



Education Report: Early Learning Regulatory Review: Network Management – policy settings and consultation

To:	Minister of Education		
Date:	10 June 2021	Priority:	Medium
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Messaging seen by Communications team:	No	Round Robin:	No

Purpose of Report

This paper seeks your agreement to consult on several early learning network management proposals as part of Tranche 2 of the Early Learning Regulatory Review.

Summary

- From 1 August 2022, sections 17 and 18 of the Education and Training Act 2020 (the Act) introduce a new pre-application process for prospective early learning services. This process is intended to assess whether there is a need for a new early learning service (section 17) and whether the prospective service provider is fit to run an early learning service (section 18). We are due to publicly consult on the proposed details of this process in September this year.
- We recommend consulting on the following proposals:
 - The introduction of national and regional statements.** The national statement would articulate government's broad priorities for new services, provide overall information about regional supply and demand, and outline the information expected from applicants. Regional statements would provide more detailed regional supply and demand information. Applicants would be expected to demonstrate how their proposed service aligned with the national and regional statements. These statements are intended to make the process more efficient by signalling where and what type of services are needed. A draft outline of a National Statement is included as an annex.
 - Specifying the matters for which extensions may be granted.** We suggest a high threshold for extensions beyond the two years of the preapprovals: natural disasters; the building is nearly complete but unavoidable delays beyond the applicant's control; or exceptional circumstances beyond the applicant's control. These would be specified to provide transparency.

- **Setting conditions on pre-approval.** Conditions on pre-approval would be related to the specific application – for example, that the pre-approval relates to setting up a service with a particular offering (such as Māori immersion) in a particular geographic area. We also see benefit in conditions that require the applicant to show progress towards setting up a service within the two year period of the pre-approval. This prevents applicants using pre-approvals solely to prevent other services being set up.
 - **Introducing a minimal fee of \$500 of pre-applications.** This would represent a partial contribution to the cost of assessing the pre-application.
- 3 National and regional statements, specifying the matters for which extensions may be granted, and placing conditions on preapprovals would require amendments to the Act. These could be included in the Education and Training Amendment Bill that is scheduled for introduction in December 2021. Timing of tranche two consultation means these amendments would need to be included via a Supplementary Order Paper.
 - 4 We also seek your agreement to two elements of the network planning regime that we do not consider require public consultation:
 - We recommend **separate regulations for pre-approvals**. This would clearly delineate pre-approvals from the issuing of licences.
 - We recommend **transitional provisions are limited** to those who have already applied for a licence prior to 1 August 2022 but whose applications have not yet been assessed. Services who have construction underway but are not ready to open and therefore have not applied for a licence would need to go through the preapproval process.
 - 5 We will provide you with further advice before the end of June on further network planning proposals relating to how the Treaty is honoured and whether there is the right of appeal.

Recommended Actions

The Ministry of Education recommends you:

- | | |
|---|-------------------------|
| a. agree to publicly consult on a system for new services that involves: | |
| i. National and regional statements | Agree / Disagree |
| i. Specifying the matters in which extensions may be granted beyond two years | Agree / Disagree |
| ii. Setting conditions for pre-application approval | Agree / Disagree |
| iii. Introducing a minimal fee of \$500 for pre-applications | Agree / Disagree |

- b. **agree** to create a new set of regulations for network management

Agree / Disagree

- c. **agree** not to provide for any transitional provisions for services that are not licensed by 1 August 2022 (and have not already applied for a licence)

Agree / Disagree

- d. **agree** this Education Report is proactively released at the same time as Tranche 2 of the Early Learning Regulatory Review is released for consultation, with any information that may need to be withheld done so in line with the provisions of the Official Information Act 1982.

Release/Not release



John Brooker
Group Manager
Education System Policy

10/6/2021

Hon Chris Hipkins
Minister of Education

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Background

- 1 The early learning sector is expecting to be consulted on matters as part of Tranche 2 of the Early Learning Regulatory Review in September 2021.
- 2 In 2019, *He taonga te tamaiti: Every child a taonga - the Early learning action plan 2019-2029* was launched with a ten-year plan for early learning. The proposals in this paper relate to Objective 5: Early learning services are part of a planned and coherent education ecosystem that is supported, accountable and sustainable.

The Education and Training Act requires new services to get pre-approval

- 3 Sections 17 and 18 of the Education and Training Act 2020 (the Act) introduced a new requirement for providers to seek pre-approval before establishing a new licensed service. The intent is to enable a more managed network approach in early learning. Providers must demonstrate that new services entering the market meet the needs of the community and that the provider does not have a history of poor-quality provision.
- 4 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

We have consulted the Advisory Group on key proposals in this paper

- 5 As part of developing the proposals in this paper we engaged with the Early Learning Regulatory Review Sector Advisory Group in April 2021. The Advisory Group comprises representatives from all major parts of the early learning sector. We have indicated the Advisory Group's views in each proposal section.

Scope

The network management approach only applies to new services

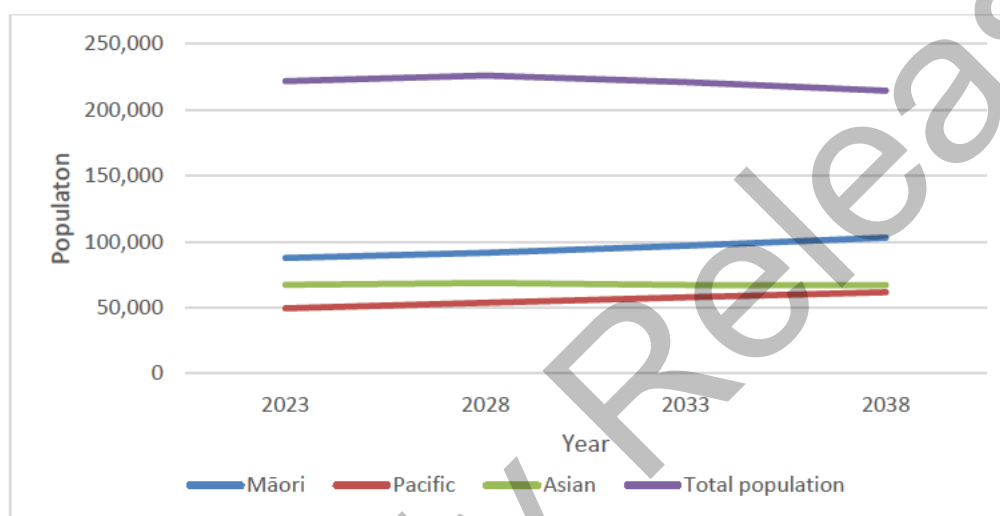
- 6 Effective management of the early learning network would require managing both existing services and the establishment of new services. However, this paper only focuses on the approach to new services. This is because sections 17 and 18 of the Act only apply to new services without a licence.
- 7 Funding provided through Budget 2021 for early learning network management also only relates to new services. Taking a more active approach to managing the existing network would require additional resourcing. 9(2)(f)(iv)

9(2)(f)(iv) We intend looking at these matters as part of tranche three of the regulatory review.

Population projections indicate we need slower growth in new services

- 8 In 2020, the Ministry granted 109 probationary licences for new services. Given the population projections showing decline of the overall 0-4 population it is unlikely we will need the same volume of new services each year and we may need a different profile of services given the expected increase in the Māori and Pacific 0-4 population and well as other regional variations. See the graph below for more details.

Figure One: 0-4 Population projections by ethnicity and total



Source: Statistics NZ population projections

Principles to guide policy design

- 9 Managing the early learning network is a new function of the Minister of Education and Ministry of Education and there is no existing framework to guide the establishment of this policy. We have developed principles to guide the design, including the proposals outlined in this paper. The first five principles apply to the design of the whole function and the last three would apply to the design of the operational policy individual applications.
- 10 We would continue to use these principles to guide the policy design and implementation of this new function.

Table Two: principles guiding the development of the network management function.

Overall principles		Rationale
Te Tiriti o Waitangi	Honours Te Tiriti o Waitangi and supports Māori Crown relationships	This is a responsibility both under the Treaty of Waitangi as well as section 4 of the Act.
Puts children at the centre	The requirements maintain the quality of education and care and put children's health, safety and wellbeing first	This is a primary purpose of early learning services as set out in section 14 of the Act.

Overall principles		Rationale
Fair and proportionate impact on parents and whānau	The impacts on parents and whānau take account of matters such as labour market participation and continuity of provision and choice	Early childhood education is a key enabler for labour market participation. Diversity of provision enables parents to appropriately blend provision with family circumstances.
Reasonable costs for the provider	Costs and compliance faced by providers are proportionate and involve limited or no duplication of effort	This is a standard principle
Reasonable costs to government and ease of implementation	Costs and compliance faced by government are reasonable and able to be implemented	This is a standard principle
Principles for applications		
Transparent	Service providers know what to expect of the process	This principle was very important to the Early Learning Regulatory Review Sector Advisory Group
Fair and equitable	Decisions for similar circumstances are treated equally and there is clear rationale where this is not the case	This principle was very important to the Early Learning Regulatory Review Sector Advisory Group
Clear	Service providers can easily interpret what is required	This is a standard principle

There are different ways of implementing a network management function

- 11 At a high level there are three ways to implement a network management function:
 - a. Open – providers of any new service may apply at any time
 - b. Closed – no providers may apply unless they meet specific criteria or the whole system could also be closed for defined periods of time. For example:
 - i. *Home-based service or hospital-based services only*
 - ii. *No new applications are accepted until 2023*
 - c. Mixed – on demand (open) for some locations/service types and closed for others. For example:
 - i. *Auckland only (any service type)*
 - ii. *Hospital-based services anywhere in the country.*
- 12 The Act is currently designed for an open approach – any service provider may seek pre-application approval at any time. This is the way the current licensing system works. We now consider an open approach would be resource intensive for both the Ministry and the sector. Under the open approach, providers could invest significant funding and not receive pre-application approval.
- 13 We see value in having a more defined system (i.e. not fully open). This would mean the Minister of Education would set some parameters around where services are needed and what type of service might be required. This provides guidance for the

sector and for Ministry staff. The effect of a more defined approach would be to limit applications in some manner. For example, you could close pre-applications for a period of time or only accept applications from specified service types.

- 14 To implement a more defined approach, we have developed the national and regional statements, which are discussed below. The Advisory Group were supportive of additional guidance or frameworks within the system.
- 15 Implementing national and regional statements would require legislative change to the Act. If this idea is progressed, it would need to be included via a Supplementary Order Paper in the Education and Training Amendment Bill scheduled for introduction in November 2021.

Policy components to the network management function to be consulted on

- 16 We have developed four policy components for public consultation, which are discussed in more detail below:
 - National and regional statements
 - Extensions on the expiry date of pre-applications
 - Setting conditions on approved pre-applications
 - Fees for pre-applications.
- 17 We also consider that how the Treaty is honoured as part of network management and whether there is the right of appeal are components that require public consultation. We will provide you with advice on these elements before the end of June.

National and regional statements

- 18 National policy statements are used in other areas such as water, land transport and urban development. Similarly, in the schooling sector we use National Education Growth Plans. These statements make public the desired state to guide development, for example the land transport national statement guides significant investment.
- 19 We propose consulting on the development of national and regional government statements to guide the establishment of new services. The national and regional statements would:
 - **outline strategic priorities** for government – for example, Māori or Pacific immersion services
 - **identify areas** of undersupply and areas where new services are not required by analysing multiple data sets (including population projections and existing services)
 - provide additional **information about the legislative requirements**, such as what information is required as part of applications.
- 20 As part of an application, an applicant would be expected to outline how the service meets the national and regional statement.
- 21 The intent of the statements would be to encourage establishment of particular services and avoid unnecessary effort by providers by outlining where there is currently oversupply. The statements are intended to assist getting applications from services

that are needed. The Advisory Group were supportive of national and regional statements as they want guidance and they do not wish to waste effort and resources if the application is not likely to be successful.

- 22 The statements are also intended to reduce information asymmetry between smaller and larger providers. Feedback from the Advisory Group highlighted differing processes for setting up a new service, with larger providers subscribing to services such as Gapmaps¹ to identify whether a proposition from a property developer was worth pursuing. Small services are unlikely to have the resources to access data mapping services such as Gapmaps.

Example of a National Statement

- 23 We have developed an outline for a National Statement (see Annex 1). We would use this as part of consultation to show what a national statement might look like. We seek your feedback on the content of this draft statement. While it is just a draft, it is likely to be viewed by the sector as a good indication of your priorities for the sector.
- 24 The outline for a National Statement focuses on demographics of the communities to be served rather than specifying particular philosophies of services (eg Montessori) or ownership structures (eg community based). The regional statements would provide more refined information at regional level about community needs and under- and oversupply.
- 25 Some in the sector are keen for these new provisions to act as a moratorium on new services in particular areas so as to protect their market share. This is not the purpose of the policy and not how national and regional statements are intended to be used.
- 26 National and regional statements may not capture demand at subregional level, and they may not be updated quickly enough when circumstances change. However, they are one input into the pre-application process. Applicants can still demonstrate their own community need or provide more up to date analysis.

Implementation considerations

- 27 Introducing national and/or regional statements will require legislative change. If this proposal is supported post consultation, it would need to be included via a Supplementary Order Paper in the Education and Training Amendment Bill, which is scheduled for introduction in December 2021.
- 28 In the first phase of implementation in August 2022, the Ministry would likely only have capacity to prepare a national statement and one regional statement. We suggest that the first regional statements focus on areas of projected population growth. This would encourage applications in areas where we think more services are needed. If you prefer, we could instead focus on regions where supply and demand are already closely matched so as to discourage applications those areas. We will provide advice on potential areas of focus later in the year.
- 29 It is unlikely we will have capacity to provide demand and supply data suburb by suburb within regional statements. This means that applicants will still need to undertake some data analysis or gather information on community need to understand and demonstrate demand for their potential service.

¹ Feedback suggested a subscription is around \$10,000 per year.

Development of national and regional statements

- 30 Statements of government priorities usually require public consultation with affected parties before finalisation. Examples within education include the Tertiary Education Strategy and the Statement of National Education and Learning Priorities. We recommend consulting on the degree of sector and community input into national and regional statements.
- 31 Should national statements be supported, the timeframe for consulting on the first national statement would be short and we would focus on key early learning organisations affected, rather than full public consultation.
- 32 There is also a question about how Māori could exercise their Treaty interests in the development of regional statements, and how to honour the Treaty in the development of national statements. We will provide advice on this before the end of June.

Setting a high threshold for any extensions

- 33 The Act provides that a pre-application approval expires two years after the date on which it is given; however, the Minister may, on application before the expiry, extend the expiry date if the Minister thinks fit to do so in the circumstances (section 17(6)).
- 34 We recommend consulting on the circumstances in which an extension may be granted to provide more certainty to the sector. The current provision is too broad and provides limited certainty to the sector.
- 35 Defining these circumstances would also enable the Ministry to set a high threshold as two years is a significant period for a provider to 'hold' pre-application approval. The Advisory Group were also supportive of a high threshold.
- 36 We recommend that extensions only be permitted where:
- a. The area was subject to a natural disaster.
 - b. For new builds, the building is nearly complete, but there is unavoidable delay beyond the applicant's control (for example, delays in construction materials).
 - c. There are other exceptional circumstances beyond the applicants control (for example significant vandalism to the building or site).
- 37 The onus would be on the applicant to demonstrate he/she meets one or more of the above criteria.
- 38 The alternative option would be to leave the extension provision as it currently stands, where extensions are made on a case by case basis. This is not our preferred option as it is not clear what matters are most relevant. Granting extensions impacts on the ability of other providers to set up in an area, so clear criteria limiting extensions better ensures services open in areas where they are needed.

Introducing conditions to approved pre-applications

- 39 We propose consulting on introducing conditions to all approved pre-applications. The intent of the conditions is to outline the expectations on the provider to move towards licensing, ensure applicants who are approved move towards licensing, and allow new approvals to be granted where an approved applicant is not progressing towards

licensing. Failure to meet the conditions would result in the pre-application being able to be cancelled.

- 40 The conditions would specify matters that the pre-application approval has relied on such as the service type that has been preapproved, the address (if known), as well as the requirement to provide regular updates to the Ministry on progress and notify any significant changes in circumstances. Conditions would only be set when they are able to be clearly defined and monitored.

For example, applicant Joe is preapproved to establish and licence an education and care service in Island Bay, Wellington by 1 August 2024.

- 41 If we do not have the ability to set conditions, two years may elapse before the approved pre-application expires and no service has been established in a community where we have identified a need. Other prospective providers would also have been impacted by this delay as it is unlikely we would recommend approval of multiple applications for the same service type at the same location further delaying early learning provision for those communities.
- 42 Introducing conditions, the ability to amend conditions, and a power to cancel a pre-application based on not meeting the conditions will require legislative change. If this proposal is supported post consultation, this change would need to be included via an SOP in the Education and Training Amendment Bill scheduled for introduction in November 2021.

Introducing a minimal fee

- 43 We propose consulting on introducing a minimal fee for pre-applications. Currently services pay a licensing fee of \$2,817.50 (including GST) as there is significant work required to assess a licensing application (estimated 25+ hours for Ministry staff per application). For pre-applications we propose to introduce a minimal fee of around \$500 to partially recover costs.
- 44 There is a strong case for a fee being charged – pre-application approval will act as a private good to providers (having an impact on the issue of future pre-applications) and there is legislative ability to set fees for this phase (section 636 of the Act). The Guidelines for Setting Charges in the Public Sector, 2017 provides that private goods should be funded by their users or beneficiaries. Charging a minimal fee recognises that there is both public and private benefit in new services being established.
- 45 Other options would be no fee or a full cost recovery fee. In our view a full cost recovery model would be difficult to implement for a newly introduced provision where there is no guarantee of a licence and therefore government funding. Full cost recovery would also be inconsistent with our current licensing fee that is not full cost recovery given it was set in 2008.
- 46 In combination a minimal fee, the ability to set conditions, and the provision of updates to the Ministry will help ensure applicants have incurred responsibility in establishing a service and hopefully deter some providers from submitting ‘holding’ applications intended to block others from entering the market.
- 47 If we set a fee this must be specified in regulation so if accepted we would include this proposal in any new regulations created.

Other matters (not to be consulted on)

- 48 Below we identify some others matters that need decisions. These are administrative matters that do not require sector input so we do not propose to consult the sector on these.

Where requirements should be specified

- 49 Some requirements will need to be set out in the Act but others will be set out at a lower level. For example, the network management function would be set out in the Act and an application process would be set out in regulations. There are different instruments we could use to outline the new network management regulatory requirements.
- 50 We recommend specifying all remaining requirements (not covered by the Act or other instruments) in a new set of regulations. Below we outline the two options with option (a) being our preferred option:
- a. Create separate regulations – this option makes the pre-application and licensing requirements clearer for services. There may be some inefficiency in requirements being duplicated across both set of regulations, however we consider this is outweighed by increased transparency for the sector.
 - b. Add a new part to the Education (Early Childhood Services) Regulations 2008 – this option would be simpler as all regulatory requirements will be in a single location but there is some risk of confusion by the sector if pre-application and licensing requirements are co-located in the same set of regulations and responsibilities for deciding compliance are different.
- 51 We envisage that the regulations will cover details to be included in the pre-application, reference to national statement, conditions of pre-application approval, and the pre-application fee.

Limited transitional provisions

- 52 We recommend providing transitional provisions for services that have applied for a licence prior to 1 August 2022 and have met all the information requirements but who have not yet been fully assessed by the Ministry.
- 53 We do not recommend transitional provisions beyond this because providers have already had over two years' notice of this provision. No transitional arrangements will encourage quick establishment and provide for a much simpler system to implement for the Ministry and the sector. The provision could be implemented earlier if we have all the settings in place, but we do not expect this could be done prior to June 2022.
- 54 If your preference was to develop a transitional regime, it could be applied to providers that have undertaken significant works and faced significant costs prior to 1 August 2022 but are not yet ready to be licensed. We cannot yet quantify how many services this may apply to.
- 55 The Early Childhood Council has approached the Ministry to ask about transitional arrangements for services that are being established (e.g. via a capital build) but will not be licensed by the time the pre-application requirement comes into force. If you agree to no transitional provisions, we would start communicating this to the early learning sector.

No alternatives are proposed for home-based services

- 56 The network management provision will be harder to implement in licensed home-based services due their set up and structure. Home-based services are not defined by a single physical location, and so the community they cater for and to is more diverse. Homes also move in and out of the network with records being kept at the service level, not the Ministry of Education. Our intention is not to design a separate system for home-based services, but rather factor in these matters into the overall design of the network management function.

Implementation

- 57 The network management function is required to be established by 1 August 2022 at the latest. It can be brought in earlier via Order in Council, however we do not anticipate this could be done prior to June 2022 given the associated work required.
- 58 This is a new function that we are designing and implementing. Our expectation is that the function will look different on day one compared to one year later. Our capability within the Ministry to actively monitor the sector will grow as our experience with applications and new data sets and analysis improves.
- 59 We need to have a firm foundation for any restrictions imposed under a closed or mixed system, and firm evidence upon which a decision to decline any application is made. This includes the data and expertise upon which the network planning function and decision-making rests. The Ministry will seek advice as part of policy development in order to plan for and incorporate these requirements within the system and processes.

Financial Implications

- 60 Funding of \$9.3 million over four years was provided as part of Budget 2021 for implementation of the early learning network management function. This funding sits within the Reform of the Tomorrow's Schools System initiative. No other government funding is expected to be required to manage the pre-application process for potential new services.
- 61 Our proposal to charge minimal fees for pre-applications will generate a small amount of revenue expected around \$500 x 100 applications = \$50,000 helping to cover some of the costs of administration.

Other Relevant Information

- 62 Because we have introduced a new step into the licensing process and providers will not necessarily know if the pre-application will be approved, we think it is unlikely some providers will have committed to a building (because of the associated costs). Pre-application approval will be sought in three different building and land related scenarios for centre-based services:

Stage	Impact	
	For the Ministry and Minister	The provider
Building is secured (via lease, ownership or other)	This scenario will make the pre application assessment simpler as the exact location	Significant impact on provider as he/she will be paying for a lease or have a financial commitment to a

Stage	Impact	
	For the Ministry and Minister	The provider
	within the network is known to assess impact and need	lease and not have certainty over pre-application outcome. But provider may have a stronger case knowing where they will be operating and the community they intend to cater to.
No building established but land is owned or leased	This scenario will make the pre application assessment simpler as the exact location within the network is known to assess impact and need	Impact on provider based on lease or mortgage of land. But provider may have a stronger case knowing where they will be operating and the community they intend to cater to.
No building and/or land secured but some definite options being explored	This scenario will make the pre application assessment more difficult as the location within the network is unknown to assess impact and need	Limited impact on provider
Fully prospective – only vague catchment area identified	This scenario will make the pre application assessment very difficult as the 'community' to be served will not be clear. Note the Minister will still have the power to request more information if information is insufficient.	Limited impact on provider

Next steps

63 Our next steps following decisions on this paper would be:

- Mid-June – final advice on other matters to be included in consultation such as the right of appeal
- June-July 2021 – Development of the tranche 2 consultation document
- Late August/early September 2021 – Cabinet considers consultation on tranche 2
- September – October 2021 – Sector consultation on tranche 2
- Early 2022 – Consultation on regulation changes
- Following consultation – design of operational policy and implementation settings
- By 1 August 2022 (at the latest) – implementation date of network management policy.

Proactive Release

Release

64 We recommend that this Education Report is proactively released at the same time Tranche 2 of the Early Learning Regulatory Review is released for consultation.

Proactively Released