

## Cabinet Paper material

### Proactive release

Minister & portfolio Hon Chris Hipkins, Minister of Education  
Name of package Proposed changes to the early learning regulatory system  
Date considered 29 July 2020

#### These documents have been proactively released:

**Cabinet Paper: Proposed changes to the early learning regulatory system**  
29 July 2020  
Ministry of Education

**Impact Summary: Early Learning Regulatory Review: Tranche One**  
23 July 2020  
Ministry of Education

**Cabinet Minute: SWC-20-MIN-0116**  
29 July 2020  
Cabinet Office

**Report of the Cabinet Minute Social Wellbeing Committee**  
31 July 2020  
Cabinet Office

#### Material redacted

Some deletions have been made from the documents in line with withholding grounds under the Official Information Act 1982. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

The applicable withholding grounds under the Act are as follows:

Section 9(2)(h) to maintain legal professional privilege

Some deletions have been made from the documents as the information withheld does not fall within scope of the Minister's portfolio responsibilities, and is not relevant to the proactive release of this material.

You can read the Official Information Act 1982 here:

<http://legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html>

In Confidence

Office of the Minister of Education

Chair, Cabinet Social Wellbeing Committee

## **Proposed changes to the early learning regulatory system**

### **Proposal**

1. This paper seeks agreement to issue drafting instructions and start public consultation on proposed technical changes to the early learning regulatory system. This is the first tranche of a comprehensive review into the early learning regulatory system.

### **Relation to government priorities**

2. This paper relates to the wider government work programme to improve the wellbeing of New Zealanders and their families. Specifically, the changes I propose in this paper supports the government's priority to make New Zealand the best place in the world to be a child by helping protect the health, safety and wellbeing of children in the early learning sector.
3. This paper also contributes to this Government's goal of all children experiencing high quality early learning that enables them to learn and thrive.

### **Executive Summary**

4. Our Government is committed to having a world class early learning system that delivers quality setting for our tamariki. A key aspect to this is a regulatory system that is clear and fit for purpose to support our youngest learners. There are some parts of the system that are no longer meeting the needs of learners, parents, whānau and communities; therefore, the Ministry of Education has begun a comprehensive review of the early learning regulatory system.
5. The Review's purpose is to ensure current and future effectiveness of the regulatory system in supporting high quality educational outcomes, and to enable the Ministry's role as regulators and stewards of the system. The Review will be completed in tranches to allow for the high priority issues to be dealt with in a timely fashion now, with those areas that require more work to come later.
6. As part of this Review, the Ministry has identified a number of gaps within our current regulations that require attention due to the degree of risk that pose to the health, safety and wellbeing of children. The proposed changes in this paper relate to the licensing regime and how we ensure services are fit to operate and are complying with the regulatory standards.
7. I am proposing that the Ministry undertakes a round of sector consultation on the proposals through a consultation document and exposure draft regulations for eight

weeks from the end of October. I will then return to Cabinet with the final regulations in due course.

## **Background**

8. Early learning services have a range of ownership and governance structures and offer different philosophies, languages and operating models. These differences have emerged over time in response to changing social contexts, cultural and educational aspirations, parental values and employment patterns. There are many different service types in the early learning sector, ranging from teacher-led services to parent-led services. In 2019, there were over 4,600 licensed early learning services and almost 200,000 children attending services across the different service types.
9. Early learning services are not owned or run by the government, although they must meet the standards set out in regulations and the licensing criteria. Since it is not compulsory for children to attend an early learning service, the sector is administered differently from schools.
10. The regulatory framework for early learning is divided into three tiers. The first tier is the Education Act 1989, which defines service types and empowers regulations and criteria to be developed. The second tier is the regulations, in particular the Education (Early Childhood Services) Regulations 2008 (the Regulations), which establishes the licensing process and sets the minimum standards that all services must follow. The third tier is the licensing criteria, which are used to assess compliance with the minimum standards set out in the regulations.
11. The Ministry's role as a regulator is to set the minimum standards for the sector and ensure those standards are met through a variety of mechanisms. It does this through licensing all services before they are eligible to open their service and receive funding, and monitoring of services to ensure they are meeting the regulated standards.

## **Review of early learning regulatory system**

12. The structure of the early learning sector has changed significantly since the current regulatory system was established in 2008. Rather than provision being undertaken predominantly by standalone community-based services, more provision is now undertaken by private, for-profit services. The number of private early learning services increased from a total of 1,402 services in 2008 to 2,315 services in 2019, while community-based services decreased slightly from 2,472 services in 2008 to 2,336 in 2019.
13. Concurrent with this is a trend towards service providers owning multiple services. These shifts, and the more competitive environment that has developed as providers have sought to maintain or build market share, have put pressure on the early learning regulatory system.
14. The Ministry is experiencing an increasing number of complaints and incident notifications about early learning services. In 2013 the Ministry received 246 complaints (79 of which were upheld) which grew to 430 in 2018 (with 221 being upheld). There are

growing numbers of challenges by service providers of regulatory actions taken by the Ministry to respond to these complaints.

15. It is also likely that COVID-19 will impact early learning services in a number of ways including through changing community needs, reduced participation and enrolments. This could result in some services experiencing financial difficulties potentially leading to decisions that do not support quality outcomes for children, or even the closure of some services.
16. The Early Learning Action Plan 2019-2029 (the Action Plan) and Review of Home-based Early Childhood Education made a number of recommendations that require regulatory change. The Action Plan and Review of Home-based ECE are part of the Government's comprehensive programme of change across the education system to ensure it delivers the best outcomes for tamariki and their families and whānau. The Regulations Review Committee also recently recommended a re-write of the Regulations following a complaint regarding the Education (Early Childhood Services) Amendment Regulations 2019.
17. A high quality early learning system is key to achieving this Government's vision for education which has the wellbeing of learners at the centre, that enables all children to achieve their full potential and that supports their identity, language and culture. It is important to ensure that the regulatory system aligns with these objectives. Therefore, it is my view that a review of the regulatory system is needed to ensure that our system is clear and fit for purpose to support our youngest learners.
18. The Ministry of Education is consequently undertaking a comprehensive review of the early learning regulatory system (the Review) to ensure that the system is clear and fit-for-purpose to support high quality educational outcomes. The Review's aim is to ensure current and future effectiveness of the regulatory system to support the Ministry's regulatory role and enable good stewardship of the system.
19. The Review will be undertaken in three tranches to ensure high priority issues are prioritised first. Less pressing issues, or issues that require further policy work and sector engagement, will be addressed in later tranches. The Terms of Reference for the Review are attached. Broadly the tranches are as follows:
  - 19.1. Tranche one will address a number of known issues within the current regulatory system that present limitations to ensuring regulatory standards are met, or are cumbersome to implement. These issues pose a degree of risk to the health, safety and wellbeing of children. Tranche one is the subject of this Cabinet paper and is aiming for implementation early next year.
  - 19.2. Tranche two will largely cover the commitments we have made as part of the Action Plan released last year and as part of the home-based review. The intention is for tranche two to be implemented by mid-2022.
  - 19.3. Tranche three are the remaining matters that require significant further work to develop such as ensuring that children are at the centre of our system, and how the regulatory system can support the Crown's responsibilities under Te Tiriti o Waitangi. The intention is for this tranche to be implemented in late 2023.

## **Overview of tranche one**

20. Tranche one targets regulatory gaps that require attention due to the degree of risk they pose to the health, safety and wellbeing of children. Most of these gaps relate to provisions that enable the Ministry to ensure services are fit to operate and are complying with current regulatory standards. I propose consulting on the following amendments:
  - 20.1. clarifying that the fee for a new licence is payable upon application and is non-refundable
  - 20.2. clarifying the information used to assess an application for a probationary licence. Probationary licences are the category of licence for new services
  - 20.3. clarifying the provisions for licence amendments when the service provider changes
  - 20.4. creating written directives for health and safety matters that require immediate attention
  - 20.5. clarifying provisions relating to provisional licences. Provisional licences are a key lever for ensuring compliance with the Regulations
  - 20.6. removing the 21 day minimum notice period for licence suspensions for not returning a full licence when invalid and for a change in control
  - 20.7. clarifying existing person responsible requirements. The person responsible is the person within a service who is responsible for the education, care, comfort, and health and safety of the children attending
  - 20.8. increasing the minimum room temperature from 16 degrees to 18 degrees Celsius.
21. I am proposing that there be a round of public consultation. Engagement will run for eight weeks from the end of October using a discussion document, including the draft regulations, and will largely be undertaken through an online format with a number of hui with some sector or representative groups.
22. Engagement will be geared towards a sector audience. I will utilise existing forums, such as the Early Childhood Advisory Committee (ECAC), as well as the Ministry's other networks and contacts to initiate engagement with the sector.
23. After consultation, I will return to Cabinet with final amendments to regulations.

## **Proposed changes to the Regulations**

### ***Clarify that the fee for a new licence is payable upon application and is non-refundable***

24. The Regulations allow for the Ministry to charge a fee for those applying for a new licence to operate an early learning service. The intent behind this is to cover the costs associated with the processing and assessment of the licence application.
25. As this process requires considerable time and resource, the Ministry requests that the fee is payable on application and is non-refundable. This practice both discourages poorly prepared and/or repeat applications and protects the fiscal risk to the Ministry in the case of applicants pulling out of the licensing process before the licence is approved.
26. However, 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', which implies that an application can be made and processed before the fee is paid. Therefore, I propose to amend Regulation 25(1) to make it clear that the fee is payable upon application and non-refundable.

### ***Information used to assess an application for a probationary licence***

27. A probationary licence is the first step in the licensing process. When a service provider applies for a licence for a new early learning service, the Ministry currently assesses that application and does a licensing visit to determine whether the service complies with, or is likely to comply with, the regulated standards and is therefore ready to be granted a licence to begin operating. If the service provider passes this first step, they are granted a probationary licence, which means they can open and enrol children. The final assessment for a full licence occurs up to a year after the service opens to assess compliance against all regulatory standards.
28. 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 by the applicant, that the service is likely to comply with the regulations relating to curriculum, health and safety practices, and the governance, management, and administration standards.
29. This creates ambiguity and the potential for argument as to whether the decision on granting a licence is limited to only the information that is provided by the applicant, rather than any information held by the Ministry including any previous breaches of the Regulations. This is inconsistent with the fit and proper assessment which allows the Secretary to consider any relevant matters when deciding to grant a licence. Therefore, I propose to expand Regulation 11(1)(b) to give the Secretary the ability to consider any other relevant information when determining the likelihood of compliance with the regulated standards outlined in the Regulations.

### ***Clarifying the provisions for licence amendments when the service provider changes***

30. Regulation 33(1)(c) of the Regulations requires a service provider for 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 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'.
31. 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).
32. There has been an increase in the number of amendments applied for due to a change in the identity of the service provider. This is largely due to changes to the market structure of the early learning sector, with an increasing number of providers transferring early learning businesses and owning multiple services across regions.
33. The current provisions for a licence amendment for when there is a change in the identity of the service provider have a lack of clarity in terms of:
  - 33.1. the requirement for a service to apply for an amendment before taking over the operation of the service
  - 33.2. the phrase "review the licence".
34. This lack of clarity means that some service providers are using the licence amendment process to effectively start a new service rather than applying for a new licence, as the licence amendment process is currently a less rigorous process. This could pose risks to the health and safety of children, and the quality of care and education provided.
35. There is regional variability in the approach to licence amendments for a change in the identity of the service provider. This leads to a lack of clarity for the early learning sector, including operators that have services across regions. This variability could lead services to challenge the Ministry's regulatory actions.
36. I therefore propose to amend regulation 33:
  - 36.1. to 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 taking over operations (Regulation 33(1)(c))
  - 36.2. to 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).

37. These clarifications would support greater regional consistency in approaches to licence amendments for a change in the identity of the service provider.

***Clarifying the use of written directives for health and safety matters***

38. The current process for dealing with any regulatory non-compliance by service providers is restricted to the formal licensing interventions outlined in the Regulations. This often necessitates a full investigation of multiple licensing requirements and takes time. There are limited options for the Ministry to deal quickly and effectively with either minor health and safety matters that do not warrant a full licensing intervention, or more serious health and safety matters that require immediate attention if the service is to continue operating. The Ministry can request that a minor health and safety issue be addressed in an informal way, but that wouldn't form part of the licensing history of the provider and there is no sanction pathway if the service does not comply.
39. Regulation 15 (1)(d) states that the Secretary may reclassify a licence as provisional if a service provider does not comply with a written direction 'from the Secretary under these Regulations' within a reasonable timeframe. However, there is very limited mention of written directions in the Regulations, with only very narrow directions contemplated. Written directions outside of those specific situations have no formal or legal status.
40. I propose to clarify the situations when written directives mentioned in Regulation 15(1) (b) can be used by the Ministry. This will be for situations where there is one or more health and safety matters that require an immediate or short-term remedy if the service is to continue operating, regardless of whether there are other compliance concerns that warrant a full licensing investigation.
41. This will ensure that health and safety matters, including in relation to the premises and facilities, are required to be dealt with to ensure no ongoing risk of harm to children or staff. This will enable the Ministry to formally require remedial action without having to resort to the more intensive licensing sanction of suspension, or wait for a full investigation of all regulatory matters to be completed.
42. Expanding the use of written directions in these circumstances will offer a more targeted approach to health and safety issues, which if remedied, will likely assist to avoid undue impact on the operation of the service unless there are other regulatory issues or serious concerns for the wellbeing of children necessitating further regulatory action.

***Amending certain provisional licence regulations to remove ambiguity***

43. Provisional licences are a key lever for ensuring services comply with the Regulations. A service can be placed on a provisional licence when it is not complying with the Regulations or the conditions of its licence, or a complaint has been lodged that warrants an investigation. A provisional licence means that a service has to comply with certain conditions before being returned to a full licence. The service must display the licence at all times where parents can see it so that parents are aware of the service's current licence status.



### *Issuing a provisional licence in the event of an incident*

44. Regulation 15(1)(c) of the Regulations enables the Ministry to put early learning services on a provisional licence where there has been a complaint that warrants an investigation. However, at times the Ministry is made aware of other incidents that justify investigation where it is not immediately apparent there has been a breach of the regulations, but where a suspension is not appropriate. For example, in the case of a medical event involving a child at a service.
45. The Ministry needs the ability to investigate to ensure that the service is meeting all of the regulatory requirements. Using a provisional licence as a mechanism to investigate these other incidents would provide consistency across all types of incidents, and not just those that the Ministry is made aware of via a complaint.
46. I propose amending Regulation 15(1)(c) to include 'incident at a service involving a child that requires investigation'.
47. I also propose amending Regulations 15 and 16 so that it is clear there is no requirement that investigations should be dealt with by placing a condition on a provisional licence. The wording of the Regulations creates ambiguity that should be clarified. However, should the Ministry wish to place conditions on a licence if the service fails to cooperate during the investigation, they may do so.

### *Cancellation of licences based on a service's licensing history*

48. There are no restrictions on the number of times an early learning service can be placed on a provisional licence. This means services can cycle on and off provisional licences for regulatory breaches, even repeated breaches of the same regulation, as long as they meet the licence conditions within the required timeframes. This type of 'cycling' demonstrates that a service is unable to sustain compliance with the Regulations and could be putting the health and safety of children at risk. It is of particular concern when a service is frequently on a provisional licence for the same type of breaches and unable to embed practices that ensure continued compliance.
49. I propose amending Regulation 32 to give the Ministry the ability to cancel a licence based on provisional licence history. This will enable the Ministry to consider a service's previous licensing history before determining whether to either:
  - 49.1. issue a further provisional licence, or
  - 49.2. progress to cancellation.
50. The Ministry would consider whether the service is 'likely to comply' with the conditions that would be placed on any subsequent provisional licence. This assessment would be based on the service's previous performance. For example, a service that has been on a provisional licence, or suspended, for similar types of breaches may not be issued a further provisional licence. Instead, the Ministry would be able to cancel the service's licence, rather than issuing another provisional licence

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

51. The Secretary for Education (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 before the suspension will take effect (Regulation 31(2)). A service cannot operate, and children cannot attend, when a service's licence is suspended.
52. If a service has not returned its full licence it may still be displaying this invalid licence. Displaying a full licence would be misleading to parents and whānau, as display of the provisional licence is one mechanism to ensure that they are aware of issues in a service.
53. I propose removing the 21 day minimum notice period for suspensions if a service has not returned its full licence when invalid. This would mean that a suspension would take effect on the date specified in the notice effecting it, which could be immediate or at a later date as is the case with other suspensions. This would provide the Ministry with greater discretion when responding to serious risks to the health and safety of children, and the quality of care and education provided.
54. The scale of change is very minor. Anecdotally, the Ministry does not have any examples of a suspension for not returning the full licence in the last few years. The rationale for suspensions will continue to go through the Ministry's review process, including ensuring that the effect on families is minimised.

***Removing the 21 day minimum notice period for suspensions for change of control***

55. The Secretary may suspend an early learning service's licence if satisfied that the service is no longer under the control of its licensed service provider. The Secretary must provide a notice period of at least 21 days (regulation 31(2)).
56. Service providers have a continuing duty to advise the Secretary of any changes in circumstances (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).
57. Having a 21 day minimum notice period could mean that a service is being governed by people that have not been subject to a fit and proper assessment and the licence may not have been reviewed (as required under regulation 33(4)). This may pose risks to the health and safety of children, and the quality of care and education provided.
58. I propose removing the 21 day minimum notice period for suspensions if a service is no longer under the control of its licensed service provider. This means that a suspension would take effect on the date specified in the notice effecting it, which could be immediate or at a later date as is the case with other suspensions. This would provide

the Ministry with greater discretion when responding to serious risks to the health and safety of children, and the quality of care and education provided.

59. The scale of change is minor. Anecdotally, the Ministry estimates that there has only been one or two suspensions for change in control in the last five years. The rationale for suspensions will continue to go through the Ministry's review process, including ensuring that the effect on families is minimised.

### ***Consolidating existing person responsible requirements***

60. The Regulations require that every licensed service have a person responsible. They are responsible for the day-to-day education, care, and health and safety of the children attending a service, and are the professional leader of the service. In centre-based services, a person responsible must be physically present when children are attending the service.
61. The requirements for a person responsible in teacher-led services are currently set out in the Regulations, the Education Act 1989 and the Education (Registration of Early Childhood Services Teachers) Regulations 2004.
62. In late 2019, we consulted on changes to the qualification requirements for persons responsible in teacher-led centres to allow primary qualified teachers to undertake this role. During consultation, a number of respondents suggested only allowing qualified teachers to be a person responsible if they were registered and certificated with the Teaching Council of Aotearoa New Zealand.
63. A person responsible already needs to be registered and certificated with the Teaching Council. This feedback suggests that that these requirements are not well understood in the sector. Therefore, I propose inserting the registration and certification requirements into Schedule 1 of the Education (Early Childhood Services) Regulations 2008. I anticipate this will improve services' compliance with the person responsible requirement.

### ***Increasing minimum room temperature requirements***

64. The current Licensing Criteria in relation to room temperature states that all rooms used by children must be kept at a minimum of 16 degrees (Licensing Criteria HS24). The World Health Organisation guidelines recommend 18 degrees for residential living spaces. The lower minimum in the Licensing Criteria is to allow for fluctuations in temperatures caused by doors opening to allow children to move between indoor and outdoor spaces.
65. During COVID-19 Alert Level 3, this minimum was increased to 18 degrees for public health reasons. Now that the country is at Alert Level 1, this is no longer a requirement but it is still recommended that services maintain 18 degrees for the comfort of the children, especially during the colder winter months.

66. I propose seeking sector feedback on raising the required minimum room temperature to 18 degrees to align with the guidelines of the World Health Organisation for residential spaces.
67. As this requirement sits at the level of Licensing Criteria, there is no need to amend the Regulations to give effect to any changes regarding room temperature.

### **Legal implications**

68. s 9(2)(h)

69.

### **Financial Implications**

70. The potential changes in this Cabinet paper do not have direct financial implications.

### **Legislative Implications**

71. Amendments to the Education (Early Childhood Services) Regulations 2008 will be required to implement most of the changes proposed in this Cabinet paper. There will also be amendments, including consequential amendments, to the Licensing Criteria.

### **Impact Analysis**

72. The Ministry of Education's regulatory review panel reviewed the Early Learning Regulatory Review: Tranche One Regulatory Impact Analysis (RIA) and assessed it as partially meeting the RIA review criteria. This RIA covered all the proposals in this paper with the exception of the person responsible requirements and the proposed increase to the minimum room temperature.
73. The focus of the RIA was to clarify specific regulations to minimise the risk to the health and safety of children. The RIA was assessed as partially meeting the assessment criteria primarily because consultation on the specific proposals was not undertaken. This is mitigated somewhat by the fact it was informed by previous consultation from the sector and that it is proposed to consult on the exposure draft before the proposals are finalised.
74. The Regulatory Quality Team at the Treasury has determined that regulatory impact analysis is not required for the person responsible proposals as there is already an

existing RIA and they are expected to have no or minor 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>

75. The proposed changes to the minimum room temperature does 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**

76. The Ministry for the Environment has been consulted and confirm that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

### **Population Implications**

77. The potential changes in this Cabinet paper do not have direct implications for population groups. The Ministry of Education will consider how to effectively engage with population groups as they develop the process for public consultation. This will include Māori, Pacific peoples, groups representing ethnic communities, and groups representing children with disabilities and their caregivers. Consideration will also be given to rural communities where online consultation may not be feasible.

### **Human Rights**

78. All of the proposals appear to be consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

### **Consultation**

79. 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.

### **Communications**

80. The Ministry of Education will launch the consultation by announcing it via press release and through their usual communication channels.

### **Proactive Release**

81. I intend to proactively release this Cabinet paper and other key documents relating to the Review. Any information which may need to be withheld will be done so in line with the provisions of the Official Information Act 1982.

### **Recommendations**

82. The Minister of Education recommends that the Committee:

1. **note** that the Ministry of Education has begun a comprehensive review of the early learning regulatory system, which has identified a number of regulatory gaps that present limitations, or are cumbersome to implement, and these may pose a degree of risk to the health, safety and wellbeing of children
2. **agree** that Regulation 25(1) of the Education (Early Childhood Services) Regulations 2008 be amended to state that the fee is payable upon application and is non-refundable in order to cover the costs associated with the processing and administration of the application
3. **agree** to expand Regulation 11(1)(b) of the Education (Early Childhood Services) Regulations 2008 to include the ability for the Secretary to consider any other relevant information
4. **agree** that the following is clarified for the provisions for licence amendments when the service provider changes:
  - 4.1. 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 (regulation 33(1)(c))
  - 4.2. 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)
5. **agree** to clarify in the Education (Early Childhood Services) Regulations 2008 that a written directive may be issued in situations where there is one or more health and safety matters that require immediate or short-term remedy if the service provider is to continue to operate, regardless of whether there are other compliance concerns that warrant a full licensing investigation
6. **agree** that Regulation 15(1)(c) of the Education (Early Childhood Services) Regulations 2008 is amended to include ‘incident at a service involving a child that requires investigation’
7. **agree** 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
8. **agree** that Regulation 32 of the Education (Early Childhood Services) Regulations 2008 is amended to include the ability for the Ministry to cancel a licence based on provisional licence history and the likelihood that the service is unable to sustain compliance
9. **agree** to removing the 21 day minimum notice period for licence suspensions for:
  - 9.1. not returning a full licence when invalid
  - 9.2. a change in control

10. **agree** to insert the registration and certification requirements for persons responsible into Schedule 1 of the Education (Early Childhood Services) Regulations 2008
11. **agree** to consult on increasing the required minimum temperature for rooms used by children in the Licensing Criteria from 16 degrees to 18 degrees
12. **invite** the Minister of Education to issue drafting instructions for legislation to give effect to these proposals
13. **authorise** 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 in the paper
14. **note** that the recommendations with drafting implications are subject to Parliamentary Counsel's discretion as to how best to express these in legislation
15. **authorise** the Ministry of Education to undertake consultation on the draft regulations for eight weeks from the end of October 2020
16. **authorise** the Minister of Education to approve the release of any public consultation material related to the above decisions.

Authorised for lodgement

Hon Chris Hipkins

Minister of Education

# Impact Summary: Early Learning Regulatory Review: Tranche One

## Section 1: General information

### Purpose

The Ministry of Education is solely responsible for the analysis and advice set out in this Impact Summary, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing consultation with stakeholders on a government exposure draft of planned regulations.

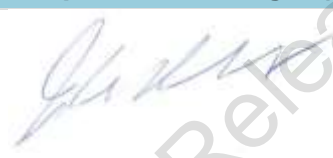
### Key Limitations or Constraints on Analysis

The issues outlined in this analysis cover the first tranche of changes resulting from the Early Learning Regulatory Review. The intention of the first tranche of the Review is to address areas within the Education (Early Childhood Services) Regulations 2008 (the Regulations) that present limitations to ensuring regulatory standards are met, or are cumbersome to implement. As these issues are tightly defined, there are limited options to address the issues.

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

The purpose of this impact summary template is to accompany the Cabinet paper seeking approval to issue drafting instructions for exposure draft regulations for consultation. There has been no public engagement to date on these issues.

### Responsible Manager (signature and date):



John Brooker  
Acting General Manager  
Education System Policy  
Ministry of Education  
23/07/2020



*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 focus of the RIA was to clarify specific regulations to minimise the risk to the health and safety of children. The RIA was assessed as partially meeting the assessment criteria primarily because consultation on the specific proposals was not undertaken. This is mitigated somewhat by the fact it was informed by previous consultation from the sector and that it is proposed to consult on the exposure draft before the proposals are finalised.

## Section 2: Problem definition and objectives

### 2.1 What is the policy problem or opportunity?

#### The 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, for example 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:

1. first tier – the Education Act 1989 which regulates the early learning system by establishing a licensing and certification system for services, defining service types and empowers regulations and criteria to be developed.;
2. second tier – regulations for early childhood education (ECE)<sup>1</sup> and playgroups. These are predominantly stated in the Education (Early Childhood Services) Regulations 2008 and Education (Playgroups) Regulations 2008. These regulations provide for the licensing process for establishing and transferring of services; regulate the management, operation, and control of services; and prescribes minimum standards for ensuring the health, comfort, care, education, and safety of children attending services; and,
3. third tier – the Licensing Criteria. These are more detailed standards set under the empowering 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, for example expectations around the premises, health and safety, governance and management as well as professional practice. The Criteria are used by the Ministry in its assessment of service quality compliance against regulated standards.

#### Licensing process

When a potential service provider wishes to open a service, it applies to the Ministry for a licence. There are four classes of licences:

- *Probationary licence:* The Ministry 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 the class of licence that is issued while a full licence application is assessed and allows the service to open and begin operating. A probationary licence is issued under Regulation 11.

<sup>1</sup> Through 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 of all licensed or certificated early learning services. These include education and care services, kindergartens, ngā kōhanga reo, playgroups, hospital-based services and home-based services.

- *Full licence:* A full licence assessment must be carried out within 12 months of gaining a probationary licence. A full licence is granted under Regulation 13.
- *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 Ministry may at any time reclassify a service's probationary or full licence as a provisional licence. The maximum duration for a provisional licence is 12 months. The service will have conditions it must meet before it can be returned to a probationary or full licence (as applicable) and it may continue to operate. If the service does not meet the conditions by the date specified the licence is cancelled. The process for reclassifying a licence as provisional is within Regulation 15.
- *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) and the new premises comply with or are 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 there are serious risks to the health safety and wellbeing of children the Ministry 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 a number of 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.

### **Review of the Early Learning Regulatory System**

The Ministry has recently begun 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 will include ensuring there are effective pathways for dealing with services that are non-compliant with regulatory standards. This will require that consideration be given to what is meant by high quality education in the early learning context as well as 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 those 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 a number of instances in recent years that have highlighted limitations or a lack of responsiveness in the current regulatory framework. This makes it difficult or cumbersome to hold service providers to account and as a consequence may pose some level of risk to children attending early learning.

The Review will be 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 is intended to cover the first tranche of the Review.

### **Tranche one of the Review**

As a result of the Ministry's work on non-compliance in the early learning sector, a number of areas within the Education (Early Childhood Services) Regulations 2008 (the Regulations) have been identified as presenting limitations, or being cumbersome to implement. This poses difficulties in ensuring regulatory standards are met. These areas of the Regulations either require clarification or may pose a degree of risk to the health, safety and wellbeing of children. Tranche one looks at the following areas:

- The circumstances around the application fee for a new licence.
- The information used 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 when granting an application for a probationary licence.
- Provisions relating to licence amendments if there is a change in the identity of the service provider operating the service (change in the identity).
- The use of written directives for health and safety matters.
- The circumstances which a provisional licence can be used while an investigation takes place.
- Options for dealing with services that have been repeatedly placed on a provisional licence.
- Reviewing the 21 day minimum notice period for licence suspensions for not returning a full licence when invalid and for a change in control.

Each of these areas is outlined in more detail below.

#### **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 cover the costs to the Ministry associated with the processing and assessment of the licence application; however, the current drafting is unclear that the fee is to be payable on application.

The processing and assessment of a licence application requires considerable resource for the Ministry and therefore it has been generally stating to applicants that the fee is non-refundable. By having a non-refundable fee it discourages poorly completed and/or repeated applications. However, there is currently no clear authority for the fee to be retained to cover the costs of the licensing applications.

### Information used to assess an application for a probationary licence

Regulation 11(1)(b) states that the Secretary of Education (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 won't necessarily be evidence of compliance with these regulations because the service hasn't actually opened. By having information provided there is a level of obligation on the service provider to provide this information 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 wording of the regulation creates uncertainty about what information the Ministry can take into account in making a decision. It is important that the Ministry is able to take into account publicly available information and knowledge it holds about the past performance of the applicant where relevant. For example, if an applicant has a history of having breached one of the three regulations mentioned, and doesn't mention this in their application, it is important that the Ministry is able to consider such information.

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.

The current drafting of Regulation 11(1)(b) creates ambiguity and the potential for argument as to whether the decision on granting a licence is limited only the information that is provided by the applicant, rather than any information held by the Ministry including any previous breaches of the regulations mentioned in Regulation 11(1)(b). For example, this may mean if an applicant does not disclose a previous breaches of health and safety standards which have put children at risk, even on prompting, the current wording may mean that the Ministry is unable to use this knowledge in declining the application.

### Provisions for licence amendments when the service provider changes

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 (change in the identity). 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.

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).

There has been an increase in the number of amendments applied for due to a change in the identity. This is largely due to changes to the market structure of the early learning sector, with an increasing number of providers owning multiple services across regions. This has led to an increase in governance changes and transfers of early learning businesses.

The current provisions for a licence amendment for when there is a change in the identity have a lack of clarity in terms of:

- the requirement for a service provider to apply for an amendment before taking over the operation of the service
- the phrase “review the licence”.

This lack of clarity could pose risks to the health and safety of children, and the quality of care and education provided. Some service providers are using the licence amendment process to effectively start a new service rather than applying for a new licence, as this is currently a less rigorous process.

There is regional variability in the approach to licence amendments for a change in the identity. This leads to a lack of clarity for the early learning sector, including operators that have services across regions. This variability could lead services to challenge the Ministry’s regulatory actions.

There have been a few examples of service providers using the licence amendment process in way that could pose risks to the health and safety of children, and the quality of care and education provided:

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

The private nature of the market for early learning provision means that it is difficult to provide further evidence that services are using the amendment process to effectively start a new service, in ways that may risk health, safety and the provision of quality care and education.

#### The use of written directives for health and safety matters

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

There are currently limited options for the Ministry to deal with either:

- minor health and safety matters that don't warrant a formal licensing intervention
- a service that the Ministry is going to reclassify their licence as a provisional but there is a health and safety matter that requires immediate attention, or
- if 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 be viewed as heavy handed.

Regulation 15(1)(d) states that the Secretary may reclassify a licence as provisional if a service provider doesn't comply with a written direction 'from the Secretary under these Regulations' within a reasonable timeframe. However, there is no other mention of a written direction in the Regulations, this means there is a lack of clarity about how these might be used, when and by whom.

### Provisional licences

*Allowing the Ministry to put services on a provisional licence without specified conditions while an investigation takes place*

Regulation 15(1)(c) enables the Ministry to place a service on a provisional licence when there has been a complaint alleging non-compliance against the Regulations that warrants investigation. Regulation 16 requires that a provisional licence must specify the conditions that need to be complied with.

A service with a full licence can only be reclassified as provisional if it is found to be in breach of the Regulations.

If the Ministry is notified of an incident that requires an investigation there are two ways the situation can currently be managed. It can either keep the service on their current class of licence, with no obligation on the service to notify parents. Alternatively, the Ministry 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. A service's licence will only be suspended under Regulation 30 if it is considered not in the best interests of the children attending the service to continue to operate. However, in some circumstances the Ministry may be notified of an incident that requires an investigation where a suspension would not be appropriate, and where it is not immediately apparent there has been a breach of the regulations.

The Ministry does not currently have the ability to use a provisional licence without conditions as a mechanism for investigating incidents that do not warrant suspension. For example, where a medical event involving a child occurs and the Ministry needs to seek assurance that the service is meeting health and safety requirements.

### *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 a provisional licence. This means services can continually cycle on and off provisional licences without the consequence of having their licence cancelled.

Concerns have been raised, in particular, with services that are repeatedly on provisional licences for the same types of breaches or may have had their licence suspended in the past.

If a service has a history of provisional licences 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 for children.

#### The 21 day minimum notice period for 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 (Regulation 31(2)).

Service providers have a continuing duty to advise the Secretary of any changes in circumstances (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).

Having a 21 day minimum notice period may pose risks to the health and safety of children, and the quality of care and education provided. It could mean that a service is being governed by people that have not been subject to a fit and proper assessment and the licence may not have been reviewed (as required under Regulation 33(4)).

There have been a few examples of where the 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
- 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 could not be assured that it would provide quality care and education in the 21 day notice period.

#### The 21 day minimum notice period for suspensions for not returning a full licence when invalid

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. This may pose risks to the health and safety of children, and the quality of care and education provided. Displaying a full licence would be misleading to parents and whānau, as display of the provisional licence is one mechanism to ensure that they are aware of issues in a service.



## 2.2 Who is affected and how?

The proposals in this regulatory impact analysis will result in amendments to the Education (Early Childhood Services) Regulations 2008 and will impact the following groups:

- Children, parents and whānau can be impacted as a result of children being exposed to risks to their health, safety and wellbeing by attending poor quality services or if the service provider is not complying with the regulated standards. There is also an impact on a child's participation in early learning if service's licence status changes and they are no longer operating which has flow on impacts for the caregivers' labour market participation at least in the short term.
- Early learning service providers 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 which in some cases may result in a different outcomes for some services, including impacts on their ongoing operation.
- When 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 will be impacted through changes to the licensing system operation and administration, including additional tools for dealing with non-compliance.

The specific impacts of the proposals are outlined below.

### Application fee for a new licence

The application fee for a new licence impacts all prospective service providers that are applying for a licence and the Ministry, which administers the licensing process. There is no impact on children, parents and their whānau from the application fee as it is paid prior to a service opening. By clarifying aspects around the application fee there would be minimal impact on service providers and the Ministry as it is seeking to confirm current practice.

### Information used to assess an application for a probationary licence

Regulation 11 is regarding the granting of a probationary licence and includes the matters which the Secretary must consider when granting the licence. The rationale for this regulation is to ensure that any service provider entering the market meets certain standards and has or is likely to comply with the regulated standards. 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 and the service provider has a history of poorer quality of care and education.

This regulation impacts on prospective service providers as it indicates the matters which the Ministry will take into account, as well as giving the Ministry the authority and criteria for the granting of the licence.

By clarifying the information that can be used by the Secretary in determining if an applicant is likely to comply with the regulations set out in Regulation 11(1)(b) the

Ministry would not be changing the requirement on service providers to supply evidence; therefore, there is minimal impact on service providers when they apply for a licence. This change would mean that there is no doubt the Ministry is able to take into account information it may know about, but had not been provided by the applicant, including any previous breaches of the Regulations mentioned. This would also mean that in cases where an applicant hasn't 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.

#### Clarifying the provisions for licence amendments when the service provider changes

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. The Secretary must "review the licence" however this is not clarified in the Regulations in terms of the timing of the application for an amendment and the scope of the review.

This lack of clarity could pose risks to the health and safety of children, and the quality of care and education provided, as some services are being operated by service providers that have not gone through a rigorous assessment.

Services that have a change in 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.

#### Written directives for health and safety matters

While there is no legal standing currently for a written directive in the Regulations, the intent is for them to be used as a more effective and targeted compliance tool before having to resort to a licensing sanction. It is also intended to be used in cases where a service has an immediate issue that needs addressing in order to remain safely open.

By creating a process for issuing a written directive for health and safety matters it will mean that issues are required to be dealt with by ensuring no ongoing risk of harm to children or staff. This will enable the Ministry to formally require remedial action without having to resort to the more intensive licensing sanction of suspension, or wait for a full investigation of all regulatory matters to be completed. Services will also benefit from issues being dealt with in a more proportionate way enabling them to remain in operation.

#### Provisional licences

The main parties that are affected by provisional licences are children, parents and whānau, as children can be exposed to risks to their health and safety and poorer quality of care and education. Early learning services that have had their licence reclassified as provisional are also affected as they will have a number of conditions imposed on them that they will need to rectify before they can return to a full licence. This also impacts on the Ministry as regulator because it increases workloads for our regional staff first and foremost.

In respect of Regulation 15(1)(c) the Ministry is seeking to change the behaviour of early learning services. The Ministry wants to ensure services are compliant with the

Regulations at all times and seeking to improve on compliance with the Regulations where they might have previously been deficient.

The Ministry also seeks to change the behaviour of early learning services that continually cycle on and off provisional licences, particularly for similar breaches of the Regulations. Services that have a history of provisional licences are more likely to comply with the Regulations and ensure that they do not repeat similar breaches because of the risk they will have their licence cancelled. Services that are unable to break the cycle of provisional licences may not have the resources or know-how to maintain compliance.

The Ministry is seeking this change as it may be more appropriate for these services to have their licences cancelled to maintain a quality network of provision.

#### Removing the 21 day minimum notice period for 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 (Regulation 31(2)).

This may pose risks to the health and safety of children, and the quality of care and education provided. It could mean that a service is being governed by people that have not been subject to a fit and proper assessment and the licence may not have been reviewed (as required under Regulation 33(4)).

Removing the 21 day minimum may give parents and whānau less time to find an alternative early learning service for their child or children. Services may also have less time to prepare for the service being suspended. The Ministry would benefit from have greater discretion in reducing the period of time when risks are posed to children.

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

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)).

This may pose risks to the health and safety of children, and the quality of care and education provided, as parents and whānau would not be informed about issues in a service and therefore would not have an opportunity to avoid these risks.

Removing the 21 day minimum may give parents and whānau less time to find an alternative early learning service for their child or children. Services may also have less time to prepare for the service being suspended. The Ministry would benefit from have greater discretion in reducing the period of time when risks are posed to children.

## 2.3 What are the objectives sought in relation to the identified problem?

There are four central guiding policy objectives for the Regulatory Review:

### **1. The early learning regulatory system 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. The early learning regulatory system 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. The early learning regulatory system 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. The early learning regulatory system provides the foundation for learning in a world class inclusive environment.**

- The regulatory system ensures an internationally-respected early learning sector and supports effective partnerships between Māori and the Crown.
- The regulatory system is adaptive and responsive to the needs of all learners/ākonga and ensures that they receive high quality care and education which sets the foundations for future learning.

These objectives are listed in order of priority, with the key objective being that the regulatory system has learners/ākonga and their whānau at the centre of education.

Running across all of these policy objectives are a series of regulatory objectives which have been used as the criteria for this analysis. These are:

- **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/ākongā, 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/ākongā.
- **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.

## Section 3: Options identification

### 3.1 What options have been considered?

The criteria for assessment has been outlined in the response to section 2.3 above. We have also assessed the options in regards to their impact on the overall policy objectives of the Review, with a particular focus on objective 1 (the early learning system has learners/ākonga and the whānau at the centre of education). 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

#### Application fee for a new licence

- Status quo*: Fee for a new licence due before a licence can be issued – there is a risk that the Ministry could be challenged on its current and long standing practice of requesting the fee upon application and stating that the fee is non-refundable.

There is also the risk that a prospective service provider applies for a licence but pulls out of the process before the licence is issued and not pay the fee. This would benefit the service provider as there would be no cost to them but it would be an unrecovered cost to the Ministry.

- Option one*: Make the new licence application fee payable upon application and non-refundable – this is in line with current practice. This would achieve the policy intent of the fee, which is cost recovery, but also ensure that any of those submitting poorly completed and/or repeated applications are discouraged from applying for a new licence if they are unlikely to be able to obtain one.

	Status quo	Option one
Policy objectives	0	0
Te Tiriti o Waitangi	0	0
Effectiveness and risk management	0	0
Efficiency	0	+
Durability and resilience	0	0
Ministry as a capable regulator	0	+
Fairness and accountability	0	+
<b>Overall assessment</b>	<b>0</b>	<b>+3</b>

### Information used to assess an application for a probationary licence

- *Status quo*: Taking into account the information provided by the applicant – this means that an applicant can decide not to include any undesirable history in their application for a licence that relates to their likelihood of compliance with the regulated standards. If the Ministry is not aware of this information then there is a risk that the licence could be approved potentially putting children at risk.

If the Ministry is aware of any history of the provider that has not been provided in their application, then the practice has been to provide that information to the applicant and give them the opportunity to respond. However, the current wording could be interpreted as limiting the Ministry's authority to use this information in its final assessment.

- *Option one*: Ensuring the Secretary for Education is able to consider any other relevant information when assessing the applicant's likelihood of compliance with the Regulations outlined in Regulation 11(1)(b) – this would mean it is clear that the Secretary is able to consider known history of the applicant when granting a probationary licence, such as a cancelled licence due to breaches of the health and safety standards outlined in Regulation 46, regardless of whether this information has been provided by the applicant.

This would will benefit children, parents and whānau, and teachers, as poor quality providers may be less likely to be granted a probationary licence. This will also mean that in those cases where an applicant has failed to disclose previous breaches of the regulated standards, the Ministry will not need to go back to the applicant to clarify. This will reduce the time and compliance associated with processing the application.

	Status quo	Option one
Policy objectives	0	+
Te Tiriti o Waitangi	0	0
Effectiveness and risk management	0	+
Efficiency	0	+
Durability and resilience	0	0
Ministry as a capable regulator	0	+
Fairness and accountability	0	+
<b>Overall assessment</b>	0	+5

### Clarifying the provisions for licence amendments when the service provider changes

#### *Timing of the application for a licence amendment when the service provider changes (Regulation 33(1)(c))*

- *Status quo*: Service providers often apply for a licence amendment after a new service provider has taken over the operation of the service. This means that the

new service provider can operate with little scrutiny until the licence is reviewed as part of the licence amendment process.

- *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.

This would clarify the intent of the provision. It would support greater regional consistency in approaches to licence amendments for a change in the identity of the service provider.

- *Option two:* Require the existing service provider (as named in the current licence) to remain in control of the service until the Secretary has confirmed the licence amendment.

This removes discretion for the Ministry. It also has operational implications due to the increase in suspensions for change of control (i.e. the consequence for services that did not follow the requirement).

	Status quo	Option one	Option two
Policy Objectives	0	+	0
Te Tiriti o Waitangi	0	0	0
Effectiveness and risk management	0	++	+
Efficiency	0	+	-
Durability and resilience	0	+	-
Ministry as a capable regulator	0	+	-
Fairness and accountability	0	+	+
<b>Overall assessment</b>	<b>0</b>	<b>+7</b>	<b>-1</b>

#### *Scope of the review of the licence when the service provider changes (Regulation 33(4))*

- *Status quo:* There is a lack of clarity on what is meant by 'reviewing the licence' meaning inconsistent approach to licence amendments across the country. This lack of clarity means that some service providers are using the licence amendment process to effectively start a new service rather than applying for a new licence, as this is currently a less rigorous process.
- *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).

This would clarify the intent of the provision. It would support greater regional consistency in approaches to licence amendments for a change in the identity of the service provider.



- *Option two:* 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).

This would significantly reduce the Ministry's discretion when approaching licence amendments. It would have a significant operational implications in terms of the additional workload (e.g. for changes in governance or organisational structure in large organisations).

	Status quo	Option one	Option two
Policy Objectives	0	+	0
Te Tiriti o Waitangi	0	0	0
Effectiveness and risk management	0	++	-
Efficiency	0	+	--
Durability and resilience	0	++	--
Ministry as a capable regulator	0	++	--
Fairness and accountability	0	++	+
<b>Overall assessment</b>	<b>0</b>	<b>+10</b>	<b>-6</b>

#### The use of written directives for health and safety matters

- *Status quo:* Leave the option of issuing a written directive undefined within the Regulations – this leaves the current status of the written directive unclear to both service providers and the Ministry. This includes what situations they may be used for.

There is risk that those regional offices that are issuing written directives could be challenged as a result of a lack of clarity on the status and delegations within the Regulations.

- *Option one:* Create option of written directive for health and safety matters requiring the service provider's immediate attention, regardless of whether there are other matters that warrant a full investigation – this would mean that there is clarity and transparency as to the status and process for a written directive.

This would mean that there is an option for the Ministry to deal with low level health and safety matters without needing to resort to a resource and time intensive licensing sanction. It will mean that health and safety matters that require the immediate attention of the service provider can be addressed without impacting unduly on the operation of the service and thereby reducing the immediate risk to children.

	Status quo	Option one
Policy Objectives	0	+
Te Tiriti o Waitangi	0	0
Effectiveness and risk management	0	+
Efficiency	0	+
Durability and resilience	0	+
Ministry as a capable regulator	0	+
Fairness and accountability	0	+
<b>Overall assessment</b>	<b>0</b>	<b>+6</b>

### Provisional licences

#### *A provisional licence issued for an investigation - section 15(1)(c) and 16*

- **Status quo:** If the Ministry is notified of an incident that requires an investigation there are two ways the situation can be managed. It can either keep the service on their current class of licence, with no obligation on the service to notify parents. Alternatively, the Ministry 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.
- **Option one:** Add 'or incident at a service involving a child that requires investigation' where it is not immediately apparent there has been a breach of the regulations to section 15(1)(c). Amend section 16 to specify that there is no requirement to place a condition on a provisional licence that has been issued due to an investigation. And, if any non-compliance is found during the investigation then this can be added as a condition to the provisional licence.

This would enable a greater level of transparency for parents than at present when a service is under investigation due to a complaint or incident requiring investigation. However, there may be more services placed on provisional licences. The Ministry would need to have a category 'while an investigation is undertaken' to reflect that these services are not necessarily in breach of the Regulations.

- **Option two:** Repeal section 15(1)(c) and have the general ability to issue a provisional licence with no conditions while carrying out an investigation for a specified period of time (e.g. 30 working days).

This would enable discretion in the ability to issue a licence. However, the downside of this option is that it would perhaps open us up to legal challenge. Serious complaints and incidents may in fact require conditions.

	Status quo	Option one	Option two
Policy Objectives	0	++	+
Te Tiriti o Waitangi	0	+	+
Effectiveness and risk management	0	+	-
Efficiency	0	+	+
Durability and resilience	0	+	+
Ministry as a capable regulator	0	+	-
Fairness and accountability	0	+	-
<b>Overall assessment</b>	<b>0</b>	<b>+8</b>	<b>+1</b>

### *Provisional licence cycling*

- *Status quo*: Continue with the current approach of no restrictions or consequences for services that have had their licence reclassified as provisional a number of times. This puts children at ongoing risk if the service continues to operate without any enduring improvements in service quality.
- *Option one*: Prescribe a limit on the total number of provisional licences a service can access.
- *Option two*: Amend the Regulations to enable the Ministry to consider a service's previous provisional licence history before determining whether to issue another provisional licence; or progress to cancellation.

Both options one and two would enable a service's licence to be cancelled when sustained non-compliance is evident to the Ministry, through the repeated issue of similar provisional licences. This would allow the Ministry to take stronger action where a service is repeatedly placed on a provisional licence for similar issues and is able to demonstrate compliance in the short term only.

There are potential unintended consequences, including greater likelihood of:

- legal challenge from providers when being issued a provisional licence, placing the Ministry under greater scrutiny
- potential to limit the use of provisional licences in favour of non-regulatory action (e.g. action plans) which reduces the visibility of non-compliance
- service providers implementing workarounds to avoid a new provisional licence being issued.

For option one it may be difficult to determine the appropriate limit the Ministry would set for the maximum number of provisional licences able to be issued. This is due to the different circumstances that lead to the provisional licence being issued.

	Status quo	Option one	Option two
Policy Objectives	0	-	+
Te Tiriti o Waitangi	0	0	+
Effectiveness and risk management	0	+	+
Efficiency	0	+	+
Durability and resilience	0	-	+
Ministry as a capable regulator	0	+	+
Fairness and accountability	0	-	+
<b>Overall assessment</b>	<b>0</b>	<b>0</b>	<b>+7</b>

#### Removing the 21 day minimum notice period for suspensions for change of control

- *Status quo*: 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. This could mean that a service is governed by people that have not been subject to a fit and proper assessment and the licence may not have been reviewed. This may pose risks to the health and safety of children, and the quality of care and education provided.
- *Option one*: Lowering the 21 day minimum notice period for such suspensions to, for example, 10 days but not allowing suspensions immediately upon notice. As with the status quo, this could mean that a service would be governed by people that have not been subject to a fit and proper assessment and the licence may not have been reviewed. This may pose risks to the health and safety of children, and the quality of care and education provided, for a shorter period than the status quo.
- *Option two*: Removing the 21 day minimum notice period for suspensions if a service is no longer under the control of its licensed service provider. It would allow the Ministry discretion to reduce the period of time when risks are posed to the health and safety of children, and the quality of care and education provided. A suspension would take effect on the date specified in the notice effecting it, which could be immediate or at a later date as is the case with other suspensions.

	Status quo	Option one	Option two
Policy Objectives	0	0	+
Te Tiriti o Waitangi	0	0	0
Effectiveness and risk management	0	+	++
Efficiency	0	0	+
Durability and resilience	0	+	++
Ministry as a capable regulator	0	+	++
Fairness and accountability	0	0	+
<b>Overall assessment</b>	<b>0</b>	<b>+3</b>	<b>+9</b>

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

- *Status quo*: 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. This means the service could continue to operate as if it has a full licence for those 21 days, thereby misleading parents and whānau as to the issues within the service.
- *Option one*: Lowering the 21 day minimum notice period for such suspensions to, for example, 10 days but not allowing suspensions immediately upon notice. This means that the service could continue to operate as if it had a full licence for that period of time. Similar to the status quo this would be potentially misleading parents and whānau as to the issues within the service but for a shorter period than is currently the case.
- *Option two*: Removing the 21 day minimum notice period for suspensions if a service has not returned its full licence when invalid. This would mean that a suspension would take effect on the date specified in the notice effecting it, which could be immediate or at a later date as is the case with other suspensions.

This would reduce the risks to children's health and safety, and quality of care and education by increasing parents and whānau awareness of issues in a service.

	Status quo	Option one	Option two
Policy Objectives	0	0	+
Te Tiriti o Waitangi	0	0	0
Effectiveness and risk management	0	+	++
Efficiency	0	0	+
Durability and resilience	0	+	++
Ministry as a capable regulator	0	+	++
Fairness and accountability	0	0	+
<b>Overall assessment</b>	<b>0</b>	<b>+3</b>	<b>+9</b>

### 3.2 Which of these options is the proposed approach?

#### Application fee for a new licence

Option one is the preferred option as it would ensure the Ministry maintains cost recovery from the processing of new licence applications while at the same time discouraging poorly completed and/or repeated applications.

This primarily supports the efficiency of the system and the Ministry's role as regulator through covering some of the costs associated with the application process. 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.

#### Information used to assess an application for a probationary licence

Option one is the preferred option due to the impact on the quality of provision from declining a licence application from those providers with a history of poor curriculum delivery, health and safety practices, or governance, management, and administration standards. This option supports the overall health, safety and educational outcomes of children through ensuring all relevant history of the provider is taken into account when making a decision on whether to grant a probationary licence.

This also 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. This is through allowing us to take the full set of information the Ministry has into account in a timely fashion without having to seek clarification from the applicant thereby saving time and resources.

## Clarifying the provisions for licence amendments when the service provider changes

### *Timing of the application for a licence amendment when the service provider changes (Regulation 33(1)(c))*

Option one is the preferred option as it comes out more strongly against the criteria of effectiveness and risk management in the regulatory system. It would reduce risks to the health and safety of children, and the quality of care and education provided. It would reduce the likelihood of services providers using the licence amendment process to effectively start a new service rather than applying for a new licence. It would support greater regional consistency in approaches to licence amendments for a change in the identity of the service provider.

### *Scope of the review of the licence when the service provider changes (Regulation 33(4))*

Option one is the preferred option as it comes out more strongly against the criteria of effectiveness and risk management in the regulatory system. It would reduce risks to the health and safety of children, and the quality of care and education provided. It would reduce the likelihood of services providers using the licence amendment process to effectively start a new service rather than applying for a new licence. It would support greater regional consistency in approaches to licence amendments for a change in the identity of the service provider.

## The use of written directives for health and safety matters

Option one is the preferred option as this would allow for a wider range of tools to be available to the Ministry in dealing with health and safety matters that have come to its attention, thereby reducing the impact on children. There is very limited reference to written directives in the Regulations and no reference to use for the purpose of addressing health and safety matters. This option would therefore allow for more effective and targeted management of health and safety matters.

This improves the durability and resilience of the system by providing the Ministry 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.

## Provisional licences

### *Provisional licence issued for an investigation*

Option one is the preferred option as it provides the greatest level of transparency for parents and the wider public, as well as the Ministry. It addresses the problem identified by enabling the Ministry to place services on a provisional licence if an incident occurs, and without conditions if conditions are not deemed to be necessary. This option in particular strongly meets the criteria of durability and resilience as well as fairness and accountability.

### *Provisional licence cycling*

Option two is the preferred option for services that cycle on and off provisional licences. It enables the Ministry to take into account a service's provisional licence history and the

types of breaches, before determining whether or not to cancel a licence. This would address the problem by enabling the Ministry the ability to cancel a service's licence based on its history of provisional licences. The Ministry will have the discretion to consider the breaches, whether the service is likely to comply, and the impact on children should the service continue to operate.

Option two is preferred because it most strongly enables durability and resilience whilst still enabling the Ministry to act as a capable regulator.

#### Removing the 21 day minimum notice period for suspensions for change of control

Option two is the preferred option as it comes out more strongly against the criteria of effectiveness and risk management in the regulatory system. The greater discretion would allow the Ministry to reduce the period of time when risks are posed to the health and safety of children, and the quality of care and education provided. A suspension would take effect on the date specified in the notice effecting it, which could be immediate or at a later date as is the case with other suspensions.

Option one, lowering the 21 day minimum notice period for such suspensions, would not allow the Ministry the discretion to respond quickly to serious risks to the health and safety of children, and the quality of care and education provided.

The scale of change is minor. Suspensions are only used as a last resort. Anecdotally, the Ministry estimates that there has only been one or two suspensions for change in control in the last five years.

The greater discretion allowed by this option will be used responsibly by the Ministry as all proposed suspensions must go through internal, regional and national office review, including ensuring that the effect on families is minimised.

In cases where the notice period is less than 21 days, parents and whānau would have a shorter length of time to find an alternative early learning service for their child or children. However, on balance avoiding exposing children to unnecessary risks to their health and safety, and poorer quality of care and education, outweighs this.

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

Option two is the preferred option as it comes out more strongly against the criteria of effectiveness and risk management in the regulatory system. The greater discretion would allow the Ministry to reduce the period of time when risks are posed to the health and safety of children, and the quality of care and education provided. It would assist the Ministry to ensure that parents and whānau are aware of issues in a service. A suspension would take effect on the date specified in the notice effecting it, which could be immediate or at a later date as is the case with other suspensions.

Option one, lowering the 21 day minimum notice period for such suspensions, would not allow the Ministry the discretion to respond quickly to serious risks to the health and safety of children, and the quality of care and education provided.



The scale of change is very minor. Suspensions are only used as a last resort. Anecdotally, the Ministry does not have any examples of a suspension for not returning the full licence in the last few years.

The greater discretion allowed by this option will be used responsibly by the Ministry as all proposed suspensions must go through internal, regional and national office review, including ensuring that the effect on families is minimised.

## Section 4: Impact Analysis (Proposed approach)

### 4.1 Summary table of costs and benefits

#### Application fee for a new licence

Affected parties	Comment	Impact
Additional costs of proposed approach, compared to taking no action		
Regulated parties	No impact as the preferred option is in line with the current long standing practice and the fee level remains the same.	N/A
Regulators	No impact as the preferred option is in line with the current long standing practice and the fee level remains the same.	N/A
Wider government	No impact	N/A
Other parties	No impact	N/A
<b>Total Monetised Cost</b>		
<b>Non-monetised costs</b>		Low
Expected benefits of proposed approach, compared to taking no action		
Regulated parties	No impact as the preferred option is in line with the current long standing practice and the fee level remains the same.	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
<b>Total Monetised Benefit</b>		
<b>Non-monetised benefits</b>		Low

Information used to assess an application for a probationary licence

Affected parties	Comment	Impact
Additional costs of proposed approach, compared to taking no action		
Regulated parties	Will impact a small number of providers with a history of poor quality provision that may now have the application for a new licence declined	Low
Regulators	Minimal 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
<b>Total Monetised Cost</b>		N/A
<b>Non-monetised costs</b>		Low

Expected benefits of proposed approach, compared to taking no action		
Regulated parties	No impact	N/A
Regulators	Being able to take into account 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
<b>Total Monetised Benefit</b>		N/A
<b>Non-monetised benefits</b>		Low

## Clarifying the provisions for licence amendments when the service provider changes

Affected parties	Comment	Impact
Additional costs of proposed approach, compared to taking no action		
Regulated parties	Some impact as 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 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
<b>Total Monetised Cost</b>		N/A
<b>Non-monetised costs</b>		Low
Expected benefits of proposed approach, compared to taking no action		
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 the country.  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
<b>Total Monetised Benefit</b>		
<b>Non-monetised benefits</b>		Low

## Clarifying the use of written directives for health and safety matters

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

## Provisional licences

Affected parties	Comment	Impact
Additional costs of proposed approach, compared to taking no action		
Regulated parties	<p>Services that have had a number of provisional licences issued 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	An additional cost to the Ministry as there may be an increase in services that are placed on provisional licences for incidents.	Low
Wider government	Some costs to ERO perhaps as it may increase checks for services on provisional licences.	Low
Other parties	<p>There may 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
<b>Total Monetised Cost</b>	Low	Low
<b>Non-monetised costs</b>	Low	Low
Expected benefits of proposed approach, compared to taking no action		
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 suspended licence following an incident in the past that will now have a provisional licence issued.</p>	Low
Regulators	<p>Having more options to deal with services where an incident has occurred.</p> <p>Potential improved compliance with the Regulations for those services been cycling on and off provisional licence.</p> <p>Having the ability to cancel a licence where there have been repeated provisional licences issued for a poor quality service.</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
<b>Total Monetised Benefit</b>		Medium
<b>Non-monetised benefits</b>		Medium

## Removing the 21 day period before a licence suspension takes effect in certain circumstances

Affected parties	Comment	Impact
Additional costs of proposed approach, compared to taking no action		
Regulated parties	The services that are going to have their licences suspended will now be suspended sooner meaning they have to close earlier with a subsequent loss of income.	Low (due to the small number of suspensions)
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
<b>Total Monetised Cost</b>		N/A
<b>Non-monetised costs</b>		Low

Expected benefits of proposed approach, compared to taking no action		
Regulated parties	No benefits identified	N/A
Regulators	Services that meet the requirements to have their licence suspended are closed quicker meaning a reduction in risk 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 a reduction in risk to the health, safety and wellbeing of children.	Medium
<b>Total Monetised Benefit</b>		N/A
<b>Non-monetised benefits</b>		Medium

### 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: Stakeholder views

### 5.1 What do stakeholders think about the problem and the proposed solution?

There was general agreement during the consultation of the draft Early Learning Strategic Plan in early 2019 that there is a need to lift the overall quality of the sector through removing poor quality providers from the market, or stopping them entering the market altogether. However these exact proposals were not discussed.

There has been no specific consultation on the proposals outlined in this analysis to date. This analysis is intended to support a Cabinet discussion on the proposed regulatory changes and seek its agreement to consult on an exposure draft of the regulations.

It is proposed that following Cabinet agreement to the proposals and the issuing of drafting instructions, the Ministry will work with the Parliamentary Counsel Office on drafting the regulatory changes ahead of public consultation on an exposure draft of the regulations. It is anticipated that public consultation will take place between 7 September and 2 November 2020.

The intention is to have one round of public consultation with the exposure draft regulations. Engagement will be supported by a discussion document and will largely be undertaken through an online format. There will likely be some face-to-face hui required with some sector groups.



## Section 6: Implementation and operation

### 6.1 How will the new arrangements be given effect?

These proposals all relate to changes to the Education (Early Childhood Services) Regulations 2008 with Cabinet approval of the final regulations to be sought before the end of the year following public consultation. It is proposed that they will all come into force following notification in the Gazette in accordance with the 28 day rule.

These changes would be implemented by the Ministry of Education and would become part of its ongoing operational and enforcement activity. The changes relating to clarification of requirements only will need minimal implementation support. 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.

## Section 7: Monitoring, evaluation and review

### 7.1 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.

### 7.2 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 in 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 Social Wellbeing Committee

## 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.*

### Proposed Changes to the Early Learning Regulatory System

Portfolio                      Education

On 29 July 2020, the Cabinet Social Wellbeing Committee:

- 1        **noted** that the Ministry of Education has begun a comprehensive review of the early learning regulatory system, which has identified a number of regulatory gaps that present limitations, or are cumbersome to implement, and these may pose a degree of risk to the health, safety and wellbeing of children;
- 2        **agreed** that Regulation 25(1) of the Education (Early Childhood Services) Regulations 2008 be amended to state that the fee is payable upon application and is non-refundable in order to cover the costs associated with the processing and administration of the application;
- 3        **agreed** to expand Regulation 11(1)(b) of the Education (Early Childhood Services) Regulations 2008 to include the ability for the Secretary to consider any other relevant information;
- 4        **agreed** that the following is clarified for the provisions for licence amendments when the service provider changes:
  - 4.1        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 (regulation 33(1)(c));
  - 4.2        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);
- 5        **agreed** to clarify in the Education (Early Childhood Services) Regulations 2008 that a written directive may be issued in situations where there is one or more health and safety matters that require immediate or short-term remedy if the service provider is to continue to operate, regardless of whether there are other compliance concerns that warrant a full licensing investigation;
- 6        **agreed** that Regulation 15(1)(c) of the Education (Early Childhood Services) Regulations 2008 is amended to include ‘incident at a service involving a child that requires investigation’;
- 7        **agreed** 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;

- 8 **agreed** that Regulation 32 of the Education (Early Childhood Services) Regulations 2008 is amended to include the ability for the Ministry of Education to cancel a licence based on provisional licence history and the likelihood that the service is unable to sustain compliance;
- 9 **agreed** to removing the 21 day minimum notice period for licence suspensions for:
- 9.1 not returning a full licence when invalid;
- 9.2 a change in control;
- 10 **agreed** to insert the registration and certification requirements for persons responsible into Schedule 1 of the Education (Early Childhood Services) Regulations 2008;
- 11 **agreed** to consult on increasing the required minimum temperature for rooms used by children in the Licensing Criteria from 16 degrees to 18 degrees;
- 12 **invited** the Minister of Education to issue drafting instructions for legislation to give effect to the above decisions;
- 13 **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 in the paper under SWC-20-SUB-0116;
- 14 **noted** that the recommendations with drafting implications are subject to Parliamentary Counsel's discretion as to how best to express these in legislation;
- 15 **directed** the Ministry of Education to undertake consultation on the draft regulations for eight weeks from the end of October 2020;
- 16 **authorised** the Minister of Education to approve the release of any public consultation material related to the above decisions.

Vivien Meek  
Committee Secretary

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**Present:**

Rt Hon Jacinda Ardern  
Rt Hon Winston Peters  
Hon Kelvin Davis  
Hon Dr Megan Woods  
Hon Carmel Sepuloni (Chair)  
Hon Stuart Nash  
Hon Damien O'Connor  
Hon Kris Faafoi  
Hon Willie Jackson  
Hon Aupito William Sio  
Hon Poto Williams  
Jan Logie, MP

**Officials present from:**

Prime Minister's Office  
Officials Committee for SWC  
Office of the SWC Chair



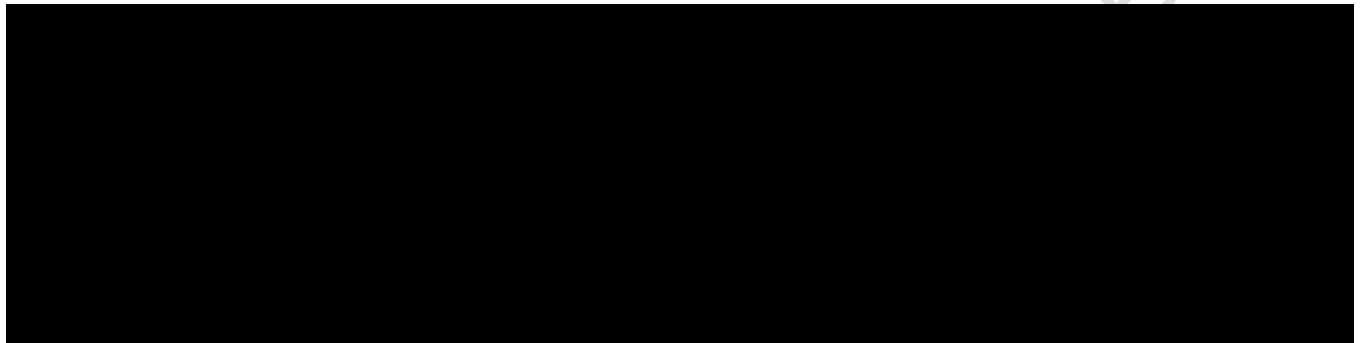
# Cabinet

## Minute of Decision

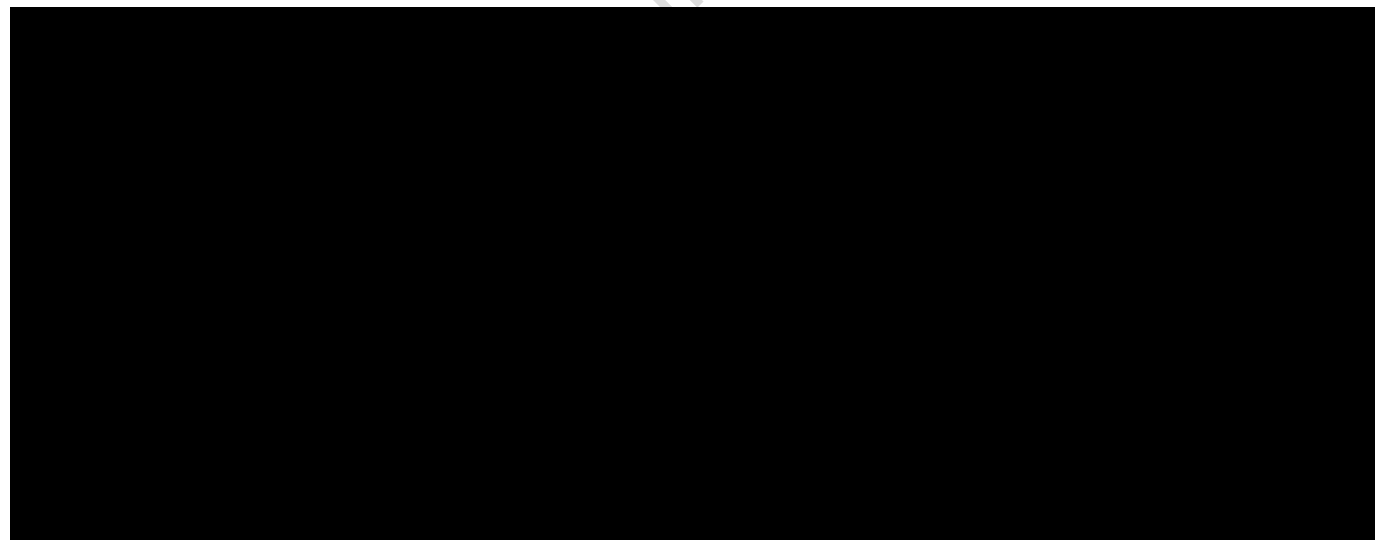
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**Redactions made as content outside of scope of Minister's portfolio responsibilities**

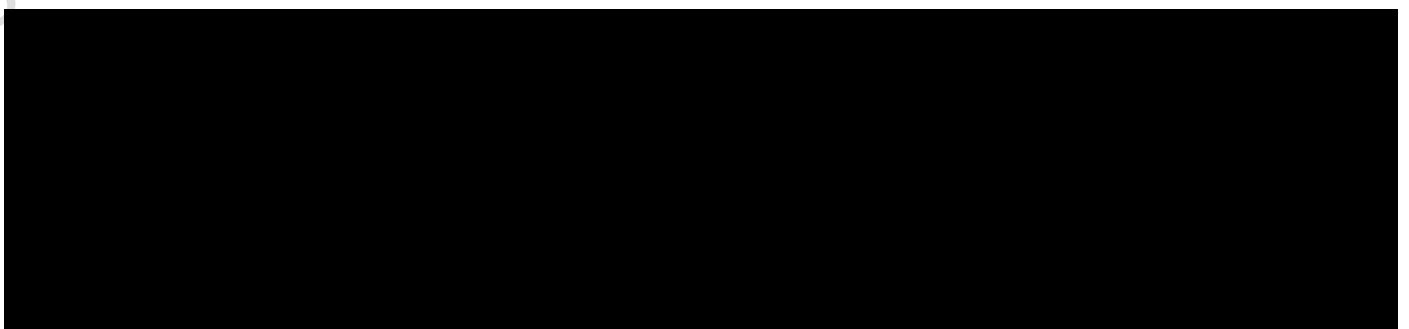
### **Report of the Cabinet Social Wellbeing Committee: Period Ended 31 July 2020**

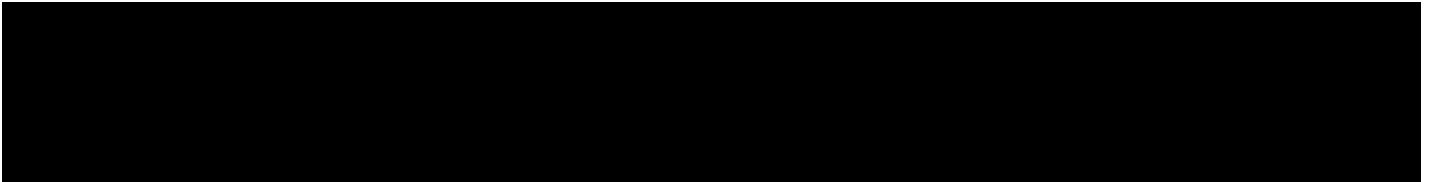


SWC-20-MIN-0118 **COVID-19 Recovery: New Careers Guidance Services** CONFIRMED  
Portfolio: Education



SWC-20-MIN-0116 **Proposed Changes to the Early Learning Regulatory  
System** CONFIRMED  
Portfolio: Education





Michael Webster  
Secretary of the Cabinet

Proactively Released by the Minister of Education