



Education Report: Further proposals for Tranche 2 of the Early Learning Regulatory Review

To:	Hon Chris Hipkins, Minister of Education		
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Purpose of Report

This paper seeks your agreement to include two additional proposals in the forthcoming Cabinet paper seeking approval to amend the Education (Early Childhood Services) Regulations 2008 (the Regulations) to regulate for 80 percent qualified teachers and strengthen person responsible requirements. These two additional proposals will amend the Regulations to strengthen the Ministry of Education's (the Ministry's) licensing and enforcement practices.

Summary

1. The Ministry is working on Tranche 2 of a three-stage review of the early learning regulatory system [SWC-20-MIN-0116 refers]. As part of this work, we recently sought your agreement to prepare a draft Cabinet paper seeking approval to issue drafting instructions to the Parliamentary Counsel Office (PCO) and to publicly consult on draft regulations to:
 - a. regulate for 80% qualified teachers in teacher-led centre-based services [METIS 1253466]; and
 - b. strengthen the person responsible requirement in teacher-led centre-based services, hospital-based services, and home-based services [METIS 1255415].
2. During the development of this advice, we have identified two further amendments to the current Regulations to help ensure the Ministry can be a more effective and responsive regulator. The amendments have implications for the Ministry's licensing and enforcement practices, and relate to:
 - a. the ability to add conditions to a provisional licence; and
 - b. the definition of 'permanently cease to operate' for the purpose of cancelling a licence, including expressly allowing for the Secretary to grant temporary closures.
3. We would like to undertake public consultation on proposals to amend the Regulations so that additional conditions can be added to a provisional licence, at the discretion of

the Secretary where this is considered to be fair and appropriate, to be met by a new deadline but no longer than 12 months from when the licence was reclassified as provisional.

4. We would also like to publicly consult on proposals to amend the Regulations to clarify that 'permanently ceased to operate' be defined as:
 - a. when the service provider has notified the Ministry that it has permanently ceased to operate; or
 - b. when the Ministry is made aware that the service has not been operating for a minimum period of three months or more as evidenced by two or more of the following criteria:
 - i. there being no children enrolled and/or attending the service; or
 - ii. there being no staff employed or engaged and working in the service; or
 - iii. the service provider has not claimed ECE funding.
5. We intend to seek feedback on two options for implementing this definition based on the period of time that would need to pass with the criteria being met before a service would be deemed to have permanently ceased to operate (i.e., either three or six months). We are also clarifying that service providers can apply to the Secretary for a temporary closure. Service providers ask for a temporary closure when they need to close for a short period but intend to resume operation.
6. We are seeking your agreement to include these proposed amendments in the draft Cabinet paper referred to above, and publicly consult on these amendments later this year.
7. Subject to your agreement, we will prepare consultation material and append this to the draft Cabinet paper. We intend to provide you with a draft Cabinet paper by October 2022.
8. Following consultation, we will report back to Cabinet in April 2023 seeking agreement to proposed amendments and to issue drafting instructions to PCO.

Recommended Actions

The Ministry of Education recommends you:

- a. **agree** that we seek Cabinet approval to consult on two further amendments to the Education (Early Childhood Services) Regulations 2008 in the forthcoming Cabinet paper addressing 80 percent qualified teachers in teacher-led centre-based services [METIS 1253466] and strengthening the person responsible requirement in teacher-led centre-based, hospital-based and home-based services [METIS 1255415].

Agree / Disagree

- b. **agree** that we seek Cabinet approval to consult on a proposal to amend regulations so that additional conditions can be added to a provisional licence, at the discretion of the Secretary where this is considered to be fair and appropriate, to be met by a new deadline, but no longer than 12-months from when the licence was reclassified as provisional.

Agree / Disagree


- c. **agree** that we seek Cabinet approval to consult on proposals to amend regulations to insert a definition of the term 'permanently ceased to operate' as:

- i. when the service provider has notified the Ministry of Education that it has permanently ceased to operate; or
- ii. when the Ministry of Education is made aware that the service has not been operating for a minimum period of three OR six months or more as evidenced by two or more of the following criteria:
 - i. there being no children enrolled and/or attending the service; or
 - ii. there being no staff employed or engaged and working in the service; or
 - iii. the service provider has not claimed early childhood education funding.

Agree / Disagree

- d. **agree** that the Ministry of Education release this briefing in full once the proposals have been publicly consulted on.

Agree / Disagree


Paul Scholey
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Te Puna Kaupapahere

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Hon Chris Hipkins
Minister of Education

2/9/22

Background

1. The Ministry is working on Tranche 2 of a three-stage review of the early learning regulatory system [SWC-20-MIN-0116 refers]. Tranche 2 involves achieving some key shifts in the system, including implementing network management, regulating for 80% qualified teachers in teacher-led centres, and strengthening person responsible requirements.
2. We recently sought your agreement to prepare a draft Cabinet paper seeking approval to issue drafting instructions to PCO and to publicly consult on draft regulations to:
 - a. regulate for 80% qualified teachers in teacher-led centre-based services [METIS 1253466]; and
 - b. strengthen the person responsible requirement in teacher-led centre-based services, hospital-based services, and home-based services [METIS 1255415].
3. During the development of this advice, and through our wider work to implement network management, we have identified two further amendments to the Regulations that we consider should be addressed as part of Tranche 2 to ensure the Ministry can be an effective and responsive regulator. The amendments have implications for the Ministry's licensing and enforcement practices, and relate to:
 - a. the ability to add conditions to a provisional licence; and
 - b. the definition of 'permanently cease to operate' for the purpose of cancelling a licence.
4. We have developed proposals to amend the regulations to expressly allow the Secretary to add conditions to provisional licences, insert a definition for 'permanently ceased to operate', and provide for the Secretary, at their discretion, to grant a service provider the ability to temporarily close the service for a period up to three months on application. We would like to seek Cabinet agreement to publicly consult on these proposals.

Adding conditions to a provisional licence

Current requirements relating to provisional licensing

5. The reclassification of a service provider's licence to a provisional licence is one of the key tools available to the Ministry to enforce compliance with the Regulations and licence conditions.
6. A provisional licence allows a service to continue operating and children to continue attending while the service provider works towards achieving full compliance. Regulation 15 provides for the Secretary to reclassify a probationary licence or a full licence as a provisional licence for several reasons, including if the service does not comply with the regulations or conditions on their licence.¹
7. Services that have their licence reclassified to a provisional licence must comply with conditions specified on the provisional licence by the specified date(s). Each condition on a provisional licence can have a different date specified for compliance. Typical practice is that deadlines for complying with specific conditions are set up to three

¹ Other reasons that a service may have their probationary or full licence reclassified as a provisional licence includes when a complaint is lodged alleging non-compliance with the regulations; an incident involving a child has occurred at the service warranting investigation; or the service has not complied with a written direction from the Secretary under these regulations within a reasonable time.

months.² Issues that are likely to take longer to address, such as improvements to the delivery of the curriculum, may be set at six months.

8. The Secretary can extend the deadline for a condition under Regulation 16(3). However, no compliance dates can be set later than 12 months after the provisional licence was issued.³ This helps to ensure that services address non-compliance in a timely manner.
9. A provisional licence remains in force until the Secretary either:
 - a. revokes the provisional licence and returns a full or probationary licence; or
 - b. cancels the service provider's provisional licence.
10. The Secretary must cancel a provisional licence if satisfied that any condition has not been complied with by the date specified for compliance.
11. The effect of the above regulations is that a provisional licence must be cancelled (i.e., the service provider will no longer be able to operate) if compliance is not demonstrated by the compliance date set for any one condition, regardless of whether there are later compliance dates set for other conditions, unless an extension is provided. Where a cancellation pathway is followed, the Secretary implements a process of giving notice of proposed provisional licence cancellations to ensure natural justice requirements are met.

The problem with the current provisional licensing requirements

12. The regulations do not expressly allow for new conditions to be added to a provisional licence during the term of the provisional licence or set boundaries around when and how this can be done. Additional non-compliance can be identified during Ministry on-site visits to assess compliance with existing conditions or when responding to an incident or complaint.
13. Currently, although the Secretary can issue a written direction or suspend a service provider's licence, in many cases they can only make the service provider aware of the new non-compliance and then wait until the current provisional licence process has been completed before issuing a subsequent provisional licence to address this new non-compliance.
14. The inability to add additional conditions to provisional licences impedes the Ministry's ability to respond directly and in a timely manner when further non-compliance is identified. They also do not provide the services enough certainty around the expectations for when compliance issues must be addressed.

Amending the Regulations to ensure provisional licensing is a more effective and responsive enforcement tool

15. We recommend that the Regulations be amended to expressly allow the Secretary to add additional conditions to a provisional licence at their discretion, provided the Secretary considers this to be a fair and appropriate response to the non-compliance. This change will allow the Ministry to better undertake its regulatory function by providing more timely and responsive enforcement action to address newly identified compliance

² Regulation 16(2) outlines that compliance dates will not usually be set longer than three months after the day on which the provisional licence was issued.

³ Additionally, the Secretary has powers under subclause 39A(3)(c) of the regulations to extend the date for compliance with any conditions, and subsequent extensions, set out in a provisional licence, by no more than a further three months. These special powers are only able to be applied under the state of emergency or epidemic notice.

issues. It also provides services more certainty around our requirements to address compliance issues, as well as provide greater transparency for parents and whānau of a service's compliance with regulations.

16. We consider that the use of this power should be at the Secretary's discretion and where it is deemed fair and reasonable for the Secretary to exercise this option. This is because there may be situations where, depending on when additional non-compliance is identified and the nature of this non-compliance, adding additional conditions to a provisional licence would not be an appropriate enforcement response. This is because it may have an undue impact on the service provider, the children attending the service, and/or parents and whānau. For example, it may be preferable to allow the current provisional licence process to be completed and a new provisional licence issued, or the Secretary may have already confirmed their intention to cancel the licence.
17. Additionally, a recent change to regulations requires the Secretary to cancel a service provider's licence if satisfied that the provider has previously had a probationary or full licence be reclassified as provisional, is currently non-compliant with one or more of the regulatory standards, and is not likely to comply with the standards in the future.
18. In some cases, such as where the additional non-compliance found is relatively minor, the immediate issuing of another provisional licence can unnecessarily create a provisional licence history and/or require cancellation of the licence. Providing the Secretary with discretion to determine whether to add conditions to an existing provisional licence will help to ensure that the overall impact of any enforcement action is considered and proportionate to the situation and risks associated with the non-compliance issues being addressed.

Proposals for adding conditions to provisional licences

19. We would like to consult on a proposal to amend regulations so that additional conditions can be added to a provisional licence, at the discretion of the Secretary where this is considered to be fair and appropriate, to be met by a new deadline, but no longer than 12-months from when the licence was reclassified as provisional.
20. Following consultation feedback, this proposal will be assessed against the following objectives. The proposed amendment:
 - a. ensures the Ministry can be a competent and responsive regulator, including undertaking enforcement action in a considered, proportionate, and timely manner;
 - b. ensures there is clarity and certainty for service providers, parents and whānau, and the Ministry regarding the use of provisional licences to enforce compliance with the regulations and licence conditions; and
 - c. facilitates a prompt and timely response to compliance issues by service providers.
21. We also propose to allow service providers to seek extensions to the timeframe for the new conditions in accordance with the current provisions for allowing extensions. The existing 12-month maximum period for all conditions to be complied with (inclusive of any permitted extensions) would still apply from when the licence was reclassified as provisional.
22. This proposal provides the Secretary with flexibility to impose an appropriate timeframe for service providers to resolve newly identified compliance issues. It also provides parents and whānau with some assurance that the service provider will be required to address the identified compliance concerns within 12 months of when the provisional licence was first issued.

23. Under this option there may still be situations where service providers would not have enough time to address any substantive compliance issues that arise close to the 12-month end date for a service to comply with conditions on their provisional licence. However, in such cases, the Secretary can wait to formally address the additional non-compliance as part of a service provider's new provisional licence (issued once the previous provisional licence date has ended) rather than adding conditions to the existing provisional licence. If the non-compliance is urgent the Secretary can issue a written direction or suspension of a service's licence.

Other options considered

Adding additional conditions to an existing provisional licence, with compliance deadlines the same as for existing licence conditions

24. We considered the option of amending regulations to give the Secretary the discretion to add additional conditions to an existing provisional licence, with timeframes for compliance to be no later than the last deadline for existing licence conditions.
25. This option would provide some reassurance to parents and whānau that service providers would address any new matters of non-compliance within the same timeframes that were set to address the initial compliance concerns.
26. However, we are not progressing with this option as, depending on the timing and nature of the new compliance concern identified, it may not allow service providers a reasonable amount of time to remedy these issues. This may also compromise the ability of the service provider to meet existing conditions on time. A further risk is that this option would likely cause service providers to more frequently request extensions to the timeframes that have been set which would increase the administrative burden for both the Ministry and service providers.
27. Additionally, the option to set additional conditions to the last deadline for existing licence conditions can be accommodated, if appropriate, within the scope of the Secretary's discretion as per the proposal.

Adding additional conditions to an existing provisional licence, with compliance deadlines extending beyond the 12-months from when a licence was reclassified as provisional

28. We also considered the option of amending the regulations so that additional conditions can be added to a provisional licence as per the above proposal, with timeframes for conditions allowed to extend beyond 12-months from when the licence was reclassified as provisional, under exceptional circumstances. What was deemed to be exceptional circumstances would be at the discretion of the Secretary. At present, the Secretary cannot set compliance dates beyond 12-months to avoid services being in an extended period of non-compliance.
29. Ultimately, we are not progressing with this option as allowing service providers to potentially be non-compliant with the regulations for longer than 12 months would present a significant change to the regulatory framework. This would have negative impacts on parents and whānau and children attending the service.

Defining 'permanently ceased to operate'

Current requirements relating to the cancellation of licences

30. As part of our work to implement network management, we have identified an opportunity to amend the Regulations to provide greater clarity and certainty regarding the cancellation of licences for services that are no longer operating. The ability to cancel licences that are clearly no longer in use by a service provider and potentially free up network space for other providers will be important for achieving the intention of network management.
31. Regulation 32(2) sets out the Secretary's powers to cancel a service provider's licence. It states that the Secretary is required to cancel the licence of an early childhood service if satisfied that the service:
 - a. has permanently ceased to operate; or
 - b. has ceased to be an early childhood service; or
 - c. if applicable, has ceased to operate in the premises specified in the licence and has not been issued with a temporary relocation licence.
32. The Secretary is required to take all reasonable steps to give the licensed service provider notice of the Secretary's intention to cancel the licence before cancelling, and to take account of any representations received from the service provider.
33. Section 28(1) of the Education and Training Act (the Act) requires that licensed service providers who operate an early childhood education and care centre are committing an offence if they cease to operate a centre, in circumstances other than an emergency, without first notify the Secretary. A person who commits the above offence is liable for conviction to a fine not exceeding \$200. This requirement does not cover hospital-based or home-based service providers, and only concerns providers who operate a centre-based service. Addressing this issue would require amendment to the Act.
34. There are situations where a service provider may want to cease operating for a short period of time only and therefore not want their licence to be cancelled. For example, a service provider may temporarily close its premises to undertake renovations or as a result of temporarily low attendance numbers (e.g., due to the impact of COVID-19).
35. In these cases, current operational practice is for the service provider to seek agreement from the Secretary to a 'Voluntary Temporary Closure'. If approved, voluntary temporary closures are usually agreed for a period of up to three months, after which a service can request a further three-month extension in extenuating circumstances.⁴ However, it is important that voluntary temporary closures are only permitted for a short and managed period of time, as extended closures can significantly impact the ability of service providers to continue to meet all of their ongoing regulatory requirements.

Problem with the current requirements around cancellation of licences

36. The current regulations require the Secretary to cancel the licence of any service that has permanently ceased to operate. However, there is no definition of 'permanently ceased to operate' in the regulations, which means there can sometimes be disagreement between the Ministry and the service provider about whether they have permanently ceased to operate or not. This can cause unnecessary confusion and distress and be both resource and time consuming for the service provider and the Ministry.

⁴ In exceptional circumstances relating to COVID-19 services can request to stay closed for a further three months.

37. Centre-based service providers are required to notify the Secretary when their service has ceased to operate. However, it is not uncommon for the Ministry to become aware that a service has ceased to operate without any notification being given. This is particularly an issue for home-based services, who are not covered by the notification requirements in 28(1), where our data suggests that notification often tends to follow a change in management. To carry out its network management function, the Ministry needs to know when a service is no longer operating so it can be removed from the network. This information is also important to prevent services from fraudulently claiming the ECE funding subsidy.
38. Additionally, the regulations do not set out the process for services to temporarily close. Care is required to ensure that any changes to the requirements for the cancellation of licences do not inadvertently affect the ability of service providers to request a temporary closure where there is genuine need and intention to reopen. This will be particularly important following the introduction of network management, where service providers that have their licence cancelled will need to apply for and receive network management approval before they can apply for a new licence if they want to reopen.

Proposals to amend the Regulations to clarify requirements around cancellation of licences and temporary closures

39. We propose to amend the Regulations to insert a definition of the term 'permanently ceased to operate' as:
- a. when the service provider has notified the Ministry that it has permanently ceased to operate; or
 - b. when the Ministry is made aware that the service has not been operating for a minimum period of three months or more as evidenced by two or more of the following criteria:
 - i. there being no children enrolled and/or attending the service; or
 - ii. there being no staff employed or engaged and working in the service; or
 - iii. the service provider has not claimed ECE funding.
40. We also propose to amend the regulations to explicitly provide for the Secretary to grant a service provider approval to temporarily close the service for a period up to three months, with the possibility of an extension on request. This would be at the discretion of the Secretary and subject to an application from the service provider.
41. These amendments would provide greater certainty and clarity around the exercise of the power to cancel licences in Regulation 32, including greater clarity about when the Secretary is required to cancel licences that are not operating. This would also ease the removal of defunct licences from the network of licensed early childhood services to facilitate entry of new services as set out in the Act.⁵
42. These amendments would also provide more certainty and transparency to the sector on temporary closures, as well as strengthen the Ministry's ability to enforce the existing requirements for early childhood education and care centres to notify the Ministry when they intend to close. However, we note that the exercise of discretion by the Secretary will be required to prevent service providers who have no intention of re-opening from being able to 'temporarily' close for extended periods of time while they seek to sell their service.

⁵ Sections 17-18 of the Act set out new network management requirements that service providers must meet before being granted a licence. These provisions come into force in 2023.

Options for defining 'permanently ceased to operate'

43. We have identified two options for making the amendments outlined in paragraph 39 that we would like to get feedback on through public consultation. They relate to the period of time that would need to pass with the criteria being met before a service would be deemed to have permanently ceased to operate (i.e., either three or six months).
44. Following consultation feedback, these options will be assessed against the following objectives. The proposed amendment:
- a. ensures the Ministry can be a competent and responsive regulator, including establishing robust systems and practices to perform its network management function;
 - b. ensures there is certainty for service providers, parents and whānau, and the Ministry regarding temporary closures and the cancellation of licences; and
 - c. ensure clarity in regulations around when services permanently cease to operate and when licences are required to be cancelled.

Option 1 – Set the period of time for which a service has not been in operation before it is deemed to have permanently ceased to operate at three months or more

45. This option enables more timely and active management of the network by removing non-operating services from the network more swiftly. This will free up space in the network for new service providers wanting to enter the network. However, there is a risk that three months is not enough time for service providers to determine whether they will permanently cease to operate or intend to resume operation.

Option 2 – Set the period of time for which a service has not been in operation before it is deemed to have permanently ceased to operate at six months or more

46. This option may strike a more reasonable balance for a service provider to close its' service for a short period of time when there are good reasons to do so before risking cancellation of the licence.
47. However, this option would not support the network management function as well as Option 1, because it would take longer for the Secretary to be able to cancel the licence of a service providers that has permanently ceased to operate but not notified the Ministry. This could have a negative impact on any new services assessment on whether there is an opportunity to seek network management approval.

Te Tiriti o Waitangi considerations

48. The Crown has an obligation under Te Tiriti o Waitangi to protect and promote te reo Māori and tikanga Māori. The proposed regulatory amendments outlined in this report will apply to the Ministry's licensing and enforcement practices for all licensed early childhood services, including those held by Māori and iwi service providers and those used for the provision of Māori medium and Kaupapa Māori early learning services.
49. The proposal to add conditions to provisional licenses is intended to ensure that services address all compliance issues and provide high quality early learning, benefitting all the children that attend these services and their whānau. The other changes outlined in this paper will enable services that have permanently ceased to operate to be removed from the network. This will support more active management of the early learning network

including helping to grow the provision of Māori immersion services, hāpu/iwi-owned services and services with a distinct Māori identity and culture.

Next steps

50. Subject to your agreement, we will include the above proposals in the draft Cabinet paper referred to in paragraph 2.
51. We will prepare draft consultation material seeking feedback on these options, which we will append to the draft Cabinet paper. A general timeline is outlined below.

Date	Activity
October 2022	Cabinet paper seeking agreement to consult on proposed amendments
November – December 2022	Public consultation on policy proposals on proposed amendments
December 2022 – January 2023	Analysis of submissions
April 2023	Cabinet paper seeking agreement to amend the regulations and issue drafting instructions to PCO

52. It is recommended that this paper is proactively released in full once the proposals have been publicly consulted on.