

Childcare free entitlement: delivery model
Response from the Low Incomes Tax Reform Group (LITRG)

1 Executive Summary

- 1.1 We welcome the opportunity to respond to the Childcare free entitlement consultation and provide comment on the draft regulations and statutory guidance.
- 1.2 Finding reliable, high quality, affordable childcare is a major concern for working families. The high costs and availability of childcare are two of the biggest challenges that parents face. The high costs of childcare can be prohibitive to parents looking to enter the workplace or increase their hours. It is clear that this needs to be addressed in order to improve work incentives for parents and we welcome the Government's commitment to tackling this issue.
- 1.3 Whilst we are wholly supportive of extending free childcare to 30 hours, and also of the Government's support for childcare through the tax-free childcare (TFC) scheme, the childcare landscape that results will be incredibly complex. It is therefore crucial that people are given complete guidance that not only explains the rules of each childcare scheme but also gives enough information for them to choose between schemes or understand how they interact.
- 1.4 We remain very concerned about the potential impact of increases, announced in the Autumn Statement 2015, in minimum income limits for both the extended provision of free childcare and the delayed TFC scheme.
- 1.5 In particular, we are concerned how the increase in minimum income limits (announced in the Autumn statement) will impact on parents who are self-employed and those who are employed on zero-hours contracts. While parents who are paid a higher hourly rate may indeed qualify for support by working a low number of hours per week, those who earn

national minimum wage or national living wage will effectively have to work more hours to qualify for the same type of support. Those extra hours may not be available to them. We comment further on the grace period proposals below.

2 About Us

- 2.1 The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low income workers, pensioners, migrants, students, disabled people and carers.
- 2.2 LITRG works extensively with HM Revenue & Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.
- 2.3 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.
- 2.4 Our response to this consultation is limited to those areas where we have most experience and knowledge.

3 Responses to consultation questions

- 3.1 ***Question 1: Does the use of terms or quarters to manage the 'grace period' achieve the government's objective to minimise disruption to children, parents, local authorities and providers?***
- 3.1.1 We welcome the objective of the proposed grace period to enable parents to retain their childcare place for a short period if they have become ineligible for the extended entitlement. However, we are concerned about potential confusion for those using the scheme as to when a grace period will apply.
- 3.1.2 We think that whatever grace period definition is put in place, it should be in regulations and should be consistent in all Local Authority areas. Local authorities, as well as the Department for Education (DfE) and HMRC, will need to ensure that users fully understand the grace period so that they can plan accordingly.
- 3.1.3 Our understanding of the draft regulations is that a declaration will be made for a three month period (in the same way as for TFC) and that the free entitlement is therefore guaranteed for that three month period even if circumstances change. The grace period therefore appears to be something in addition to this, although this is not clear. If it is an

additional period, then this will need to be explained in any materials and it would be helpful to have examples that show how the two periods fit together.

- 3.1.4 Whilst the use of terms or quarters makes sense from a local authority perspective, it is likely to confuse if the quarterly periods are different to the ones set for the main free entitlement period.
- 3.1.5 The con doc makes it clear that the grace period only kicks in at the point at which the parents become ineligible for the extended entitlement. This means that if one parent loses their job just after their three month declaration period has started, they would retain childcare until the end of those three months and then the grace period would kick in presumably from the last day of that three month period.
- 3.1.6 We recommend that further thought is given to this issue and more work done on potential scenarios to understand the consequences for parents and the potential confusion that may arise so that communication materials can adequately explain the grace period, and how it interacts with the declaration period, to parents.
- 3.1.7 We are pleased to see the 'exceptional circumstances' provision where it is recognised that the grace period may need to be longer in some cases. However, there should be guidance for local authorities to ensure that whilst they have discretion there is some guidance on when the grace period can be extended.
- 3.1.8 In our previous submissions relating to the TFC scheme and during the passage of the Childcare Bill, we highlighted the importance of alignment where possible. It is therefore disappointing that the TFC scheme does not have an equivalent of the grace period that is being implemented for the 30 hour offer. This will need to be made clear to parents where they are benefiting from both schemes otherwise it could lead to a situation where they cannot sustain their childcare during the grace period because of the loss of the additional support from TFC (which will stop at the end of the declaration period).
- 3.2 ***Q15 How often should information about childcare be updated and published for parents?***
- 3.2.1 It is welcome that the legislation recognises the need for information for parents. In terms of frequency, the information should be updated as often as necessary to ensure it is accurate and up to date otherwise the information is rendered unhelpful if it is not an accurate reflection of the current landscape.
- 3.3 ***Q16 We believe that electronic means e.g. via a website is the most easily accessible format for parents. Do you agree?***
- 3.3.1 We agree that some parents may want to access material via a website and for some parents this may be the most easily accessible format for them. However, for some people online material is not easily accessible. This could be because they have no internet access, due to a disability or for some other reason.
- 3.3.2 There should be a statutory requirement that local authorities make arrangements for those who are unable to access information online.

3.4 ***Q17 Is there other information directly related to childcare provision that could be helpful to parents that local authorities should consider collecting and publishing?***

- 3.4.1 The childcare support landscape is now very complex and it can be difficult for people to understand how the schemes operate together. For example, if you get 30 hours free childcare, what does that mean for the TFC scheme or for Universal Credit (UC) childcare support? It is therefore critical that users are given complete guidance that not only explains the rules of each childcare scheme but also gives enough information for them to choose between schemes or to understand how they interact.
- 3.4.2 Failure to have this information could lead to parents finding themselves in overpayment situations or they could make poor financial decisions.
- 3.4.3 We believe the Government have a responsibility to produce this information and provide advice and support to parents to help them make the right decision. Although a calculator is being produced by the TFC team, we are not yet aware of what other support will be in place, for example via a telephone line. Local authorities should also have a duty to provide this information and the Government should provide them with a toolkit to do so to ensure accurate and consistent messaging around the scheme interactions.

4 Comments on the draft Regulations

4.1 General comments

- 4.1.1 The comments we make below on the draft Regulations reflect those made on the equivalent TFC eligibility regulations¹ and also seek to highlight areas where there are differences between the two schemes. It is important that there are only differences where there is strong justification.
- 4.1.2 Although it is clear from careful examination of the legislation that other people with parental responsibility or care of a child can benefit from the scheme, even though they may not be the child's biological parent. This needs to be made clear in all communications.

4.2 Regulation 2 – Interpretation

- 4.2.1 There is currently no definition of the terms 'employed' or 'self-employed' in the interpretation section. We see no good reason not to follow the same definitions used in Regulation 2 of the TFC eligibility regulations to ensure consistency.
- 4.2.2 However, we would like to highlight our comments made previously on the TFC regulations definition of self-employed where we suggested it should be aligned to the UC definition to ensure consistency across the schemes. Instead the TFC regulations add in an extra 'commerciality' requirement that does not exist in UC. We therefore suggest that the definition used in Regulation 2 of the TFC eligibility regulations be re-written to exclude the

¹ The Childcare Payments (Eligibility) Regulations 2015 SI 448/2015)

words 'on a commercial basis and with a view to a profit' and replaced with 'for payment or in expectation of payment. We suggest that this same amended definition is adopted in these regulations.

4.3 ***Regulations 5 and 6– Requirement to be in qualifying paid work and the calculation of expected income***

- 4.3.1 For UC purposes, claimants are required to report their 'net' income – after the deduction of tax, national insurance and pension contributions. For tax credits, they are required to report their gross income less any pension contributions. However, it seems that Regulation 10(1) will require a different figure again. This will make the creation of better-off calculators and communications for scheme users more complex. Although we appreciate that for the 30 hour entitlement (and TFC) you won't need an actual figure reported, instead you will require confirmation they exceed a certain level. However, when asking people for income details or asking them if they meet a threshold, you will need to be absolutely clear what income you want to know and where they can find the required information.
- 4.3.2 We do not think that the minimum earnings threshold works for users who are self-employed, particularly in a situation where they make a loss unless some flexibility is given around 'expected' income.
- 4.3.3 Our other concern for the self-employed is the introduction of yet another income measure requiring them to work out and keep records of 'receipts' and 'expenses' and make adjustments for capital expenditure on a basis that is different to both the tax and existing benefit systems (tax credits and UC). There is no guidance in the Regulation on what constitutes a 'receipt' or an 'expense'. For example, is an income tax refund a receipt? Is an expense for business entertainment an allowable expense? This will be a further administrative burden on small businesses.
- 4.3.4 Communication to self-employed individuals around the criteria will be important. Those self-employed individuals who make losses and who may be used to declaring their income for tax credits as 'nil' may immediately think they don't qualify because they do not have earnings above the required threshold, however once capital deductions are added back in they may well qualify.
- 4.3.5 The final point in relation to Regulations 5 and 6 is about the use of 'expected' income for both the employed and the self-employed. Regulation 5(3) states that the expectation must be 'reasonable'. Who will deem this to be reasonable and what guidance will parents be given? We can see that, in line with the TFC regulations, HMRC will have various penalty powers in relation to inaccurate declarations of eligibility and a specific power to impose a penalty where an inaccuracy is discovered at a later date and a person fails to take reasonable steps to inform HMRC.

4.3.6 It is not clear whether these provisions can apply in situations where expected income turns out to be incorrect and additional information becomes available to a person further into the entitlement period that could mean their expectation is revised.

4.3.7 Users of the scheme will need adequate guidance on how to work out their 'expected' income but they will also need certainty that the support they receive based on this expectation is final. We would welcome further conversations with HMRC on this part of the Regulations.

4.4 **Regulations 13 and 14**

4.4.1 Regulation 13 requires that a declaration must be in the form specified by HMRC, and Regulation 14 states that the declaration must be made by electronic communications unless one of the exceptions in 14(3) applies.

4.4.2 Whilst we are pleased to see that the regulations attempt to allow exceptions, we do have concerns about the wording of regulation 14(3) which mimics the wording used for the TFC scheme.

4.4.3 On a point of drafting, Regulation 14(3)(c) should have 'or' inserted after (i) and (ii) in order to make it clear that age and disability are standalone reasons for not being able to comply with digital requirements and should not be required in addition to (iii).

4.4.4 The decision in *LH Bishop Electrical Co Ltd and others v HMRC Commissioners* [2013] UKFTT 522 (TC) ('*Bishop*') was that VAT regulations breached the human rights of three of the joint appellants by not providing exemptions from the obligation to file online for those who were prevented from doing so by disability, age or remoteness. In addition to those possible grounds, the Judge also mentioned that the online filing requirement should also take into account any who were prevented from filing online for 'any other reason' to reflect the 'other status' limb of Art 14 of the European Convention on Human Rights¹ (the human rights anti-discrimination legislation). LITRG supported the joint appellants in *Bishop* and we have been involved in the various VAT consultations that followed the case.

4.4.5 We are concerned that Regulation 14 (3) is extremely widely drafted and does not provide any certainty about the alternative methods available. It would therefore be open for HMRC to mandate an alternative method that may also not be suitable.

4.4.6 We think the best model for this type of exemption is the recently promulgated VAT regulations which provide an exemption from online filing where HMRC are satisfied that 'it

¹ "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or **other status**" [emphasis supplied].

is not reasonably practicable' for the person to use electronic means. This exemption also echoes the current RTI exemption. The VAT regulations specify that businesses will be permitted to use the telephone where online filing is not 'reasonably practicable' and importantly if telephone filing is not 'reasonably practicable' either, they will be permitted to file on paper. This should be followed in the regulations for both free entitlement and TFC otherwise it may well be open to challenge similar to that in *Bishop*.

- 4.4.7 One important feature of the VAT legislation is that taxpayers can appeal against HMRC's decision to refuse telephone or paper filing. It is important that those accessing free childcare entitlement and TFC claimants also have a right of appeal in such a situation.

LITRG
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