

Regulatory Impact Statement: Network Management in Early Learning

Coversheet

Purpose of Document

Decision sought:	This is a RIA with analysis produced for the purpose of informing final Cabinet decisions.
Advising agencies:	Ministry of Education
Proposing Ministers:	Minister of Education
Date finalised:	5 November 2021

Problem Definition

Sections 17 and 18 of the Education and Training Act 2020 (the Act) provide a framework for the new network management regime for early learning. The Minister must take into account the needs of the community and suitability of the applicant when assessing an application to establish a new early childhood service. The commencement date of sections 17 and 18 was delayed by 2 years to reflect that the network management function is entirely new, so the Act and corresponding regulations need to provide for a clear and transparent process.

In undertaking detailed work to give effect to sections 17 and 18, the Ministry of Education (the Ministry) identified additional regulatory changes that are required to provide transparency and clarity and support the effective implementation of the network management approach. We have identified a number of issues below, which requires changes to the Act to provide clarity to the sector and ensure the design is fit for purpose before commencement of the network management provisions in the Act on 1 August 2022.

Executive Summary

Following the commencement of the Act in 2020, the Ministry has been developing the policy for the network management provisions and we have identified areas that need to be amended/enhanced in order to fully realise the gains that were intended. These changes will involve changes to the Education and Training Act 2020 (the Act).

We have developed four proposals to support the introduction of the network management regime, that are summarised below:

1. Ensuring applicants meet the needs of the community
 - National and Regional Statements
2. Ensuring network management decisions are fit for purpose
 - allocating assessments of fit and proper and an initial financial viability assessment to the Secretary for Education (the Secretary)

3. Ensuring applicants are suitable
 - changes to fit and proper requirements
 - adding a requirement for the Minister of Education (the Minister) to consider capability to deliver the service and other relevant factors
4. Ensuring providers move towards licensing after network management approvals
 - introducing conditions to network approval granted by the Minister
 - changing period of network approval to up to 2 years
 - setting a high threshold for any extensions

Potential positive impacts of preferred options

More active management of the network is intended to help ensure all children have access to quality early learning settings and prevent unintended consequences of over-supply. The proposed settings will position proposed new services to provide quality early learning settings by checking they are capable, fit and proper, and have sufficient finances in place to establish a new service.

National and Regional Statements provide guidance for applicants and prevent wasted effort if the application is unlikely to succeed. Smaller services who are unlikely to have resources to access data mapping services may benefit from the data offered by the Ministry to identify areas of under and oversupply. Network approval would also have an impact on the issue of future approvals for the same service type in that region.

The changes would also provide more transparency and clarity to the decision-making provisions in the Act, as well as specify requirements from applicants to inform effective network management decisions.

Potential negative impacts of preferred options

If network management resulted in the undersupply of services in an area, this could result in increased fees for parents and whānau.

The Secretary is the regulator of the education system, who gives delegated authority to the Ministry of Education. The Ministry would also need to develop how the criteria will be assessed to inform effective network management decisions and guidance material to support applicants.

Limitations and Constraints on Analysis

There are no constraints on analysis

Responsible Manager(s) (completed by relevant manager)

Siobhan Murray



Senior Policy Manager
Te Puna Kaupapahere
Ministry of Education
5 November 2021

Quality Assurance (completed by QA panel)	
Reviewing Agency:	Ministry of Education
Panel Assessment & Comment:	<p>The Ministry of Education's Quality Assurance Panel has reviewed the Regulatory Impact Statement "Network Management in Early Learning" produced by the Ministry of Education and dated 5 November 2021. The panel considers that it meets the Quality Assurance criteria.</p> <p>The RIS provides a clear and convincing case for proposed amendments to the Education and Training Act to better support the implementation of network management in early learning. The proposed changes reflect feedback from stakeholders received during recent consultation and, while the Statement presents a limited number of options, the analysis of these options and their impacts justifies this limited range of options, as does the feedback from consultation.</p>

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

Overview of the Early Learning Regulatory system

1. Government regulation of early learning is intended to establish the parameters for the operation of the sector and to ensure minimum standards for children's health, safety, wellbeing and education are met.
2. Licensed early childhood education (ECE) is regulated by the three-tiered regulatory framework that applies to all licensed early learning services.
 - 2.1. **First tier** – the Education and Training Act 2020 provides a high-level framework for licensing, certifying and funding of services, and it empowers regulations and criteria to be developed.
 - 2.2. **Second tier** – This tier includes the Education (Early Childhood Services) Regulations 2008, which establish minimum standards, and the ECE Funding Handbook that sets some additional requirements.
 - 2.3. **Third tier** – This tier includes the Licensing Criteria, used to assess compliance with the minimum standards set out in the Regulations, and the Curriculum framework.
3. The Education Review Office (ERO) also has a significant role in the sector, as the government agency that evaluates and reports on the education and care of children in ECE.

The Ministry's Review of the Early Learning Regulatory System

4. The proposals outlined in this RIA are part of tranche 2 of the review of the early learning regulatory system (the Review) that the Ministry of Education is currently undertaking. The Review is being completed in three tranches to ensure that the high priority issues can be progressed in a timely fashion while allowing additional time for the matters that require further policy work and consultation.

5. The purpose of the Review is to ensure that the regulatory system for the early learning sector is clear and fit for purpose to support high quality educational outcomes. The Review also considers the Secretary's role as both a steward of the system and a regulator.
6. This Review is timely due to the significant changes in the sector since the current regulatory system was established in 2008. Over the last decade, both the number of children and the number of hours that children participate in ECE has increased rapidly. Children are also attending from younger ages and for longer hours.
7. **Tranche one** – The final regulations for tranche one were announced on 14 July 2021. The main aim of tranche one was to address some of the immediate gaps in our current system including those that pose a risk to children's health, safety, and wellbeing. Generally, these changes most impact new early learning services, service providers that have a change in circumstance, and services that have compliance issues.
8. **Tranche two** – The proposals in this RIA are part of tranche 2 proposals. The proposals in this RIA aim to implement the new network planning function under the Education and Training Act 2020: changes relating to licensed early childhood services and ngā kōhanga reo.
9. **Tranche three** – These changes will cover the remaining matters that require significant further work to develop. This will likely involve a complete rewrite of the Education (Early Childhood Services) Regulations 2008 (the Regulations).

Education and Training Act 2020 (the Act)

10. In 2019, as part of *He taonga te tamaiti: Every child a taonga - Early learning action plan 2019-2029*, the Government set an objective that early learning services become part of a planned and coherent education ecosystem that is supported, accountable and sustainable. One of the actions to support this objective is network management.
11. The Ministry had previously undertaken a regulatory impact assessment for the legislative changes, which gave rise to the network management provisions in the Act. This RIA focuses on the proposed issues we have identified to strengthen the regulatory framework and implementation for network management.
12. From 1 August 2022, sections 17 and 18 of the Act introduce a new requirement for providers wanting to establish a new ECE service to seek the Minister's approval to apply for a licence. The Minister must take into account the needs of the community and the suitability of the applicant when assessing an application to establish a new early childhood service.
13. Section 17 adds a preliminary stage to the licensing process for the services. This is intended to assess whether there is a need for a new early learning service in a particular area. Potential service providers would need to apply to the Minister for approval to apply for a licence to operate any licensed early childhood service.
14. The purpose of this new stage is to enable planning of the overall network of early learning services, with a focus on ensuring that they reflect the needs of communities.
15. Section 18 of the Act requires the Minister to assess whether a person is fit and proper to be granted approval to apply for a licence under section 17. This is to assess whether the prospective service provider is fit to run an early learning service. Providers wishing to establish a new service will need to follow two steps, as set out in Table One.

Table One: new licensing process

Stage	Details	Status
1. Pre-application	A provider must meet the new network management requirements as set out in Sections 17 and 18 of the Education and Training Act 2020. Pre-application approval enables the service to apply for stage 2 below.	This is a new requirement
2. Licensing application	A provider must meet the requirements set out in the Education (Early Childhood Services) Regulations 2008.	This is a current requirement

What is the policy problem or opportunity?

16. Sections 17 and 18 of the Act introduce a requirement that any person wishing to apply for a licence to operate must first apply to the Minister of Education for approval. These sections of the Act set out the network management policy, which establishes the considerations that the Minister must take into account before granting approval and a requirement for the person approved to be 'fit and proper'.
17. Parliament passed the network management provisions in sections 17 and 18 of the Act and provided two years for implementation of this new function. In undertaking implementation planning we have identified the need for greater clarity and transparency around the decision-making process to support applicants to better understand the requirements for applications, reduce unnecessary costs being placed on applicants, to clarify decision rights and processes, and reduce the potential for legal challenges.
18. This regulatory impact statement relates to amendments to the network management provisions to ensure they can be implemented effectively, not to whether a network management policy should be introduced into the Act.
19. The Act provides a framework for the network management regime and mandatory standards. We have identified the issues that need to be addressed to provide clarity and ensure the design is fit for purpose before commencement of sections 17 and 18 of the Act on 1 August 2022.
20. The enhancements support the introduction of the network management regime by:
 - 20.1. ensuring applicants meet the needs of the community;
 - 20.2. ensuring network management decisions are fit for purpose;
 - 20.3. ensuring that applicants are suitable; and
 - 20.4. ensuring that applicants move towards a licensing application in a timely manner after network approval.

Summary of proposals

21. The proposals can be summarised as:

Changes to section 17: Ministerial approval required for licensing application	Changes to section 18: persons approved to apply for licence must be suitable
Introducing National and Regional statements	Allocating fit and proper decisions under section 18 to the Secretary (fit and proper and initial financial viability assessments)

Network management decisions are high-level decisions of the Minister	Changes to fit and proper person assessment
Addition of requirement for the Minister to consider applicant's capability and any other relevant factors	Applicants who are dissatisfied with the Secretary's determination may appeal to the District Court against the decision.
Introducing conditions on network approval and introducing the ability for the Minister to revoke an approval at any time if conditions are not complied with, there has been material change in circumstances, or information provided was materially incorrect or misleading	
Changing Network approval period to <u>up to</u> two years	
Specifying circumstances for extension of network approval period	

Stakeholders and how they will be affected

22. The proposals outlined in this analysis aim to provide transparency and clarity as well as support the effective implementation of network management. The changes identified below are anticipated to affect the following groups:
- children, parents and whānau;
 - prospective network approval applicants as regulated parties;
 - Māori and Pacific peoples; and
 - the Ministry.

Children, parents and whānau

Positive impacts

23. More active management of the network is intended to help ensure all children have access to quality early learning settings and prevent unintended consequences of over-supply. The proposed settings will mean proposed new services are well positioned to provide quality early learning settings, by checking the provider is capable, fit and proper and has sufficient finances in place to establish a new service.
24. The proposed network management settings, particularly the National and Regional Statements, will identify where there is demand for new services. This will enable parents to access early learning for their children at the right times and provide opportunities for labour force participation, especially for women.

Negative impacts

25. There may be a slight increase in ECE costs for parents if it leads to fewer new services opening in areas of oversupply and less competition.

Prospective network approval applicants

Positive impacts

26. The National and Regional Statements would provide more guidance for applicants to prevent wasted effort and resources if the application is not likely to be successful. Smaller services who are unlikely to have resources to access data mapping services may benefit from the data offered by the Ministry to identify areas of under and oversupply. Network approval would also have an impact on the issue of future network approvals for the same service type in that region.

Negative impacts

27. The proposed changes would require applicants to provide more specific and additional information for the Minister and Secretary to make an effective decision for network approval. This may result in additional costs for applicants.

Māori and Pacific

Positive impacts

28. The proposed settings, particularly the National Statement, would set Government's priorities for network management. It is expected that one of these outcomes would include a focus on Māori and Pacific immersion services. The aim is to enable greater choice through supporting the provision of service types that are valued for families and whānau. This will strengthen the provision in te reo Māori and Pacific languages to better support children's pathways for Māori medium schooling and kura and quality early learning settings that meet the needs of Pacific communities.

Negative impacts

29. Requiring all Māori early childhood services to go through an additional step before applying for licensing may appear to undermine Māori agency and Te Tiriti.

The Ministry

Positive impacts

30. The proposed changes would provide more transparency and clarity to the decision-making provisions in the Act, as well as specify requirements from applicants to inform effective network management decisions.

Negative impacts

31. The Ministry may need to assist applicants to understand the requirements and there would be costs associated with implementing the changes, including developing criteria/guidance to support decision-making and consulting with the sector, public and Māori and Pacific peoples.

What objectives are sought in relation to the policy problem?

32. The overall objectives of the regulatory changes to the new network management approach are to ensure that:
 - 32.1. The legislative requirements in sections 17 and 18 of the Act are clear and transparent to the sector;
 - 32.2. Clear decision-making rights and processes are prescribed;

- 32.3. Treaty of Waitangi obligations in the Act are given effect to; and
- 32.4. The design of the process is fit-for-purpose and ensures the quality of services and management of oversupply to ensure network sustainability.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

33. We have used the following criteria to assess the options:

- **Impact on the quality of education and care of children:** maintain the quality of education and care and put children's health, safety and wellbeing first
- **Reasonable costs to government and ease of implementation:** Costs and compliance faced by government are reasonable and able to be implemented
- **Reasonable costs for ECE providers:** Costs and compliance faced by providers are proportionate and involve limited or no duplication of effort
- **Te Tiriti o Waitangi:** Honours Te Tiriti o Waitangi and supports Māori Crown relationships
- **Clear and transparent:** Service providers know what to expect of the process and can easily interpret what is required
- **Fair and equitable:** Decisions for similar circumstances are treated equally and there is clear rationale where this is not the case

What scope will options be considered within?

34. The scope of feasible options has not been limited by Minister's commissioning, previous policy decisions or stakeholder engagement.
35. No non-regulatory options are available as the proposals all relate to provisions in the Act.

What options are being considered?

Proposal One: Ensuring applicants meet the needs of the community

Problem definition

36. Understandably, the Act does not contain detail about how network management decisions will be made. The sector also needs certainty and clear guidance on how these criteria are assessed and what a prospective service provider needs to provide to meet the criteria. The lack of certainty may also result in wasted effort and resources from applicants if the application is not likely to be successful.
37. The design of this function needs to give effect to the policy intent of this section, which is to ensure quality provision of new early childhood services across the regions and that the new services match the needs and aspirations of parents and whanau in the regions. This would require changes to the Act.

Options

Option One – the status quo

38. Section 17(2) requires the Minister to take into account the relevant attributes of the area to be served, including (without limitation) the demography of the area, the needs of the communities in the area, the needs of the children in the area, and the availability of services in the area with different offerings (for example, the provision of te reo Māori or Pacific languages).

Option Two - introducing National and Regional statements

39. Under this option section 17 of the Act is amended to allow the issuing of National and Regional statements, which would outline strategic priorities for government, identify areas of undersupply and oversupply, and provide potential applicants with more information about the early learning network
40. The Minister must consult with the early learning sector and iwi/Māori before issuing statements. This option encourages the establishment of services that are needed, and avoids unnecessary effort by providers where there is oversupply. All potential applicants have access to the same information, and statements could, for example, specify that new Māori immersion and iwi-led early learning services are a government priority.

Stakeholder support

41. 85% of submitters either agreed or strongly agreed with the proposal to introduce National and Regional Statements, while 4% disagreed or strongly disagreed.
42. Submitters' comments indicated that they were hopeful that the introduction of National and Regional Statements would help to address issues of oversupply and quality of services. Some respondents noted that it would also be important to consider the market driven nature of ECE and the impact of parental choice on service demand.
43. 90% of submitters either agreed or strongly agreed with the proposal to consult the early learning sector and Māori before issuing National and Regional Statements, while 2% disagreed or strongly disagreed.
44. Respondents were supportive of consulting with the early learning sector and iwi/Māori, remarking on the partnership this would encourage. Some respondents thought that Māori should have a greater role than was indicated.

45. Te Kōhanga Reo National Trust have requested exempting kōhanga reo from network management or an alternative process. In their view, they already complete a chartering process akin to network management and do not see any major differences in their approach compared to the network management proposals.

Proposal Two: Ensuring network management decisions are fit for purpose

Problem definition

46. The Act specifies that the Minister of Education makes decisions for pre-approving applications for licences. This includes making the fit and proper assessment in section 18, as well as consideration of the assessments in section 17, which includes assessing regional needs, suitability of the applicant and the applicant's financial position and licensing history.
47. The decisions made under section 17 are discretionary in nature, meaning that the decision-maker has the discretion whether to approve based on whether the applicant is suitable to operate the proposed service and whether the service meets regional needs. The decision maker may also be required to decide between multiple applicants seeking to establish services in the same region, who may all meet the section 17 requirements. This requires policy judgment, which is appropriately made by the Minister.
48. The fit and proper as well as financial viability assessments are components of assessing the suitability of the applicant and governance members. It is an administrative function, whereby the decision maker considers whether the applicant is fit and proper or not based on a set list of criteria in section 18. Due to the administrative nature of this type of assessment, it would generally result in a right of appeal that may be provided for in legislation, whereas judicial review is the more appropriate form of review for Ministerial-level decisions.

Options

Option One - the status quo

49. Under this option the Minister makes decisions for both sections 17 and 18 assessments.

Option Two: Amend the Act so that the Minister of Education makes section 17 assessments and the Secretary makes section 18 assessments

50. This option has a number of elements which have been included in a package that we consider is the most effective way of achieving the objectives.
51. Under this option the Act is amended to:
- 51.1. specify that the network management decision is a discretionary decision of the Minister of Education, and that the Minister;
- may rely on the advice of the Secretary and is not required to duplicate any assessment process undertaken by the Secretary;
 - may consider an application on its own or with others regardless of the order in which applications were received;
 - is not required to defer a decision on an application only because another applicant has appealed a determination of the Secretary or has commenced judicial proceedings;
 - has the ability to revoke network management approval in response to material changes in circumstances. For example:

- the approved applicant or members of governance change or are no longer fit and proper;
 - information provided was materially incorrect or misleading; or
 - the approved applicant has not complied with any condition of approval.
- 51.2. ensure approved applicants keep the Secretary updated of material changes;
- 51.3. enable the Secretary to make the following administrative decisions to locate the decision rights with the most appropriate decision maker:
- the fit and proper assessment set out in section 18 of the Act, and the Secretary must advise the Minister of the Secretary's determination; and
 - the requirement to obtain Police vets.
- 51.4. introduce a requirement to sections 17 and 18 that the Secretary provides the Minister with advice about whether the proposed early childhood service is financially viable, as part of the broader assessment of the financial viability of the applicant under section 17;
- 51.5. allow the Secretary to consider whether the applicant has access to sufficient resources to establish the service or a credible plan to obtain access to sufficient resources to establish the service, when considering the applicants financial viability;
- 51.6. ensure that, prior to providing an adverse determination to the Minister, the Secretary must first notify the applicant, and give the applicant an opportunity to comment;
- 51.7. that no person or entity may apply for a licence to operate an early childhood service without the Minister's approval;
- 51.8. the Minister is able to consider all relevant information in addition to the specific matters set out in section 17;
- 51.9. the Minister can seek additional information, and where necessary, including requiring information from a third party;
- 51.10. applicants can appeal a decision of the Secretary to the District Court. This will align appeal rights with the appeal process for licencing, which also sits with the Secretary; and
- 51.11. clarify that every decision of the Secretary continues in force pending the determination of any appeal.
52. This option signals a clear difference between the discretionary components of the network decisions made by the Minister under section 17, and the administrative thresholds assessed by the Secretary as administrator of the system. It also provides an appeal function to recognise the change in decision maker.

Stakeholder support

53. We did not consult on the proposals to specify that the Minister's decisions are high-level, while the Secretary is responsible for making the administrative decisions.
54. We consulted on the two separate ways to challenge decisions:
- 54.1. judicial review in the High Court in respect of decisions of the Minister of Education not to approve an application for network management; and

- 54.2. a right of appeal in the District Court in respect of a determination by the Secretary that the applicant is not fit and proper and/or financially viable.
55. 65% of submitters agreed or strongly agreed (an additional 23% were neutral) with the two proposed pathways relating to challenging decisions, while 11% disagreed or strongly disagreed. Across the board, respondents were concerned about the costliness of the judicial review process for both the Ministry and applicants.

Proposal Three: Ensuring applicants are suitable

Problem definition

The fit and proper assessment

56. The fit and proper assessment of the applicant is covered in section 18 of the Act. An amendment could be made to improve understanding. In section 17(2)(b), it requires the suitability of the applicant and every person involved in the governance of the proposed service to be assessed, which includes whether the person is fit and proper. However, it is not clear that the fit and proper assessment in section 18 only refers to a person applying for approval, and does not explicitly refer to the other people involved in the governance.
57. Section 18(1)(a) is restricted to convictions for offences involving harm to children, violence and fraud. Other potentially relevant offences are not clearly captured, such as some offences that prevent a person working as a children's worker in an early childhood service and convictions under the Health and Safety at Work Act or Education and Training Act. This section also only applies to convictions against individuals, but it is also possible than an applicant or governance member has been associated with an organisation that has been convicted of a relevant offence. These convictions may also be relevant for the assessment of whether the person is fit and proper for the purposes of establishing a quality service.
58. Under section 17, the Minister must take into account the suitability of the applicant and of every person involved in the governance of the proposed service, including whether they are a fit and proper person. The Minister can ask applicants to supply additional information, but is not authorised to consider any other relevant factors.

Capability to establish proposed service

59. There are no requirements in section 17 for the applicant to have the capability to establish the proposed service, except in relation to their financial position and licensing history. It is important that the applicant has knowledge of the regulatory framework for early learning services. It is also important the applicant has the relevant experience and skill to establish the proposed service. This is especially relevant in cases where the applicant seeks to establish a specialised type of service, such as a Māori or Pacific language immersion service, which requires specific skills and knowledge. If the applicant cannot show evidence that they are capable of establishing a quality service, this would be contrary to the intent of the network management regime.

Other relevant factors

60. Section 17 also does not allow the Minister to consider other relevant factors as part of the assessments. As the Minister's decision on whether to pre-approve an application is discretionary and requires policy judgments, the Minister should be able to request additional information and consider other factors if necessary. This would also help the

Minister to distinguish between strong applicants in the same area. Any changes require section 17 to be amended.

Options

Option 1 – the status quo

61. Under section 17 the Minister's approval is required for a licensing application. Under section 18 the Minister must assess whether a person is a fit and proper person to be granted approval to apply for a licence under section 17.

Option Two – amending the fit and proper test

62. This option has a number of elements which have been included in a package that we consider is the most effective way of achieving the objectives.

63. Under this option the Act is amended:

63.1. to make the following improvements to the fit and proper test:

- clarifying the test applies to both the applicant and every person involved in the governance of the proposed service;
- including consideration of all personal convictions of an applicant and any governance members relevant to providing an early childhood service;
- including any convictions considered relevant of an organisation that an applicant or governance member has been associated with;
- clarifying that the Secretary may consider, and give such weight as the Secretary thinks fit having regard to the degree and nature of the person's involvement in the proposed service, each component of the fit and proper test; and
- clarifying that it is the proposed service provider intending to operate the proposed service that must apply for network management approval, to ensure the test is applied to the correct entity or person;

63.2. to require applicants to demonstrate capability to deliver the type of service being proposed; and

63.3. to enable the Minister to consider other relevant factors, not just seek additional information, and enabling the Minister to require information from a third party.

64. This option is aimed at avoiding unsuitable applicants, or applicants that do not have the required skills and knowledge, being able to establish services. It also provides clarity about the application of the fit and proper test.

Stakeholder support

65. 91% of submitters agreed or strongly agreed with the proposals to improve the fit and proper test, while 2% disagreed or strongly disagreed.

66. Respondents were supportive of the proposals to improve the fit and proper test. Some respondents indicated the importance of having ECE knowledge and experience among the governing body. Others noted the importance of ensuring that applicants were motivated by a desire to support teachers, children and their families, rather than an opportunity for profit.

67. 95% of submitters agreed or strongly agreed with the proposal to include an assessment of the capability of the applicant to deliver the service, while 1% disagreed or strongly disagreed.
68. Respondents noted the importance of applicants having an ECE background or qualification, as well as supplying evidence of management skills and financial literacy. Some respondents also remarked that applicants should provide evidence of qualified staff in their previous or existing services.

Proposal Four: Ensuring providers move towards licensing in a timely manner after network approval

Problem definition

69. There are currently no mechanisms in the Act to require providers to move towards licensing after network approval, or for approvals to be revoked if there is a material change in circumstances or the information upon which an approval was based proves materially incorrect or misleading. This means there is no guarantee that a service would be established after two years, or that the service complies with the network approval. This would also impact other prospective providers who may be able to establish a desired service in that area but are prevented from doing so because another provider has already been given the network approval.
70. Section 17(6) allows the Minister, upon application before the expiry, to extend the expiry date if they think fit to do so in the circumstances. The Act does not specify the circumstances under which an extension would be considered. This could create ambiguity and uncertainty for pre-approved and prospective applicants.
71. The current provision does not reflect that a two-year pre-approval period is a significant amount of time. If the provider does not move towards applying for licensing during this period, there would be delay in establishing a service in a community with identified needs. The delay would also impact other prospective providers looking at establishing in the same area, as it is unlikely the Minister would approve multiple applications for the same service type at the same location.
72. Section 17(6) requires that every pre-application approval expires two years after the date on which it is given. Applicants may not need two years to establish a new service, but there is no flexibility for the Minister to set a shorter timeframe. If an applicant can establish a service in less than two years, and/or the timing of establishment of any service is a key factor in any particular decision, then there is no need for the pre-application to be issued for the full two years.
73. A two-year network approval period would be unnecessarily long for some pre-application approvals. Applicants may delay applying for licensing, after approval to apply has been granted, when it is beneficial for the applicant to take longer to do so. Network approvals may 'crowd out' other potential applicants as it is unlikely that another pre-application approval would be granted at the same time in the same location for a similar service. Any changes to the network approval period require amendments to section 17.

Options

Option One – the status quo

74. Under section 17 an approval for a licensing application expires two years after the date on which it is given, but the Minister may extend the expiry date if the Minister thinks fit to do so in the circumstances.

Option Two – amending section 17 to enable extensions at the Minister’s discretion with clear guidance and a high threshold for all extensions

75. This option has a number of elements which have been included in a package that we consider is the most effective way of achieving the objectives.
76. Under this option, section 17 would be amended to:
- 76.1. enable conditions to be imposed on network management approval to specify:
 - matters that the application for network approval has relied on such as the nature or size of the service proposed and the site (if known);
 - a requirement to provide regular updates to the Ministry on milestones and progress; and
 - a requirement to notify any significant changes in circumstances;
 - 76.2. enable network management approval to be revoked for breaching conditions;
 - 76.3. allow any conditions imposed to include a date for compliance (where appropriate) and the Minister would have the ability to amend the date set for compliance with any condition within the allocated period of approval;
 - 76.4. amend the expiry date for approvals of two years in section 17 to up to two years, and making it clear that the Minister can set an earlier date if desired;
 - 76.5. make it clear that when granting an approval the Minister must specify the date on which the approval expires and any conditions of approval imposed;
 - 76.6. allow the Minister to amend the initial expiry date as long as it is within the two-year period;
 - 76.7. make it more explicit about when extensions beyond two years would be considered, with clear guidance produced. Extensions beyond the two-year maximum may only be considered where:
 - the area was subject to a natural disaster;
 - for new builds, the building is nearly complete, but there is unavoidable delay beyond the applicant’s control (for example, delays in construction materials); or
 - there are other exceptional circumstances beyond the applicant’s control (for example significant vandalism to the building or site).
77. Under this option, applicants are incentivised to establish their service quickly, and the number of applicants seeking extensions is reduced, which will reduce costs to applicants and government.

Stakeholder support

78. 78% of submitters agreed or strongly agreed with the proposal to set conditions on approved applications, while 8% disagreed or strongly disagreed.
79. Many respondents noted the significance of an awareness of the financial implications of certain conditions, such as limiting service size and location. Some respondents particularly commented on the significance of ensuring that it does not become cost prohibitive for smaller or community-based organisations.
80. 78% of submitters agreed or strongly agreed with the three proposals to clarify when extensions will be considered, while 6% disagreed or strongly disagreed.

81. Respondents were supportive of the proposals to clarify when extensions will be considered, however they were particularly concerned about ensuring the inclusion of Covid-19 impacts on the ability to open a centre. Others highlighted the arbitrariness of the two-year time frame or commented that it was too short.

How do the options compare to the status quo/counterfactual?

Note: Option one for all proposals is the status quo. We have not included this option in the table.

	Quality of education	Cost to government	Cost to providers	Te Tiriti o Waitangi	Clear and transparent	Fair and equitable
Proposal One: Ensuring applicants meet the needs of the community						
<i>Option 2 National and regional statements</i>	0	+ cost of producing statements will fall on government	0	++ enables recognition that iwi-led services and Māori immersion are a government priority	++ will provide transparency about under and over supply	++ everyone will have access to the same information
Proposal Two: Ensuring network management decisions are fit for purpose						
<i>Option 2 - Minister makes s17 decisions, Secretary makes s18 decisions</i>	0	+ efficiency gains will reduce costs	0	0	+ clear division of functions	+ appeal rights more accessible
Proposal Three: Ensuring applicants are suitable						
<i>Option 2 – amending the fit and proper test</i>	+ people governing the service will influence the quality and operations	+ efficiency gains will reduce costs	Applicants provide specific information, but in relation to more people	+ providers must demonstrate capability to establish a Māori or Pacific language immersion service if relevant to their application	+ will provide clarity about fit and proper test	+ all applicants provide the same specific information
Proposal Four: Ensuring providers move towards licensing in a timely manner after network approval						
<i>Option 2 Amending s17</i>	0	+ clear guidance will reduce costs	+ clear guidance will reduce costs	0	+ establishes clear expectations for applicants	+ applicants do not prevent others from entering the market

Key:

++ much better than the status quo + better than the status quo 0 about the same as the status quo - worse than the status quo -- much worse than the status quo

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

82. We consider that the following options are the preferred option as they best meet the decision-making criteria and are the best response to the problems identified in section one:

Proposal	Preferred option
1. Ensuring applicants meet the needs of the community	Option 2 - National and regional statements
2. Ensuring network management decisions are fit for purpose	Option 2 - Minister makes s17 decisions, Secretary makes s18 decisions
3. Ensuring applicants are suitable	Option 2 – amending the fit and proper test
4. Ensuring providers move towards licensing in a timely manner after network approval	Option 2 - amending section 17

What are the marginal costs and benefits of the option?

Proposal One: Ensuring applicants meet the needs of the community

Affected groups	Comment	Impact.	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated parties	Applicants expected to outline how they will meet the statements, but will still need to gather information at a lower level to demonstrate need for their potential service	Medium	Low
Regulators	Ministry would need to develop the statements, which would require consultation with the early learning sector and iwi/Māori. Significant data analysis is also required to identify areas of under and over supply. There are also ongoing costs to ensure the statements remain up-to-date and relevant.	Medium	Low
Wider government	No impact	N/A	Low
Other parties	There may be increased costs for parents as there will be fewer services opening in areas of oversupply and less competition	Low	Low
Total monetised costs		N/A	N/A
Non-monetised costs		Medium	Low
Additional benefits of the preferred option compared to taking no action			
Regulated parties	Statements provide more guidance for prospective applicants and they would not need to waste effort and resources if the application is not likely to be successful. Smaller services with less resources may benefit from the data offered by the Ministry to identify areas of under and over supply.	Medium	Low
Regulators	Statements would make assessment of the regional needs more consistent and objective	Medium	Low
Wider government	N/A		
Other parties	Increased provision of ECE services that align with the needs of the community and children in the region	Medium	Low
Total monetised benefits		N/A	N/A
Non-monetised benefits		Medium	Low

Proposal Two: Ensuring network management decisions are fit for purpose

Affected groups	Comment	Impact.	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated parties	<p>Some impact on services to provide additional information for every person involved in the governance of the proposed service.</p> <p>Applicants would need to demonstrate that they have the capability to establish a quality service and provide evidence of specific expertise. Applicants would also need to provide additional information for the Minister to consider if requested. It may be more difficult for new applicants to provide this sort of evidence.</p>	Low/med	Low
Regulators	<p>Some costs associated with assessing more information for more people involved in governance. The Ministry would also need to develop guidance/criteria around what relevant convictions would include.</p> <p>The Ministry may need to develop a set of criteria for the applicant to demonstrate capability to establish the type of service proposed. For example, what kind of expertise is required to establish a Māori or Pacific language immersion service.</p>	Low	Low
Wider government	N/A	N/A	Low
Total monetised costs	N/A		
Non-monetised costs		Low/med	Low
Additional benefits of the preferred option compared to taking no action			
Regulated parties	Consistent fit and proper test in both the Act and licensing regulations would increase clarity for applicants regarding the requirements at both steps of the process.	Low	Low
Regulators	<p>This option reduces gaps in the fit and proper test and more comprehensively assesses whether an applicant and other members of the governance are suitable to run a new service.</p> <p>More comprehensively assesses the capability of an applicant to establish a particular type of service.</p>	Medium	Low
Wider government	N/A	N/A	Low
Other parties	<p>Parents and children would also benefit from more comprehensive screening of the people involved in governance of new services, as it improves children's health and safety.</p> <p>More assurance to parents and children that people setting up new services have the expertise of running that type of service.</p>	Medium	Low

Total monetised benefits		Medium	Low
Non-monetised benefits	N/A	N/A	Low

Proposal Three: Ensuring applicants are suitable

Affected groups	Comment	Impact.	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated parties	Some impact on applicants to provide additional information for every person involved in the governance of the proposed service, including all relevant convictions and consideration of other services the applicant or governance members are associated with. Applicants would need to demonstrate that they have the capability to establish a quality service and provide evidence of specific expertise. Applicants would also need to provide additional information for the Minister to consider any other relevant factors if requested. It may be more difficult for new players to provide this sort of evidence.	Low/med	Low
Regulators	Some costs associated with assessing more information for more people involved in governance. The Ministry would also need to develop guidance/criteria around relevant convictions. The Ministry may need to develop criteria for demonstrating expertise in delivering the type of service proposed.	Low	Low
Wider government	N/A	N/A	Low
Other parties	Some costs for third parties to provide information about applicant's proposed service if requested by the Minister.	Low	Low
Total monetised costs		N/A	N/A
Non-monetised costs		Low/med	Low
Additional benefits of the preferred option compared to taking no action			
Regulated parties	Consistent fit and proper test would increase clarity for applicants	Low	Low
Regulators	Reduces gaps in the fit and proper test and more comprehensively assesses whether an applicant and other governance members are suitable to run a new service. More comprehensively assesses the capability of an applicant to establish a particular type of service.	Medium	Low
Wider government	N/A	N/A	Low

Other parties	Improves the health and safety of children, and provides more assurance to parents and children that people setting up new services have the required expertise.	Medium	Low
Total monetised benefits		N/A	N/A
Non-monetised benefits		Medium	Low

Proposal Four: Ensuring providers move towards licensing in a timely manner after network approval

Affected groups	Comment	Impact.	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated parties	<p>Minor impact on applicants, who may need to provide updates to on a regular basis.</p> <p>A high extension threshold after 2 years means applications may have to move to establishment more quickly, which may be more costly. If they meet the criteria for seeking extensions, they would need to make an extension application.</p> <p>As preapproval application may be granted for less than 2 years, applicants may have to move to establishment more quickly, which may be more costly.</p>	Low	Low
Regulators	<p>Creates a burden on the Ministry to ensure that applicants comply with the conditions of their network approval and recommend cancellation to Minister.</p> <p>Some impact on the Ministry to establish criteria to effectively assess whether extensions should be granted and for how long. Assessing and setting timeframes may involve more work for the Ministry.</p> <p>Applicants with shorter timeframes are more likely to request an extension, creating more work for the Ministry.</p>	Low	Low
Wider government		N/A	Low
Other parties		N/A	Low
Total monetised costs		N/A	Low
Non-monetised costs		Low	Low
Additional benefits of the preferred option compared to taking no action			
Regulated parties	<p>Clear guidance on what extensions will be granted provides certainty to applicants, enabling better decision-making.</p> <p>A clear, firm time limit mitigates risk of unfair crowding out of other potential applicants.</p>	Medium	Low

	Shorter timeframes mitigate risk of unfair crowding out of other potential applicants.		
Regulators	<p>The Ministry can more effectively manage the network and ensure that pre-approved applicants move towards licensing. The mechanism to cancel a network approval would also incentivise applicants to actively move towards licensing and reduce unnecessary delays. This would also ensure that the location and type of established service aligns with what was initially approved. Clear guidance may reduce the number of extension applications that are very unlikely to be accepted, reducing administrative burden.</p> <p>Flexibility in setting timeframes better enables regulators to manage the network in a time-sensitive way.</p>	Medium	Low
Wider government		N/A	Low
Other parties	<p>Where an applicant is not progressing towards licensing, their network approval may be cancelled, which would allow new applicants looking to establish in that area to apply for approval.</p> <p>A clear, firm time limit mitigates risk of unfair crowding out of other potential applicants. Applicants having better information may lead to establishment of ECE services more quickly. This would benefit children, whānau and communities, especially in areas where there is low supply of available ECE services.</p> <p>Shorter timeframes may lead to faster establishment of services. This benefits children who may otherwise have missed out on education and whānau who may now be more enabled to work.</p>	Medium	Low
Total monetised benefits		N/A	N/A
Non-monetised benefits		Medium	Low

Section 3: Delivering an option

How will the new arrangements be implemented?

83. The preferred approaches would be implemented through amendments to the Act and drafting of a new set of regulations to govern network planning for early learning, including National and Regional statements. The regulations will provide more guidance for the operation of sections 17 and 18 of the Act and allow the Ministry to effectively implement the two-stage licencing process. The arrangements would take effect on 1 August 2022 to align with the commencement date of sections 17 and 18.
84. The regulatory changes will be supported by the development of new forms, guidance and communications including through the Ministry website and various bulletins. There will be training for relevant Ministry of Education staff on how to apply the updated regulations in various scenarios. The Ministry will communicate proactively with the sector to ensure they are aware of the changes through its normal communication channels and peak bodies.

How will the new arrangements be monitored, evaluated, and reviewed?

85. As part of the Ministry's work on its first regulatory stewardship strategy, it will be completing an assessment of the early learning regulatory system, which will look at the overall performance of the system.
86. There is currently no systematic monitoring or evaluation of the operation of the network due to the open nature of the market. However, the Ministry regularly monitors and reports on complaints and incidents in early learning, which is one marker of the health, safety and wellbeing of children. As part of the regulatory and operational policy design we will look at what new data requirements is needed to be able to assess the full impact and delivery of the new network management function.
87. As part of the Ministry's work on our first regulatory stewardship strategy we will be looking at how improvement work across the systems can be prioritised, and resourcing implications for ongoing regulatory stewardship work. This work will include how we can build effective monitoring and evaluation into our regulatory system.