. Eligibility is:

- All 3 and 4 year olds from the term following the 3<sup>rd</sup> birthday.
- Disadvantaged 2 year olds, from the term following their birthday.
  - those who meet the low income entitlement for free school meals,
  - 'looked after' 2 year olds and those with a kinship care order or parent appointed guardian

*A Scottish Government debate was held on 29<sup>th</sup> September and a number of PQs on the issue of early learning and childcare are due for answer on 4<sup>th</sup> October.*

### **Possible themes for discussion**

#### **1. Contribution to narrowing the attainment gap**

Potential themes for discussion

- educational benefit of 30 hours compared to 16 hours
- contribution of all early learning and childcare (whether Government funded or not) to future attainment at school

The argument for providing quality early learning and childcare is in part based on the contribution that early learning can make to a child being ready to start school. A large scale research project in England, known as '[EPPE](#)' ([Effective Provision of Pre-school Education](#)) found that:

- Full time attendance led to no better gains for children than part-time provision.
- Disadvantaged children benefit significantly from good quality pre-school experiences, especially where they are with a mixture of children from different social backgrounds.
- Settings that have staff with higher qualifications have higher quality scores and their children make more progress ([EPPE briefing](#))

As mentioned, those settings providing the statutory '600 hours' are inspected by Education Scotland for the delivery of their educational content.

The Education (Scotland) Act 2016 includes a duty on local authorities:

To have due regard to the need to carry out school education functions in a way designed to reduce inequalities of outcome for those pupils experiencing them as a result of socio-economic disadvantage

This is expected to come into force in August 2017 and [draft statutory guidance](#) is currently being consulted on. 'School education' includes 'early learning and childcare' and so this duty applies to those in receipt of the funded 600 hours of early learning and childcare.

The 2016 Act also places the [National Improvement Framework](#) in statute. The collection of assessment data in the first phase of the starts from P1. However the intention is to collect evidence from pre-birth onwards. The nature of the evidence to be collected has not yet been announced. The Framework, published in January 2016, stated:

Additional measures to monitor progress from pre-birth onwards will be considered as part of the next phase of the Framework (from 2017).

## 2. Flexibility of provision

Potential themes for discussion

- ensuring flexibility and choice for parents
- ensuring parents can access the 600 hours funded early learning and childcare
- use of 'partner providers' by local authorities now, and in delivering 1,140 hours

Parents' childcare arrangements can be complex, including a mixture of friends and family, childcare purchased themselves and the 600 hours offered via local authorities. Demand for childcare is linked to parents' working patterns.

In addition to its educational aims, the policy to expand early learning and childcare is intended to enable parents to work.

High quality will be at the heart of ELC provision, as will providing the flexibility parents need to work, train or study ([Scottish Government Discussion Paper, January 2016](#))

In recognition of this, the current statutory framework includes a duty for local authorities to:

have regard to the desirability of ensuring that the method by which it makes early learning and childcare available in pursuance of this Part is flexible enough to allow parents an appropriate degree of choice when deciding how to access the service. ([s.52, 2014 Act](#))



The 2014 Act (s.50) also requires local authorities to consult every two years with “those representative of parents” of children under school age “about how it should make early learning and childcare available.” It should then publish a plan.

[Fair Funding for Our Kids](#) have campaigned on the practical difficulties that parents experience when trying to access the statutory provision. Currently, parents do not have a right to choose the provider at which they will access the 600 hours funded provision. Problems can arise if the nursery provision offered by a local authority is not convenient or possible for a parent to access – it may be at a different nursery to the one they currently use. Additionally, where local authorities only offer half day provision without the option for parents to buy additional hours, this can make it difficult for working parents to access that local authority provision. They issued a [report](#) based on an FOI request to local authorities in June 2016 which highlighted some of these issues.

In answer to a recent PQ, the Scottish Government gave examples of flexible provision and said the issue is being considered by the Strategic Evidence Group:

The Minister for Childcare and Early Years met with Fair Funding for our Kids on 30 August 2016 to discuss their report and welcomed their interest. There is evidence of local authorities such as Edinburgh City and Fife offering a wider range of choice including full days in around 25% of their settings; and 38% of Glasgow City Council nurseries are open extended hours, but demand continues to outstrip supply. Through the Early Learning and Childcare Strategic Evidence group we are considering how best to monitor and evaluate the implementation of early learning and childcare provisions under the Children and Young People (Scotland) Act including flexibility and choice. [Question S5W-01979: Tavish Scott, Shetland Islands, Scottish Liberal Democrats, Date Lodged: 16/08/2016](#)

The Scottish Government is expected to publish a ‘policy blueprint’ in the next few weeks. Press reports suggest that this might include an option for parents to choose where they access funded provision:

One expected proposal is a "child account" for every child, to provide a more transparent route through which all funding - public and private - is distributed and to ensure the money follows the child, not the institutions.

It would mean parents could choose how they spend their free hours, including spending it on a childminder ([BBC 29<sup>th</sup> September 2016](#)).

A related issue is the level of funding provided to partner providers. This is considered below.

### **3. Capacity for growth**

Potential themes for discussion:

- extent to which entirely new provision is required compared to changing the source of the funding from parents to government.
- potential to expand use of childminders
- impact of delivering 1,140 hours on provision of childcare outwith this commitment

The expansion to 1,140 hours will result in many parents needing to buy fewer hours themselves, and relying to a large extent on government funded provision. There will be parents who do not currently buy childcare, but who would wish to access the 1,140 hours. There will also be parents who would not want to use the full entitlement to 1,140. The balance between these is difficult to determine which makes the actual requirement for additional provision difficult to predict.

The level of payment made to partner providers will be an important aspect of the willingness and ability of these businesses to contract to provide funded hours. Issues arising in relation to the expansion to 600 hours have been:

- the level of partner provider rate paid by local authorities
- the number of places that local authorities contract from partner providers

#### *Partner Provider Rate*

The NDNA state that the current 'partner provider' fee paid by local authorities to private and voluntary sector providers does not meet their costs. The [NDNA survey 2016](#) reported a £1.88 per child per hour shortfall.

The [financial review](#) found that the average cost to partner providers was £3.70 per child per hour for 0 to 5 year olds and the average rate paid by councils was £4.78 for 2 year olds and £3.59 for 3 to 5 year olds. It concluded that: "Given current wage rates, local authority payments to partner providers appear to cover the costs of the great majority of partner providers."

Fair Funding for Our Kids also reported that at 31% of partner provider nurseries, councils were capping the number places they would fund with that provider.

The Care Inspectorate collects statistics on all early learning and childcare, whether funded or not. The tables below show that most provision is focused on funded childcare.

If provision for 3 and 4 year olds and disadvantaged 2 year olds was to double, this may have an impact on provision for other children.

**Table 1: Total number of places available in early learning and childcare, by main service type. 2014**

Childminding	34,430
Children / family centre	7,380
Creche	3,100
Holiday play scheme	2,030
Nursery	108,210
Out of school care	28,450
Playgroup	6,780
Other services	1,500

source: Care Inspectorate, 2015.

**Table 2: % of children attending early learning and childcare by age.**

under 1	6.4%
1 year old	30.5%
2 year old	47.8%
3 year old	89.1%
4 year old	106.1%
5 year old	19.8%
6 year old	18.4%
7 – 11 year	13.6%

n.b children are counted once for each setting they attend, so counts of over 100% are possible. source: [Care Inspectorate, 2015](#). Table 7.

In its response to the workforce review, the Scottish Government has said:

The need for high quality childcare provision does not end when a child starts school and, in recognition of the vital role played by out of school care, we will also work with partners to develop an updated Framework for out of school care ([Scottish Government 2015](#))

#### **4. Ensuring quality provision during expansion**

Potential themes for discussion:

- required qualification levels compared to salary levels
- maintaining quality while almost doubling provision

A priority for the Scottish Government in expanding Early Learning and Childcare is to ensure quality of provision.

The [Workforce Review](#) noted that:

Quality can be defined in a number of different ways, [...]; but the evidence base is clear: children benefit when the adults around them interact with them in sensitive, responsive and stimulating ways. Further, where this type of care and experience are lacking, the benefits of early learning and education do not materialise and may even damage children's prospects

and that:

both the levels of qualification which staff have achieved generally, and the relevance (content) of those qualifications to the sector, are highly associated with quality.

The financial review found that Local Authority provision cost more than partner provider provision, largely due to differences in staff costs. The review stated:

“by any standard, pay in private and not for profit partner providers is low, even at senior and management grades”

In partner providers average salary levels were around £14k for practitioners and around £23k for a full time managers (sample of c.100). Managers are required to have, or be working towards a degree level qualification.

The review found that 63% of partner providers (sample – 197) found it fairly or very difficult to recruit suitably qualified staff.

As mentioned above, the Scottish Government has established a ‘Workforce and Quality strategic group’ as part of its work on expanding early learning and childcare.

## 5. Parental affordability of childcare

Potential themes for discussion:

- interaction between reserved and devolved childcare subsidies
- demand for childcare outwith funded hours for 3 and 4 year olds
- affordability of childcare outwith Government funded hours

The policy commitment on affordable, quality childcare applies to all early learning and childcare: “Our aim is to develop high quality, flexible early learning and childcare (ELC) which is affordable and accessible for all. This means the whole system - including out of school care - and not just the Government funded hours” ([Scottish Government discussion paper 2016](#))

The Family and Childcare Trust produces an [annual survey of childcare costs](#). In 2016, average costs in Scotland were as follows:

- |                                    |  |
|------------------------------------|--|
| • Nursery 25 hours (under 2)       | £111.13 (under 2) £104.06 (2 and over) |
| • Childminder 25 hours (under 2)   | £102.50 (under 2) £102.02 (2 and over) |
| • After school club 15 hours       | £53.21                                 |
| • Childminder after school pick up | £65.98                                 |

The survey found that 13% of Scottish local authorities report that sufficient childcare is available in their area for parents who work full time. For parents of disabled children the figure was 9% and it was 0% for parents with atypical work patterns([Family and Childcare Trust 2016](#)).

In addition to the Scottish Government funded hours, parents can also get help with childcare costs through:

- Childcare costs element in Working Tax Credit and Universal Credit  
70% of childcare costs in Working Tax Credit (85% in Universal Credit) up to a maximum of £175 per week for 1 child and £300 per week for 2 or more children.

- [Taxfree childcare scheme from 2017](#) for working parents. This will provide 20% of childcare costs up to a maximum of £2,000 per year. Only working parents earning between £115 per week and £100k p.a are eligible. Parents cannot claim this at the same time as Universal Credit/Working Tax Credit childcare costs.
- Employer-supported tax free childcare. Where an employer is in a childcare voucher scheme, their employees can get tax relief on up to £55 per week from their gross salary where this is used to pay for registered childcare. These schemes will continue to run, but will close to new members from April 2018.

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Schools, children's services, social security  
SPICe  
28<sup>th</sup> September 2016