

Cabinet Paper material

Proactive release

Minister & portfolio Hon Chris Hipkins, Minister of Education
Name of package Education (Early Childhood Services) Amendment Regulations 2021
Date considered 28 June 2021
Date of release 20 July 2021

These documents have been proactively released:

Cabinet Paper: Education (Early Childhood Services) Amendment Regulations 2021
28 June 2021
Minister of Education

Cabinet Minute: CAB-21-MIN-0242
28 June 2021
Cabinet Office

Cabinet Minute: LEG-21-MIN-0093
24 June 2021
Cabinet Office

Material redacted

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The applicable withholding grounds under the Act are as follows:

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In confidence

Office of the Minister for Education
Chair, Cabinet Legislation Committee

Education (Early Childhood Services) Amendment Regulations 2021

Proposal

- 1 This paper seeks agreement to submit the “Education (Early Childhood Services) Amendment Regulations 2021” (the Amendment Regulations) to the Executive Council. This is the first tranche of changes in a comprehensive review into the early learning regulatory system.

Executive Summary

- 2 The Ministry of Education is currently undertaking a comprehensive review of the early learning regulatory system (the Review) to ensure the system is clear and fit-for-purpose to support high quality educational outcomes.
- 3 Cabinet authorised the Ministry to consult on proposals for tranche one of the Review (CAB-20-MIN-0359 refers). These proposals are designed to address gaps in the current system and areas that pose a risk to children’s health, safety, and wellbeing. The proposals related to:
 - 3.1 creating a cancellation pathway based on a service’s provisional licence history (proposal one)
 - 3.2 issuing a provisional licence to carry out an investigation in the event of an incident involving a child (proposal two)
 - 3.3 creating written directives for health and safety matters that require immediate attention (proposal three)
 - 3.4 clarifying the provisions for licence amendments when the service provider changes (proposal four)
 - 3.5 removing the 21-day minimum notice period for licence suspensions for change of control (proposal five)
 - 3.6 removing the 21-day minimum notice period for licence suspensions for not returning an invalid licence (proposal six)
 - 3.7 clarifying the information used to assess an application for a probationary licence (proposal seven)
 - 3.8 clarifying that the fee for a new licence is payable upon application and is non-refundable (proposal nine)
 - 3.9 clarifying existing person responsible requirements (proposal ten).

- 4 Consultation ran from 8 December 2020 to 12 February 2021. The Ministry also used this opportunity to consult on two sets of changes to the licensing criteria, the third tier of the early learning regulatory framework. Generally, there was strong support for the proposals.
- 5 As part of the consultation there was a set of draft regulation changes for the sector to provide feedback on. Based on consultation feedback, I only consider it necessary to make minor amendments to the following proposals:
 - 5.1 the cancellation pathway based on a service's provisional licence history will not apply to provisional licences issued for an investigation unless the investigation finds a breach of the regulations (proposal one)
 - 5.2 the maximum timeframe for compliance with a written direction for immediate health and safety matters will be increased from five to ten working days and remove the definition of immediate health and safety risk (proposal three)
 - 5.3 the grounds for licence suspension for not returning an invalid licence will be removed as it is no longer required (proposal six)
 - 5.4 the fee for a new licence will be increased to \$2817.50, up from \$2756.25 to take into account the current rate of GST (proposal nine)
 - 5.5 the practising certificate requirement for persons responsible in teacher-led centres, hospital-based services and home-based services by amending Schedule 1 further (proposal ten)
- 6 It is my view that these changes are matters of detail and are consistent with the intent of the original policy decisions approved by Cabinet (CAB-20-MIN-0359 refers).
- 7 Following Cabinet approval of the Amendment Regulations and assent at Executive Council, the Amendment Regulations will come into force in two stages:
 - 7.1 Proposals one, four, and seven will have a delayed implementation of six months to develop robust internal practice tools to support consistent decision making and guidance for the sector
 - 7.2 The rest of the proposals will come into force on 30 July 2021.

Background

- 8 The Ministry of Education recently began a comprehensive review of the early learning regulatory system (the Review). The purpose of the Review is to ensure the regulatory system is clear and fit for purpose to support high quality educational outcomes for our youngest learners. It is also designed to enhance the Ministry's role as regulator and steward of the system.
- 9 The Review is being undertaken in three tranches to address some of the immediate gaps in our current system first. The latter tranches of the Review will cover the areas that are more complex and require more policy work, including

some of the actions in the Early Learning Action Plan. The final tranche will involve a complete rewrite of the Education (Early Childhood Services) Regulations 2008 (the Regulations).

Policy

- 10 This paper covers tranche one proposals which target regulatory gaps that present limitations, or are cumbersome to implement, and areas that may pose a degree of risk to the health, safety and wellbeing of children.
- 11 On 3 August 2020, Cabinet agreed to issue drafting instructions and start public consultation on tranche one proposals (CAB-20-MIN-0359 refers). These changes include:
 - 11.1 creating a cancellation pathway based on a service's provisional licence history (proposal one)
 - 11.2 issuing a provisional licence to carry out an investigation in the event of an incident involving a child (proposal two)
 - 11.3 creating written directives for health and safety matters that require immediate attention (proposal three)
 - 11.4 clarifying the provisions for licence amendments when the service provider changes (proposal four)
 - 11.5 removing the 21-day minimum notice period for licence suspensions for change of control (proposal five)
 - 11.6 removing the 21-day minimum notice period for licence suspensions for not returning an invalid licence (proposal six)
 - 11.7 clarifying the information used to assess an application for a probationary licence (proposal seven)
 - 11.8 clarifying that the fee for a new licence is payable upon application and is non-refundable (proposal nine)
 - 11.9 clarifying existing person responsible requirements (proposal ten).
- 12 Cabinet also agreed to consult on increasing the minimum room temperature from 16 degrees to 18 degrees Celsius, a requirement set out in the Licensing Criteria.
- 13 I was authorised by Cabinet to make decisions on any issues of detail that may arise during the drafting process without further reference to Cabinet, subject to the decisions being consistent with the decisions from that paper (CAB-20-MIN-0359 refers).
- 14 The Ministry also took the opportunity to consult on amending the licensing criteria for philosophy statements, self-review and annual planning, requiring services to demonstrate regard for the National Education Learning Priorities (NELP).

- 15 The Ministry released a public consultation document and survey on 8 December 2020, with consultation being open until 12 February 2021. The Ministry received 258 survey responses and 21 written submissions. Almost all proposals were well supported, with the exception of the proposal relating to the NELP.
- 16 Based on consultation feedback, and in accordance with the authority provided to me by Cabinet to make decisions on issues with detail, I propose the minor changes outlined below in relation to some of the draft Regulations that were consulted on.

Proposal one: creating a cancellation pathway based on a service provisional licence history

- 17 The key lever for ensuring compliance with the Regulations is a provisional licence. A service can have their licence reclassified as provisional when there has been a breach of the Regulations or the conditions of its licence, or when a complaint has been lodged that warrants an investigation. When a service's licence has been reclassified as provisional, the service provider must resolve the issue within a set timeframe to return to their previous licence status. If the service provider does not comply with the conditions within the specified timeframe, then the licence may be cancelled.
- 18 Currently, if a service is returned to their previous licence from provisional and goes on to breach the regulations later, they can be reclassified as provisional again. This type of cycling can go on indefinitely, indicating the service is unable to sustain compliance with the regulated standards. This could have a detrimental impact on the health, safety, and educational outcomes of children. In August, Cabinet agreed to create a cancellation pathway based on a service's provisional licence history.
- 19 I propose amending Regulation 32 (Cancellation of licences) to allow the Secretary to cancel a licence based on the service's provisional licence history, and their likelihood of future compliance.
- 20 Overall, consultation revealed strong support for the proposal, with many respondents stating that the health and safety of children should be the highest priority.
- 21 Some expressed concern during consultation about the inclusion in the cancellation pathway of licences reclassified as provisional when no regulatory breach has been proven. In other words, following a complaint (Regulation 15(1)(c)) or an incident (proposed new Regulation 15(1)(ca) discussed below) that warrant investigation.
- 22 In response to this feedback, I propose excluding licences that have been classified as provisional, unless the Ministry finds a breach of the regulations, from counting towards the cancellation pathway.

Proposal two: issuing a provisional licence to carry out an investigation in the event of an incident involving a child

- 23 Regulation 15(1)(c) enables the Secretary to place a service on a provisional licence when there has been a complaint alleging non-compliance against the Regulations that warrants investigation.
- 24 However, there is no similar power following an incident involving a child that warrants an investigation if a complaint has not been lodged. This means the Secretary cannot require a service to undertake an investigation into what happened, including whether there were any regulatory breaches that contributed to the incident.
- 25 In August, Cabinet agreed to add an 'incident at a service involving a child that requires investigation' into the grounds for reclassifying a licence as provisional.
- 26 In consultation, respondents generally supported the proposal. However, some respondents considered defining 'incident' clearly and only allowing the Secretary to use this power for serious incidents.
- 27 It remains my view that when an incident involving a child is serious enough to warrant an investigation, there is a mechanism to require an investigation to take place, with the Ministry informed of the outcome. This is particularly important to understand what happened to the child and to minimise any risks of a similar incident occurring again. Not all incidents will be assessed by the Secretary as requiring further investigation. For example, since 2011 there have been on average seven provisional licences reclassified under Regulation 15(1)(c).
- 28 I propose inserting a new regulation after Regulation 15(1)(c) to state that a licence may be reclassified as provisional following an incident involving a child, if the Secretary considers that the incident warrants investigation.
- 29 Cabinet also agreed that there should be no requirement for conditions to be placed on the licence for those that are dealing with investigations following a compliant or incident. However, during the drafting stage it was apparent that the only way a provisional licence can come to an end is related to the conditions - i.e. the service either complies with the conditions and is returned to their previous class of licence, or they don't comply with the conditions and the licence is cancelled. Therefore, I recommend that this Cabinet agreement be rescinded to ensure that services are not sitting on a provisional licence indefinitely.

Proposal three: creating written directions for health and safety matters that require immediate attention

- 30 The process for dealing with any regulatory non-compliance by service providers is restricted to the formal licensing interventions outlined in the Regulations. There are limited options for the Ministry to deal quickly and effectively with health and safety matters that require immediate attention if the service is to continue operating.
- 31 Cabinet agreed that there should be the ability for the Secretary to issue a written direction for health and safety matters that require immediate attention.
- 32 During consultation, respondents largely agreed that there should be such a regulatory tool.

- 33 There was some feedback on the timeframes for compliance being too short if there is a need to access tradespeople. Therefore, I am proposing that the timeframe be increased from what was consulted on from 'up to five working days' to 'up to ten working days' in the final Amendment Regulations. I believe that this strikes the right balance between ensuring the health and safety of children and staff and enabling the service provider to safely remedy the issue in a timely manner.
- 34 I propose inserting a new Regulation 54A into the Regulations to enable the Secretary to issue a written direction for a service provider to remedy an immediate health and safety issue within ten working days. Non-compliance with the written direction will be included in the grounds for being reclassified as provisional (in Regulation 15).
- 35 The Regulations Review Committee recommended redrafting Regulation 54A and the definition of 'immediate health and safety risk'. I propose making this change as it would improve sector understanding of the provision.

Proposal four: clarifying the provisions for licence amendments when the service provider changes

- 36 Regulation 33(1)(c) requires a service provider to apply to the Secretary for a licence amendment if there is a change in the identity of the service provider operating the service. To confirm the licence, the Secretary must be satisfied that any proposed person is a fit and proper person, and the Secretary must review the licence.
- 37 However, as these provisions are unclear, some service providers have used the licence amendment process to start a new service in preference to the process by which a provider applies for a new licence. This may pose a degree of risk to children's health, safety and education.
- 38 Cabinet agreed that:
- 38.1 early learning services are required to apply to the Secretary for a licence amendment before a change in the identity of the service provider operating the service
- 38.2 the Secretary has the discretion to use any assessments used for granting a probationary licence and/or for granting a full licence.
- 39 Respondents supporting this proposal indicated that it could help prevent poor provision of education and care. Several respondents thought that further clarification on the nature and intensity of assessments was needed. I do not recommend any changes to this proposal as children's health and safety should be paramount. The Ministry will work with the sector on the nature and intensity of assessment needed.
- 40 My officials have also identified an opportunity to clarify that the Secretary has the ability to decline an application to amend a licence under any grounds.
- 41 I propose that Regulation 33 be amended to clarify that:

- 41.1 early learning services are required to apply to the Secretary for a licence amendment before a change in the identity of the service provider operating the service
- 41.2 the Secretary has the discretion to use any assessments used for granting a probationary licence and/or for granting a full licence
- 41.3 the Secretary has the ability to decline an application to amend a licence under any grounds.

Proposal five: removing the 21-day minimum notice period for suspensions for change of control

- 42 In cases of serious non-compliance or when there are serious risks to the health safety and wellbeing of children, the Secretary may suspend a licence. This means the service must close until such time as it complies with the conditions set out in the notice to suspend.
- 43 As mentioned in paragraph 36, a service provider must apply for a licence amendment if there is going to be a change in the identity of the service provider operating a service. If a service is no longer under the control of its licenced service provider, the Secretary can suspend the licence, but the notice period for suspension must be at least 21 days after the day on which the notice of suspension is given.
- 44 This notice period could pose a risk to children's wellbeing, as the service could be controlled by people that have not been through appropriate assessments.
- 45 I propose removing the 21-day minimum notice period for suspensions in Regulation 33 if a service is no longer under the control of its licensed service provider. This would allow the Secretary to respond more promptly to risks to children's health and safety.
- 46 This proposal was relatively well supported, with 68% agreement to this proposal in the online survey. However, some respondents were concerned about the impact on children, whānau and staff from having to find an alternative service or employment at short notice. I do not intend to make any changes to the draft regulations, as the Secretary still has the discretion to specify a longer notice period if necessary. The Ministry will also continue to support families and whānau to find alternative services.

Proposal six: removing the 21-day minimum notice period for not returning an invalid licence

- 47 Regulation 30(3) authorises the Secretary to suspend a service's licence if it has not returned its full physical licence after the licence has been reclassified as provisional. However, there is a minimum notice period of at least 21 days.
- 48 Originally, Cabinet agreed to removing the 21-day minimum notice period to safeguard children's health and safety [SWC-20-MIN-0116 refers]. The rationale was that services that had returned an invalid licence would display their provisional licence so that parents and whānau were made aware of the service's reclassification.

- 49 However, consultation feedback indicated that the requirement to return an invalid licence is ineffective, as services can easily display a photocopy of a full licence even after returning the original.
- 50 On this basis, I propose removing the Secretary's ability to suspend a service's licence on these grounds (by removing regulation 30(3) and 15(2)(a)), as it imposes an unnecessary compliance burden. I also recommend that the Cabinet agreement to remove the 21-day minimum notice period be rescinded.
- 51 The Ministry will explore other options to ensure that parents and whānau are made aware of their service's licence status later in the wider Review.

Proposal seven: clarifying the information used to assess an application for a probationary licence

- 52 Under Regulation 11(1)(b), the Secretary must grant a probationary licence if satisfied on reasonable grounds that a service is likely to comply with the curriculum, health and safety standards, and the governance, management, and administration standards.
- 53 However, the wording of the Regulation would benefit from clarifying that these decisions can be based on all relevant information, including the applicant's information and other relevant information.
- 54 I propose that 'and any other information the Secretary considers relevant' be inserted into Regulation 11(1)(b) to ensure that all pertinent, legitimate, information is considered when granting probationary licences.
- 55 Some raised concerns about the use of social media content being used against applicants. Any information that is used in the decision to grant a probationary licence will still need to meet evidentiary standards. Applicants would also be provided with the opportunity to respond to any negative inferences drawn from the assessment of any information not provided with an application. Therefore, I am not proposing any changes as a result of this feedback.

Proposal nine: clarifying that the fee for a new licence is payable upon application and is non-refundable

- 56 The intent of the licence fee is to cover some of the costs incurred by the Ministry in processing and assessing applications. Cabinet agreed that the current licensing fee be clarified to ensure that it is payable upon application and non-refundable.
- 57 Having the fee paid on application and non-refundable discourages poorly prepared and/or repeat applications and protects the fiscal risk to the Ministry. However, the current wording of the regulations implies that an application can be made and processed before the fee is paid.
- 58 I propose merging Regulation 25 with Regulation 5 to state that the fee must accompany the application and is non-refundable. This proposal was generally well supported through consultation.

- 59 As the current fee was set when the rate of goods and services tax (GST) was 12.5 percent, I am also taking this opportunity to propose that the fee amount align with the current rate of GST. This increases the new fee stated in Regulations to \$2817.50, up from \$2756.25. This will not change the Ministry's practice, as Section 78(3)(a) of the Goods and Services Tax Act 1985 allows for any changes in GST to flow through to any prescribed fees.

Proposal ten: clarifying existing person responsible requirements

- 60 In teacher-led centres, hospital-based services and home-based services, a person responsible must hold a recognised qualification and be registered and certificated with the Teaching Council of Aotearoa New Zealand. However, this is not explicit in the primary Regulations.
- 61 During consultation, we heard that the items in Schedule 1 make the qualification requirements hard to understand. This point was also reiterated when the Regulations Review Committee considered the draft Regulations.
- 62 I propose amending Schedule 1 to clarify the practising certificate requirements further for persons responsible in teacher-led centres, hospital-based services and home-based services.
- 63 In tranche two of the Review, we will also re-consider the suitability of the current person responsible requirement in teacher-led centres and how it could be strengthened further.

Changes to Licensing Criteria

- 64 Licensing Criteria are the third tier of the regulatory framework for early learning, sitting under the Regulations and the ECE Funding Handbook. Licensing Criteria are used by the Ministry and ERO to assess whether regulated standards are being met.
- 65 As the Minister of Education, I have a delegated authority to make changes to the Licensing Criteria by virtue of section 636(2)(b) of the Education and Training Act 2020. However, I would like to bring to Cabinet's attention two changes to the Licensing Criteria that the Ministry sought feedback on during the same consultation process as the matters above.

Increasing the minimum room temperature from 16 degrees to 18 degrees Celsius (proposal eight)

- 66 In April 2020, the Director-General of Health recommended aligning the minimum indoor room temperature in early learning services with the World Health Organisation (WHO) recommendations of 18 degrees Celsius. There are public health benefits associated with a higher temperature, and it may be necessary for vulnerable groups such as young children.
- 67 There was general support for increasing the room temperature through consultation, although some respondents expressed concern about the change increasing the cost of heating and restricting outdoor play as services try and maintain the higher temperature.

- 68 I have agreed to prescribe an amendment to permanently increase the minimum indoor room temperature from 16 degrees to 18 degrees Celsius for all licensed centre-based, home-based and hospital-based early learning services. I intend for the amendments to take effect from 16 July 2021.
- 69 The Ministry is working further with Te Kōhanga Reo National Trust on a similar amendment to the Licensing Criteria for ngā kōhanga reo. The Ministry expects this work to be completed and changes to licensing criteria for kōhanga reo to be implemented in line with other service types.

Amending the licensing criteria requiring services to demonstrate regard for the National Education and Learning Priorities (proposal eleven)

- 70 The NELP set out Government's education priorities across the education system for early learning services, schools and kura to help every child and young person to progress and achieve their aspirations (CAB-20-MIN-0376 refers). All services are required to have regard for the NELP under the Education and Training Act 2020 and the Regulations.
- 71 The Ministry sought feedback on three changes to the licensing criteria relating to governance, management and administration (GMA6). The amendments were aimed at supporting services to have regard for NELP, and demonstrate that they understand and meet the aspirations of NELP within the day-to-day operation of their service.
- 72 There was wide support for the NELP, but some respondents felt the licensing criteria added an unnecessary level of compliance. Some stated that the NELP should not be considered within the requirement to have a philosophy statement as this is unique to each service's aspiration, direction and ideology.
- 73 I have agreed to prescribe an amendment to the licensing criteria for self-review and annual planning. At the Ministry's recommendation and in response to the public consultation feedback, I will not be progressing with proposed amendment requiring a philosophy statement.
- 74 I have also agreed to the Ministry inserting the wording "internal evaluation" into the criteria, to align with overarching inquiry processes already understood by the early learning sector and the Education Review Office (among other agencies).
- 75 Embedding the NELP within the GMA criteria supports services to implement the NELP. The Ministry has planned a phased implementation of the criteria through regular updates to the guidance that supports the licensing criteria, beginning in July 2021.
- 76 I intend for the amended licensing criteria to take effect from 16 July 2021.
- 77 As for the amendment to Licensing Criteria for minimum room temperature, the Ministry is undertaking further work with Te Kōhanga Reo National Trust before making any changes to the criteria for ngā kōhanga reo within this timeframe.

The Education (Early Childhood Services) Amendment Regulations 2021

- 78 On the strength of consultation feedback, I seek agreement to:

- 78.1 Create a cancellation pathway based on a service's provisional licence history (changes to Regulation 32)
- 78.2 Enable the Ministry to issue a provisional licence to carry out an investigation in the event of an incident involving a child (changes to Regulation 15)
- 78.3 Create written directions for health and safety matters that require immediate attention (changes to Regulations 3 and 15, and inserting Regulation 54A)
- 78.4 Clarify the provisions for licence amendments when the service provider changes (changes to Regulation 33)
- 78.5 Clarify that the Secretary has the ability to decline an application to amend a licence (Regulation 33)
- 78.6 Remove the 21-day minimum notice period for suspensions for change of control (changes to Regulation 33)
- 78.7 Clarify the information used to assess an application for a probationary licence (Regulation 11)
- 78.8 Clarify that the fee for a new licence is payable upon application, is non-refundable, and is updated to reflect the current rate of GST (changes to Regulation 5 and 25)
- 78.9 Clarify the existing person responsible requirements (changes to Schedule 1)
- 79 I would also like Cabinet to note I am amending the Licensing Criteria for all services by increasing the minimum room temperature from 16 degrees to 18 degrees Celsius, and amending the Licensing Criteria for self-review and annual planning to demonstrate regard to the NELP.

Implementation

- 80 The implementation of three proposals are likely to limit the expansion of poorly performing service providers. This involves:
- 80.1 changes to the assessment of new services (changes to Regulation 11)
- 80.2 the assessment of purchases of existing services (licence amendment for change of service provider in Regulation 33)
- 80.3 the creation of a new mechanism to exit service providers who cannot sustain compliance with regulatory standards (cancellation pathway changes to Regulation 32).

81 9(2)(g)(i)

- 82 I propose delaying implementation for these amendments by six months. This will enable the Ministry to develop robust internal practice tools to support consistent decision making and ensure the Ministry can work with the sector and give clear guidance on the changes. It will also provide service providers with sufficient time to account for these new processes in their legal agreements and establishment plans.
- 83 The delegation to issue written directions will initially be rolled out region by region. This will enable the Ministry to monitor the impact on the sector and amend operational policy as required, before implementing it nationally.

Timing and 28-day rule

- 84 I propose that Cabinet refer the Amendment Regulations to the Executive Council on 28 June 2021. The Amendment Regulations will be gazetted on 2 July 2021 and will come into force on 30 July 2021, with the exception of clauses 7, 12, and 13 coming into force on 1 February 2022. This is in line with the 28-day rule.

Compliance

- 85 I consider the Amendment Regulations comply with:
- 85.1 the principles of the Treaty of Waitangi;
 - 85.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
 - 85.3 the principles and guidelines set out in the Privacy Act 2020;
 - 85.4 relevant international standards and obligations;
 - 85.5 the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Regulations Review Committee

- 86 I do not consider there are grounds under Standing Order 319 on which the Regulations Review Committee could draw these regulations to the special attention of the House of Representatives.
- 87 I have sought feedback from the Regulations Review Committee on the draft regulations that were consulted on and some of their feedback has been incorporated into the final regulations that are the subject of this paper.

Certification by Parliamentary Counsel

- 88 The draft regulations have been certified by the Parliamentary Counsel Office as being in order for submission to Cabinet.

Impact Analysis

- 89 A Regulatory Impact Assessment for has been prepared for proposals with a substantial change in policy. The RIA is attached in Appendix One.

- 90 This RIA covers all the proposals in this paper, with the exceptions being the person responsible and Licensing Criteria proposals.
- 91 The Ministry of Education's RIA panel has reviewed the Regulatory Impact Analysis produced by the Ministry and dated 13 May 2021. The panel considers that it partially meets the assessment criteria. The proposed changes are generally supported by stakeholders and are likely to provide greater clarity to the licencing process and requirements if well implemented. The statement's discussion of implementation and monitoring, however, remains light. This impacts on the confidence that the benefits sought will be realised. It will be important, therefore, that the Ministry manages this risk by successfully communicating and delivering the changes.
- 92 The Regulatory Quality Team at the Treasury determined that regulatory impact analysis was not required for the person responsible proposal as there is already an existing RIA. The change is also expected to have no material impacts on individuals, businesses or not-for profit entities. The existing RIA can be found at <https://www.education.govt.nz/assets/Uploads/2-Person-responsible-RIS.pdf>.
- 93 The proposed changes to the Licensing Criteria do not meet the threshold for requiring a regulatory impact analysis, as there are no changes proposed to an Act or Regulations.

Climate Implications of Policy Assessment

- 94 The Climate Implications of Policy Assessment team has been consulted and confirms that the CIPA requirements do not apply to these proposals as there is no direct emissions impact.

Publicity

- 95 The Amendment Regulations will be notified in the New Zealand Gazette.
- 96 The Ministry will use the Early Learning Bulletin to communicate with the sector about the Amendment Regulations.

Proactive release

- 97 I intend to proactively release this Cabinet paper, the RIA and a consultation report. Any information which may need to be withheld will be done so in line with the provisions of the Official Information Act 1982.

Consultation

- 98 The Treasury, State Services Commission, Department of Prime Minister and Cabinet, Ministry of Social Development, Ministry of Health, Ministry of Justice, Ministry of Business, Innovation and Employment, Oranga Tamariki – Ministry for Children, Ministry for Women, Te Puni Kōkiri, Ministry for Pacific Peoples, New Zealand Qualifications Authority and Education Review Office have been consulted on this paper.

Recommendations

I recommend that the Cabinet Legislation Committee:

- 1 **note** the Ministry of Education is reviewing the early learning regulatory system and the Review will be completed in three tranches
- 2 **note** that tranche one proposals aim to target regulatory gaps that present limitations, or are cumbersome to implement, and areas that may pose a degree of risk to the health, safety and wellbeing of children
- 3 **note** that on 3 August 2020, Cabinet agreed to issue drafting instructions and start public consultation on tranche one proposals (CAB-20-MIN-0359 refers)
- 4 **note** that on 3 August 2020, Cabinet authorised the Minister of Education to make decisions on any issues of detail that may arise during the drafting process without further reference to Cabinet, subject to the decisions being consistent with the decisions from that paper (CAB-20-MIN-0359 refers)
- 5 **note** that consultation feedback showed strong support for most proposals
- 6 **note** that the Education (Early Childhood Services) Amendment Regulations 2021 will give effect to the decision referred to in recommendation 3 above
- 7 **agree** to the Education (Early Childhood Services) Amendment Regulations 2021, which will amend the Education (Early Childhood Services) Regulations 2008 in the following ways:
 - 7.1 Create a cancellation pathway based on a service provisional licence history (changes to Regulation 32)
 - 7.2 Enable the Secretary to issue a provisional licence to carry out an investigation in the event of an incident involving a child (changes to Regulation 15)
 - 7.3 Enable the Secretary to create written directions for health and safety matters that require immediate attention (changes to Regulation 15 and inserting Regulation 54A)
 - 7.4 Clarify the provisions for licence amendments when the service provider changes (changes to Regulation 33)
 - 7.5 Clarify that the Secretary has the ability to decline an application to amend a licence (changes to Regulation 33)
 - 7.6 Remove the 21-day minimum notice period for suspensions for change of control (changes to Regulations 33)
 - 7.7 Remove the Secretary's ability to suspend a service's licence for not returning the full physical licence after the licence has been reclassified as provisional (revoking Regulations 30(3) and 15(2)(a))
 - 7.8 Clarify the information used to assess an application for a probationary licence (changes to Regulation 11)

- 7.9 Clarify that the fee for a new licence is payable upon application, is non-refundable, and is updated to reflect the current rate of GST (changes to Regulation 5 and 25)
- 7.10 Clarify the existing person responsible requirements (changes to Schedule 1)
- 8 **agree** to recommend that Cabinet rescind the decision referred to in recommendation 7 of SWC-20-MIN-0116, that Regulation 16 of the Education (Early Childhood Services) Regulations 2008 is amended so that there is no mandatory requirement to place a condition on a provisional licence that has been issued as part of an investigation
- 9 **agree** to recommend that Cabinet rescind the decision referred to in recommendation 9.1 of SWC-20-MIN-0116, that removes the 21-day minimum notice period for licence suspensions for not returning a full licence when invalid
- 10 **authorise** the submission to the Executive Council of the Education (Early Childhood Services) Amendment Regulations 2021
- 11 **note** that clauses 1-6, 8-11, and 14-15 of the Education (Early Childhood Services) Amendment Regulations 2021 will come into force on 30 July 2021, and the remainder will come into force on 1 February 2022
- 12 **note** the amendment to the Licensing Criteria relating to minimum indoor temperature to 18 degrees Celsius and for self-review and annual planning to demonstrate regard to the NELP.

Authorised for lodgement

Hon Chris Hipkins

Minister of Education

Impact Summary: Early Learning Regulatory Review: Tranche One

Section 1: General information

Purpose

The analysis set out in this Impact Summary has been produced for the purpose of supporting Cabinet's decision on the proposed regulatory changes for tranche one of the Early Learning Regulatory Review, following public consultation. The Ministry of Education is solely responsible for the analysis and advice, except as otherwise explicitly indicated.

Key Limitations or Constraints on Analysis

The issues outlined in this analysis cover the first tranche of changes resulting from the Early Learning Regulatory Review (the Review). These are the areas within the Education (Early Childhood Services) Regulations 2008 (the Regulations) that currently present limitations to ensuring regulatory standards are met or are cumbersome to implement. The regulation changes selected for the first tranche are those with greatest urgency or which address known issues.

As these issues are tightly defined, there are limited options to address them. In some circumstances, the Ministry only identified one viable option. The preferred option for each issue was presented to the public as draft regulations. Following public consultation, we have incorporated additional policy options in some areas which are the preferred options for the final version of the proposed regulations.

As latter tranches of the Review will address other parts of the regulatory system, there may be further changes to the issues covered in this analysis in the medium term.

Responsible Manager (signature and date):

Andrea Schöllmann

Deputy Secretary
Education System Policy
Ministry of Education

13/05/2020

To be completed by quality assurers:

Quality Assurance Reviewing Agency:

The RIA was assessed by the Ministry of Education's regulatory review panel.

Quality Assurance Assessment:

The panel reviewed the Early Learning Regulatory Review: Tranche One RIA and assessed it as partially meeting the RIA review criteria.

Reviewer Comments and Recommendations:

The proposed changes are generally supported by stakeholders and are likely to provide greater clarity to the licencing process and requirements if well implemented. The statement's discussion of implementation and monitoring, however, remains light. This impacts on the confidence that the benefits sought will be realised. It will be important, therefore, that the Ministry manages this risk by successfully communicating and delivering the changes.

Section 2: Problem scope

2.1 Background

Review of the Early Learning Regulatory System

The Ministry of Education is currently undertaking a review of the early learning regulatory system. The purpose of this Review is to ensure that the regulatory system for the early learning sector is clear and fit for purpose to support high quality educational outcomes. This includes ensuring there are effective pathways for dealing with services that are non-compliant with regulatory standards. The Review requires consideration be given to what is meant by high quality education in the early learning context. It also considers the Ministry's role as both a steward of the system and a regulator, alongside other agencies.

This Review is timely due to the significant changes in the sector since the current regulatory system was established in 2008, as well as changes proposed as part of the Early Learning Action Plan 2019-2029 (Action Plan) and Review of Home-based Education. The Regulations Review Committee recently recommended a re-write of the Regulations following a complaint regarding the Education (Early Childhood Services) Amendment Regulations 2019. There have also been instances in recent years that highlighted limitations or a lack of responsiveness in the current regulatory framework.

The Review is being completed in three tranches to ensure that the high priority issues can be progressed in a timely fashion while allowing additional time for the matters that require further policy work and consultation. This regulatory impact analysis covers the proposed final regulation changes that are within the first tranche of the Review.

Tranche one of the Review

The Ministry's work on non-compliance in the early learning sector has identified several priority areas within the Regulations that present limitations to implementation. These limitations pose difficulties in ensuring regulatory standards are being met and that service providers are being held to account, thereby creating a level of risk to the health, safety, and wellbeing of children attending. Tranche one looks at amending the following areas:

- Options for dealing with services that have repeatedly had their licence reclassified as provisional.
- The circumstances in which a licence can be reclassified as provisional while an investigation takes place.
- The use of written directives for health and safety matters.
- Provisions relating to licence amendments if there is a change in the identity of the service provider operating the service.
- Reviewing the 21-day minimum notice period for licence suspensions for not returning a full licence when invalid and for a change in control.

- The information used when granting an application for a probationary licence to assess if a service provider is likely to comply with the curriculum standards, the health and safety practices standards, and the governance, management, and administration standards set out Regulations.
- The circumstances around the application fee for a new licence.

More detail on each of these areas is outlined in section 2.2. Below is background information about the early learning regulatory system and licensing process that is necessary for understanding the proposed changes.

The Early Learning Regulatory system

Government regulation of early learning is intended to establish the parameters for the operation of the sector (for example, through establishing a licensing and accountability regime), and to ensure at least minimum standards of health, safety, wellbeing and education for young children. Regulation is also used as a mechanism to implement government policies and goals such as around diversity and choice, or ratios of adults to children.

The regulatory system governing minimum standards for early learning in New Zealand is divided into three tiers.

- First tier – the Education and Training Act 2020. The Act regulates the early learning system by establishing a licensing and certification system for services, defining service types, and empowering regulations and criteria to be developed.
- Second tier – the Education (Early Childhood Services) Regulations 2008 and Education (Playgroups) Regulations 2008.¹ These regulations provide the licensing process for establishing and transferring services; regulate the management, operation, and control of services; and prescribe minimum standards for ensuring the health, comfort, care, education, and safety of children attending services.
- Third tier – the Licensing Criteria. These are more detailed standards set under the second tier regulation that services must comply with, and are promulgated by the Ministry of Education (the Ministry). These cover a wide range of areas such as expectations around the premises, health and safety, governance, and management as well as professional practice. The Criteria are used by the Secretary for Education (the Secretary) and the Ministry in its assessment of service quality compliance against regulated standards.

¹ Throughout this regulatory impact statement, the term *early learning* has been used as an inclusive term to describe the range of services providing education and care of children before they go to school. However, the Regulations refer to *early childhood education services* which comprises all licensed or certificated early learning services, including education and care services, kindergartens, ngā kōhanga reo, playgroups, hospital-based services, and home-based services.

Licensing process

There are four classes of licences that early learning services can operate under:

1. *Probationary licence*: A probationary licence is the class of licence that is issued to allow the service to open and begin operating while a full licence application is assessed. When a potential service provider wishes to open a service, it applies to the Ministry for a licence. The Secretary assesses the application and undertakes a licence assessment visit to determine if the service complies with the standards set out in Regulations and is therefore ready to be granted a probationary licence. A probationary licence is issued under Regulation 11.
2. *Full licence*: A full licence assessment must be carried out within 12 months of the service gaining a probationary licence. A full licence is granted under Regulation 13.
3. *Provisional licence*: If a service is found to not be complying with the regulated standards or the conditions in which the licence was issued, the Secretary may at any time reclassify a service's probationary or full licence as a provisional licence. The service will have one or more conditions it must meet before it can be returned to a probationary or full licence (as applicable). The service can continue to operate while on a provisional licence. If the service does not meet the conditions by the date specified, the licence is cancelled. The maximum duration for a provisional licence is 12 months. The process for reclassifying a licence as provisional is within Regulation 15.
4. *Temporary relocation licence*: The Secretary may grant a temporary relocation licence if a service provider needs to temporarily relocate the service to other premises (whether because of renovations to the premises or otherwise). The new premises must comply with, or be likely to comply with, the Regulations relating to premises and facilities. A temporary relocation licence may last for up to ten months. A temporary relocation licence is issued under Regulation 18.

In cases of serious non-compliance or where there are serious risks to the health, safety, and wellbeing of children, the Secretary may suspend a licence. This means the service must close until such time as it complies with the conditions set out in the notice to suspend.

There are also situations where the Secretary must cancel a licence. This includes when services continue to operate while on a suspended licence, the service provider has been convicted of certain types of offences, or the service has ceased to operate.

2.2 Problem definition and impact

The proposals in this regulatory impact analysis address problematic areas in the regulations and will result in amendments to the Education (Early Childhood Services) Regulations 2008. The changes relate to issues that impact the following groups:

- **Children, parents, and whānau** – The health, safety and wellbeing of children may be compromised when attending low quality services that do not comply with minimum regulatory standards. There is also an impact on a child's participation in early learning if their service's licence status changes and can no longer operate. This has flow on impacts for caregivers' labour market participation, at least in the short term. The proposed regulatory changes will have a positive impact on these areas, as they support well-run service providers, which should have a positive impact on learners, families, and caregivers.
- **Early learning service providers** – They are impacted through the changes in their interactions with the Ministry, as the regulator of the system. These changes may impact the operation of the service compared to the status quo. In some cases, this may result in different outcomes for some services, including impacts on their ongoing operation.
- **Early learning service employees** – If there is a cancellation or suspension of a service's licence, there will be an impact on those employed at the service through the loss of their job and income.
- **The Ministry as the regulator** – Changes to the licensing system operation and administration, including additional tools for dealing with non-compliance, will have an impact.

Provisional licences

Services that repeatedly have their licence reclassified as provisional

There is no restriction on the number of times a service can have their full licence reclassified as provisional. This means that services can continually cycle on and off a provisional licence classification without the consequence of having their licence cancelled. Concerns have been raised about services that are repeatedly on a provisional licence classification for the same types of breaches.

If a service has a history of provisional licence classifications, it may demonstrate that the service is of low quality and lacks the capability to improve and embed practices that meet the minimum regulatory requirements. This could have detrimental effects for the health, safety, and educational outcomes of children. There is currently no ability for the Secretary to consider cancelling a licence on the grounds of repeated provisional licence classifications.

The Ministry seeks to change the behaviour of early learning services that continually cycle on and off provisional licence classifications, particularly for similar breaches of the Regulations. By creating a risk of licence cancellation, services that have a history of provisional licence classifications will be incentivised to maintain compliance with the Regulations and ensure that they do not repeat similar breaches. Services that are unable to break the cycle of provisional licence classifications may not have the resources or know-how to maintain compliance. In these cases, it may be appropriate for these services to have their licences cancelled to maintain a quality network of provision.

Allowing the Secretary to reclassify a service's licence as provisional while an investigation takes place

Regulation 15(1)(c) enables the Secretary to place a service on a provisional licence when there has been a complaint alleging non-compliance against the Regulations that warrants investigation.

If the Ministry is notified of an incident that requires an investigation, but no one has lodged a complaint, there are two ways the situation can currently be managed. The Secretary can either keep the service on their current class of licence, with no obligation on the service to notify parents. Alternatively, the Secretary can suspend the licence if there were concerns that met the definition of a suspension, in which case the service must close while an investigation takes place.

The Ministry may be notified of an incident where a child has been seriously injured and an investigation is required, but a licence suspension is not appropriate. In these circumstances, there is currently no ability for the Ministry or the Secretary to require an investigation to take place. A service's licence will only be suspended under Regulation 30 if allowing the service to continue operating is considered not in the best interests of the children attending the service.

Who is affected and how?

The main parties that will be affected by the proposed changes are children, parents, and whanau as children will be less exposed to health and safety risks and poorer quality of care and education.

Early learning service providers will be impacted as they may have their licence reclassified as provisional or their licence cancelled.

The proposed changes also impact on the Ministry as a regulator because it would provide additional mechanisms to support compliance. It would also increase workloads for regional staff.

The use of written directives for health and safety matters

The current options for dealing with non-compliance by service providers are limited and the process is linear from suspension of a licence, and/or reclassification as provisional, to cancellation of the licence. These licensing interventions have a formal status in the Regulations and require the Secretary and the Ministry to follow a particular process.

There are currently limited options when either:

- there are minor health and safety matters that do not warrant a formal licensing intervention;
- the Secretary is going to reclassify a service's licence as a provisional but there is a health and safety matter that requires immediate attention; or
- there is a health and safety matter that requires immediate attention that may trigger a suspension if not addressed, but there are no other issues with the service so a suspension may not be warranted or may be viewed as heavy handed.

The intent of written directions for health and safety matters is to have a more effective and targeted compliance tool rather than resorting to a licensing sanction. It is also intended for use in cases where a service has an immediate issue that needs addressing in order to remain safely open.

Who is affected and how?

The power provided through the proposed change would benefit children and staff in a service because service providers would be required to address health and safety matters that pose a risk to children within a short timeframe. This should limit the ongoing risk of harm to children and staff.

Service providers would be impacted by the change because they would need to rectify a health and safety risk (which is considered likely to breach the Regulations) within a short period of time. If the service provider does not comply with the written direction within the specified timeframe, the Secretary would be able to reclassify the licence as provisional or suspend the licence. The service provider would benefit because the regulatory power available to the Secretary is proportionate to the risk, with the service able to continue operating while addressing the risk promptly.

The power would benefit the Secretary because they can formally require service providers to take remedial action quickly. They will not need to resort to more intensive licensing sanctions or wait for a full investigation of all regulatory matters to be completed before taking action.

Provisions for licence amendments when the service provider changes

There is a lack of clarity in two areas regarding the current provisions for a licence amendment when there is a change in the identity of the service provider.

The requirement for a service provider to apply for an amendment before taking over the operation of the service.

Regulation 33(1)(c) of the Regulations requires a licensed early learning service to apply to the Secretary for a licence amendment if there is a change in the identity of the service provider operating the service. To approve the changes, the Secretary must be satisfied that any proposed person is a fit and proper person, and the Secretary must review the licence. The intent of this provision was to require a service provider to apply for an amendment *before* a change in the identity, so that the Secretary can undertake the necessary assessments. However, this is not clear in the current wording.

The phrase “review the licence” is not clarified in the Regulations.

The intention of this requirement was to give the Secretary the discretion to use appropriate assessments, including assessments used for granting a probationary licence (Regulation 11) and/or for granting a full licence (Regulation 13).

This lack of clarity has meant that some service providers are using the less rigorous licence amendment process to effectively start a new service rather than applying for a new licence. Service providers using the licence amendment process in this way could pose risks to the health and safety of children, and the quality of care and education provided. There have been a few examples of this, such as:

- services that want to expand rapidly into other regions and had previously had their applications for a new licence declined;
- services under the same governance organisation that seek to transfer licences between themselves to avoid financial scrutiny; or
- people or bodies purchasing an early learning business with little understanding and preparedness for the full responsibilities of operating an early learning service.

Due to changes to the market structure of the early learning sector, we have seen an increase in the number of applications for licence amendments, largely for a change in the identity of a service provider. In particular, there has been an increase in the number of providers owning multiple services across regions, which has led to an increase in governance changes and transfers of early learning businesses. This has exacerbated the two unclear areas outlined above and has also revealed regional variability in the approach to licence amendments for a change in the identity of the service provider. These issues lead to a lack of clarity for the early learning sector and could lead services to challenge the Secretary's regulatory actions.

Who is affected and how?

The proposed changes would impact children, parents and whānau as they would decrease risks to the health and safety of children, and ensure the quality of care and education provided. The changes would ensure that services are being operated by service providers that have gone through a rigorous assessment.

Services providers that have a change in the identity would benefit from the increased clarity in terms of making operating decisions. The Ministry would be able to improve the consistency of regional approaches to licence amendments.

The 21-day minimum notice period for licence suspensions for change of control

The Secretary may suspend an early learning service's licence if satisfied that an early learning service is no longer under the control of its licensed service provider. The Secretary must provide a notice period of at least 21 days before the suspension takes effect (Regulation 31(2)).

Service providers have a continuing duty to advise the Secretary of any changes in circumstances, such as a change in control (Regulation 35). The intent of this provision is to capture early learning services that have changed control without applying for an amendment under Regulation 33(1)(c) (change in the identity of the service provider).

There have been instances where the requirement of a 21-day minimum notice period has led to risks to the health and safety of children, and the quality of care and education:

- a situation whereby two bodies were in conflict over which one was the service provider, leading the Ministry to be uncertain as to which body was providing care and education during the 21-day notice period; and
- a situation whereby the business that was the service provider went into receivership, and when the receivers took over, their intent was to receive funding and the Ministry was not able to provide this funding as it could not be assured that the receivers would provide quality care and education in the 21-day notice period.

Who is affected and how?

The proposed changes would impact children, parents and whānau as they would decrease risks to the health and safety of children. When there has been a change of control, having a 21-day minimum notice period before suspension could mean that a service is being governed by persons who have not been subject to a fit and proper assessment and the licence may not have been reviewed.

Removing the 21-day minimum notice period may give parents and whānau less time to find an alternative early learning service for their children. Services may also have less time to prepare for the service being suspended.

The Ministry would benefit from having greater discretion to reduce the length of the notice period when risks are posed to children.

The 21-day minimum notice period for suspensions for not returning a full licence

The Secretary may suspend an early learning service's licence if the service has not returned its full physical licence after the licence has been reclassified as a provisional licence (Regulation 30(3)). The Secretary must provide a notice period of at least 21 days (Regulation 31(2)). A service cannot operate, and children cannot attend, when a service's licence is suspended.

If a service has not returned its full licence it may still be displaying this invalid licence. There was concern that this would be misleading to parents and whānau, and may pose risks to the health and safety of children, and the quality of care and education provided.

However, this requirement now appears ineffective, as services can easily display photocopies of a full licence even after returning their physical licence to the Secretary.

Who is affected and how?

The proposed change would mainly impact service providers as it removes the unnecessary administrative burden of returning a physical licence when invalid.

Information used to assess an application for a probationary licence

Regulation 11(1)(b) states that the Secretary must grant a probationary licence if satisfied on reasonable grounds, and having regard to the information provided, that the service is likely to comply with the curriculum standard set out in Regulation 44, the health and safety practices standard set out in Regulation 45, and the governance, management, and administration standard set out in Regulation 47.

As part of the application for a new licence, the Ministry requests that the applicant provides information regarding how they will be adhering to the regulated standards outlined in Regulation 11(1)(b), such as their policies and procedures. The rationale for requesting this information from the applicant is that when a new service is set up, there may not necessarily be evidence of compliance with these regulations because the service has not yet opened. By requiring the information be provided, it acts as a proxy for proving compliance with the regulated standard. This is useful in cases where a potential service provider is new to the market and there is no licensing or regulatory history for the Ministry to draw on for its assessment for a probationary licence.

However, the current wording of the regulation creates uncertainty about what information the Secretary can consider when deciding to grant a licence. There is an argument that this decision is solely limited to the information provided by the applicant, rather than the applicant's information and any relevant information held by the Ministry. This may mean that if an applicant does not disclose a previous breach of health and safety standards which have put children at risk, even on prompting, the Secretary is unable to use this knowledge in declining the application.

If a relevant matter is not disclosed, the Ministry is obliged to raise that matter with the applicant and offer the applicant an opportunity to comment or amend their application.

Who is affected and how?

There is potential that children can be exposed to risks if a full range of information is not used when determining if a service is ready to begin operating. The proposed change to the regulations would ensure that the Secretary is able to consider known history of the applicant when assessing a licence application so that poor-quality providers are less likely to be granted a probationary licence, thereby increasing the safety of children.

This regulation impacts on prospective service providers as it currently suggests that the Secretary is limited to only considering information provided by the applicant when granting a licence. The proposed change does not alter the requirement for service providers to supply evidence in their application, so the impact on service providers is minimal.

The proposed change would remove doubt about whether the Ministry and the Secretary are able to consider information they may know about but have not been provided by the applicant, including any previous breaches of the Regulations mentioned. This would also mean that in cases where an applicant has not supplied the full information to support their application, there would no longer be the need to go back to the applicant seeking clarification of their application, thereby saving time and resources.

Application fee for a new licence

Regulation 25(1) states that 'the Secretary must not issue a licence unless the service provider has paid the Secretary a fee of \$2,756.25'. The policy intent for the fee is to help offset the costs to the Ministry associated with the processing and assessment of the licence application. However, the current wording is unclear that the fee is to be payable on application and retained by the Ministry to help offset the costs of the licensing applications.

The GST-inclusive fee in Regulation 25(1) is also out of date. It was set in 2008 when GST was 12.5% however GST is now 15%.

Who is affected and how?

The processing and assessment of a licence application requires considerable resource from the Ministry. The proposed change of clarifying that the fee is payable upon application and is non-refundable, would ensure that the fee is paid to the Ministry to help offset these costs. Clarifying that the fee is non-refundable would also help to discourage poorly completed and/or repeated applications.

The impact on service providers would not be high, as this is seeking to clarify current practice. There is no impact on early learning service employees and no impact on children, parents, and their whānau, as the application fee is paid prior to a service opening.

Section 3: Policy objectives and option analysis

3.1 Policy objectives

There are four guiding policy objectives that are central for the Regulatory Review. The first three objectives are less relevant for the more technical nature of these proposals. These three points have been combined into one criterion (“Policy objectives”) for assessing the options.

The early learning regulatory system:

1. has learners/ākonga and their whānau at the centre of education

- The regulatory system protects the safety, wellbeing, and education of learners/ākonga and ensures that all learners/ākonga are free from all forms of racism, discrimination, and stigma.
- The regulatory system ensures that every learner/ākonga feels safe, appreciated, and included for who they are, including their identity, language and culture, and learning needs.
- The regulatory system promotes partnership between early learning services, whānau, and the community, and supports Māori to exercise authority and agency about the learning of their tamariki as per the principle of partnership in Te Tiriti o Waitangi.

2. enables barrier free access and enhances choice for every learner/ākonga

- The regulatory system ensures equitable outcomes for all learners/ākonga.
- The regulatory system supports the diverse provision of early learning services which offers choice to parents and whānau.
- The regulatory system enables parents and whānau to exercise choice and mana tikanga, based on their educational and cultural aspirations.

3. ensures a quality teaching and non-teaching workforce and leadership

- Those involved in the care and education of learners/ākonga are diverse, highly skilled, and motivated to make a positive difference.
- The regulatory system promotes a healthy early learning sector by taking into account the needs of service providers and kaiako (people in teaching positions).

4. provides the foundation for learning in a world class inclusive environment

- **Te Tiriti o Waitangi:** ensuring that the regulatory system upholds the Ministry’s responsibilities under Te Tiriti o Waitangi, including enabling Māori to exercise tino rangatiratanga, provide active protection of taonga, and support an effective partnership between learners/ākonga, their whānau, service providers and the Crown.

- **Effectiveness and risk management:** there are clear results demonstrating that the regulatory system delivers its intended outcomes.
- **Efficiency:** the benefits of the regulatory system outweigh the costs.
- **Durability and resilience:** the regulatory system responds well to variation, pressure, and changes. It provides flexibility for service providers to develop innovative ways to meet requirements, and flexibility for regulators in dealing with non-compliance.
- **The Ministry as a capable regulator:** the Ministry has the capability to effectively and efficiently operate the regulatory regime with ongoing attention to improving outcomes for learners/ākonga.
- **Fairness and accountability:** the regulatory system is transparent and delivers good process and is clear and transparent to ensure all actors within the system know where they stand and why. When non-compliance occurs, the principles of natural justice apply.

We have used the six regulatory objectives under the fourth guiding policy objective as main criteria for this analysis as they are a better fit for the technical nature of the proposals.

3.2 Options identification and stakeholder views

Outlined in the table below are identified options, criteria against which each option is assessed, preferred option, and stakeholder feedback on the preferred option.

The criteria for assessment have been outlined in section 3.1 above. The analysis on each of the options within the issue headings use the following key:

- ++ much better than doing nothing/the status quo
- + better than doing nothing/the status quo
- 0 about the same as doing nothing/the status quo
- worse than doing nothing/the status quo
- much worse than doing nothing/the status quo

Options	Assessment against objectives								Preferred option	Stakeholder views
	Policy objectives	Te Tiriti o Waitangi	Effectiveness & risk management	Efficiency	Durability & resilience	Ministry as capable regulator	Fairness & accountability	Overall assessment		
Provisional licence cycling <i>Policy intent: Allow the Secretary to consider cancelling a licence on the grounds of repeated provisional licences.</i>										
<i>Status quo:</i> Continue with the current approach of no restrictions or consequences for services that have had their licence reclassified as provisional multiple times.	0	0	0	0	0	0	0	0	<i>Preferred option - Option three:</i> This option most strongly enables transparency and fairness whilst still enabling the Ministry to act as a capable regulator. The status quo puts children at ongoing risk if the service continues to operate without any enduring improvements in service quality. The other three options all enable a service's licence to be cancelled when sustained non-compliance is evident to the Ministry, which allows the Secretary to take stronger action where a service has repeatedly had their licence reclassified as provisional. However, for option one, it is difficult to determine the appropriate maximum number of provisional licence reclassifications before cancellation is considered. Option three build son option two by accounting for circumstances where a licence is reclassified as provisional in the case of an investigation, thereby providing greater fairness and accountability.	90% agreed that the Secretary should be able to cancel a licence when there is evidence that a service provider is not consistently complying with the regulations, while 4% disagreed . Respondents' comments were divided on the level of discretion that should be employed when considering a service's provisional licence history. Some respondents felt that cancellation should be required after a certain number of provisional licences within specified timeframes, while others felt that the Ministry should take a supportive, rather than punitive, approach and consider the type and seriousness of breaches as well as other aspects of the service's circumstances before considering cancellation.
<i>Option one:</i> Prescribe a limit on the total number of times that a service's licence can be reclassified as provisional.	-	0	+	+	-	+	-	0		
<i>Option two:</i> Enable the Secretary to consider a service's previous provisional licence history before determining whether to issue another provisional licence; or progress to cancellation.	+	0	+	+	+	+	+	+6		
<i>Option three:</i> Enable the Secretary to consider a service's previous provisional licence history, excluding those reclassified under Regulation 15(1)(c) and 15(1)(ca), before determining whether to issue another provisional licence; or progress to cancellation.	+	0	+	+	+	+	++	+7		
A provisional licence issued for an investigation <i>Policy intent: Allow the Secretary to reclassify a service's licence as provisional while an investigation takes place.</i>										
<i>Status quo:</i> If the Ministry is notified of an incident that requires an investigation, it can either keep the service on their current class of licence, with no obligation on the service to undertake an investigation, or alternatively, the Secretary can suspend the licence if there were concerns that met the criteria for a suspension.	0	0	0	0	0	0	0	0	<i>Preferred option - Option one:</i> This provides the greatest level of transparency for parents, the wider public, and the Ministry. It addresses the problem identified by enabling the Secretary to place services on a provisional licence if an incident involving a child occurs that requires an investigation. This option strongly meets the criteria of durability and resilience, as well as fairness and accountability.	61% agreed that following an incident involving a child, the Secretary should have the ability to reclassify a licence as provisional while an investigation is undertaken, while 25% disagreed . Respondents were concerned about the clarity of what constitutes an 'incident' and thought these measures should only be used for serious incidents. There were also concerns that it would be unfair to have a potential cancellation due to the licence being reclassified as provisional following an accident without any clear regulatory breach. One suggestion was to have a new category of licence to indicate that the service is under investigation. This is outside the scope of the original Cabinet approvals so will be considered as part of the wider regulatory review into other aspects of the licensing system.
<i>Option one:</i> Insert a new provision into Regulation 15 that would allow the Secretary to reclassify a service's licence as provisional in the case of an incident involving a child that the Secretary considers requires an investigation. This would allow the Secretary to require a service, or a third party, to undertake an investigation and be kept informed as to the progress of that investigation.	+	0	+	+	+	+	+	+6		

The use of written directions for immediate health and safety matters										
Policy intent: Have options available to deal with health and safety matters that require immediate attention and/or, are minor and don't warrant a formal licensing intervention.										
Status quo: Leave the option of issuing a written direction undefined within the Regulations	0	0	0	0	0	0	0	0	Preferred option - Option one: This option ensures transparency as to the status and process for a written direction. It would allow the Ministry to deal with immediate health and safety matters without having to resort to a resource-intensive licensing sanction. It would allow health and safety matters that require the immediate attention of the service provider to be addressed without impacting unduly on the operation of the service and thereby reducing the immediate risk to children. This option also improves the durability and resilience of the system by providing the Secretary with a wider set of tools to deal with health and safety matters more flexibly. It also has a positive impact on risk management and the Ministry's role as a capable regulator by supporting a more proportionate response to these matters. The status quo leaves the status of the written direction unclear which runs the risk of written directions issued by regional offices being challenged.	86% agreed that issuing written directions for health and safety matters that require immediate attention is a good way to require a service to immediately address the matter while allowing them to safely remain open, while 5% disagreed. 68% agreed that up to five working days is an appropriate length of time for a service to comply with a written direction, while 19% disagreed. Respondents were concerned that it may be difficult to access tradespeople within five working days. Therefore, we have extended the timeframe for compliance to 'up to ten working days', to balance the health and safety with the ability of the service provider to remedy the issue. 90% agreed that the Secretary should be able to suspend a licence, or reclassify it as provisional, if a service has not complied with the written direction within the specified timeframe, while 4% disagreed.
Option one: Create an option of written direction for health and safety matters requiring the service provider's immediate attention. This would only be used in situations where the issue can be dealt with quickly and safely while the service remains open. Written directions will also form part of the licensing history of the service provider. Any non-compliance with a written direction could result in the service's licence being reclassified as provisional or suspended, depending on the circumstances. This option would result in a new Regulation 54A that would enable the Secretary to issue a written direction to a service provider to remedy the immediate health and safety risk. Service providers would be required to comply by the date specified on the notice.	+	0	+	+	+	+	+	+6		
Timing of the application for a licence amendment when the service provider changes										
Policy intent: To require a service provider to apply for an amendment before a change in the identity of the service provider.										
Status quo: Service providers often apply for a licence amendment after a new service provider has taken over the operation of the service.	0	0	0	0	0	0	0	0	Preferred option - Option one: This would significantly improve on the status quo in terms of effectiveness and risk management in the regulatory system. For example, the change would reduce the likelihood of service providers using the licence amendment process to effectively start a new service rather than applying for a new licence, thereby reducing risks to the health and safety of children. It also would clarify the intent of the provision and support greater regional consistency in approaches to licence amendments for a change in the identity of the service provider. The status quo risks new service providers operating with little scrutiny until the licence is reviewed as part of the licence amendment process.	76% agreed that the changes better reflect that service providers must apply for an amendment before there is a change in the identity of the service provider, while 8% disagreed. Respondents supported preventing poor provision by making these clarifications. However, a few respondents were concerned about the impact on sale and purchase processes and the potential impact on community-based services.
Option one: Clarify that early learning services are required to apply to the Secretary for a licence amendment if there is a proposed change in the identity of the service provider operating the service before the new service provider takes over operations.	+	0	+	+	+	+	+	+		
Scope of the review of the licence when the service provider changes										
Policy intent: To give the Secretary the discretion to use appropriate assessments, including assessments used for granting a probationary licence (Regulation 11) and/or for granting a full licence (Regulation 13).										
Status quo: There is a lack of clarity on what is meant by 'reviewing the licence,' meaning inconsistent approaches to licence amendments across regions.	0	0	0	0	0	0	0	0	Preferred option - Option one: This would clarify the intent of the provision and support greater regional consistency in approaches to licence amendments for a change in the identity of the service provider. Option two on the other hand would reduce the Secretary's discretion when approaching licence	74% agreed that the changes better reflect that the Secretary has the discretion to use appropriate assessments, while 6% disagreed.
Option one: Clarify that the phrase 'review the licence' can include the assessments used for granting a probationary licence (Regulation 11) and/or for granting a full licence (Regulation 13).	+	0	+	+	+	+	+	+		

<i>Option two:</i> Require licence amendments for service provider changes to be assessed using the assessment in a probationary licence (Regulation 11) and/or for granting a full licence (Regulation 13).	0	0	-	-	-	-	-	-5	amendments and have significant operational implications which would create additional workload (e.g. for changes in governance or organisational structure in large organisations). The lack of clarity in the status quo means that service providers can use the less rigorous process of licence amendment to effectively start a new service rather than applying for a new licence which has potential risks for children.	Respondents supported the Ministry ensuring quality provision by making these clarifications. Several respondents felt that clarification on the nature and intensity of assessments was needed.
Removing the 21-day minimum notice period for suspensions for a change of control										
<i>Policy intent: Reduce or remove the 21-day notice period for licence suspensions to avoid exposing children to risks to their health and safety and poorer quality of care and education</i>										
<i>Status quo:</i> If a service is no longer under the control of the licensed service provider then there must be a 21-day notice period to suspend the licence.	0	0	0	0	0	0	0	0	<i>Preferred option - Option two:</i> This option comes out more strongly against the criteria of effectiveness and risk management in the regulatory system since it would allow the Secretary to use discretion to reduce the period of time before a suspension takes effect when risks are posed to children. A suspension would take effect on the date specified in the notice effecting it, which could be immediate. Parents and whānau would have a shorter length of time to find an alternative early learning service, but this is outweighed by the benefit of decreasing risks to children. Option one and the status quo mean that a service could be governed by people that have not been subject to a fit and proper assessment and the licence may not have been reviewed, which could pose risks to children.	68% agreed that we should remove the 21-day minimum notice period for suspensions for change in control of a service provider without a licence amendment, while 12% disagreed . Respondents largely supported having more timely protection of children’s health and safety. However, some respondents were concerned about the impact on children and whānau of having to find alternative early learning services. Some respondents also had concerns about delays to the transition to a new service provider, for example, when there is a sale and transfer process. A number of survey respondents supported decreasing the time period for suspension rather than removing it, with the average number of days being approximately 7.5 days.
<i>Option one:</i> Reduce the 21-day minimum notice period for such suspensions to, for example, 10 days, but not allowing suspensions immediately upon notice.	0	0	+	0	+	+	0	+3		
<i>Option two:</i> Remove the 21-day minimum notice period for suspensions if a service is no longer under the control of its licensed service provider.	+	0	+	+	+	+	+	+6		
Removing the 21-day minimum notice period for suspensions for not returning a full licence when invalid										
<i>Policy intent: Reduce or remove the 21-day notice period for not returning an invalid full licence to ensure that parents and whānau are not misled as to their service’s licence status</i>										
<i>Status quo:</i> If a service has had its licence reclassified as provisional and it does not return their licence, then the Secretary gives 21 days’ notice that the licence is to be suspended.	0	0	0	0	0	0	0	0	<i>Preferred option - Option three:</i> This option removes an unnecessary compliance burden on services that is posed by the other three options. Option three therefore measures more strongly against the criteria of efficiency, and fairness and accountability. However, there is a risk of misleading parents and whānau as to the issues within the service if the invalid licence continues to be displayed in the service. The Ministry will explore other options in later tranches of the Review to ensure that parents and whānau are made aware of their service’s licence status.	At the time of the online survey, option two (to remove the 21-day minimum notice period) was our preferred option. 66% agreed with this option, while 13% disagreed . Several respondents questioned the need for being able to suspend a licence on these grounds, since the physical return of a license is no longer as important as it once was due to changes in digital technologies. Based on this feedback, we changed our preferred option to removing this regulation, instead.
<i>Option one:</i> Reduce the 21-day minimum notice period for such suspensions to, for example, 10 days, but not allowing suspensions immediately upon notice.	0	0	0	0	+	+	0	+2		
<i>Option two:</i> Remove the 21-day minimum notice period for suspensions if a service has not returned its full licence when invalid.	+	0	0	0	+	+	+	+4		
<i>Option three:</i> Remove the ability of the Secretary to suspend a service’s licence if the service provider has not returned an invalid licence.	+	0	0	+	+	+	+	+5		

Information used to assess an application for a probationary licence										
Policy intent: Have adequate information to be able to assess if a service is likely to comply with the curriculum standard, the health and safety practices standard, and the governance, management, and administration standard (set out in Regulation 44, 45, and 47, respectively) before granting a probationary licence.										
Status quo: The information considered when assessing an application for a probationary licence is limited to what the applicant provides. An applicant can decide not to include any undesirable history in their application that relates to their likelihood of compliance with the regulated standards.	0	0	0	0	0	0	0	0	Preferred option - Option one: This ensures that the Ministry is able to fulfil its role as a capable regulator and supports the efficient and effective management of the probationary licence process. For example, the Secretary would be able to consider the full set of information without having to seek clarification from the applicant, thereby saving time and resources. Operational policy will be developed to provide clarity on how to assess whether information meets evidentiary standards. The status quo risks limiting the Secretary's authority to use relevant information in their final assessment which could put children at risk.	82% agreed with how the proposed regulations have been drafted, while 6% disagreed. Some respondents felt that the draft regulations were not clear about the types of information that would be considered. Any information that is considered will need to meet evidentiary standards, therefore information sourced from social media or gossip will not be used. Applicants will be provided with the opportunity to respond.
Option one: Clarify that the Secretary is able to consider any relevant information when assessing the applicant's likelihood of compliance with the Regulations outlined in Regulation 11(1)(b).	+	0	+	+	0	+	+	+5		
Application for a new licence										
Policy intent: Fee to help offset the costs to the Ministry associated with the processing and assessment of the licence application										
Status quo: Fee for a new licence is due before a licence can be issued (rather than at the time of application) and there is no clear authority in the regulations that the licence application fee is to be retained by the Ministry.	0	0	0	0	0	0	0	0	Preferred option - Option one: This primarily supports the efficiency of the system and the Ministry's role as regulator. It would achieve the policy intent of the fee, which is to help offset the costs of processing and assessment, and help discourage poorly completed and/or repeated applications. It also improves fairness and accountability by codifying the current practice of seeking the fee on application and making it clear that it is non-refundable. The status quo runs the risk of the Ministry being challenged for requesting the fee upon application and/or stating that the fee is non-refundable. It also risks prospective service providers applying for a licence, then pulling out of the process before the licence is issued, and not paying the fee.	79% agreed that having the fee payable upon application better meets the purpose of the application fee, while 2% disagreed. 64% agreed that having the fee non-refundable better meets the purpose of the application fee, while 10% disagreed. We heard in the written submissions that this may impact small, community-based applicants. The Ministry will continue to support those services where possible.
Option one: Fee for the new licence is payable upon application and non-refundable. Also update fee from \$2,756.25 to \$2,817.50 reflect the increase of GST. We propose that this is done by merging Regulation 25 (licensing fee) into Regulation 5 (applications for licences).	0	0	0	+	0	+	+	+3		

Section 4: Impact Analysis (Proposed approach)

4.1 Summary table of costs and benefits

Provisional licences

Additional costs of proposed approach, compared to taking no action		Impact
Regulated parties	<p>Services that have had their licence reclassified as provisional a number of times will be at risk of having their licence cancelled if further regulatory breaches are found.</p> <p>Some services may face a provisional licence following an incident where they may have had no licensing sanction imposed in the past.</p>	Low
Regulators	<p>An additional cost to the Ministry as there may be an increase in services that are placed on provisional licences for incidents.</p> <p>The Secretary and the Ministry may face legal challenges from service providers with a history of provisional licences that have had their licence cancelled due to being found in breach of the Regulations.</p>	Low
Wider government	Some costs to ERO perhaps as it may increase checks for services on provisional licences.	Low
Other parties	<p>There may be some costs to parents of finding alternative early learning services if services' licences are cancelled due to repeated provisional licences and poor performance.</p> <p>This may have a short-term impact on labour market participation while alternative arrangements are made.</p>	Low
Total Monetised Cost		N/A
Non-monetised costs		Low

Expected benefits of proposed approach, compared to taking no action		Impact
Regulated parties	<p>Poor quality service providers may be more likely to improve, meet, and maintain compliance with the regulatory standards if it is clear that there is a cancellation pathway for repeated provisional licences.</p> <p>There may be some services that would have faced a licence suspension following an incident in the past that will now have their licence reclassified as provisional, instead.</p>	Low
Regulators	<p>Having more options to deal with services where an incident has occurred, including requiring a service provider to undertake an investigation.</p> <p>Potential improved compliance with the Regulations for those services cycling on and off a provisional licence.</p> <p>Having the ability to cancel a licence for a poor-quality service where the licence has repeatedly been reclassified as provisional.</p>	Low-medium
Wider government		N/A
Other parties	Increased confidence that poor quality providers will not be allowed to continue and that incidents are managed proportionately.	Low-medium
Total Monetised Benefit		N/A
Non-monetised benefits		Low-medium

Clarifying the use of written directions for health and safety matters

Additional costs of proposed approach, compared to taking no action		Impact
Regulated parties	If a service provider is issued a written direction for a matter that requires immediate attention, the cost of dealing with the issue will be brought forward, compared to the current approach of having at least 3 months if they have been placed on a provisional licence.	Low
Regulators	Written directions may become more common because of the clarity on the criteria and usage.	Low
Wider government	No impact	N/A
Other parties	No impact	N/A
Total Monetised Cost		N/A
Non-monetised costs		Low

Expected benefits of proposed approach, compared to taking no action		Impact
Regulated parties	There may be cases where a service provider would have been placed on a provisional licence or had their licence suspended as a result of a health and safety issue that required immediate attention, and will instead be issued with a written direction which has a lower level of compliance compared with a licensing sanction. Health and safety matters are dealt with in a proportionate and timely way.	Low
Regulators	More options when dealing with health and safety matters that come to the Ministry's attention. Reduced risk of challenge for those regional offices that have been issuing written directions. Health and safety matters are dealt with in a proportionate and timely way.	Low
Wider government	No impact	N/A
Other parties	Health and safety matters are dealt with in a proportionate and timely way which improves the health and safety of children.	Low
Total Monetised Benefit		N/A
Non-monetised benefits		Low

Clarifying the provisions for licence amendments when the service provider changes

Additional costs of proposed approach, compared to taking no action		Impact
Regulated parties	Some impact as a service will now have to apply for an amendment of their licence prior to the change of control. Services will also be potentially subject to a more rigorous review of their licence than is currently the case.	Low
Regulators	There will be an impact on the Ministry's regional staff as they will undertake a more comprehensive assessment of licence amendment applications in some cases.	Low
Wider government	No impact	N/A
Other parties	No impact	N/A
Total Monetised Cost		N/A
Non-monetised costs		Low

Expected benefits of proposed approach, compared to taking no action		Impact
Regulated parties	Greater clarity as to what to expect from the process of a licence amendment, especially for providers that have services in more than one region.	Low
Regulators	Greater consistency and clarity of how licence amendments are dealt with across regions. Decreased risks associated with service providers having to go through the process prior to taking over control of the service.	Low – medium
Wider government	No impact	N/A
Other parties	Increased confidence that the new service provider has met the same standards as the previous provider. Decreased risks associated with service providers having to go through the process prior to taking over control of the service.	Low
Total Monetised Benefit		N/A
Non-monetised benefits		Low

Removing the 21-day minimum notice period for suspensions for change of control before a licence suspension takes effect in certain circumstances

Additional costs of proposed approach, compared to taking no action		Impact
Regulated parties	The services that would have their licences suspended will now be suspended sooner meaning they have to close earlier with a subsequent loss of income. However, due to the small number of suspensions, the impact is likely to be low.	Low
Regulators	Minimal impact on the Ministry as this would only change the timing of when the suspension would take effect and there is no change to the process overall.	Low
Wider government	No impact	N/A
Other parties	Parents of children attending the services that have had their licence suspended will need to find alternative arrangements sooner than they would under the status quo. This may be disruptive for children. It may also have a short-term impact on labour market participation while alternative arrangements are made.	Low
Total Monetised Cost		N/A
Non-monetised costs		Low

Expected benefits of proposed approach, compared to taking no action		Impact
Regulated parties		N/A
Regulators	Services that meet the requirements to have their licence suspended are closed quicker meaning reduced risks to the health, safety, and wellbeing of children.	Medium
Wider government	No impact	N/A
Other parties	Services that meet the requirements to have their licence suspended are closed quicker meaning reduced risks to the health, safety, and wellbeing of children.	Medium
Total Monetised Benefit		N/A
Non-monetised benefits		Medium

Removing the 21-day minimum notice period for suspensions for not returning a full licence when invalid

Additional costs of proposed approach, compared to taking no action		Impact
Regulated parties	No impact	N/A
Regulators	No impact	N/A
Wider government	No impact	N/A
Other parties	No impact	N/A
Total Monetised Cost		N/A
Non-monetised costs		N/A

Expected benefits of proposed approach, compared to taking no action		Impact
Regulated parties	The services that have been put on a provisional licence no longer have to return their full physical licence.	Low
Regulators	Minimal impact on the Ministry as suspensions under these grounds are uncommon. Anecdotally, the Ministry does not have any examples of a suspension for not returning a full licence in the last few years.	Low
Wider government	No impact	N/A
Other parties	No impact	N/A
Total Monetised Benefit		N/A
Non-monetised benefits		Low

Information used to assess an application for a probationary licence

Additional costs of proposed approach, compared to taking no action		Impact
Regulated parties	Will impact a small number of providers with a history of poor-quality provision that may now have their application for a new licence declined.	Low
Regulators	Some resource impact on the staff assessing applications for new licences as they will be able to take into consideration a wider range of information rather than just what has been provided by the applicant.	Low
Wider government	No impact	N/A
Other parties	There is a small chance that a service may not be available in the areas needed due to an applicant having their licence application declined, therefore impacting children's access to early learning, and parent and whānau labour market participation.	Low
Total Monetised Cost		N/A
Non-monetised costs		Low

Expected benefits of proposed approach, compared to taking no action		Impact
Regulated parties	No impact	N/A
Regulators	Being able to consider a broader range of information on the likely compliance of the applicant to the regulated standards relating to curriculum delivery, health and safety practices, or governance, management, and administration.	Low – medium
Wider government	No impact	N/A
Other parties	Increased confidence that new service providers are likely to comply with the regulated standards in relation to curriculum delivery, health and safety practices, or governance, management, and administration.	Low
Total Monetised Benefit		N/A
Non-monetised benefits		Low

Application fee for a new licence

Additional costs of proposed approach, compared to taking no action		Impact
Regulated parties	No impact as the preferred option is in line with the current practice.	N/A
Regulators	No impact as the preferred option is in line with the current practice.	N/A
Wider government	No impact	N/A
Other parties	No impact	N/A
Total Monetised Cost		N/A
Non-monetised costs		N/A

Expected benefits of proposed approach, compared to taking no action		Impact
Regulated parties	No impact as the preferred option is in line with the current practice.	N/A
Regulators	Small impact as there is a reduced risk that service providers will challenge the current practice of seeking the fee on application and stating it is non-refundable. Preferred option also discourages poorly completed and/or repeated applications.	Low
Wider government	No impact	N/A
Other parties	No Impact	N/A
Total Monetised Benefit		N/A
Non-monetised benefits		Low

4.2 What other impacts is this approach likely to have?

For all children to benefit, the early learning system must consistently provide high quality experiences across the range of provision types valued by parents and whānau. The regulatory proposals outlined contribute to the overall goal of raising the quality of provision across the system, particularly the proposals that are aimed at services not complying with the regulated standards.

Section 5: Implementation and operation

5.1 How will the new arrangements be given effect?

These proposals all require amendments to the Education (Early Childhood Services) Regulations 2008. These changes will be implemented by the Ministry of Education and become part of its ongoing operational and enforcement activity. The changes relating only to clarification of requirements will need minimal support for implementation. The remaining regulatory changes will be supported by updates to forms, guidance, and communications. There will be training for relevant Ministry of Education staff on how to apply the updated regulations in various scenarios. The Ministry will communicate proactively with the sector to ensure they are aware of the changes through its normal communication channels and peak bodies. Note that all regulatory decisions discussed in this impact analysis are currently delegated down from the Secretary to regional Education Managers.

The timing of the implementation of these proposals will be split into two phases.

Phase 1

The following proposals will come into force following notification in the Gazette in accordance with the 28-day rule. Assuming Cabinet approval is obtained on 28 June, the Amendment Regulations can go to the Executive Council on the same day, with a view to come into force on 30 July 2021.

- Application fee for a new licence
- Clarifying the use of written directions for health and safety matters
- Reclassifying a licence as provisional to carry out an investigation in the event of an incident involving a child
- Removing the 21-day minimum notice period before a licence suspension takes effect in certain circumstances

It is intended that the ability to issue a written direction for health and safety matters will be delegated to Senior Education Advisors based in our regional offices. However, this will be the first time that regulatory powers have been delegated to this level. To ensure smooth implementation, initially we will only delegate to this level in a prescribed region. This will enable National Office staff to monitor the impact on the sector and provide an opportunity to amend operational policy before implementing the policy nationwide.

Phase 2

We recommend delaying implementation by six months for the following three proposals:

- Creating a cancellation pathway based on a service's provisional licence history.
- Clarifying the provisions for licence amendments when the service provider changes.
- Clarifying the information used to assess an application for a probationary licence.

The Ministry is not currently well placed to respond to increased challenges to decision making. These delays are recommended because we expect some service providers will test the Secretary's discretion for these proposals. The establishment of an Education Service Agency within a redesigned Ministry may also impact on resourcing to support effective implementation for these proposals as the Ministry will be in transition from July 2021.

For licence amendments, where there is a substantial change or a sale, service providers will need to allow at least 30 working days for an assessment to take place. This will give the Ministry time to assess whether all persons involved in the management of the proposed service are fit and proper persons, and to enable an onsite assessment before a licence amendment is granted. The Ministry will work with the sector on the nature and timing of assessments for other circumstances.

Delaying implementation for these three proposals until 1 February 2022 will:

- enable the development of robust internal practice tools to support consistent decision-making, and direct Ministry resource towards higher-risk scenarios;
- ensure that we can work with and give clear guidance to the sector on what the changes will mean in practice;
- provide the Ministry with the time to re-allocate limited resources to undertake additional work; and
- provide service providers with sufficient time to account for the changes.

Section 6: Monitoring, evaluation, and review

6.1 How will the impact of the new arrangements be monitored?

As part of the Ministry's work on its first regulatory stewardship strategy, it will be completing an assessment of the early learning regulatory system which will look at the overall performance of the system.

These new regulations will be monitored through the Ministry's normal regulatory processes which include licensing activity, responding to complaints and incidents, and applying sanctions.

6.2 When and how will the new arrangements be reviewed?

As mentioned above, the Ministry has begun work on its first regulatory stewardship strategy which will include how to build effective monitoring and evaluation into the regulatory system. The Ministry will also be looking at how improvement work across the systems can be prioritised, and resourcing implications for ongoing regulatory stewardship work.



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Report of the Cabinet Legislation Committee: Period Ended 25 June 2021

On 28 June 2021, Cabinet made the following decisions on the work of the Cabinet Legislation Committee for the period ended 25 June 2021:

Out of scope

LEG-21-MIN-0093

**Education (Early Childhood Services) Amendment
Regulations 2021**
Portfolio: Education

CONFIRMED

Out of scope

Michael Webster
Secretary of the Cabinet



Cabinet Legislation Committee

Minute of Decision

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Education (Early Childhood Services) Amendment Regulations 2021

Portfolio Education

On 24 June 2021, the Cabinet Legislation Committee:

- 1 **noted** that the Ministry of Education is reviewing the early learning regulatory system and the Review will be completed in three tranches;
 - 2 **noted** that tranche one proposals aim to target regulatory gaps that present limitations, or are cumbersome to implement, and areas that may pose a degree of risk to the health, safety and wellbeing of children;
 - 3 **noted** that on 29 July 2020, the Cabinet Social Wellbeing Committee (SWC):
 - 3.1 agreed to amendments to the Education (Early Childhood Services) Regulations 2008 and to start public consultation on tranche one proposals;
 - 3.2 authorised the Minister of Education to make decisions on any issues of detail that may arise during the drafting process without further reference to Cabinet, subject to the decisions being consistent with policy decisions;
- [SWC-20-MIN-0116]
- 4 **noted** that consultation feedback showed strong support for most proposals;
 - 5 **noted** that the Education (Early Childhood Services) Amendment Regulations 2021 give effect to the decision referred to in paragraph 3 above;
 - 6 **noted** that the Education (Early Childhood Services) Amendment Regulations 2021 amend the Education (Early Childhood Services) Regulations 2008 in the following ways:
 - 6.1 create a cancellation pathway based on a service provisional licence history (changes to regulation 32);
 - 6.2 enable the Secretary to issue a provisional licence to carry out an investigation in the event of an incident involving a child (changes to regulation 15);
 - 6.3 enable the Secretary of Education to create written directions for health and safety matters that require immediate attention (changes to regulation 15 and inserting regulation 54A)

- 6.4 clarify the provisions for licence amendments when the service provider changes (changes to regulation 33);
- 6.5 clarify that the Secretary of Education has the ability to decline an application to amend a licence (changes to regulation 33);
- 6.6 remove the 21-day minimum notice period for suspensions for change of control (changes to regulations 33);
- 6.7 remove the Secretary of Education's ability to suspend a service's licence for not returning the full physical licence after the licence has been reclassified as provisional (revoking regulations 30(3) and 15(2)(a));
- 6.8 clarify the information used to assess an application for a probationary licence (changes to regulation 11);
- 6.9 clarify that the fee for a new licence is payable upon application, is non-refundable, and is updated to reflect the current rate of GST (changes to regulation 5 and 25);
- 6.10 clarify the existing person responsible requirements (changes to schedule 1);
- 7 **noted** that on 29 July 2020, SWC agreed:
- 7.1 that regulation 16 of the Education (Early Childhood Services) Regulations 2008 be amended so that there is no mandatory requirement to place a condition on a provisional licence that has been issued as part of an investigation [SWC-20-MIN-0116];
- 7.2 to removing the 21 day minimum notice period for licence suspensions for not returning a full licence when invalid [SWC-20-MIN-0116];
- 8 **noted** that the Minister of Education does not consider the amendments in paragraph 7 necessary;
- 9 **authorised** the submission to the Executive Council of the Education (Early Childhood Services) Amendment Regulations 2021 [PCO 23224/3.0];
- 10 **noted** that clauses 1-6, 8-11, and 14-15 of the Education (Early Childhood Services) Amendment Regulations 2021 will come into force on 30 July 2021, and the remainder will come into force on 1 February 2022;
- 11 **noted** the amendment to the Licensing Criteria relating to minimum indoor temperature to 18 degrees Celsius and for self-review and annual planning to demonstrate regard to the NELP.

Rebecca Davies
Committee Secretary

Present:

Hon Chris Hipkins
Hon Grant Robertson
Hon David Parker
Hon Kris Faafoi

Officials present from:

Office of the Prime Minister
Officials Committee for LEG