Purpose of Report

This is the second of two papers seeking your agreement to consult on proposals for the early learning network management function as part of Tranche 2 of the Early Learning Regulatory Review. Both papers include proposals for changes to the Act.

This paper also seeks your agreement to a revised implementation date for network management. This would enable consultation on National Statements after the enabling legislative provisions have been passed, and would provide more time for implementation.

Summary

1. Sections 17 and 18 of the Education and Training Act 2020 (the Act) introduce a new pre-application process for prospective early childhood services. This process is intended to assess whether there is a need for the proposed new early childhood service (section 17) and whether the prospective service provider is fit to run an early childhood service (section 18). We are due to publicly consult on the proposed details of this process in September this year as part of Tranche 2 of the Early Learning Regulatory Review.

2. We recommend consulting on the following proposals:

- **amendments to sections 17 and 18 to improve the application and clarity of the sections.** We are also recommending that the Secretary for Education is responsible for advising you on whether the applicant meets the fit and proper test and has sufficient financial resources or plans to establish an early childhood service.

- **options to fulfil the Crown’s Te Tiriti o Waitangi responsibilities** under section 4 of the Education and Training Act 2020. We recommend our initial focus is:
i. analysis of the current provision of te reo Māori pathways in early learning and where potential gaps in provision are located

ii. the establishment of new Māori immersion and iwi-led early learning services (in the National Statement)

iii. the interests of Māori in particular applications for approval.

- **the right to challenge decisions.** We recommend not providing any statutory right appeal against a Ministerial decision to decline an application for network approval. We recommend an applicant have a right of appeal to the District Court relating to a determination by the Secretary for Education that the applicant or governance member is not fit and proper or financially viable.

- **options to assess financial position and licensing history.** We are recommending an applicant provide information to show it has sufficient financial resources, or provide a plan for how sufficient finances will be attained. We are proposing assessing licensing history by an applicant providing a list of all services that the applicant and its governance members has/have been in control of and relevant timeframes.

3 We also seek your agreement to **delay commencement** of the network planning function (currently 1 August 2022) by six months to 1 February 2023. This is to allow for consultation on a draft National Statement once the empowering legislation has been enacted, and to provide more time for operational processes to be developed. Delaying commencement would require a Supplementary Order Paper for the Education and Training Amendment Bill (number 1) currently before the House.

4 Keeping with the current timeframe would mean we would consult on a draft National Statement while the empowering legislation is still in the House, which potentially pre-empts the will of Parliament. The current timeframe also has no room for slippage.

5 Finally, we seek your confirmation of the proposed **scope of Tranche 2**: regulating for 80% qualified teachers, improving the person responsible requirement, implementing the network planning function, and other technical matters that arise.

**Recommended Actions**

The Ministry of Education recommends you:

a. **agree** to publicly consult on a system for new services that involves:

i. amendments to sections 17 and 18 to improve the application and clarity of the sections and roles and responsibilities of the Minister of Education and Secretary for Education, in particular:

1. making the fit and proper assessment in section 18 an assessment conducted by the Secretary for Education instead of the Minister of Education

   **Agree / Disagree**

2. ensuring that it is clear that the fit and proper test in section 18 applies to the applicant and to every person involved in the governance, and that it is the proposed service provider intending to operate the proposed service that must apply for approval

   **Agree / Disagree**
3. broadening section 18(1)(a) to apply to any convictions relevant to providing an early childhood service

   Agree / Disagree

4. introducing a new sub-section in section 18 to capture any relevant convictions of an organisation an applicant or governance member has been associated with

   Agree / Disagree

5. moving the requirement to obtain Police vets from section 17 into the fit and proper test in section 18

   Agree / Disagree

6. introducing a new subsection to the section 17 assessment requiring capability to establish the proposed early learning service

   Agree / Disagree

7. clarifying the ability for the Minister to consider any other relevant factors, not just seek additional information, and where necessary, enabling the Minister to require information from a third party

   Agree / Disagree

8. introducing a requirement under sections 17 and 18 that the Secretary provide you 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

   Agree / Disagree

9. amending the expiry date of 2 years in section 17 to up to 2 years, and making it clear that the Minister can set an earlier expiry date if desired

   Agree / Disagree

10. allowing for the Minister to impose conditions of approval and to revoke approvals

    Agree / Disagree

Honouring Te Tiriti o Waitangi

ii. fulfilling the Crown’s Te Tiriti o Waitangi responsibilities under section 4 of the Education and Training Act 2020 by prioritising:

1. analysis of the current provision of te reo Māori pathways in early learning and where potential gaps in provision are located

   Agree / Disagree

2. the establishment of new Māori immersion and iwi-led early learning services (in the National Statement)

   Agree / Disagree

3. the interests of Māori in particular applications for approval

   Agree / Disagree
iii. seeking additional input into other ways the Crown could give effect to Te Tiriti o Waitangi responsibilities

Agree / Disagree

Right to Challenge Decisions

iv. not providing any statutory right appeal against a Ministerial decision to decline an application for network approval, which would mean the right of judicial review would be the primary option for challenging such a decision

Agree / Disagree

v. providing a right of appeal to the District Court relating to a determination by the Secretary for Education that the applicant or governance member is not fit and proper or financially viable, following notice of an intention to make an adverse determination on this basis

Agree / Disagree

Assessing Financial Position and Licensing History

vi. assessing the financial position of an applicant by requiring them to provide any financial information that demonstrates the applicant has either sufficient finances to establish the service and/or a business plan to show how sufficient finances will be attained

Agree / Disagree

vii. assessing licensing history through requiring an applicant to provide a list of all services that the applicant and its governance members has/have been in control of and relevant timeframes

Agree / Disagree

Implementation

EITHER (Ministry preferred)

b. agree to delay commencement of the network planning function by six months to 1 February 2023, which would require a Supplementary Order Paper on the Education and Training Amendment Bill (no 1) currently before the House

Agree / Disagree

OR

c. agree to keep the implementation date at 1 August 2022

Agree / Disagree

Scope of Tranche 2

d. confirm that the scope of Tranche 2 is:

i. regulating for 80% qualified teachers [METIS 1253466 and 1255415 refers]

ii. improving the person responsible requirement [METIS 1255415 refers]

iii. implementing the new network planning function [METIS 1255416 and 1265914 refer], including changes to existing licensing regulations to support or align with network planning

iv. technical matters (to be progressed via consultation on draft regulations)

Agree / Disagree
e. **note** that any changes required to the Education and Training Act 2020 relating to the above proposals (except the implementation date) are intended to be included in the Education and Training Bill (no 2) scheduled for introduction in December 2021, via a Supplementary Order Paper.

f. **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**

Andrea Schöllmann  
Deputy Secretary  
Education System Policy

14 / 07 / 2021

Hon Chris Hipkins  
Minister of Education

__/__/____
Background

1 The Education and Training Act 2020 (the Act) introduces a new pre-application process for prospective early learning services from 1 August 2022. 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). The early learning sector is expecting to be consulted on matters related to the implementation of these new provisions as part of Tranche 2 of the Early Learning Regulatory Review in September 2021.

2 When we provided you with a paper with four network management proposals for inclusion in the Tranche 2 consultation on 10 June 2021, we noted we would come back to you with advice on additional consultation matters [Metis 1255416 refers].

Scope of this paper

3 In relation to network management this paper covers:
   - amendments we propose to make to sections 17 and 18 to improve the application and clarity of the sections, as well as the roles and responsibilities of the Minister of Education and Secretary for Education
   - proposals for giving effect to Te Tiriti o Waitangi obligations set out in the Act
   - proposals for challenging decisions
   - proposals for assessing financial position and licensing history
   - timing of implementation of the network planning function.

4 In addition, this paper also seeks your agreement to the full scope of Tranche 2 of the Early Learning Regulatory Review and includes some technical matters.

We propose tightening and strengthening aspects in sections 17 and 18

5 Our policy work on the network planning function has identified some issues with sections 17 and 18 of the Education and Training Act 2020. Currently the Minister of Education is responsible for assessing both sections 17 and 18. Section 17 is about whether the proposed service should be included in the network (a discretionary policy judgement) and section 18 is about whether the applicant is fit and proper (an administrative judgment which also applies at licensing).

6 We propose changes to these sections to:
   - locate decision rights with the most appropriate decision-maker based on the nature of the decision being made. We propose that discretionary policy assessments are made by the Minister of Education and administrative decisions are made by the Secretary for Education
   - ensure the fit and proper test sufficiently covers all relevant matters in establishing an early learning service
   - clarify any ambiguity and correct any omissions identified.

7 Our proposals will mean the Minister of Education continues to make the final determination on the decision to grant approval but the Secretary for Education will first assess and advise the Minister whether the applicant meets the fit and proper
threshold and has sufficient financial resources or plans to obtain sufficient financial resources to establish the proposed early childhood service.

8 We propose the following changes:

- making the fit and proper assessment in section 18 an assessment conducted by the Secretary for Education rather than the Minister of Education

- strengthening aspects of section 17 (the Minister’s assessment)

- clarifying and strengthening aspects of section 18 (the proposed Secretary’s assessment).

9 These are detailed below. We have also included a draft version of what the proposed changes might look like in Annex 1. This is not a draft prepared by Parliamentary Counsel Office, so it is indicative only. The changes also include the proposal to add conditions onto pre-approvals and references to national and regional statements, which were proposals in the previous paper on network planning [METIS 1255416 refers].

10 If you agree to these changes, we would signal these to the early learning sector in the consultation document. We propose to include these proposals as part of the Education and Training Amendment Bill (no 2) that is scheduled for introduction in December 2021.

Making the fit and proper assessment in section 18 an assessment by the Secretary for Education

11 The fit and proper assessment in section 18 is an administrative matter – the applicant either meets or does not meet the tests in section 18. In contrast, the tests in section 17, which require an assessment of community need and the offerings in the area, require more evaluation and judgement.

12 Given the tests in section 18 are an administrative matter, we propose this responsibility be shifted to the Secretary for Education. In our view, this shift will signal a clear difference between the discretionary policy components of the network decisions made by you as Minister in section 17, and the administrative thresholds assessed by the Secretary as administrator of the system.

13 We also propose moving the requirement to obtain Police vets from section 17 into the fit and proper test in section 18. Consideration of whether police vets are satisfactory is an administrative matter and our view is this would fit better in section 18 to support an assessment of relevant convictions and fit and proper status.

14 We propose introducing a requirement under sections 17 and 18 that the Secretary provide you 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. The financial viability of the proposed service is an important part of the assessment of a network approval application and can be appropriately included as part of the administrative assessments to be conducted by the Secretary under section 18. This is explained in more detail later in this paper.
Strengthening aspects of section 17

15 We propose the following additions to section 17:

a. a new subsection requiring capability to establish the proposed early learning service. This new section would cover matters such as understanding the regulatory framework for early learning services and specific expertise to deliver the type of service the applicant is proposing to offer. For example, some evidence that the applicant has the capability to establish a Māori immersion service. An applicant would demonstrate capability by including information and capability relevant to the specific service type being proposed.

b. clarifying the ability for the Minister to consider any other relevant factors, not just seek additional information, and, where necessary, enabling the Minister to require information from a third party. This is a good practice for the avoidance of doubt and more clearly signals that a network approval decision is a discretionary power of the Minister.

c. amending the expiry date of 2 years to up to 2 years and making it clear that the Minister can set an earlier expiry date if desired. If an applicant can establish a service in less than 2 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 preapplication to be issued for the full 2 years.

d. allowing for the Minister to impose conditions of approval (as recommended in the paper of 10 June) and to revoke approvals if there is a material change in circumstances or the information upon which an approval was based proves materially incorrect or misleading.

e. introducing a decision-making framework in section 17 for the Minister to follow for the purpose of ensuring that the Minister's decision-making role is clear, which is based in part on other legislative precedent. This framework would make clear that the Minister's decision is a high-level assessment, that it need not duplicate the Secretary's assessments, that the Minister may consider applications together or separately or in any particular order, and that the Minister would not be required to defer any decision only because another applicant has challenged any determination of the Secretary or a Ministerial network approval decision.

Clarifying and strengthening aspects of section 18

16 We propose the following additions to section 18:

a. ensuring that it is clear that the fit and proper test applies to both the applicant and to every person involved in the governance. Currently the section is drafted in a manner that is not easily understood. We also propose clarifying the nature of the applicant further in section 17 to make it clear that the applicant for approval must be the person or entity that intends to operate a licensed service, not a third party.

b. broadening section 18(1)(a) to apply to any convictions relevant to providing an early childhood service. Currently s18(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 change may require the applicant to list any convictions and the date of the conviction.

c. **a new subsection to capture any relevant convictions of an organisation an applicant or governance member has been associated with.** Section 18(1)(a) applies to convictions against individuals, but it is also possible that an applicant or governance member has been associated with an organisation that has been convicted of a relevant offence and was in a position of responsibility. This change may require the applicant to list any convictions, their role in the organisation and the date of the conviction.

d. **creating a right of appeal** to the District Court from the Secretary’s assessments under section 18, as explained later in this paper.

17 To ensure consistency across network approval applications and licensing, we propose to mirror all matters in the fit and proper test set out in section 18 in the licensing regulations (specifically regulations 7 and 8 of the Education (Early Childhood Services) Regulations 2008), with the exception of the financial viability test, which would no longer be a key consideration. This will ensure we are undertaking the same fit and proper test at both stages of establishment (network approval and licensing).

18 We also found an error in section 9(2)(b) of the Education and Training Act 2020. The current subsection describes section 17 as being Ministerial approval of a licensed service and this is incorrect.

Honouring Te Tiriti o Waitangi

19 The Government has an enduring focus on improving education outcomes for Māori learners and giving effect to Te Tiriti o Waitangi and its principles. The Act currently reflects this. Section 4(d) states that the purpose of the Act is “to establish and regulate an education system that honours Te Tiriti o Waitangi and supports Māori-Crown relationships.”

20 Section 9 of the Act also contains a signposting or “elaborated” Te Tiriti o Waitangi clause that sets out that section 4 is one of the main provisions of the Act that recognises and respects the Crown’s responsibility to give effect to Te Tiriti o Waitangi. Section 9(2)(b) also refers to section 17 of the Act, which is the network planning provision. Under section 17, before granting approval to apply for a licence, the Minister must take into account the availability of services in the area with different offerings, for example, the provision of te reo Māori. However, section 9 is unlikely to cover all the Crown’s Te Tiriti responsibilities under the Act.

21 As part of designing the new network planning provisions, we need to consider how the policy will give effect to Te Tiriti o Waitangi. Specific Te Tiriti o Waitangi obligations are a recent addition to the Act so this will be one of the first times the government will consider how it should apply to the design and implementation of a new education function.

22 Our proposals would directly contribute to the goals set out in the Maihi Karauna, the Crown’s Strategy for Māori Language Revitalisation, and support Tau Mai Te Reo, the Māori Language in Education Strategy for all learners, by encouraging the establishment of services that support more learners to learn te reo Māori.
We suggest the following three aspects should be part of our initial design

23 As part of fulfilling the Crown’s Te Tiriti responsibilities, we think it is important, at a minimum, that our network planning policy initially prioritises:

1. analysis of the current provision of te reo Māori pathways in early learning and where potential gaps in provision are located
2. the establishment of new Māori immersion and Iwi-led early learning services
3. interests of Māori in particular applications for approval.

Current te reo Māori pathways in early learning

24 We propose dedicated resource be set aside for analysing and assessing the network of services supporting te reo Māori pathways in early learning (as part of the network planning function that was funded as part of Budget 2021). It will be important that the analysis includes consideration of kōhanga reo, puna reo and the wider schooling and kura network to support effective transitions from early learning to schooling. This work would build on the work led by Te Tira Hou.

25 This resource would monitor the existing network as well as identify areas of community need for additional services that support te reo Māori pathways. This function may need to supplement Ministry held information with information from other sources such as Te Kupenga, key education providers such as Te Kōhanga Reo National Trust and information directly from iwi and hapū about community need. Our proposal is that potential applicants would have access to quality information about the current and future state of the te reo Māori pathways in early learning.

New Māori immersion services and iwi-led services

26 If you agree to the creation of National and Regional Statements as outlined in our report of 10 June, we propose that new Māori immersion and iwi-led early learning services are specified as a government priority in the National Statement. We propose the National statement set a broad definition of early learning services that gives effect to the Crown’s Te Tiriti responsibilities, such as Te Kōhanga Reo and Māori immersion services and other services governed and managed by iwi, hapū or Māori organisations.

27 As part of developing the National Statement, it will be important to engage with Māori and seek their views and input.

Interests of Māori in particular applications for approval

28 Subject to the outcome of engagement with Māori on national and regional statements, we also intend to consider how the interests of Māori should be factored into the decision-making process relating to individual applications for network approval.

29 We anticipate that, where an application for approval engages Tiriti rights or interests, for example those under a Tiriti settlement, or the interests of Māori in a particular community it would be necessary that such decisions are properly informed by these considerations, including ensuring that the interests of local hapū and iwi are properly understood and appropriately weighed in making any decision. In some applications for network approval, it is likely that Māori interests would need to be given significant weight, and it may be necessary to ascertain who has, or not, supported the proposed

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1 Te Kupenga gives a picture of the social, cultural, and economic wellbeing of Māori in New Zealand, including information from a Māori cultural perspective.
service, particularly if it is expressed to provide a te reo Māori pathway or to serve a Māori community.

These matters do not need express reference in the Act, but may be referred to in the national or regional statements, or in regulations created to support the process for obtaining network approval, if appropriate.

We propose to consult on our proposals but also invite other suggestions

We propose to engage on these preferred proposals and ask respondents to identify other proposals they consider would give effect to Te Tiriti and its principles, and to sections 4(d) and 9(2)(b) of the Act. We think it is important that we consult with an open approach as to how we consider this in our policy development and implementation.

We propose to consult on our proposals but also invite other suggestions

We propose to engage on these preferred proposals and ask respondents to identify other proposals they consider would give effect to Te Tiriti and its principles, and to sections 4(d) and 9(2)(b) of the Act. We think it is important that we consult with an open approach as to how we consider this in our policy development and implementation.

In line with the way these responsibilities are currently expressed in legislation our key questions would be:

- What are some ways the Crown could give effect to Te Tiriti o Waitangi as part of the design and implementation of the network planning function?
- What are some ways the Crown could better support Māori-Crown relationships as part of the design and implementation of the network planning function?
- What are some ways the Minister could consider the availability of services in the area with different offerings, for example, the provision of te reo Māori?

It will be important that we design the new network planning framework with engagement from Māori on these proposals.

We expect that Te Tiriti o Waitangi requirements could develop over time, either as we learn from the network approval once implemented and/or as other changes to give effect to Section 4 obligations are introduced more broadly across the education system.

Te Tiriti submissions on the Bill

As part of developing this paper we have reviewed submissions on the Education and Training Bill and considered advice on the meaning of section 4(d) of the Act. There were very few submissions that referenced early learning and almost none referred to network management.

The written submission from the Iwi Chairs Leaders Forum on the Bill suggested all new applications should require consultation with mana whenua including how te reo Māori, tikanga and local mātauranga will be incorporated.

We have not put forward this proposal because on balance we consider it is a higher threshold for the establishment of new early learning services that does not currently apply to schools or tertiary providers. It may also put significant compliance cost on mana whenua to engage with every application for pre-approval.

If the Government wishes to consult with mana whenua on the establishment of all new education services, then we consider this would be best dealt with via a mechanism that is focused on the education system as a whole.
Right to Challenge Decisions

39 As part of designing a new function that will regulate the early learning network, we need to consider what review or appeal rights an applicant should have in respect of network planning approval decisions, if any. This issue has not been explicitly addressed previously. A general principle outlined in the Legislation Design and Advisory Committee’s Legislation Guidance is that: “Where a public body makes a decision affecting a person’s rights or interest, that person should generally be able to have the decision reviewed in some way”.

40 We propose consulting with the early learning sector on:

- Not providing any statutory right appeal against a Ministerial decision to decline an application for network approval, which would mean the right of judicial review would be the primary option for challenging such a decision.
- The proposed right of appeal to the District Court relating to a determination by the Secretary for Education that the applicant is not fit and proper or financially viable, following notice of an intention to make an adverse determination on this basis).

We propose that judicial review is the most appropriate review option for Ministerial decisions under s17

41 We propose not to provide for any statutory appeal against decisions made under section 17. The most appropriate review option for section 17 is a right to judicial review of the decision in the High Court, which exists independently of any statutory appeal rights. Applicants who are dissatisfied with your decision to decline an application for network approval would have a right to judicial review, the procedure for which is set out in the Judicial Review Procedure Act 2016. This right of review does not need to be specified in our legislation.

42 A judicial review has the following benefits:

- it is already provided for in law
- it can be quicker than the District Court process and therefore a decision is more timely
- it provides a framework for considering the lawfulness of a decision (including the process followed) without reconsidering the merits of the decision, so is better suited to Ministerial decisions that are discretionary or involve policy.

43 There are some disadvantages with judicial review for you as decision maker. A High Court judge can overturn your decision if he/she considers you were mistaken about the facts or about the law, took into account irrelevant factors, or did not follow the rules of natural justice. Judicial review can also be used by non-applicants who consider they were impacted by the decision to approve or decline a pre-application. In our view these reasons do not justify explicitly removing the right to judicial review, which is affirmed by s 27(2) of the New Zealand Bill of Rights Act 1990. Circumstances must be compelling to limit the right of judicial review.
We considered providing for other review and appeal options, including if an applicant should have the right to appeal your decision to a court (see Table 1). On balance none of these options are preferable to the existing right of judicial review and also carry additional disadvantages. We will need to clearly communicate our rationale for this approach to the sector, given there is an appeal right against administrative decisions of the Secretary in the existing licensing regulations.

Table 1: analysis of other appeal options

<table>
<thead>
<tr>
<th>Other options considered</th>
<th>Benefits</th>
<th>Issues</th>
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<tbody>
<tr>
<td>General appeal to the District Court</td>
<td>Consistent with licensing regulations that include a right of appeal to the District Court</td>
<td>An appeal to the District Court on the merits of a decision is less suitable for a Ministerial decision that is discretionary (rather than administrative), because the District Court should not be asked to second guess the Minister’s policy judgement. The District Court can be slower.</td>
</tr>
<tr>
<td>General appeal to the High Court</td>
<td>It is more appropriate that a decision of a Minister is reviewed at the High Court, rather than the District Court</td>
<td>An appeal to the High Court on the merits of the decision is less suitable for a Ministerial decision that is discretionary (rather than administrative), because the High Court should not be asked to second-guess the Minister’s policy judgement.</td>
</tr>
<tr>
<td>Appeal to the High Court on a question of law</td>
<td>This can be a good option where you want to constrain the jurisdiction of the court to consider particular matters only</td>
<td>This type of appeal does not generally offer any greater rights than are available through judicial review.</td>
</tr>
<tr>
<td>Establishment of a separate appeal or review authority</td>
<td>This can be an effective option where the matter may require specific technical expertise</td>
<td>We do not consider this option is warranted given the high administrative costs to establish such a committee and small number of preapplications likely to seek an appeal.</td>
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We propose a right of appeal to the District Court against adverse decisions of the Secretary under s18

We propose a two-stage process for the proposed fit and proper assessment and financial viability assessment conducted by the Secretary under section 18.

**Stage one**

We propose that, prior to the Secretary for Education making any adverse decision, the Secretary would first issue a notice of intention to make such a decision, and invite a response from the applicant. This would be set out in the regulations created to
serve the network planning application process, rather than in the legislation. This process would require the Secretary to provide an applicant with the opportunity to respond to the proposed reasons for concluding that any applicant or governance member was not fit and proper, or the proposed early childhood service was not considered financially viable.

47 We consider this is an important way to ensure that any decision is not based on material errors of fact or misinterpretation, and that any other information held by the Secretary and taken into account is put to the applicant for comment. A notice of intention process would also give the applicant an opportunity to remove a particular person from a governance role if that person prevents the applicant from otherwise being considered fit and proper.

Stage two

48 We propose an applicant should ultimately have a right of appeal to the District Court, similar to the right of appeal against decisions of the Secretary under the Education (Early Childhood Services) Regulations 2008 that apply to the licensing process. This right would be set out in section 18 itself.

49 The fit and proper and financial viability thresholds require administrative assessments that are the type of decisions that would generally result in a right of appeal and it would be unusual not to provide this.

Assessing Financial Position and Licensing History

50 The Education and Training Act 2020 has introduced two new provisions relating to financial position and licensing history and we want to consult with the early learning sector on our proposals to assess these matters.

51 The purpose of these provisions is to assess the suitability of an applicant to establish a new service. An applicant that has insufficient funding and resources, and/or a poor licensing history is unlikely to be suitable to establish and operate an early learning service.

Assessing financial position

52 To assess financial position, we propose that the applicant provide any financial information that demonstrates the applicant has either sufficient finances to establish the service and/or a business plan to show how sufficient finances will be attained. Financial information could include an annual report, a business plan identifying how the service will be funded, and/or statements from appropriate financial institutions or licensed financial advice providers. The Secretary would review these in detail as part of the section 18 assessment.

53 At the network approval stage, we think it is unreasonable to expect all services to have sufficient funding, particularly community-based services that may be relying on some aspect of government funding, fundraising efforts and/or donations. If an applicant does not have sufficient finances at the preapplication stage, we propose to use conditions to require an applicant to provide regular updates on financial progress. Large providers with significant capital will likely find this particular requirement easy to satisfy.

Assessing licensing history

54 To assess licensing history, we propose to ask for a list of all services that the applicant has been in control of or had any role as a governing member and relevant timeframe.
We will then determine suitability by assessing this list of services against information held by the Ministry.

55  If the applicant did not provide this information the Secretary would have a limited means of determining which services the applicant has been associated with, largely based on any publicly available records, as the Ministry does not currently collect information about governors and directors of services.

Timing of implementation

56  The Education and Training Act requires the network planning function to come into effect by 1 August 2022. The timeframes for implementation are now very tight.

57  Deferring commencement for six months would provide more time to consult on a National Statement and to develop operational policy. Deferring commencement would require amending the Act, which could be achieved through a Supplementary Order Paper on the Education and Training Amendment Bill (ETAB) currently before the House.

58  Timelines and considerations of the two options (current timeline or delayed commencement) are outlined below. The Ministry’s preferred option is delaying commencement.

Option 1: Continue with current implementation of 1 August 2022

59  The timeline below does not have room for slippage. To meet the timeframe for implementation, we are likely to need to reduce the public consultation period in September to four weeks. |

<table>
<thead>
<tr>
<th>Date</th>
<th>Stage</th>
<th>Comment</th>
</tr>
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<tbody>
<tr>
<td>Aug 2021</td>
<td>Cabinet approval for consultation</td>
<td>25 Aug - SWC 30 Aug - Cabinet</td>
</tr>
<tr>
<td>Sept 2021</td>
<td>Public consultation</td>
<td>We had planned an 8 week consultation period. This timeline assumes a shortened consultation timeframe of 4 weeks. Consultation will include a mock up of a National Statement.</td>
</tr>
<tr>
<td>Oct 2021</td>
<td>Analysis of consultation feedback</td>
<td>Provides 4 weeks for analysis of submissions.</td>
</tr>
<tr>
<td>Nov 2021</td>
<td>Provision of advice, dept and ministerial consultation on Cabinet paper</td>
<td>First week of December. May receive first reading and be referred to Select Committee. Select Committee may open submissions.</td>
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<tr>
<td>Dec 2021</td>
<td>Education &amp; Training Amendment Act (no 2) introduced</td>
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<td>Date</td>
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</table>
| Dec 2021        | Cabinet agreement to issue drafting instructions for network planning Act changes | SWC – 8 December  
                   |                                                                      | Cabinet – 13 December                                                 |
| Jan 2022        | Cabinet paper drafted and circulated for dept and ministerial feedback | Needs to be lodged by 3 Feb                                            |
| Feb 2022        | Cabinet agreement to introduce as SOP to ETAB2                        | LEG – 10 February  
                   |                                                                      | Cabinet – 14 February                                                 |
| Late Feb 2022   | SOP referred to Select Ctte, call for submissions                     | Late introduction means the timeframe for submissions on this component is short |
| Late April / early May 2022 | ETAB2 reported back to the House | Assumes Bill is in Select Ctte for 4-5 months                            |
| May 2022        | House stages of ETAB2                                               | Bill passed by 31 May                                                  |
| Dec 2021-Feb 2022 | Development of supporting regulations, provision of advice on these  | Regulations will outline the fee, the process, and the content required in the application for pre-approval. 
                   | Provision of advice on draft National Statement                      | Consequential amendments to the existing licensing regulations will also be needed (eg to make sure the fit and proper assessment is the same) |
| March-April 2022 | Public consultation on proposals for regulation change                | Will require Cabinet approval to consult.                              |
|                 | Public consultation on a draft National Statement                    | Ideally consultation on a draft National Statement and regulations supporting network planning would occur once the enabling legislation has passed. |
| April 2022      | Analysis of consultation feedback                                    |                                                                        |
| May 2022        | Cabinet agreement to drafting instructions for regulations            | SWC – first week of May  
                   |                                                                      | Cabinet – second Monday in May                                        |
|                 |                                                                     | Provides a very short period for PCO to draft.                        |
| June 2022       | Cabinet agreement to regulations                                      | To provide for the 28 day rule:  
                   | National Statement gazetted                                           | LEG – 15 June  
                   |                                                                      | Cabinet – 20 June  
                   |                                                                      | EC – 4 July |
| 1 Aug 2022      | Policy implementation                                                |                                                                        |

**Option 2: Defer commencement by six months (to 1 February 2023)**

This option would still require the Act changes to be introduced via a Supplementary Order Paper in February 2022 – this part of the timeline would largely remain the same (shaded in yellow in the above table; not repeated in the table below). However, ETAB2 could take slightly longer in Select Committee and in the House once reported back.
62 The deferred commencement would enable consultation on a draft National Statement once the legislation has been passed. It would also provide more lead in time for the development of operational policy and processes, which would improve the implementation of the new function.

63 The deferral of the commencement date would require Cabinet agreement to drafting instructions and to introduction. The current Education and Training Amendment Bill is about to be reported back to the House. Its House stages would need to be delayed to enable a deferred commencement via SOP.

<table>
<thead>
<tr>
<th>Date</th>
<th>Stage</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aug 2021</td>
<td>Cabinet agreement to deferral of commencement</td>
<td>Approval of drafting instructions SWC – 4 August, Cabinet – 9 August, Approval to introduce LEG – 26 August, Cabinet – 30 August (same Cabinet as approval to consult on policy options)</td>
</tr>
<tr>
<td>Sept 2021</td>
<td>SOP on Education and Training Amendment Bill (no. 1)</td>
<td>ETAB1 must be passed by the end of 2021</td>
</tr>
<tr>
<td>Aug 21 – May 22</td>
<td>Same steps as shaded yellow in above timeline</td>
<td></td>
</tr>
<tr>
<td>Dec-March 2022</td>
<td>Development of supporting regulations, provision of advice on these</td>
<td>Regulations will outline the fee, the process, and the content required in the application.</td>
</tr>
<tr>
<td>April-May 2022</td>
<td>Public consultation on proposed regulations</td>
<td>Cannot be brought in until ETAB2 has passed</td>
</tr>
<tr>
<td>From May 2022</td>
<td>House stages of ETAB2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Cabinet agreement to supporting regulations</td>
<td></td>
</tr>
<tr>
<td>Once ETAB2 is passed</td>
<td>Public consultation on draft National Statement</td>
<td>Allow two month consultation. Longer may be required for Iwi and Māori input.</td>
</tr>
<tr>
<td>Once legislative settings are clear</td>
<td>Development and finalisation of operational processes and policies</td>
<td>This includes communication collateral for the sector to ensure the process is clear for applicants</td>
</tr>
<tr>
<td>1 Feb 2023</td>
<td>Policy implementation</td>
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Scope of Tranche 2

64 To confirm the scope of the consultation document in September 2021, we recommend that you confirm that the following workstreams are in-scope for tranche two of the Review:

- Regulating for 80% qualified teachers [METIS 1253466 and 1255415 refers].
- Improving the person responsible requirement [METIS 1255415 refers].
- Implementing the new network planning function METIS 1255416 and this paper refers, including changes to existing licencing regulations (the Education
(Early Childhood Services) Regulations 2008) to support or align with network planning

- Technical matters (to be progressed via consultation on draft regulations) [see below].

Other technical matters

65 Following consultation on proposals for Tranche 2 we expect additional technical matters will be raised that may require additional changes to the Education (Early Childhood Services) Regulations 2008. At this stage is not possible to identify all the matters this may include.

66 If additional issues are raised we propose to give the sector the opportunity to provide feedback via consultation on the draft regulations exposure draft (if time permits). We would seek your agreement to any additional changes prior to consulting with the sector.

Proactive Release

67 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.