

A BLUEPRINT FOR 2020: THE EXPANSION OF EARLY LEARNING AND CHILDCARE IN SCOTLAND

CONSULTATION ON EARLY LEARNING AND
CHILDCARE STATUTORY GUIDANCE

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Consultation on Early Learning and Childcare Statutory Guidance - Overview

This consultation sets out updated Statutory Guidance to education authorities to support them in exercising their functions in relation to the delivery of early learning and childcare from 1 August 2020. Statutory Guidance was previously published in 2014 to support the implementation of the changes relating to Early Learning and Childcare made by way of the Children and Young People (Scotland) Act 2014 (“the 2014 Act”).

Since 2014 there have been substantial changes in the overarching policy and legislative framework for the delivery of early learning and childcare, in particular with the commitment to almost doubling the funded early learning and childcare entitlement for eligible children from 600 hours to 1140 hours from August 2020. The legislative changes required ahead of August 2020 – to increase the statutory funded early learning and childcare entitlement, and changes to the length of a funded early learning and childcare session - were agreed by the Scottish Parliament during 2019.¹

One of the key changes to the policy framework is the introduction of [Funding Follows the Child](#) in August 2020. This provider neutral approach is underpinned by a National Standard that all providers wishing to offer the funded early learning and childcare entitlement will have to meet. Funding Follows the Child was developed through the Scottish Government, COSLA and education authorities working in partnership, including through a joint Scottish Government and COSLA consultation.

The Statutory Guidance has been updated to reflect the new policy framework. We have also taken the opportunity, drawing on feedback from stakeholders, to refresh the document to ensure that it is clear and readable and to improve clarity on specific points. We are grateful for their contributions so far and look forward to further contributions through the consultation process.

We do anticipate further changes in future to the eligibility criteria for funded early learning and childcare for children whose entry to school is deferred for a year. However, the guidance as updated in this document, reflects the current legislation. The guidance will be updated in the future to reflect any future legislative changes.

It has been our intention to make the guidance as useful as possible, focussed on supporting education authorities to implement their functions in the delivery of early learning and childcare.

¹ The Children and Young People (Scotland) Act 2014 (Modification) (No. 1) Order 2019 and the Children and Young People (Scotland) Act 2014 (Modification) (No. 2) Order 2019.

We also want to ensure that everyone involved in early learning and childcare can provide their views before the guidance is finalised. That is why we are now consulting on the updated Early Learning and Childcare Statutory Guidance and would welcome your views on the following questions:

- 1 (a) Does the Guidance help your understanding of the legislation relating to education authorities' functions in the delivery of early learning and childcare?

(b) Are there any specific aspects of the early learning and childcare legislative framework that remain unclear after reading the Guidance?
- 2 (a) Do you find the Guidance clear and readable?

(b) Are there any specific areas of the Guidance where we could improve readability?
- 3 Do you have any other comments on the Early Learning and Childcare Statutory Guidance for education authorities?

The consultation will run until 4 March 2020, and you can submit your responses at: <https://consult.gov.scot/children-and-families/early-learning-and-childcare-statutory-guidance/>.

Following consideration of the responses to the consultation, which will include an independent analysis of the responses, the final version of the Early Learning and Childcare Statutory Guidance will be published in May 2020 and come into force from 1 August 2020

**Early Learning and Childcare
Statutory Guidance**

CONTENTS

	Page
INTRODUCTION	6
SECTION 46: DEFINITION OF EARLY LEARNING AND CHILDCARE	10
SECTION 47: DUTY TO SECURE PROVISION OF EARLY LEARNING AND CHILDCARE	11
ELIGIBLE 2 YEAR OLDS	12
STARTING AND STOPPING DATES FOR ELIGIBILITY	14
DEFERRED SCHOOL ENTRY AND ELIGIBILITY	16
SECTION 48: MANDATORY AMOUNT OF EARLY LEARNING AND CHILDCARE	19
FUNDED EARLY LEARNING AND CHILDCARE ENTITLEMENT DELIVERED WITHOUT THE PAYMENT OF FEES	19
CHARGES FOR OPTIONAL EXTRAS	20
PROVISION OF ADDITIONAL EARLY LEARNING AND CHILDCARE	20
SECTION 49: LOOKED AFTER 2 YEAR OLDS: ALTERNATIVE ARRANGEMENTS TO MEET WELLBEING NEEDS	22
SECTION 50: DUTY TO CONSULT AND PLAN ON DELIVERY OF EARLY LEARNING AND CHILDCARE	24
UNDERTAKING THE CONSULTATION	24
FREQUENCY OF CONSULTATION	26
PREPARING AND PUBLISHING A PLAN ON EARLY LEARNING AND CHILDCARE DELIVERY	26
ADDITIONAL SUPPORT NEEDS	28

SECTION 51: METHOD OF DELIVERY OF EARLY LEARNING AND CHILDCARE	31
FRAMEWORK FOR DELIVERING FUNDED EARLY LEARNING AND CHILDCARE	31
PROVIDING LESS THAN THE STATUTORY FUNDED EARLY LEARNING AND CHILDCARE ENTITLEMENT ATTENDANCE	32
	33
SECTION 52: FLEXIBILITY IN THE WAY IN WHICH EARLY LEARNING AND CHILDCARE IS MADE AVAILABLE	34
TRANSITIONS AND SPLIT PLACEMENTS	35
ADDITIONAL GUIDANCE ON OTHER KEY LEGISLATION AND POLICY RELATING TO THE DELIVERY OF EARLY LEARNING AND CHILDCARE	37
DELIVERY OF FUNDED EARLY LEARNING AND CHILDCARE THROUGH A RANGE OF PROVIDERS	37
CONSULTATION UNDER THE SCHOOLS CONSULTATION (SCOTLAND) ACT 2010	39
ADMISSIONS POLICIES AND CROSS BOUNDARY ARRANGEMENTS	40
MEALS, SNACKS AND DRINKS	40
ENFORCEMENT OF STATUTORY OBLIGATIONS	43
ANNEX A: GLOSSARY	44

Early Learning and Childcare Statutory Guidance

Introduction

1. This statutory guidance is issued under section 34 of the Standards in Scotland's Schools Act 2000 (the 2000 Act) which empowers Scottish Ministers to issue guidance to education authorities on the exercise of their functions in relation to the delivery of early learning and childcare. This statutory guidance applies from 1 August 2020.
2. This guidance will replace previous guidance and circulars; and should be read in connection with the legislation to which it relates.
3. The main part of the statutory guidance follows the provisions as set out in Part 6 of the Children and Young People (Scotland) Act 2014, as it is through these functions that early learning and childcare is defined. To complement this the document also sets out additional guidance on key related legislation and policy that are out-with the scope of section 34 of the 2000 Act under which this statutory guidance is issued.

Interpretation

4. In this document local authorities are referred to as 'education authorities' as most of the references in the guidance are with regards to their statutory functions that relate to school education.
5. Education authorities functions to secure education for children under school age are provided for in the **Education (Scotland) Act 1980**.
6. The **Children and Young People (Scotland) Act 2014** (the 2014 Act), and the accompanying secondary legislation made since 2014, define the term 'early learning and childcare'; eligibility for early learning and childcare; the amount of funded early learning and childcare (referred to as the mandatory amount of early learning and childcare in the legislation) that eligible children are entitled to and; the framework for delivering this. These terms are further explained in the Glossary (in Annex A).
7. To avoid potential confusion, and to align with supporting policy guidance documents, this Guidance refers to the 'mandatory amount of early learning and childcare' as the **funded early learning and childcare entitlement**.
8. Eligible children are not required to take up all, or any, of their funded early learning and childcare entitlement.

9. The 2014 Act places duties on education authorities to consult with parents and carers on the delivery of funded early learning and childcare, and to have regard to the desirability of ensuring that early learning and childcare is made available in a way that is flexible and allows parents an appropriate degree of choice when deciding how to access the service.
10. The other key aspects regarding how funded early learning and childcare must be delivered are set out in the **Standards in Scotland's Schools etc. Act 2000**. This Act requires that early learning and childcare provision to eligible pre-school children must be delivered without the payment of fees. It also enables education authorities to enter into arrangements with other persons (i.e. providers in the private, third or childminding sectors) to deliver this provision.
11. The **Education (Scotland) Act 1980** enables education authorities to deliver discretionary provision for children under school age. This power can be used to provide access to provision that is out-with the statutory entitlement as defined through the **Children and Young People (Scotland) Act 2014**. The **Standards in Scotland's Schools etc Act 2000** empowers education authorities to charge for this discretionary provision to children under school age. This guidance describes this provision as **discretionary early learning and childcare**.
12. There are also other pieces of legislation that have implications for the delivery of early learning and childcare and to which references are made in this guidance. When referring to the various pieces of legislation throughout the remainder of the document the following terms are used:
 - *the 2014 Act* means the Children & Young People (Scotland) Act 2014;
 - *the 2014 Order* means the Provision of Early Learning and Childcare (Specified Children) Order 2014.
 - *the 1980 Act* means the Education (Scotland) Act 1980;
 - *the 2000 Act* means the Standards in Scotland's Schools etc. Act 2000;
 - *the 1995 Act* means the Children (Scotland) Act 1995;
 - *the 2004 Act* means the Education (Additional Support for Learning) (Scotland) Act 2004; and
 - *the 2010 Act* means the Schools Consultation (Scotland) Act.

Context

13. The earliest years of life are crucial to a child's development and have a lasting impact on outcomes in health, education and employment opportunities later in life. It is widely acknowledged that the provision of universally accessible and

high quality early learning and childcare can play a vital role in helping to close the poverty-related attainment gap.

14. From 1 August 2020 the funded early learning and childcare entitlement is 1140 hours per year for all 3 and 4 year olds, and eligible 2 year olds. This will be high quality, flexible early learning and childcare that is accessible and affordable for families.
15. [Funding Follows the Child](#)², which was agreed by the Scottish Government and COSLA and comes into effect from August 2020, ensures that the funded early learning and childcare entitlement is delivered in high quality settings. This approach is 'provider neutral' and is underpinned by a National Standard that all settings that wish to deliver the funded entitlement have to meet. At the heart of the National Standard is a clear and consistent set of quality criteria, to ensure that all settings who are offering the funded entitlement are delivering the highest quality early learning and childcare experience. Funding Follows the Child also enables choice as parents and carers can access their child's funded early learning and childcare entitlement at the provider of their choice if that provider meets the criteria in the National Standard, has a space available and is willing to enter into a contract with the education authority.
16. Details on Funding Follows the Child were published on 18 December 2018, including operating guidance for education authorities and providers³.
17. This is intended to support a wider system for the delivery of funded early learning and childcare that is built upon a mixed economy model of provision in the public, private and third sectors. It is expected that education authorities and providers offering the funded early learning and childcare entitlement will work together meaningfully and in genuine partnership to deliver high quality and flexible early learning and childcare provision.
18. This guidance is supported by the Getting it Right for Every Child (GIRFEC) national approach which aims to improve outcomes through coordinating services that work with children and young people. The GIRFEC approach puts the rights and wellbeing of children and young people at the heart of the policies and services that support them and their families – such as early years services, schools and the NHS.

² *Funding Follows the Child and the National Standard for Early Learning and Childcare Providers: Principles and Practice* provides an overview of the approach and can be found at: <https://www.gov.scot/publications/funding-follows-child-national-standard-early-learning-childcare-providers-principles-practice/>.

³ More information on Funding Follows the Child, including all supporting guidance and documentation, is available at: <https://www.gov.scot/policies/early-education-and-care/national-standard-for-early-learning-and-childcare/>.

How to use this guidance

19. This statutory guidance is issued to education authorities who are required to have regard to it when carrying out their statutory functions in relation to securing the funded early learning and childcare entitlement for eligible children in their area. It is also intended to assist all those involved in the implementation and delivery of early learning and childcare, including providers in the private, third and childminding sectors, community planning partners, and agencies across all sectors which support the early learning and childcare sector.
20. This guidance will also be of interest to parents and carers, local communities, and anyone with an interest in how education authorities consult on and deliver early learning and childcare. Further information is available for parents on their local authority's website, and from the Scottish Government⁴ and Parent Club⁵.
21. The structure of the guidance broadly follows the order of the provisions under Part 6 of the 2014 Act.

⁴ <https://www.mygov.scot/childcare-costs-help/when-funded-early-learning-and-childcare-can-start/>
and

<https://education.gov.scot/parentzone/my-child/transitions/Starting%20school>

⁵ <https://www.parentclub.scot/elc>

Section 46: Definition of early learning and childcare

Early learning and childcare is defined in section 46 of the 2014 Act as *a service, consisting of education and care, of a kind which is suitable in the ordinary case for children who are under school age, regard being had to the importance of interactions and other experiences which support learning and development in a caring and nurturing setting.*

22. Early learning and childcare, as defined in the 2014 Act, removed the artificial divide between pre-school for 3 and 4 year olds; and, childcare for 0 – 3 year olds; or, pre-school and wrap around care for 3 and 4 year olds; whereby pre-school is the educational element delivered in short blocks tied to a certain number of hours in a day; topped up by childcare or wrap around care which can be seen as less important to learning. It recognises the role that responsive care, regardless of how it is funded, plays in supporting children’s development.
23. This term seeks to emphasise the holistic and seamless provision of nurture, care and development of social, emotional, physical and cognitive skills, abilities and wellbeing.
24. Play, as outlined in the national practice guidance ‘Building the Ambition’⁶, will continue to be an essential and fundamental part of children’s learning and happiness. Early learning and childcare providers should ensure that all children have play experiences as part of their daily lives, as enshrined in Article 31 of the United National Convention on the Rights of Children (UNCRC)⁷.

⁶ <https://education.gov.scot/improvement/learning-resources/building-the-ambition/> (This document will be updated with ‘Realising the Ambition’ Education Scotland, January 2020.)

⁷ “the UNCRC” means the United Nations Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

Section 47: Duty to secure provision of early learning and childcare for eligible children.

Section 47 of the 2014 Act places a statutory duty on education authorities to secure the funded early learning and childcare entitlement for those eligible children in their local area. Section 47 of the 2014 Act and the 2014 Order further define which children are eligible for funded early learning and childcare.

25. Section 47(1) of the 2014 Act provides that each education authority must secure the statutory funded early learning and childcare entitlement for each eligible young child belonging to (i.e. residing in) its area. Where an education authority has responsibility for a child residing out-with the education authority area, e.g. for foster care, kinship care or additional support needs; the host authority is responsible for securing the statutory entitlement; including providing appropriate transport arrangements.
26. Under section 35 of the 2000 Act, an education authority can enter into arrangements with any persons to secure the statutory funded early learning and childcare entitlement for children under school age, i.e. early learning and childcare providers in the private and third sectors including childminders.
27. Education authorities may work with providers in the private and third sectors, including childminders, to secure all or part of a child's funded early learning and childcare entitlement. As such, education authorities may enter into a section 35 arrangement with such a provider, regardless of whether or not the provider can deliver the full statutory entitlement of 1140 hours of funded early learning and childcare.
28. Section 47(2) of the 2014 Act provides that an eligible child is a child who is under school age and has not yet started primary school. In addition a child is eligible if they fall within subsection (3) which includes 2 year old children who are or have been looked after or under a kinship care order.
29. Under section 47(2)(c)(ii) of the 2014 Act, a child is also an eligible pre-school child if they are under school age and have not yet started primary school; and, is within such age range, or is of such other description, as Scottish Ministers may specify by order. This provides Scottish Ministers with the power to specify and expand eligibility through secondary legislation subject to affirmative procedure before the Scottish Parliament.
30. The 2014 Order, as amended (made under these powers) sets out further information on who is an 'eligible child', including which 2 year olds are eligible and the start dates for all children's eligibility commencing.

Eligible 2 year olds

31. Eligibility for funded early learning and childcare entitlement for 2 year olds is set out in the 2014 Act (for looked after children, children in kinship care and those with a parent-appointed guardian) and in the 2014 Order.

Looked after children, kinship care and guardianship orders

32. Section 47(3) of the 2014 Act provides that any child who is aged 2 or over and is or has at any time since their second birthday been looked after⁸, subject of a kinship care order, or who has or has had a guardian by virtue of an appointment under section 7 of the 1995 Act (a parent-appointed guardian), should be considered an eligible child entitled to funded early learning and childcare. As such, they remain eligible for the full funded early learning and childcare entitlement regardless of whether they remain looked after or not. Further detail on 2 year olds who are looked after, including arrangements to meet wellbeing needs, is outlined in this document in the guidance on section 49 of the 2014 Act.

33. Under section 47(4) of the 2014 Act, Scottish Ministers can specify that the children defined as eligible under section 47(3) of the 2014 Act (those who were entitled as 2 year olds where they were looked after, under a kinship care order, or with a parent appointed guardian) are no longer entitled to funded early learning and childcare once they reach school starting age. The 2014 Order⁹ makes the same provision for stopping those children from receiving funded early learning and childcare as for all other children.

Parents in receipt of qualifying benefits

34. Under the 2014 Order, 2 year olds from households where a parent or carer is in receipt of certain benefits will be eligible from the first term after their second birthday; or, the first term after the parent or carer starts receiving those benefits. Those 2 year olds will remain entitled to funded early learning and childcare regardless of whether the parent or carer in their household remains on those benefits or not.

35. All 2 year olds who have gained eligibility will remain eligible, even where a parent or carer's circumstances change from the initial qualifying criteria, until their stopping date in relation to starting school.

⁸ In terms of section 97(2) of the Act, "looked after" is to be construed in accordance with section 17(6) of the 1995 Act.

⁹ Article 3 of the Provision of Early Learning and Childcare (Specified Children) (Scotland) Order 2014

36. As the 2014 Order may be subject to further amendments, a list of the current eligibility criteria can be found at: <https://www.mygov.scot/childcare-costs-help/funded-early-learning-and-childcare/>.

37. As uptake of the funded early learning and childcare entitlement is not compulsory, and depends upon parents or carers taking up a place for their child, education authorities and all agencies and services working with families have a crucial role in identifying eligible families and promoting the entitlement.

Starting and stopping dates for eligibility

38. Section 47(2)(c)(ii) and (4) of the 2014 Act gives Scottish Ministers the power to specify and expand eligibility for funded early learning and childcare through secondary legislation subject to affirmative procedure before the Scottish Parliament. The 2014 Order therefore specifies when eligibility for funded early learning and childcare starts and stops.
39. Starting and stopping dates for funded early learning and childcare depend on the date of the child's birthday, local school term dates and, where relevant, whether the parent or carer has chosen to defer the child's start at primary school for a year.
40. In terms of starting dates, under the 2014 Order, eligible 2 year olds and all 3 year olds will be eligible for funded early learning and childcare from the beginning of the first term after the child's 2nd or 3rd birthday, as set out in the following table:

Where a child's birthday falls on or between the following dates:	The child will become eligible from the terms set out below:
1 March – 31 August	August (autumn term) occurring in that year
1 September – 31 December	January (spring term) following their birthday
1 January – last day February	March/ April (summer term) following their birthday

41. Stopping dates under the 2014 Order are summarised as follows:

Where a child's birthday falls on or between the following dates:	Stopping funded early learning and childcare and starting school:	Eligibility for funded early learning and childcare when deferring school entry:
1 March – the school commencement date ¹⁰ in August	Children's entitlement to funded early learning and childcare stops from the August (autumn term) in the year they turn 5, at which point they will start school.	As these children will be 5 years old on the school commencement date, parents and carers cannot defer entry to school.
After the school commencement date in August – 31 December	Children's entitlement to funded early learning and childcare stops from the August (autumn term) in the year they turn 5, at which point they can start school or parents and carers can defer their child's entry to school to the August (autumn term) of the following year.	Children's entitlement to funded early learning and childcare has ceased but parents and carers can request that the education authority provide an additional year of funded early learning and childcare using their discretionary power under section 1(1C) of the 1980 Act.
1 January – last day February	Children's entitlement to funded early learning and childcare stops from the August (autumn term) in the year they turn 5. Children can start school in the August (autumn term) before they turn 5, or parents and carers can defer their entry to school until the August (autumn term) after they turn 5.	Children's entitlement to funded early learning and childcare continues to the August in the year of their 5 th birthday so they are still entitled to funded early learning and childcare if they defer school entry.

42. Education authorities who wish to offer funded early learning and childcare to children who are not an 'eligible child' can do so using their discretionary powers under section 1(1C) of the 1980 Act. For example, some education authorities use these powers to provide access before the statutory 'start date' or after the 'stopping date'; or to widen local eligibility criteria for 2 year old children, beyond the statutory eligibility criteria.

43. A number of education authorities use these discretionary powers to provide funded early learning and childcare to 3 year olds from their 3rd birthday, from the month after their 3rd birthday, or to certain children before they are 3 years old. Arrangements to commence closer to the child's 3rd birthday are encouraged.

¹⁰ Each education authority fixes a date or dates for the commencement of attendance at primary schools in their area. This is referred to as the "school commencement date".

44. Powers under section 1(1C) of the 1980 Act also allow education authorities to provide an additional year of funded early learning and childcare to children born after the beginning of the autumn term, in August, and before 1 January whose parent or carer has chosen to defer the child's start at primary school for a year.

Deferred school entry and eligibility

45. The school year starts in August, with any single school year group usually consisting of children born between the beginning of March in one year and the end of February the following year. School age is defined in sections 31 and 32 of the 1980 Act¹¹. Parents and carers of children that are still 4 years old on the date they are eligible to start school can defer their child's start at primary school for a year.

46. When a parent or carer has chosen to defer their child's primary school start for a year, a child's entitlement to funded early learning and childcare depends on their date of birth. If a child's entry to school is deferred for a year:

- a) they will automatically get an additional year of funded early learning and childcare if their 5th birthday is in January or February; or
- b) parents and carers can apply to their education authority and request an additional year of funded early learning and childcare if the child's 5th birthday is after the beginning of the autumn term, in August, and before 1 January. The education authority will decide if the child is eligible for an additional year of funded early learning and childcare.

47. Parents and carers are entitled to defer their child's entry to school for a year regardless of whether they are eligible for funded early learning and childcare.

48. Education authorities will have their own local procedures, guidelines and policies on using their discretionary power under section 1(1C) of the 1980 Act to provide an additional year of funded early learning and childcare for August to December born children whose school entry is deferred. These decisions should be based on an assessment of wellbeing, putting the child at the centre and working in partnership with families.

¹¹ Sections 31 and 32 of the 1980 Act provide that a child is of school age where the child has reached the age of 5 on the school commencement date set by the education authority (a date in August). Where the child has not reached 5 on that date, the child is deemed not to have reached statutory school age until the school commencement date next following the child's 5th birthday. Where a child is not yet 5 at the school commencement date but will turn 5 before the 'latest appropriate date' set by the education authority (normally a date at the end of February), the authority can admit the child to start school in August before the child's 5th birthday.

49. Good quality and transparent decision making will involve a holistic assessment of the 8 wellbeing indicators (safe, healthy, achieving, nurtured, active, respected, responsible, and included). The GIRFEC National Practice Model¹² (including the My World Triangle and the Resilience Matrix¹³) provides a consistent way for education authorities to assess, understand and define the needs of the child, in partnership with their family and with advice from relevant professionals; and to record the outcomes of that assessment. In some cases, that assessment and analysis will lead to the development of a Child's Plan.
50. Education authorities' decisions about the provision of discretionary funded early learning and childcare should be separate from their considerations about children's additional support needs and the support that they may need. In relation to children with additional support needs (including those children with additional support needs arising from a disability within the meaning of the Equality Act 2010 ("the 2010 Act")), it is important that professionals and parents and carers understand that children with additional support needs will be supported through the 2004 Act. Further information is outlined in this document in the guidance on section 50 of the 2014 Act.
51. Education authorities should consider how they ensure local policies and procedures are accessible for all parents and carers, and can be easily understood, so that parents and carers clearly understand how to request that their education authority provide discretionary funded early learning and childcare to their child using their powers under section 1(1C) of the 1980 Act. Education authorities may also wish to consider how they can involve parents and carers from the beginning of key decision making processes, ensuring that when a final decision is reached they provide parents and carers with a clear explanation of how and why the decision was taken. The Scottish Schools (Parental Involvement) Act 2006 (the 2006 Act) places duties on education authorities and schools to involve parents and carers in their child's education, and this includes children attending nursery classes in a public school. Information on these duties can be found in the 2006 Act Statutory Guidance¹⁴.
52. Good quality communication is central to building strong relationships with parents and carers. It is also one of the key goals in the Scottish Government's 'Learning Together' Action Plan¹⁵, a joint three year plan for 2018-21 between Scottish Government and COSLA. The main focus of the plan is on ensuring parents and carers get the support and information they need in appropriate

¹² <https://www.gov.scot/publications/girfec-national-practice-model/>

¹³ <https://www.gov.scot/publications/shanarri/>

¹⁴ <https://www.gov.scot/publications/guidance-scottish-schools-parental-involvement-act-2006/>

¹⁵ <https://www.gov.scot/publications/learning-together-scotlands-national-action-plan-parental-involvement-parental-engagement/>

formats and at the right times to support, and be fully involved and engaged with, their children's learning.

53. Education authorities should consider how they make parents and carers aware of the deferral process; the support children will receive when transitioning to school; and any appeals or complaints processes. Education authorities should consider the variety of methods and approaches they can employ to ensure they are engaging parents and carers in an ongoing dialogue, recognising that a 'one size fits all' approach may not be appropriate for all parents and carers, and responding to feedback. Parents and carers are often balancing competing demands for their time and education authorities should consider how they can provide parents and carers with information with sufficient time, in advance of key deadlines, to allow parents to respond effectively. The timing of communication, particularly involving decisions on individual cases, is also key in allowing families and settings to plan transitions or make other arrangements.
54. When children do make the transition from early learning and childcare to primary school, *Curriculum for Excellence* provides a framework to ensure children are supported in an appropriate way. The Curriculum for Excellence Early Level begins at age 3, when most children will be in a range of early learning and childcare settings, and continues throughout their transition into a school setting and the early primary years.
55. All children and young people have an entitlement to a curriculum which they experience as a coherent whole, with smooth and well-paced progression through the experiences and outcomes, particularly when they transition between different settings, for example from early learning and childcare to primary. Those planning the curriculum have a responsibility to plan, in partnership with others involved in learning, how they will jointly enable children to move smoothly between settings, building on prior learning and achievement in a manner appropriate to the needs of the individual. Guidance on supporting transitions is included in *National Practice Guidance on Early Learning and Childcare: Building the Ambition*¹⁶, that builds on the current national framework of *Curriculum for Excellence*.

¹⁶ <https://hub.careinspectorate.com/media/1459/building-the-ambition-national-practice-guidance-on-early.pdf>

Section 48: Mandatory amount of early learning and childcare

Education authorities are required to secure 1140 hours of funded early learning and childcare for eligible children in each year and a pro rata amount for each part of a year.

56. Under section 47(1) of the 2014 Act, an education authority must ensure that the statutory amount of funded early learning and childcare entitlement is made available for each eligible child belonging to its area.

57. Section 48 of the 2014 Act provides the statutory entitlement as 1140 hours of funded early learning and childcare in each year and a pro-rata amount for each part of a year of which a child is eligible.¹⁷ The starting point for the year is in-line with the school year, which is dependent on local authority term dates, and usually a date in August.

58. The legislation refers to the ‘mandatory amount of early learning and childcare’, however to avoid confusion this is referred to as the funded early learning and child entitlement in this guidance. This is to make clear that this is an entitlement for children but that it is not compulsory for parents to take up all, or any, of their child’s funded early learning and childcare entitlement.

59. Section 48(2) of the 2014 Act enables Scottish Ministers to change the amount of the funded early learning and childcare entitlement. Such an order would be subject to affirmative procedure by virtue of section 99(2) of the 2014 Act and in terms of Section 48(3) of the 2014 Act enables Scottish Ministers to make different provision for different types of eligible children, for example, different number of hours for children of different ages.

Funded early learning and childcare entitlement delivered without the payment of fees

60. Under section 33(1) of the 2000 Act, the entitlement to funded early learning and childcare must be provided without the payment of fees, including where this is delivered through a third party (i.e. providers in the private and third sectors, including childminders), under a section 35 arrangement. This means that:

- parents and carers are not asked to make any upfront payment, including a deposit or any other payment, in respect of the funded early learning and childcare entitlement;

¹⁷ [The Children and Young People \(Scotland\) Act 2014 \(Modification\) \(No. 2\) Order 2019](#) amended the mandatory amount of funded early learning and childcare defined in Section 48 from 600 hours to 1140 hours. This order came into force on 1 August 2020.

- no top-up fees are charged to parents and carers relating to the funded early learning and childcare entitlement; and
- parents and carers are not required to purchase additional hours beyond the funded early learning and childcare entitlement in order to access their child's funded early learning and childcare entitlement.

Charges for optional extras

61. Any charges which are in addition to the funded early learning and childcare entitlement should be for optional extras, and limited to, for example, snacks, costs of outings or extracurricular activities. These optional charges include where a setting offers an additional optional service such as the provision of localised cover arrangements required by parents and carers (for example acting as the emergency contact for a child, cover for shift patterns, holiday cover, etc) which requires the setting to retain a place in order to meet this demand during the hours that the child is receiving part of their funded early learning and childcare entitlement at another setting as part of a split placement.
62. It is expected that where parents and carers choose to purchase further hours, or optional additional services, in addition to the funded early learning and childcare entitlement, the associated fees and hours will be transparent and clearly set out in any parental communication and invoices.

Provision of additional early learning and childcare

63. Under section 1(1C) of the 1980 Act, education authorities have discretionary powers to provide early learning and childcare beyond the statutory funded early learning and childcare entitlement requirements under section 1(1) and (1A) of the 1980 Act and section 47(1) of the 2014 Act (i.e. the funded early learning and childcare entitlement). This can enable education authorities to prioritise certain children who would benefit most from such provision.
64. Education authorities are also, under section 33(2) of the 2000 Act empowered to charge fees for such discretionary early learning and childcare. The provision of discretionary early learning and childcare, through fees subsidised or otherwise, can provide additional flexibility. Any education authority fees for parents for discretionary early learning and childcare should be transparent.
65. Where education authorities charge for discretionary early learning and childcare, as part of their overall approach to setting charges for discretionary services, it is expected that they give appropriate consideration to the potential impacts on the competitiveness and business sustainability of other providers offering the funded early learning and childcare entitlement.

66. Under section 27 of the 1995 Act, there is also a duty on education authorities to provide any form of care, whether or not on a regular basis for children under 5 who are not in school and in need, and discretion to provide any form of care to those who are not in need.¹⁸

¹⁸ Under the 1995 Act, 'day care' is understood as "any form of care provided for children during the day, whether or not it is provided on a regular basis;"

Section 49: Looked after 2 year olds: alternative arrangements to meet wellbeing needs

Section 49 of the 2014 Act provides that the duty to make available 1140 hours of early learning and childcare to every 'eligible child' can be disapplied for 2 year olds that have been looked after by an education authority where: an assessment of their needs has taken place and; alternative arrangements for their education and care are made that the authority considers more appropriate for the purposes of safeguarding or promoting the child's wellbeing.

67. Looked after children are defined in section 97(2) of the 2014 Act in accordance with section 17(6) of the 1995 Act¹⁹.
68. Under section 47(2) of the 2014 Act, any 2 year old child who is looked after, or has been looked after at any point since their second birthday, is considered an 'eligible child' for the purposes of the duties on education authorities in relation to access to early learning and childcare. As such, they remain eligible for the full statutory entitlement of funded early learning and childcare regardless of whether they remain looked after or not.
69. The purpose of section 49 of the 2014 Act is to provide increased flexibility in the type of service education authorities can make available for the education and care of 2 year olds who are (or have been since their second birthday) looked after.
70. Where an assessment of needs has been made (to consider whether alternative arrangements for the child's education and care would better safeguard or promote the child's wellbeing than access to 'early learning and childcare'), then the education authority does not need to comply with the duty to provide access to early learning and childcare.
71. If it decides it is appropriate for the duty (under Section 47 of the 2014 Act) not to apply to a child, an authority must make alternative arrangements **appropriate to safeguard or promote the child's wellbeing**. Appropriate alternative arrangements are not further defined in the 2014 Act.

¹⁹ Any reference in this Chapter of this Part to a child who is "looked after" by an education authority, is to a child—

(a) for whom they are providing accommodation under [section 25](#) of this Act;

(b) who is subject to a compulsory supervision order or an interim compulsory supervision order and in respect of whom they are the implementation authority (within the meaning of the [Children's Hearings \(Scotland\) Act 2011](#));

(d) who is subject to an order in accordance with which, by virtue of regulations made under [section 33\(1\)](#) of this Act or [section 190](#) of the [Children's Hearings \(Scotland\) Act 2011 \(asp 1\)](#) (effect of Orders made out-with Scotland), they have responsibilities as respects the child; or

(e) in respect of whom a permanence order has, on an application by them under [section 80](#) of the [Adoption and Children \(Scotland\) Act 2007 \(asp 4\)](#), been made and has not ceased to have effect.

72. Where there is an assessment of wellbeing, it must be undertaken with reference to the 8 wellbeing indicators described within Part 18, section 96 of the 2014 Act.
73. The assessment and recording of outcomes in a child's plan will ensure that there are considered and transparent reasons to support the decision making on alternative arrangements made under section 49(2)(b) of the 2014 Act as good practice.²⁰

²⁰ Part 5 of the Children and Young People (Scotland) Act 2014 is not currently in force. The Scottish Government intends to seek to repeal Part 5 of the Children and Young People (Scotland) Act 2014 which made provision for a statutory Child's Plan; however child's plan continues to be best practice under Getting it right for every child.

Section 50: Duty to consult and plan on delivery of early learning and childcare

Under section 50(1)(a) of the 2014 Act, education authorities must consult with persons who appear to be representative of parents and carers of children under school age in their area about how they should make early learning and childcare available. This consultation must be carried out at least once every 2 years.

Under Section 50(1)(b) of the 2014 Act education authorities must have regard to the views expressed in the consultation and must prepare and publish a plan setting out how they intend to make early learning and childcare available.

Undertaking the consultation

74. Consultation on the delivery of early learning and childcare should provide an opportunity for parents and carers to share their views on models, flexibility and systems of choice so that parents can inform options on offer and education authorities can develop systems to allocate options. The aim is to deliver high quality early learning and childcare that meets a range of needs.
75. Education authorities are required to consult with representative samples of their local population. However this does not mean that education authorities will be required to ask every current or prospective parent of a child eligible for the funded early learning and childcare entitlement about their individual choice of setting or pattern of hours.
76. Education authorities are encouraged to use embedded good practice in how they consult²¹, ensuring that they consult on a wide scope of needs, rather than a closed set of options. Education authorities should use this opportunity to encourage broad, open and transparent dialogue with parents and carers.
77. To ensure that consultations are representative and inclusive, education authorities should use a range of consultative methods to engage a wide range of parents and carers including:
- Working parents/carers
 - Minority ethnic families
 - Parents/carers residing in rural areas
 - Parents/carers from the gypsy traveller community
 - Parents/carers who are less likely to engage with statutory services

²¹ <http://www.voicescotland.org.uk/>

- Parents/carers with lived experience of poverty and disadvantage
- Parents/carers of children with a disability or additional support needs
- Parents/carers with a disability or additional support needs
- Corporate parents
- Parents/carers seeking Gaelic medium education
- Parents/carers who live in communities where provision is limited

78. It is also recognised that there are increased barriers that families in rural areas face in accessing early learning and childcare. Education authorities in rural areas should engage with parents and carers, providers offering the funded early learning and childcare entitlement, and communities to explore all funding and support options to ensure high quality funded early learning and childcare is accessible for families. This may include encouraging and developing innovative and/or community-led provision of funded early learning and childcare. In addition, under section 7(1) of the Islands (Scotland) Act 2018, education authorities which are relevant authorities in terms of the schedule of that Act should have regard to island communities in carrying out their functions.

79. It is important to consult with parents and carers who have children currently using provision (including those who use the funded early learning and childcare entitlement only, and those who purchase additional unfunded provision); as well as those with younger children who will use provision over the next few years. Education authorities should consult with parents and carers accessing their child's entitlement in a range of settings across the public, private and third sector, including childminders. Education authorities may also find it useful to consult parents and carers whose children received the funded early learning and childcare entitlement, but are now at early school age. These parents and carers may be able to offer a retrospective view that provides insight into past parental experiences of accessing the entitlement, and the outcomes of that provision.

80. When education authorities are consulting on the delivery of early learning and childcare and preparing their plans in response to these views, they must assess the impact on persons with 'protected characteristics' (defined under the Equality Act 2010 as age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation) and consider how to reduce inequalities of outcome as a result of socio-economic disadvantage²².

²² Section 3B of the 2000 Act, imposes certain duties on education authorities when making and implementing strategic decisions affecting pupils experiencing inequalities of outcome as a result of socio-economic disadvantage. In addition, the Fairer Scotland Duty under section 1 of the Equality Act 2010, places a legal responsibility on education authorities to actively consider (have due regard to) how they can reduce inequalities of outcome caused by socio-economic disadvantage, when making strategic decisions and a written assessment must be published showing how this has been

81. The duty to consult under the 2014 Act should provide useful evidence to help education authorities meet their duties under the Equality Act 2010²³ and section 3B of the 2000 Act and inform local impact assessments. When consulting on the delivery of early learning and childcare, it is therefore important that education authorities engage directly with persons with 'protected characteristics' and persons with lived experience of poverty and socio-economic disadvantage.

Frequency of consultation

82. Education authorities are under a duty to carry out a consultation on the delivery of early learning and childcare at least once every two years.

83. The aim of requiring consultation every two years is to ensure that services are regularly taking into account local needs, recognising that the children and families accessing early learning and childcare will be changing year on year.

84. Section 50 (2) of the 2014 Act gives Scottish Ministers the power to vary the frequency of that consultation by order subject to affirmative procedure.

Preparing and publishing a plan on early learning and childcare delivery

85. Education authorities are under a duty to publish their plan for the delivery of early learning and childcare. These plans should set out the comprehensive strategic direction for the delivery of early learning and childcare in their local area, respond to local need and will reflect the diversity of communities that education authorities cover.

86. Under section 50 (1)(b) of the 2014 Act education authorities must have regard to the views expressed in consultation as described above, before preparing the plan. Education authorities should ensure that the final consultation results can be easily accessed.

done. Guidance on meeting the Fairer Scotland Duty can be found at

<https://www.gov.scot/publications/fairer-scotland-duty-interim-guidance-public-bodies/pages/2/>

²³ The public sector equality duty under section 149 in the Equality Act 2010 requires education authorities in exercising functions, to have 'due regard' to the need to: eliminate discrimination, harassment, victimisation; advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and foster good relations between persons who share a relevant protected characteristic and persons who do not share it. Under the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, education authorities must assess and review policies and practices against the needs mentioned under section 149 in the Equality Act 2010.

87. In preparing their plans for the delivery of early learning and childcare, education authorities should be clear about the need for delivery to be manageable and affordable within their resources.
88. Ongoing engagement with the early years workforce across all early learning and childcare sectors will be a necessary part of the planning process and service design.
89. In publishing their plans, education authorities should consider how they can make this information readily accessible for parents and carers within their local area.
90. Good quality communication is central to building strong relationships with parents and carers. It is also one of the key goals in the Scottish Government's 'Learning Together' Action Plan^[2], a joint three year plan 2018-21 between Scottish Government and COSLA. Many of the actions within the plan focus on ensuring parents and carers get the support and information they need in appropriate formats and at the right times. The main focus of the plan is on ensuring parents and carers get the support and information they need in appropriate formats and at the right times to support, and be fully involved and engaged with, their children's learning.
91. National and local government both have a role to play in making sure parents can make informed choices about their child's entitlement. In addition to formal consultation there is a need to provide clear information for parents and carers on the provision of funded early learning and childcare entitlement at national and local levels. Education authorities should consider how they make parents and carers aware of their child's entitlement, of the range of provision available, and how to access this.

^[2] <https://www.gov.scot/publications/learning-together-scotlands-national-action-plan-parental-involvement-parental-engagement/>

Additional Support Needs

Education authorities have duties under the Education (Additional Support for Learning) (Scotland) Act 2004 and should have regard to this when providing funded early learning and childcare to eligible children with additional support needs

92. Children and young people will progress differently, depending on their circumstances, but every child and young person has the right²⁴ to expect appropriate support from adults to allow them to develop as fully as possible across each of the wellbeing indicators and curricular areas. Education authorities should seek to engage with parents and carers with children who are disabled or have other additional support needs as part of their duty to consult under Section 50 of the 2014 Act.
93. Section 1(1) of the 2004 Act explains that a child or young person has additional support needs where, for whatever reason, they are likely to be unable, without the provision of additional support, to benefit from school education. Education includes the provision of early learning and childcare. Education authorities are required to have regard to the 2004 Act for any eligible young child entitled to the funded early learning and childcare entitlement with additional support needs.
94. Statutory Guidance on the 2004 Act is contained in the [Code of Practice](#) on Additional Support for Learning (ASL Code of Practice).²⁵
95. Education authorities and other agencies (including NHS boards²⁶) have a wide range of duties under the 2004 Act, meaning they are required to [identify, provide for, and monitor](#), the [additional support needs](#) of their children and young people. In addition, authorities have duties to plan for [transitions](#), to consider [placing requests](#), and to establish [co-ordinated support plans](#), where appropriate. Full details of [the responsibilities on education authorities and other agencies](#) can be found in Chapter 1 of the ASL Code of Practice²⁷ which supports implementation of the 2004 Act.
96. Following identification of additional support needs, a plan should be established as to how those needs will be met, and reviewed. The National Practice Model, part of the GIRFEC approach, is well established good practice and provides a consistent framework for practitioners across all services to plan for children's wellbeing. Where a Co-ordinated Support Plan is required, this should form part

²⁴ As set out in the United Nations Convention on the Rights of the Child:

<https://www.unicef.org/sites/default/files/2019-04/UN-Convention-Rights-Child-text.pdf>

²⁵ <https://beta.gov.scot/publications/supporting-childrens-learning-statutory-guidance-education-additional-support-learning-scotland/>

²⁶ Section 23 of the 2004 Act.

²⁷ <https://beta.gov.scot/publications/supporting-childrens-learning-statutory-guidance-education-additional-support-learning-scotland/>

of the Child's Plan as outlined in the ASL Code of Practice. Education authorities duties to plan for the transition into and from early learning and childcare will also be of relevance for this group of children.

97. A key issue for young children with additional support needs is the early identification of those needs. A Universal Health Visiting Pathway for Scotland was published in October 2015 <http://www.gov.scot/Publications/2015/10/9697>. The refreshed Health Visiting Pathway presents a core home visiting programme to be offered to all families by health visitors as a minimum standard.
98. The provisions of the 2004 Act apply to looked after 2 year olds. Under section 1(1A) of the 2004 Act a looked after child is deemed to have additional support needs unless or until they are assessed otherwise. This assessment should also include an assessment as to whether a co-ordinated support plan is required.
99. The 2004 Act duties will apply when a child becomes eligible for funded early learning and childcare and so will apply to eligible 2 year olds who are subject to a kinship care order or with a parent appointed guardian or whose parents are in receipt of certain benefits. In relation to those subject to a kinship care order, carers (like any carer or parent) can request that the additional support needs of the child be assessed and this can include a specific type of assessment.
100. In certain circumstances the duties under the 2004 Act will apply earlier. The 2004 Act imposes a duty on an education authority to provide appropriate additional support for certain [disabled children under school age](#)²⁸ **before** entitlement to the mandatory amount of early learning and childcare; potentially from birth and generally before the age at which children become eligible for early learning and childcare, where this need is identified²⁹.
101. Under the Equality Act 2010 responsible bodies have a duty to make reasonable adjustments for disabled young children and provide auxiliary aids and services to avoid substantial disadvantage.³⁰
102. Further, under the Education (Disability Strategies and Pupil Educational Records (Scotland) Act 2002³¹ responsible bodies have duties to develop and publish accessibility strategies to increase access to the curriculum, the physical environment, and communication.
103. A summary of the overlap between the Equality Act 2010 and the 2004 Act definitions of children and young people is attached at Annex B.

²⁸ Annex B including column 1 and notes

²⁹ See section 5(2) and (3) of the 2004 Act.

³⁰ Section 20 of the Equality Act 2010: <http://www.legislation.gov.uk/ukpga/2010/15/section/20>

³¹ 2002 asp 12: <http://www.legislation.gov.uk/asp/2002/12/contents>

104. Under the 2004 Act parents and carers can make a [placing request](#) for early learning and childcare in relation to a child with additional support needs either within the authority they reside (home authority) or another education authority (host authority) area³².
105. Where a placing request is successful, the home authority is responsible for the costs of early learning and childcare. They may also provide free transport to the host authority, but are not under a duty to do so. The host authority is therefore not responsible for the costs of the placement or any associated transport. It is therefore essential to confirm transport arrangements with parents to inform their placing request.
106. Information for parents and carers about all of the provisions of the 2004 Act is available in the [Enquire guide](#).

³² See section 22 of, and Schedule 2 to, the 2004 Act.

Section 51: Method of delivery of early learning and childcare

The funded early learning and childcare entitlement must be delivered in sessions of **10 hours or less** and must be delivered over a minimum of **38 weeks** in any given year. This is sometimes referred to as the 'minimum framework' for the delivery of funded early learning and childcare.

Ministers may modify the framework for the delivery of funded early learning and childcare by order subject to affirmative procedure.

Framework for delivering funded early learning and childcare

107. Under section 51 of the 2014 Act, and following the Children and Young People (Scotland) Act 2014 (Modification) (No. 1) Order 2019, education authorities must ensure that funded early learning and childcare is delivered in sessions of 10 hours or less a day in duration³³. This must be delivered over a minimum of 38 weeks a year (or pro rata), which need not be confined to term time. It is intended that children take up their entitlement at times that best support their needs, and that the increased hours are used as an opportunity to support consistency for the child.

108. There are a wide range of models or patterns that funded early learning and childcare can be delivered through. For example:

- Half day sessions around 4 hours
- School day sessions around 6 hours
- Full working day sessions up to 10 hours
- Short sessions of around 2.5 hours to 3.5 hours
- Sessions operating over the full year (more than 38 weeks per year) as well as term time sessions (38 weeks per year).

109. These are just examples, and it will be for education authorities to ensure that families are able to choose from a range of types of setting, offering different patterns of provision across their local area. This should reflect local demand and circumstances and it is not expected that all options will be available in all areas and settings. The range of models and patterns of delivery should be informed by consultation carried out under Section 50 of the 2014 Act and should be reflected in education authorities' early learning and childcare delivery plans.

³³ The Children and Young People (Scotland) Act 2014 (Modification) (No. 1) Order 2019 introduced the requirement that from 1 August 2019 a funded early learning and childcare session should be 10 hours or less; <http://www.legislation.gov.uk/ssi/2019/206/contents/made>

110. While the framework permits 10 hour sessions of funded early learning and childcare, this does not set an expectation that the statutory entitlement to funded early learning and childcare should be delivered only through full day sessions. Moreover, section 51 of the 2014 Act does not set a requirement for every early learning and childcare setting delivering the funded entitlement to deliver 10 hour sessions where these are not already delivered.
111. While flexibility for families is an important element of the expansion of hours, the key purpose of the approach is to ensure children have the best start in life. If there is evidence showing that certain session lengths may have a detrimental impact on children's wellbeing and outcomes then consideration will be given to further amendments to the framework for how funded early learning and childcare is delivered.
112. The maximum session length only relates to the provision of funded early learning and childcare and does not place restrictions on the opening hours of settings or the provision of additional early learning and childcare out-with the funded early learning and childcare entitlement within in any setting, (i.e. regardless of whether it is an education authority, private, or third sector setting or a childminder).

Providing less than the statutory funded early learning and childcare entitlement

113. The statutory funded early learning and childcare is an entitlement for children, and is not compulsory. Where parents or carers request less hours than the full entitlement, it is at the education authority's discretion to make arrangements that meet the needs of the parent(s) or carer(s) and continue to meet the best interests of the child. Education authorities should seek to meet the needs of the parents or carers and the child, including by advising on the pattern of attendance that is likely to be in the best interest of each child. Clear policy and communication with parents and carers should support and ensure working out the best, realistic and manageable arrangement for the child, parent/carer, and education authority.
114. Settings offering the funded early learning and childcare entitlement do not have to be able to deliver the full amount of funded early learning and childcare entitlement. For example, there will be high quality settings across the sector who operate over shorter hours, or who may have limited capacity to expand, that limits their ability to offer the full funded early learning and childcare entitlement. Where this is the case, and a setting meets the requirements for offering the funded early learning and childcare entitlement, it is expected that the education authority and the setting will work closely together to develop delivery models

informed by local demand and the education authorities' plan for the delivery of early learning and childcare (as required under section 50 of the 2014 Act).

115. Section 51(2) of the 2014 Act enables Scottish Ministers to modify or change the method of delivering early learning and childcare by order subject to affirmative procedure by virtue of section 99(2) of the Act.

Attendance

116. All schools are required to keep an attendance register of every pupil to record if children are present³⁴. This applies to early learning and childcare where it is delivered as part of the entitlement for eligible young children. In addition, all early learning and childcare providers registered with the Care Inspectorate are required to maintain a record of children's attendance to show the total number of children in daycare of children premises at any one time.
117. This has implications for practice in providers in the private, third or childminding sectors delivering funded early learning and childcare, and where there are split placements, whereby education authorities should establish systems and procedures, e.g. links and communication between split placements and clear responsibilities on setting delivering funded early learning and childcare to record, monitor and report changes in attendance. Providers in the private, third or childminding sectors delivering funded early learning and childcare need to work in an integrated way to ensure that a child's attendance is monitored and any concerns shared and acted upon.
118. If there is a longer term absence of an eligible young child due to prolonged ill health³⁵ education authorities are under a duty to make alternative arrangements to ensure the young child continues to receive early learning and childcare elsewhere under section 14 of the 1980 Act. Consistency for the child is very important in such circumstances.
119. SEEMiS Early Years will provide the functionality for settings to record attendance of children registered for funded early learning and childcare. If this functionality is used by settings, the respective education authority will be able to monitor attendance of children within their area. Education authorities are not required to adopt SEEMiS.

³⁴ Schools General (Scotland) Regulations 1975.

³⁵ <https://www.gov.scot/publications/guidance-education-children-unable-attend-school-due-ill-health/pages/2/>

Section 52: Flexibility in the way in which early learning and childcare is made available

Education authorities must have **regard to the desirability** of ensuring that the method by which it makes early learning and childcare available is **flexible enough to allow parents an appropriate degree of choice** when deciding how to access the service.

120. The purpose of section 52 of the 2014 Act is to support families through the provision of flexible hours that provide an appropriate degree of choice.
121. The intention is that education authorities will ensure that there is flexibility and choice for parents and carers in terms of the patterns of hours of funded early learning and childcare available across their authority area.
122. Flexibility in provision also extends to access to funded early learning and childcare delivered through settings in the private and third sector, including childminders.
123. Section 52 of the 2014 Act does not place an expectation that every setting will offer every possible pattern of provision that a parent or carer may request. This is to allow providers to effectively plan for and manage the capacity of their setting, and to acknowledge that for providers in the private, third and childminding sectors they will likely have a core offer for parents that underpins their business model. For example, settings will have established session times when delivering their service. While parents or carers should have access to a range of sessions of varying lengths and start times, it is not expected that individual settings must accommodate every request from parents to use their child's statutory funded early learning and childcare entitlement for only part of a session (i.e. choosing their own drop off/pick up time).
124. Flexibility should be driven by local demand from families regarding the nature, and type, of provision that they require. The range of options available to families, should be established through consultation with representative populations of parents and carers as specified in section 50 of the 2014 Act.
125. The range should also be delivered within the framework as defined in section 51 of the 2014 Act.
126. This will enable education authorities to ensure an appropriate mix of provision within their area that reflects local circumstances and allows for choice of:

- Different types of settings including those in the private and third sector, and childminders.
- Choice in patterns of delivery such as varying lengths in sessions (whole day, half day, blended models etc.) and the number of weeks of the year in which they access the statutory entitlement (term time or year around provision).

127. It is important to stress that flexibility and choice is around patterns or models of provision. It will be for education authorities to design and develop those models in response to consultation; and to design systems of choice. Appropriate choice under section 52 of the 2014 Act is therefore intended around models and not individual providers or places.

128. Where providers in the private or third sector, or childminders, are delivering funded early learning and childcare sessions of a particular length, it is not necessary for education authorities to specify when those sessions should start and stop. Sessions also do not need to be in line with education authority timings as long as the framework for delivering funded early learning and childcare as defined in section 51 of the 2014 Act is met, as this will limit flexibility.

129. Parents may wish to alter the days of the week or the sessions during which they access their child's funded early learning and childcare during a term. Providers offering the funded early learning and childcare entitlement should work with parents to accommodate this where possible, however Section 52 of the 2014 Act does not set an expectation that settings must accommodate frequent changes to the delivery pattern for a child's funded early learning and childcare entitlement.

130. This flexibility in choices for parents and carers that arise from consultations will mean that education authorities will have to be adaptable. This will require a recognition that there will be an ongoing need to review and change models in response to demand from parents and carers within their area.

Transitions and split placements

131. The aim of flexibility is to provide options for families which are in the best interests of the child whilst also meeting the needs of the parents or carers. Being able to access funded and discretionary early learning and childcare, where they are required, at the same location can provide consistency for the child and their parent(s) or carers. However, there is no evidence to indicate that all of the child's funded early learning and childcare entitlement should be delivered by the same provider. A mixed model of provision can be beneficial for children and parents, and education authorities should accommodate split

placements across different providers where this meets the needs of the child and parents or carers.

132. The key priority in moving between settings is to manage those transitions well³⁶. This should be done by sharing responsibility for the child's personal plan and focusing on developing a supportive and caring relationship between the child and their caregivers. The most important factor is that children receive high quality provision, wherever and however early learning and childcare is provided.
133. When a child starts at an early learning and childcare setting, they will make a number of transitions: from home to the setting, within the setting, potentially between settings, and from person to person. This can be exciting yet challenging for parents and children, as change often brings apprehension. If transitions are well supported, children can learn to manage change in a positive way, which is an important skill for life. A high quality early learning and childcare setting will build on the valuable learning and experiences that a child has had in and around the home; and, staff respond to children's and parent's needs to make sure the transition is positive and meaningful.

³⁶ Principles of effective transitions are set out in a sector-wide position statement published in 2019: https://earlyyearsscotland.org/Media/Docs/What's%20New/ScottishEarlyChildhoodChildrenandFamiliesTransitionsPositionStatementFinal_May2019.pdf

Additional guidance on other key legislation and policy relating to the delivery of early learning and childcare

134. This section sets out additional guidance on aspects of the legislative and policy framework which relate to the delivery of early learning and childcare, but are out-with the scope of section 34 of the 2000 Act under which the Early Learning and Childcare Statutory Guidance is issued. Links are provided where separate guidance, either statutory or non-statutory, is available on areas covered in this section.

Delivery of funded early learning and childcare through a range of providers

135. Under section 47 of the 2014 Act, it is the duty of the education authority to secure the statutory amount of early learning and childcare for each eligible child. Under section 35 of the 2000 Act, the education authority can enter into arrangements with any persons to make that provision for children under school age. As a result funded early learning and childcare is delivered through a mixed economy model with a mixture of public, private and third sector providers, including childminders, offering the funded early learning and childcare entitlement.

Securing high quality provision

136. Under section 66(1A)³⁷ of the 1980 Act, Scottish Ministers have the power to cause inspection by HM Inspectors of Education of those providing early learning and childcare under a section 35 arrangement.

137. In addition, under the Public Services Reform (Scotland) Act 2010 (the PSR Act), all care services classed as day care of children including nurseries, children's centres, crèches, and childminders must be registered with the Care Inspectorate. The Care Inspectorate has a statutory responsibility to inspect and regulate all registered providers of day care and childminding against the National Health and Social Care Standards³⁸ and, under section 50 of the PSR Act, Scottish Ministers are required to keep any standards under review.

138. Therefore, all settings delivering the funded early learning and childcare entitlement will be inspected by the Care Inspectorate on a risk-based frequency cycle. Some providers may also be sampled for inspection by HM Inspectors of Education.

³⁷ Subsection (1A) was inserted into section 66 of the Education (Scotland) Act 1980 by section 36 of the 2000 Act.

³⁸ The Health and Social Care Standards came into force in April 2018 and can be found at: <http://www.newcarestandards.scot/>.

139. Under section 3 of the 2000 Act, Scottish Ministers and education authorities are under a duty to endeavour to secure improvement in the quality of school education which is provided in Scotland; this includes early learning and childcare; and, under section 3(3)(b) of the 2000 Act, education authorities are under a duty to endeavour to secure improvement in school education (which includes early learning and childcare) which is provided by providers under arrangements made under section 35 of the 2000 Act.
140. Therefore education authorities also have a key role in securing improvement of quality in their own settings and in settings offering the funded early learning and childcare entitlement. Education authorities undertake this through quality improvement, learning and development, CPD (continuing professional development) and other forms of support. This is most effective when carried out jointly with their own settings and other providers delivering funded early learning and childcare. Education authorities should develop an integrated approach to work through forums and networks with providers in their area delivering funded early learning and childcare to maximise access to information, learning and development, CPD, and other support in order to assure and improve quality; and, ensure effective implementation of early learning and childcare and related policies.
141. Representative bodies of private and third sector providers, and childminders, also contribute significantly to quality assurance and improvement; and, work in partnership locally and nationally to achieve this.

Local funding arrangements

142. It is the responsibility of education authorities to determine fair and sustainable settlements locally with providers who are delivering funded early learning and childcare under a section 35 (of the 2000 Act) arrangement, while securing high quality provision. [Guidance](#) has been produced to support education authorities to set sustainable rates for providers delivering the funded early learning and childcare entitlement from August 2020.³⁹
143. Providers can include third sector organisations, social enterprises, private businesses and childminders. It is not for education authorities to seek to comment on or intervene in fees charged by these providers out-with the funded early learning and childcare entitlement.
144. Providers will have important views on a range of issues to ensure the easiest and most effective method of payments and fees, such as distribution and spread

³⁹ <https://www.gov.scot/publications/funding-follows-child-national-standard-early-learning-childcare-providers-guidance-setting-sustainable-rates-august-2020/>

of funding arrangements. All providers including education authority settings who charge fees will be aware of other systems of subsidy available to parents and carers through the tax and social security systems.

145. Education authorities should not deduct payments to providers delivering funded early learning and childcare based on short term absences of children or short term emergency closure of an establishment, e.g. due to severe weather. This would not be a sustainable practice in any provision where the place is expected to be there for the child.

Consultation under the Schools Consultation (Scotland) Act 2010

146. Under the 2010 Act, education authorities must consult on any proposal to permanently discontinue a nursery school⁴⁰ or all the nursery classes⁴¹ in a public primary school.
147. To support the expansion and reconfiguration of early learning and childcare, the Schools (Consultation) (Scotland) Act 2010 (Modification) Regulations 2017 removed the requirement to carry out a statutory consultation on proposals to establish a new nursery school or new nursery class and proposals to relocate a nursery school or nursery class under the 2010 Act.
148. The requirement for education authorities to consult on the establishment of a new nursery school or a new nursery class can be reinstated through an affirmative order.
149. Further information can be found in [Schools \(Consultation\) \(Scotland\) Act 2010: guidance](#)⁴².

⁴⁰ Paragraph 1 of Schedule 1 to the 2010 Act refers to “school”; section 21(1)(a) of the 2010 Act defines “school” by reference to a public school as defined in section 135(1) of the Education (Scotland) Act 1980 (the 1980 Act); under that section “school” includes a “nursery school”. The definition of “nursery school” is contained in section 135(1) of the 1980 Act and was amended by the Act (paragraph 2(6)(b) of schedule 5) to define a nursery school as a school which provides early learning and childcare. Section 135(1) of the 1980 Act, as amended by paragraph 2(6)(a) of the Act defines “early learning and childcare” as having the same meaning as in Part 6 of the 2010 Act.

⁴¹ Paragraph 12 of Schedule 1 to the 2010 Act provides that “nursery class” is to be construed in accordance with section 135(1) of the 1980 Act. That section (as amended by paragraph 2(6)(b) of schedule 5 to the Act) defines “nursery class” as being a class which provides early learning and childcare.

⁴² <https://www.gov.scot/publications/schools-consultation-scotland-act-2010-statutory-guidance/>

Admissions policies and cross boundary arrangements

150. Education authorities can put in place admission policies to ensure they meet their statutory duty to secure the statutory entitlement to funded early learning and childcare for children within their area.
151. Admissions policies can include cross-boundary arrangements, and education authorities should, wherever possible, seek to meet families' requests for cross-boundary placements, providing there is a space available.
152. It is recommended that a cross boundary no charging policy is implemented uniformly by education authorities.
153. It is recommended that education authorities meet on a regional or neighbouring basis to identify movement and places across boundaries and reach sustainable and mutually beneficial arrangements.
154. [Funding Follows the Child and the National Standard For Early Learning and Childcare Providers: Transition Options Guidance on Contracting](#)⁴³ provides additional guidance, for where a procurement process will be undertaken, on education authority contracting arrangements with settings in the private and third sectors where there are high levels of cross boundary places.

Meals, snacks and drinks

155. Section 53 of the 1980 Act sets out the arrangements for the provision of school meals, snacks and drinks for pupils in attendance at public schools. This can apply to an eligible young child who receives funded early learning and childcare in an education authority establishment or in settings in the private and third sectors, including childminders, delivering funded early learning and childcare through a section 35 arrangement.⁴⁴

⁴³ <https://www.gov.scot/publications/funding-follows-child-national-standard-early-learning-childcare-providers-transition-options-guidance-contracting/>

⁴⁴“Pupil” is defined in section 135(1) of the 1980 Act as meaning “a person of any age for whom education is or is required to be provided under the Act”; and “public school” means any school under the management of an education authority.; “school” means an institution for the provision of primary or secondary education or both primary or secondary education being a public school, a grant-aided school or an independent school, and **includes a nursery school** and a special school; and the expression “school” where used without qualification includes any such school or all such schools as the context may require. “Nursery school” and “nursery class” have the meanings assigned by section 1(5)(a)(i) of the 1980 Act which as amended by the Children & Young People (Scotland) Act 2014 means schools and classes which provide early learning and childcare.

156. All meals and snacks must meet the most up-to-date nutritional guidance provided for Early Learning and Childcare (currently included in Setting the Table).⁴⁵

Free school meals

157. The 1980 Act provides criteria for children eligible for free school meals. Current information on eligibility criteria can be found on mygov.scot web pages.⁴⁶

158. Education authorities have a statutory duty to provide free school meals to eligible children when they are accessing their statutory entitlement to funded early learning and childcare.

159. Under section 53(12) of the 1980 Act, a school lunch means anything provided in the middle of the day which the education authority considers is appropriate for consumption as a meal at that time of day. It is for education authorities to determine at what point they serve school lunches within the general meaning of the middle of the day.

Early learning and childcare meal commitment

160. As part of the agreement to deliver the expanded statutory entitlement to funded early learning and childcare, the Scottish Government and COSLA made a joint commitment that every child attending a funded early learning and childcare session – which is any session that includes funded early learning and childcare hours, regardless of whether they are mixed with ‘paid for’ hours – from August 2020 will be provided with a free meal.

161. Children already eligible for free school meals will continue to receive their meal entitlement, which will be expanded to include all children attending a session that includes funded early learning and childcare hours.

162. Education authorities will provide settings who are delivering funded early learning and childcare with the funding to deliver the free meals, unless, in cases where a setting does not have onsite catering facilities, there may be an agreement that the education authority will provide the meals to the setting. Education authorities are expected to work in partnership with providers in the private and third sector, including childminders, to support them in identifying solutions to deliver the free meals commitment, particularly where they do not have onsite catering facilities.

⁴⁵ The current version (at the time of this guidance being published) of Setting the Table is available at <http://www.healthscotland.com/uploads/documents/30341-Setting%20the%20Table.pdf>. Updated Setting the Table guidance is due to be published in September 2020.

⁴⁶ <https://www.mygov.scot/school-meals/>

163. As is the case for free school lunches, the up-take of the free meal is optional. Parents and carers who prefer to provide their child with a packed lunch are free to do so.
164. Where children access their funded early learning and childcare in a blended model or a split placement, settings should seek to establish methods to effectively share information with other practitioners. This will ensure that practitioners are aware of what food a child has consumed during a funded early learning and childcare session, and ensure appropriate delivery of the free meals commitment.
165. Further information is available in [Funding Follows the Child and the National Standard for Early Learning and Childcare Providers: Operating Guidance](#)⁴⁷.

Additional meals/snacks

166. Under 53 (2b) of the 1980 Act, education authorities have discretionary powers to provide food and drink, including school meals, to all young children; and, to provide this free or at a charge. This means that they can provide free meals to any young children at their own discretion or under their own local priorities; and, can provide those meals at any time of the day. They can also provide snacks and meals at any time of the day and charge for children who don't fall within the eligibility criteria for a free school lunch.

Nursery Milk

167. Nursery milk can be provided under the Nursery Milk Scheme (NMS). Under current provision, all children under five in a day care, or early years setting, for two or more hours a day, are eligible to receive a free daily drink of 189 ml (1/3 pint) cow's milk. Children less than one year old are given infant formula milk.
168. Responsibility for the Nursery Milk Scheme was devolved to the Scottish Government through the Scotland Act 2016⁴⁸. Work is ongoing to develop how the scheme will be administered in Scotland. In the interim period, the Nursery Milk scheme will continue to be run by the Department of Health.

169. More information on the current scheme can be found at:
<https://www.nurserymilk.co.uk/>

⁴⁷ <https://www.gov.scot/publications/funding-follows-child-national-standard-early-learning-childcare-providers-operating-guidance/>

⁴⁸ Scotland Act 2016, Section 27: <http://www.legislation.gov.uk/ukpga/2016/11/section/27/enacted>

Enforcement of statutory obligations

170. Any concerns regarding whether an education authority is fulfilling its statutory obligations in relation to early learning and childcare should be pursued initially through the local authority complaints process and, where necessary, the Scottish Public Service Ombudsman⁴⁹.

171. Section 70 of the 1980 Act will also apply to the discharge of any statutory duties relating to early learning and childcare under the 1980 Act and the 2014 Act. Where, for example, Ministers are satisfied that an authority has failed to fulfil its statutory duties relating to early learning and childcare, then section 70 enables Scottish Ministers to require education authorities to discharge those duties. There are now statutory timescales within which a matter being considered under section 70 must be dealt with⁵⁰.

⁴⁹ <https://www.spsso.org.uk/>

⁵⁰ These are set out in the Section 70 (Procedure) (Scotland) Regulations 2017.

Annex A: Glossary

Term	Description
Additional Support Needs (ASN)	A child or young person has additional support needs where, for whatever reason, they are likely to be unable, without the provision of additional support, to benefit from school education.
Attendance	This refers to the presence of children on any given day. Settings are required to record attendance.
Blended Model	The model where children are attending two or more settings, managed by different providers, who are working together to provide them with their entitlement to funded early learning and childcare.
COSLA	COSLA, the Confederation Of Scottish Local Authorities, is the voice of Local Government in Scotland. They provide political leadership on national issues, and work with local authorities to improve local services and strengthen local democracy.
Childminders	A childminder is defined as a person who works with children for more than 2 hours a day in their own home for reward.
Early Learning and Childcare (ELC)	Provision of a service, consisting of education and care, of a kind which is suitable in the ordinary case for children who are under school age, regard being had to the importance of interactions and other experiences which support learning and development in a caring and nurturing setting.
Eligible Child	An eligible child is defined in legislation (the Children and Young People (Scotland) Act 2014 and the Provision of Early Learning and Childcare

	<p>(Specified Children) (Scotland) Order 2014, as amended).</p> <p>This is all 3 and 4 year olds and some children aged 2, from the relevant start date. The date the child can access their funded entitlement depends on their birth date.</p>
Education Authority	<p>Local authorities will sometimes be referred to as 'education authorities' where reference is being made to their statutory functions that relate to school education. Education authorities functions to secure education for children under school age are provided for in the Education (Scotland) Act 1980.</p>
Flexibility	<p>Education authorities will ensure that there is flexibility and choice for parents and carers in terms of the patterns of hours of funded early learning and childcare available across their authority area.</p> <p>This flexibility also extends to access to funded early learning and childcare delivered through settings in the private and third sector, including childminders.</p>
Funded Early Learning and Childcare Entitlement	<p>The number of hours of early learning, as defined in section 48 of the Children and Young People (Scotland) Act 2014 that eligible are entitled to and which education authorities are under a duty to secure for eligible children. This is referred to as the mandatory amount of early learning and childcare in the Children and Young People (Scotland) Act 2014 and is set at 1140 hours in each year for which a child is eligible.</p>
Funded Provider	<p>A setting that meets the National Standard and offers the statutory entitlement to funded early learning and childcare to eligible children. This</p>

	<p>includes both local authority settings and settings in the private and third sector, including childminders, who are delivering the statutory funded early learning and childcare entitlement.</p>
<p>Funding Follows the Child</p>	<p>This provider neutral approach, which will be introduced in August 2020, will ensure that the funded early learning and childcare entitlement is delivered in high quality settings, and is underpinned by a National Standard that all settings who wish to deliver the funded early learning and childcare entitlement have to meet.</p> <p>At the heart of the National Standard are a clear and consistent set of quality criteria, recognising that the ELC expansion is fundamentally about improving the early years' experience of our youngest children.</p> <p>The approach will provide parents and carers with choice as they will be able to choose any settings - regardless of whether they are in the public, private or third sectors, including childminders – that meets the National Standard, has a place available, and is willing to enter into a contract with the local authority.</p>
<p>Getting it Right for Every Child</p>	<p>The national approach in Scotland to improving the wellbeing of our children and young people by offering the right help at the right time from the right people. it support them and their parents or carers to work in partnership with the services that can help them. Wellbeing sits at the heart of the GIRFEC approach and reflects the need to tailor the support and help that children, young people and their families are offered to support their wellbeing. A child or young person's</p>

	wellbeing is influenced by everything around them and the different experiences and need they have at different times in their lives.
Minimum Framework	The minimum framework defines the method that funded early learning and childcare should be delivered. Funded early learning and childcare sessions should during at least 38 weeks in any given year, and must be 10 hours or less in duration.
Pattern of Attendance	This refers to the sessions that a child is registered to attend in a setting (e.g. 5 mornings a week, 48 weeks a year).
Play	Play encompasses children's behaviour which is freely chosen, personally directed and intrinsically motivated. It is performed for no external goal or reward and is a fundamental and integral part of healthy development which seeks to improve play experiences for all children.
Provider	Any organisation offering early learning and childcare provision, over one or more settings, registered with the Care Inspectorate under daycare of children or childminding registrations.
Provider Neutral	The approach which enables parents and carers to choose from a variety of early learning and childcare settings that best suits the needs of their child, in line with Funding Follows the Child. It allows parents and carers to choose from a number of different providers – regardless of whether they are in the public, private or third sectors, including childminders – if the setting meets the National Standard, has a place available and is willing to enter into a contract with the local authority.
Setting	Any service offering early learning and childcare provision registered with the

	Care Inspectorate under daycare of children or childminding registrations.
Third Sector	Third sector, includes charities, social enterprises and voluntary groups, delivers essential services. They play a vital role in supporting communities at a local level.

Responding to this Consultation

We are inviting responses to this consultation by 4th March 2020.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/children-and-families/early-learning-and-childcare-statutory-guidance/>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 4th March 2020.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form to:

Euan Carmichael
Early Learning and Childcare Directorate
Scottish Government
Area GD (South)
Victoria Quay
Edinburgh, EH6 6QQ

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy: <https://beta.gov.scot/privacy/>

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or at elcstatutoryguidance@gov.scot.

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Title

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:

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Are you responding as an individual or an organisation?

- Individual
- Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
- Publish response only (without name)
- Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No



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