



Education Report: Restarting the Review of the Early Learning Regulatory System

To:	Hon Chris Hipkins, Minister of Education		
Date:	3 July 2020	Priority:	Medium
Security Level:	In Confidence	METIS No:	1234266
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Messaging seen by Communications team:	No	Round Robin:	No

Purpose of Report

The purpose of this paper is for you to:

- **Agree** to the scope, timing and process for restarting the Review of the Early Learning Regulatory System

Summary

1. The Ministry of Education previously briefed you on the Review of the Early Learning Regulatory System (the Review), which is intended to ensure that it is clear and fit for purpose to support high quality educational outcomes (METIS 1218418 and 1221884 refers). The Review is to 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. However, the Review was paused during the response to COVID-19.
2. The first tranche of the Review includes a number of issues within the regulatory framework that we consider to be a high priority for change due to the degree of risk to the health, safety and wellbeing of children.
3. We are now in a position to restart the Review, therefore we are seeking your agreement to the Terms of Reference for the Review and direction on the timing and process for restarting the Review. The options are:
 - a. Option one – public consultation on tranche one of the Review during (or immediately following) the Election period.
 - b. Option two – public consultation on both tranche one and two to take place after the Election.
4. In order to begin consultation prior to the Election you would need to take a paper to the Social Wellbeing Committee on 22 or 29 June. Alternatively, you could take a paper

to Cabinet prior to the Election with consultation to be paused until the new Government is formed. Option two on the other hand would mean that addressing the known issues within the regulatory system would be further delayed.

Recommended Actions

The Ministry of Education recommends you:

- a. **agree** to restart the Review of the Early Learning Regulatory System and to the proposed Terms of Reference for the Review

☒ Agree ☐ Disagree

- b. **indicate** your preferred option for restarting the Review of the Early Learning Regulatory System:

- i. Option one a – seeking Cabinet approval now on tranche one of the Review with public consultation during the Election period

Yes ☒ No

- ii. Option one b – seeking Cabinet approval now on tranche one of the Review with public consultation immediately following the formation of the new Government

Yes ☒ No

- iii. Option two – public consultation on both tranche one and two to take place after the Election

Yes ☒ No

- c. **proactively release** this Education Report after Cabinet has agreed to the scope and process for the Review of the Early Learning Regulatory System

☒ Release ☐ Not release



John Brooker
Group Manager
Education System Policy

03/07/2020



Hon Chris Hipkins
Minister of Education

11/7/2020

Background

1. On 3 February we provided you with advice seeking your agreement to the terms of reference for the Review of the Early Learning Regulatory System (the Review) (METIS 1218418 refers).
2. The purpose of the Review was to ensure that the regulatory system was clear and fit for purpose to support high quality educational outcomes for all children. The Review was to be completed in tranches to ensure that a number of high priority issues were progressed in a timely fashion.
3. Following discussions with your office, we provided you with revised terms of reference and a draft Cabinet paper to progress the first tranche of the Review for your consideration on 28 February (METIS 1221884 refers). However, these were not finalised due to the decision to move to COVID-19 Alert Level 4.

Tranche one focusses on areas of immediate concern

4. The intention of the first tranche of the Review was 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. These issues may pose a degree of risk to the health, safety and wellbeing of children. Included in this list was:
 - a. clarifying the information used to assess an application for a probationary licence (probationary licences are the category of licence for new services)
 - b. amending certain provisions relating to provisional licences. Provisional licences are a key lever for ensuring compliance with the Regulations
 - c. removing the 21 day minimum notice period to suspend a service's licence for not returning a full licence when reclassified as provisional and when the service is no longer in the control of the service provider
 - d. clarifying that the fee for a new licence is payable upon application and is non-refundable
 - e. clarifying the provisions for licence amendments when the service provider changes
 - f. creating the ability to issue written directives for health and safety matters that require immediate attention
 - g. clarifying existing person responsible requirements (the person responsible is the person within a service who is responsible for the day-to-day education, care, comfort, and health and safety of the children attending).

The latter tranches of the Review allow us to address longer term issues

5. As well as the areas of immediate concern outlined above, it is also critical that our regulatory system is responsive to the changing nature of the sector since the Regulations were enacted in 2008. The latter tranches of work are intended to support our regulatory role in ensuring quality provision, including effective pathways for dealing with services that are non-compliant or that are performing poorly.

6. The latter tranches of the Review were to include:
 - a. actions from the Early Learning Action Plan such as regulating for 80% qualified, and implementing the network planning approach
 - b. work falling out of the Ministry's assessment of our regulatory systems as part of our regulatory stewardship role
 - c. other 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.
7. This approach will also allow us to respond to the issues that have been raised by the Regulations Review Committee regarding the lack of clarity across our regulatory framework.
8. We are now seeking your approval of the Terms of Reference for the Review as well as your guidance on the appropriate timing and process for restarting the Review. The draft Terms of Reference for the Review are attached in annex one for your approval.

Options for progressing the Review

9. One of the catalysts for the Review was the significant changes in market structure and patterns of participation since the early 2000s. We are likely to see further changes in the sector as we recover from the impacts of COVID-19.
10. For this reason, the Ministry still recommends progressing with the Review to ensure that our regulatory system is designed to support the early learning sector to deliver quality outcomes for all children.
11. There are two options to progress the Review:
 - a. restart the process immediately and implement the tranche one changes to the Regulations early next year
 - b. delay progress until after the General Election.

Option one – restart immediately with public consultation on tranche one during the Election period

12. Option one would be to seek Cabinet approval to issue drafting instructions for an exposure draft of the regulations for tranche one. If you would like to proceed with this option we have attached a draft Cabinet paper for your consideration and lodging for the next convenient Social Wellbeing Cabinet Committee (SWC) date (likely to be 22 July) and Cabinet (possibly on 27 July). A regulatory impact statement has also been prepared and is in the process of being finalised.
13. Depending on the timing of the paper going through the Cabinet process we could be in a position to begin the eight week consultation on 7 September and finishing on 2 November. This would mean consultation would take place in the weeks before and after Election Day. The final regulations would be ready for Cabinet consideration in early 2021.

14. Assuming SWC on 22 July and Cabinet on 27 July the indicative timeline would be as follows:

Date	Activity
22 July	SWC
27 July	Cabinet
28 July – 4 September	Drafting of exposure regulations and consultation document (six weeks)
7 September – 2 November	Six week consultation
November – December	Analysis
December 2020 – January 2021	Redrafting of regulations
February	Final regulations to LEG
March	Implementation
June	Cabinet approval for consultation on tranche two
July – August	Consultation on options for tranche two (six – eight weeks)
Late 2021	Cabinet – drafting instructions for tranche two changes
Early 2022	Consultation on exposure draft regulations
Mid 2022	Implementation tranche two and beginning of tranche three policy work

15. This option would result in the immediate issues that we know need addressing proceeding without delay; thereby reducing the potential risks associated with the gaps we have identified.
16. The risk with this approach is that the consultation would be taking place on both sides of Election Day. While there is nothing explicit in the Cabinet Manual or the State Services Commission guidelines to preclude public consultation on policy matters during this time, there is a risk that this would be seen to be constraining any future government. It could also be perceived that these changes were being pushed through while the sector is focussed more on the recovery from COVID-19.

Option one b – restart immediately with public consultation on tranche one immediately following the Election

17. Alternatively, there is still the option to progress through Cabinet for drafting instructions prior to the house rising for the Election, but not beginning consultation until after the new Government is formed. This would mean the Ministry would work with PCO during the election period and seek direction from the Minister of Education as a matter of urgency following the formation of the new Government. Depending on how long it takes to form the new Government, consultation may take place over the Christmas and New Year period.

18. Assuming SWC on 22 July and Cabinet on 27 July the indicative timeline would be as follows:

Date	Activity
22 July	SWC
27 July	Cabinet
28 July – October	Drafting of exposure regulations and consultation document
ASAP following the formation of the new Government	Education Report to the Minister of Education seeking approval to begin consultation on exposure regulations
October/November – December/January	Eight week consultation
January - February	Analysis
February 2020 – March 2021	Redrafting of regulations
April	Final regulations to LEG
May	Implementation
June	Cabinet approval for consultation on tranche two
July – August	Consultation on options for tranche two (six – eight weeks)
Late 2021	Cabinet – drafting instructions for tranche two changes
Early 2022	Consultation on exposure draft regulations
Mid 2022	Implementation tranche two and beginning of tranche three policy work

19. This option would mean a slightly later implementation for tranche one but no change to the timing of tranche two. However, if the consultation went for a significant part of January there may be a delay in progressing tranche two.

Option two – delay any public engagement until after the Election

20. This option would delay any public engagement until after the Election, meaning a slower timeline for implementation of tranche one. The Ministry would use the pre-election period to begin work on the other parts of the review, which may result in further issues being brought forward into the first tranche of work.
21. Once the new Government is formed following the Election, we would provide advice to the Minister of Education to seek their agreement on the scope and process for the Review. Assuming the Review was to carry on as currently scoped, we would be in a position to begin consultation early in 2021 with implementation of the new regulations for tranche one in approximately mid-2021.
22. As there would be additional time up front we would be able to begin work on tranche two of the Review which includes actions from the Early Learning Action Plan. This would include regulating for 80% qualified teachers, alignment of qualification requirements, and implementation of network planning. This would mean we could undertake the consultation on the policy proposals at the same time as tranche one.

23. The indicative timeline for the work would be as follows:

Date	Activity
June – September	Further policy work on actions related to the Early Learning Action Plan
ASAP post-Election	Brief Minister on scope and process for review
December 2020	Cabinet – approval drafting instructions for tranche one and to consult on both tranche one via an exposure draft, and tranche two via a discussion document
January – February 2021	Drafting of consultation document and exposure regulations
March – April	Consultation on exposure regulations for tranche one and policy proposals for tranche two
May – July	Analysis and redrafting of regulations
August	Cabinet – approval of final regulations for tranche one and drafting instructions for tranche two
September	Implementation tranche one
September – late 2021	Drafting of consultation document and exposure regulations tranche two
Late 2021	Consultation on exposure draft regulations
Mid 2022	Implementation tranche two and beginning of tranche three policy work

24. This option would avoid any perception of interference in a future government's policy direction. However, it would mean that the implementation of tranche one would be slower than in option one. Tranche two would have a similar timeframe in both options.

Additional matter for inclusion in tranche one consultation

25. Regardless of which option is chosen, we would like to utilise the public consultation on tranche one of the Review to undertake consultation on the licensing criteria for heating.
26. The current licensing requirement is for room temperature to be kept at a minimum of 16 degrees (HS24 of the Licensing Criteria). 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.
27. However, during COVID-19 Alert Levels 2 and 3, it was a requirement that services maintain temperatures at 18 degrees. 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.
28. We would like to take this opportunity to consult the sector on making 18 degrees the new minimum standard in the Licensing Criteria, prior to any further consideration of centre design and wider environmental factors as part of the Early Learning Action Plan.

Risks

29. While both options carry some degree of risk, option one has a higher risk due to the public consultation coinciding with the Election. In addition, there will be some services currently experiencing financial difficulties as a result of changing attendance patterns,

and therefore may not have the capacity to engage with the consultation at this time. This can be partially mitigated by delaying consultation until after the new Government is formed.

30. Option two would mean further delay in addressing the high priority issues with the current Regulations. There is a risk that some within the sector would be disappointed at the lack of progress. However, tranche two of the Review would progress on similar timelines under both options.

Regulations Review Committee

31. On 12 January 2020, the Regulations Review Committee received a complaint from David Haynes about the Education (Early Childhood Services) Amendment Regulations 2019. The Committee has been investigating the complaint which has included submissions from the Ministry. During one of the hearings we indicated to the Committee that there are a number of regulatory changes coming out of the Early Learning Action Plan that may necessitate a wider look at the regulations. The Committee has recently sent you a letter seeking your feedback on their initial recommendation.
32. In essence, their recommendation was the current regulatory requirements are unclear and that any further changes to the Regulations would exacerbate these issues. Therefore, it was their recommendation that the regulations be completely re-written.
33. Considering the wide ranging scope of the Review, and the likely number of changes resulting from it, it is likely that the Regulations will need to be repealed and replaced. But this will not be until the third tranche of the Review. However, we will be considering some of the wider issues around qualifications standards as part of tranche two of the Review.
34. We will be providing you with further advice and a draft response to the Committee's letter for your consideration shortly.

Financial implications

35. Consultation proposed within this paper would be funded from within baselines. Therefore, there are no direct financial implications arising from this paper.
36. However, a number of issues in tranches two and three will have a fiscal impact that will require additional funding. These include the changes to adult:child ratios, and regulating for an 80 percent qualified workforce. Full implementation of these changes will be contingent on funding being made available through future Budgets.

Proactive Release

37. It is intended that this Education Report is proactively released after Cabinet has agreed to the scope and process for the Review of the Early Learning Regulatory System, as per your expectation that information be released as soon as possible. Any information which may need to be withheld will be done so in line with the provisions of the Official Information Act 1982.

Annexes

- Annex 1: Draft Terms of Reference: Review of the Early Learning Regulatory System
Annex 2: Draft Cabinet paper – Proposed changes to the early learning regulatory system

Annex 1 attachment has been replaced with the final version

Proactively Released

Terms of Reference: Review of the Early Learning Regulatory System

Purpose

The purpose of this Review is to ensure that the regulatory system for the ECE sector is clear and fit for purpose to support high quality educational outcomes. Achieving this purpose will require consideration of what high quality educational outcomes are and what the Ministry's role as a regulator should be. It will be necessary to ensure there are effective tools and pathways for dealing with non-compliance and poor performance.

Context

The ECE sector has seen significant changes in the market structure and patterns of participation since the early 2000s. The majority of this shift has happened since the current regulatory system was established in 2008.

The current regulatory system and its accountability mechanisms were designed on a high trust model of regulation which did not anticipate the rapid business expansion that has emerged. This has seen a shift from primarily community-based services to a significant number of private, for-profit services. The levers and processes within the current system may not provide adequate monitoring and accountability mechanisms for the diversity of governance arrangements and business structures within the ECE sector as it is today.

This shift has happened at a time of increasing participation for all age groups (particularly for younger children) with children also attending for longer hours. It is also likely that the recent COVID-19 pandemic will result in further changes in the early learning sector for example through changing community needs, resulting in different patterns of participation and some services or providers leaving the sector.

In recent years there have been a series of large scale investigations into a number of providers, increased number of legal challenges by service providers into regulatory actions by the Ministry, more targeted monitoring through the Provider Assessment Group, and an increase in complaints to the Ministry. These have highlighted areas in the regulatory system that are no longer fit-for-purpose and not achieving their policy intent.

The Children's Act 2014 introduced a new regime aimed at improving children's safety and wellbeing, including the introduction of safety checks being required for all children's workers. With this came new obligations on the Ministry as one of the key agencies under the legislation, with monitoring obligations and the ability to prosecute for non-compliance.

In 2018, the Minister of Education commissioned the development of a ten year strategic plan for early learning. The intention is to set the direction for the sector to strengthen the current provision so that it meets the needs of all children and their families and whānau. The Early Learning Action Plan made a number of recommendations that would require regulatory change including around staffing ratios and qualifications.

The Ministry has also recently completed a review of the home-based sector which recommends a number of changes including requiring minimum qualifications for educators and greater financial transparency for parents.

Given this context, it is timely to review the current regulatory system for the early learning sector to ensure that it is fit-for-purpose and supports quality provision including the

recommendations in the Action Plan. This includes considering if the current accountability settings are sufficient to ensure quality provision.

Scope

In scope

The scope of this Review is intended to ensure the new regulatory system is clear and fit-for-purpose within the context outlined above, which will require consideration of the Ministry's regulatory role and what high quality education means. The outcome of the Review will provide options and recommendations for changes to the regulatory system, from the Education Act and regulations through to the criteria, funding handbook, informal guidance provided by the Ministry, and formal guidance (both internal and external) to services. It will ensure that the regulatory system is fit-for-purpose now and into the future for all service types including appropriate feedback loops to ensure stewardship of the system.

The Review will be completed in tranches to ensure that the high risk issues are addressed in a timely fashion with the outcome of the Regulatory Stewardship project and issues that require further policy work being addressed in later tranches. While issues relating to funding are outside the scope of this Review, if there are any issues of misalignment between the regulatory and funding requirements that surface during the Review these will be considered in the course of the Review.

Each of the tranches will be tested against the objectives for education that have been set out by the Government. This will ensure that any changes proposed as part of the Review are aligned with the vision for education and focus on improving outcomes and wellbeing across the sector. The objectives are:

- Learners at the Centre – learners and their whānau are at the centre of education
- Barrier-free access – great education opportunities and outcomes are within reach for every learner
- Quality teaching and leadership – quality teaching and leadership make the difference to learners and their whānau
- Future of learning and work – learning that is relevant to the lives of New Zealanders today and throughout their lives
- World class public education system – New Zealand education is trusted and sustainable.

Tranche one

As a result of the recent regulatory action there are several areas that have been identified as posing high risk to the health, safety and wellbeing of children as a consequence of gaps in our licencing regime. Tranche one will cover the following issues:

- Licensing
 - Clarifying the circumstances in which the Secretary can put a service on a provisional licence while an investigation into non-compliance takes place. (15(1)(c)).
 - Expand the scope of 'having regard to the information provided' when granting a probationary licence (11(1)(b)).
 - Consider a cancellation pathway for services who are frequently on a provisional licences due to a failure to sustain compliance with regulated standards.
 - Create option of written directive for health and safety matters requiring the service provider's immediate attention (15(1)(d)).
 - Clarifying the timing of when licensing fees are payable.

- Accountability
 - Requiring a change of control to meet the same criteria as applying for a new licence (33(1)(c)).
 - Remove 21 day period before suspensions take effect (31).
- Qualifications
 - Clarifying the person responsible requirements by inserting the registration and practising certificate requirements into the Education (Early Childhood Services) Regulations 2008.

Tranche two

The second tranche of the Review will be covering issues where work has already begun and there has been some level of engagement with the sector on the details through the consultation on the Early Learning Action Plan. This includes the following issues:

- Qualifications
 - Regulating for 80% qualified.
 - Ensure alignment of the qualification requirements between the Funding Handbook and Regulations.
- Home-based review
 - Lift criteria for standard rate.
 - Increase max licence size to 150 and associated changes (e.g. strengthening the role of visiting teachers).
 - Clarify definitions relating to licensing in regulations e.g. empty licence re 'sale' of licences 32(1)(d)(i).
- Network planning (dependant on the passing of the Education and Training Bill)
 - Review the definition of 'fit and proper'.
 - Settings for market entry and planned provision to ensure sufficient high quality supply of services to meet the needs of all children and communities.

Tranche three

The final tranche are those matters which require significant further policy work and engagement with the sector on the design and implementation of the potential changes. These include:

- Child at the centre of the system
 - How do we ensure that system is focussed on supporting learners as the centre of the system?
- Te Tiriti o Waitangi
 - How can our regulatory system support an effective Treaty of Waitangi partnership, provide active protection of taonga, and enable Māori to exercise their authority and agency in education?
- Ratios
 - The new adult:child ratios proposed in the Early Learning Action Plan.
- Licensing
 - The Ministry's ability to take action where providers are non-compliant
 - Remaining aspects of the licensing system including reviewing licensing in perpetuity and cost recovery.
- Accountability
 - What accountability settings are needed to incentivise the market to provide quality and safe education and care? What are the options to deal with non-compliance?
 - Does the regulatory system meet the needs for all the actors within the system, including government agencies and whānau?

- What is the role of the Ministry of Education and other actors in the system (i.e. other government agencies and providers), including ERO, in ensuring high quality provision?
- Quality curriculum delivery
 - Do the regulations support quality curriculum delivery and good educational outcomes for children including those with diverse and additional learning needs?
- Playcentre
 - Consider how parent-led services are regulated.

Other issues may be included as matters are raised by sector groups and/or through consultation.

Regulatory stewardship

The Ministry is currently undertaking an assessment of our regulatory systems as we develop our regulatory strategy as part of our regulatory stewardship role. The outcome of the assessment into the early learning sub-system will be incorporated into tranches two and three. This may include addressing any issues of misalignment between regulatory mechanisms such as the funding and licensing systems.

Out of scope

It is intended that this Review will cover all aspects of the regulatory system as they relate to ensuring quality provision within the current market context. Therefore, this Review will not be considering:

- How service provision is structured; for example the definition of service types, integration of education and care
- A move away from a licensing system that is subsidised by the Crown
- Public provision of early learning
- A review of the funding system (other than kōhanga reo and Playcentre)
- Revisiting matters covered in the home-based review.

Development process

The Review will be led by the Education System Policy Group within the Ministry of Education with support from the operational and legal parts of the organisation. There will also be involvement from and wider government agencies, such as the Education Review Office and the Ministry of Health, as required. The Review will follow due process and adhere to the Legislation Guidelines and the Government's Expectations for Good Regulatory Practice.

Policy approvals and drafting instructions will be sought from Cabinet for tranche one in July 2020. This will be followed by public consultation later in the year ahead of seeking final Cabinet approval for the regulation changes in early 2021.

The exact development process for tranches two and three will be finalised following the outcome of the assessment of the early learning subsystem undertaken as part of the regulatory stewardship project. However, both tranches are likely to follow a similar process of a public discussion document, followed by draft regulations for further consultation before final approval by Cabinet. The intention is to have tranche two implemented from mid-2022, and tranche three by late 2023.

Engaging stakeholders

Due to the time constraints and urgent nature of some of the matters within tranche one the intention is to have one round of public consultation with the final draft regulations.

Engagement will be through 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.

We intend there to be two stages to the public engagement process for tranches two and three. Engagement will be through face-to-face hui and online forums mainly geared towards a sector audience. Parents, whānau and communities will also be consulted but in a more targeted way on matters of more interest to them such as how services meet the needs of the community including through the network and curriculum delivery.