

In Confidence

Office of the Minister of Education

Cabinet Social Wellbeing Committee

Education and Training Bill – fifth tranche of policy approvals

Proposal

- 1 This paper seeks the fifth tranche of policy approvals for the Education and Training Bill (the Bill) and approval to issue related drafting instructions.

Executive Summary

- 2 The Bill (scheduled for introduction in November 2019) will, in conjunction with the Education (Vocational Education and Training Reform) Amendment Bill, repeal and replace the Education Act 1989, the Education Act 1964 and the Industry Training and Apprenticeships Act 1992, with a new Education and Training Act
- 3 I am proposing changes to the current 'physical restraint' framework for schools. The proposed changes reflect the lack of certainty in the education sector about when and how school staff can use physical restraint, when and how to report incidents of physical restraint, and what types of other physical contact with students are acceptable.
- 4 The current licensing framework for early learning services does not enable licensing decisions to reflect demographic and community needs. This leads to oversupply in some situations and undersupply in others. I propose that the Bill include provisions to redress this issue by establishing new licensing criteria. I also propose that the licensing criteria include the applicant's suitability and their history in providing early learning services. To provide a sufficient deterrent to any provider operating without a licence, I propose that the Bill change the structure of the penalty and increase the level to a maximum of \$50,000 where there is no reasonable excuse for operating without a licence.
- 5 As part of the structural design of the Bill I want to ensure the right balance between matters to be included in the Act and what should be in regulations and other instruments. The International Education provisions have been identified as matters that could be removed from the primary legislation. I have therefore recommended that those provisions be incorporated within the appropriate legislative instruments on the Bill's enactment.
- 6 I also propose that the Bill include provision to ensure there is a mandatory staff representative on the board of Te Aho o Te Kura Pounamu (Te Kura), the correspondence school.
- 7 The Education Review Office (ERO) reviews early learning services to ensure children receive high quality early childhood education. At present, ERO's powers of entry are unclear with respect to obtaining information from parent entities of early childhood education service providers if the entities do not also hold a licence. I propose that the Bill include provision to enable ERO to obtain relevant information to enable it to access governance and management information from parent entities where it relates to early learning services under their control.
- 8 I also propose that the Bill include provisions enabling the Minister to appoint a deputy chairperson to the Teaching Council of Aotearoa New Zealand (the Teaching Council) who could assume the responsibilities and powers of the chairperson in the event of the latter being unable to fulfil his or her duties.

Background

- 9 This is the fifth tranche of policy proposals for the Education and Training Bill (the Bill). The Social Wellbeing Cabinet Committee (SWC) approved the first, second and third tranches of policy proposals on 3 April 2019 [SWC-19-MIN-0029], 28 August 2019 [SWC-19-MIN-0107] and 25 September 2019 [SWC- 19-MIN-0132] respectively. The fourth tranche is the paper *Reform of the Tomorrow's Schools system: Paper 2 - legislative provisions* is being considered contemporaneously with this paper.
- 10 The Bill will, in conjunction with the Vocational Education Reform Bill, repeal and replace the Education Act 1989, the Education Act 1964, and the Industry Training and Apprenticeships Act 1992, with a new Education and Training Act. This Bill holds s 9(2)(f) s 9(2)(f)(iv). It is intended that the Bill be introduced into the House of Representatives in November 2019.

Comment

Proposed changes to the physical restraint framework

- 11 The education sector has raised a number of questions and concerns about the physical restraint framework in schools. There has been some confusion as to how the legal framework in the Education Act 1989 interacts with the Crimes Act 1961, and a view expressed by teachers and the Teaching Council that the physical restraint framework does not align with the professional code for teachers (*Our Code Our Standards*) which requires teachers to protect all learners from harm. Specifically, the education sector is unsure about what physical restraint is, when and how school staff can use physical restraint, when and how to report incidents of physical restraint, and what types of other physical contact with students are acceptable
- 12 I propose amending the Education Act 1989 to address the sector's concerns while ensuring the rights and wellbeing of students remain paramount. The legislative changes I propose will be supported by two non-regulatory supports for schools to bed-in the new framework.

Proposals to improve physical restraints framework

- 13 I propose that the Education Act 1989 be amended by:
- 13.1 including a requirement that physical force is used only as a last resort;
 - 13.2 replacing the terms "physically restrain" and "physical restraint" with "physical force", with consequential amendments;
 - 13.3 changing the threshold for when force can be used from when a teacher or authorised staff member reasonably believes 'the safety of the student or of any other person is at serious and imminent risk' to when a teacher or authorised staff member reasonably believes 'it is necessary to prevent imminent harm'; and
 - 13.4 changing the authorisation for use of physical force from restrictive to permissive.
- 14 These changes would only apply to the schooling sector. The early childhood sector has a separate framework regulating conduct similar to physical restraint in early childhood settings.

New requirement—physical force should only be used as a last resort

- 15 Currently, the Education Act 1989 does not specifically state that the use of restrictive physical force should only be used as a last resort. I propose that a requirement for the

physical force provisions be included in the Bill to reinforce the expectation that physical force, such as restraint holds, is to be used as a last resort. The Ministry will consider how to communicate what any changes mean to the sector in a way that is accessible and easily understandable.

Replacing the expressions “restraint” with “force”

- 16 Sections 139AC, 139AD and 139AE of the Education Act 1989 set the limits for use of physical restraint in schools, and provide for the Secretary for Education to make rules and issue guidelines on the use of restraint. I propose that the Bill amend these provisions by replacing the expressions ‘physical restraint’ and ‘physically restrain’ with the expression ‘physical force’. The expression ‘physical force’ better reflects the language used by teachers in their day to day work.
- 17 This change would help address confusion about how the Crimes Act 1961 and the Education Act 1989 interact, as “force” is used in the definition of assault. In contrast, “physical restraint” is seen as a more technical or specific type of physical force often used in special institutions.

Changing the framing of the authority from restrictive to permissive

- 18 Section 139AC of the Education Act 1989 restricts the use of physical restraint to those situations where safety is at serious and imminent risk and the restraint is considered reasonable and proportionate. I propose that the Bill amend section 139AC and other relevant provisions to include a permissive authorisation. Subject to Parliamentary Counsel drafting, the new provision could provide that a teacher or authorised person *“may use physical force if they reasonably believe it is necessary to prevent imminent harm to a person or persons”*. This change would give statutory authority for the use of ‘physical force’ that could be relied upon as a defence and would better reflect the Government’s intention to build a high trust environment for the teaching profession.
- 19 It will be necessary to ensure it remains clear that using force for the purposes of correction or punishment is still prohibited, as set out in section 139A of the Education Act 1989.

Changing the threshold to prevent “imminent harm”

- 20 Section 139AC of the Education Act 1989 specifies that a teacher or authorised staff member must not physically restrain a student unless the teacher or staff member reasonably believes that ‘the safety of the student or of any other person is at serious and imminent risk’, and the physical restraint is ‘reasonable and proportionate in the circumstances’.
- 21 I propose that the Bill amend section 139AC by changing the threshold for when force can be used by removing the requirement that a teacher or authorised staff member reasonably believes that safety is at ‘serious and imminent risk’, and replacing it with when a staff member reasonably believes physical force is “necessary to prevent imminent harm”, and the physical force is ‘reasonable and proportionate in the circumstances’.
- 22 There are conflicting views as to whether the term “safety” extends to a student being safe from emotional harm. Some believe it must be interpreted as being limited to safety from physical harm. By reframing the use of physical force to be enabled to prevent harm, the language will be aligned with the language in *Our Code Our Standards*, which also requires teachers to “prevent harm.” We will also be able to define harm (in the statutory guidelines) as being to health, safety or welfare, including significant emotional distress.

- 23 Changing the threshold from acting when safety is at “serious and imminent risk” to prevent “imminent harm” will enable teachers to feel more confident about being authorised to have certain types of physical contact with students in situations where the risk of harm may not be serious, but where preventative action should still be taken (for example, holding a child’s hand to prevent the child from running away when guiding them away from other students the child was disrupting). As is the case currently, I also consider that the force used would need to be reasonable and proportionate in the circumstances (for example, it would be inappropriate to forcibly pull a child’s arm to guide them from one location to another while they are strongly resisting).

Licensing of early learning services

- 24 Section 315 of the 1989 Act requires early childhood education (ECE) and care centres to be licensed before they can operate. Section 317 of the Act provides regulation-making powers relating to the licensing and management of such centres. Other types of early childhood services such as home-based and hospital based services are not required, but may elect, to be licensed.
- 25 Under the current legislative framework an applicant for a licence to operate an early childhood education and care centre or home-based service is free to enter the market as long as the intended service provider can meet the minimum licensing requirements. If the applicant service provider meets the licensing criteria, the provider must be granted a licence, irrespective of whether the new service is desirable or necessary to the network of service providers.
- 26 There is a view from some parts of the sector that ease of entry into the market has resulted in too many ECE providers in some areas, which can impact on the viability of existing services. In comparison, in other areas, there may be too few providers to meet the demands of parents and whānau. However, there is limited information about the extent of any under or over supply of provision within the early learning market.
- 27 I intend to address concerns about undersupply as part of the implementation of the Early Learning Action Plan, which I intend to bring to Cabinet shortly. Funding mechanisms, rather than regulatory levers are likely to provide better incentives for centres to open in areas where there are too few providers.
- 28 In my view, the licensing framework needs to provide for a more active network management approach for all new early learning education and care centres and home based services looking to enter the market. I want to be able to manage the network more effectively to achieve a range of types of services and philosophies that takes into account the needs of parents, whānau and communities. I do not anticipate that there will be any cost impact for parents and whānau arising from the proposed changes.

Proposed new framework for licensing early learning services

- 29 I propose a two-stage licensing process. The first stage would require potential service providers to apply for a preliminary approval to establish an early childhood education and care centre, or to obtain a licence for a home-based service. This would require the applicant to complete an application to assess the need for a new service from a network perspective. The scope of the assessment would include assessing:
- 29.1 the capacity of the network in the surrounding community to meet demographic and community needs, including the provision of different service type philosophies (such as provision in Māori medium);

- 29.2 the suitability of the applicant (including every person involved in the governance of the service provider), with each person to meet a fit and proper test and to satisfy any other relevant background checks, such as Police vetting;
- 29.3 applicant organisation's financial position to ensure it is financially sound; and
- 29.4 the licensing history of any existing services owned or operated by, or connected with the applicant.
- 30 The tests proposed around the applicant's suitability and their licensing history need to provide for the organisation and corporate structure of the applicant to be scrutinised. This is to ensure that individuals or entities cannot use friends, relatives or corporate structures to act as the service provider and disguise the reality of who is involved in, or in control of, the education and care service. This practice has been known to be employed by services in order to avoid financial audits.
- 31 At the first stage, the application would be made to the Minister of Education. The Bill will need to be clear that the Minister has the ability to decline licence applications if an applicant does not meet the assessment criteria. It also needs to be clear that the Minister can seek additional information from applicants if the information they provide is deemed to be insufficient to enable the Minister to make a decision. It is not proposed that any one criteria would take precedence over another, rather the application would be considered in totality.
- 32 At the second stage of the licensing process, applicants would go through the licensing process as set out in regulations. This will continue to be undertaken by the Ministry.
- 33 The Ministry will need to have the ability to decline a licence application if an applicant does not meet the licensing criteria, until the service can remedy the licensing issues. This will require an amendment to section 317 of the 1989 Act. I therefore propose that the Bill include the ability for the Ministry of Education to decline a licence application where criteria either cannot, or are not, met.
- 34 In my view, once a service provider has passed the first stage of the licensing process, the service provider should continue to be subject to the same requirements from the original application in relation to the suitability of the applicant, their organisation or licensing history. Therefore, if any significant new information comes to light, or the applicant's circumstances change in relation to the Minister's original assessment, the Ministry will have the ability to request a reassessment of the licence application. This will also need to be approved by the Minister of Education. This will require an amendment to section 317 of the 1989 Act.
- 35 Further changes will be required to the Education (Early Childhood Education Services) Regulations 2008 to fully implement the two stage licensing process. Parts of the regulatory framework are currently being reviewed to ensure that they are clear and fit for purpose. I propose that the regulatory changes required to fully implement the two stage licensing process will be progressed as part of this review. I intend that a policy discussion document covering the purpose, objectives and assessment of the fitness for purpose of the regulatory system will be released for public consultation in mid-2020 with final implementation in late 2021 or early 2022. Further work is needed to design and consult on the proposed early learning network management function before final decisions are made by Cabinet later this month.

Operating without a licence

- 36 The offence for early childhood education and care centres operating without a licence is currently set at a rate of \$200 per day of operation. This is set out in section 315(3) of the Act. The very low level of fine is unlikely to be a deterrent which means there is potential

for the management of the network to be undermined. To provide a sufficient deterrent to any provider operating without a licence, I propose that the Bill change the structure of the penalty and increase the level to a maximum of \$50,000, where there is no reasonable excuse for operating without a licence.

Application of new licensing framework to kōhanga reo

- 37 All early learning services that fit the definition of an early childhood education and care centre under section 310 of the Act will be subject to this licensing process, including kōhanga reo. This new regime will need to ensure that there is scope for applications for new kōhanga reo to be considered fairly. Any licence applications will be considered in the context of the applicant meeting the needs of their community which includes the ability of whānau to access provision and educational pathways in te reo Māori. Without this, there is a risk of further Waitangi Tribunal claims if the Crown were to block a licence application by Te Kōhanga Reo National Trust to establish a new kōhanga.

Proposed International Education Regulations

- 38 I have indicated previously that I would come back to this Committee with any new proposals for moving existing Education Act 1989 provisions into regulations. As part of the ongoing structural work on the Bill, a number of international education provisions have been identified for shifting out of the primary statute. These relate primarily to the Code of Practice for the Pastoral Care of International Students, the Export Education Levy, and the International Students Dispute Resolution Scheme.
- 39 As there are existing legislative instruments covering these three areas, I propose to shift the provisions into the appropriate instrument and take the opportunity to regularise the status of these instruments and streamline them where possible.

Mandatory staff member on the board of Te Aho o Te Kura Pounamu (Te Kura)

- 40 The Education Act 1989 provides for the constitution of school board of trustees of State schools and special institutions. Te Kura is defined as a 'special institution' under Part 9 of the Act. Section 95 of the Act provides that the composition of special institutions shall be determined by the Minister by notice in the Gazette. Currently, the Te Kura board comprises a chairperson and up to six members appointed by the Minister of Education. The composition of the board has changed several times since 2001 as previous Ministers of Education have sought to better enable it to meet various challenges, including the school's financial sustainability, a changing student population, and a move to increase the school's digital capabilities.
- 41 I am concerned that the Act does not require a staff member to be on the Te Kura board. This has also been a concern of some Te Kura staff. Including a mandatory staff member on the board would:
- 41.1 recognise that staff have an important interest in the board's decision-making;
 - 41.2 ensure that there are opportunities for staff to bring their particular expertise in decisions around the implementation of board decisions; and
 - 41.3 provide a stronger connection for staff with the school because they will have a voice in the school's governance.
- 42 I propose that the Bill include provision to amend section 95 of the Act to require any *Gazette* notice on the Te Kura board's composition to include a requirement for a staff member to be on the board. It will be up to each Minister to determine, by way of the *Gazette* notice, whether the staff member is elected, co-opted by the board, or appointed by the Minister.

Changes to the Education Review Office's powers in respect of parent entities

- 43 The Education Review Office (ERO) reviews early learning services to ensure children receive high quality early childhood education. ERO requires service providers to supply evidence of their governance, management and accountability practices as a way to assess the quality and effectiveness of their systems and processes.
- 44 At present, Part 28 of the Education Act 1989 enables ERO to obtain this information from service providers. A service provider may hold multiple licences and run a number of services across a network. Kindergarten associations, for example, are service providers. This part of the Act was developed at a time in which the service provider (who holds the licence) was the same as the organisation providing the service.
- 45 However, a service provider can now be either the organisation providing the service, or a company that is a subsidiary of a parent entity. With changes in the sector, many of the responsibilities that may formerly have been held at service level are sometimes held at service provider or parent entity level in relation to personnel, health and safety monitoring, and curriculum management.
- 46 ERO's powers of entry are unclear with respect to obtaining information from parent entities if they do not also hold a licence. Without this information, ERO is unable to fully assess governance and management structures and supports within those organisations.
- 47 I intend to extend ERO's powers to enable them to access governance and management information from parent entities where it relates to early learning services under their control, through legislative amendments to section 323 of the Education Act 1989. Section 323 details the interpretation of Part 28 of the Act. Legislative change would apply to the interpretation of the term "applicable organisation" to include parent entities, thus extending the powers of the Chief Review Officer in section 327 of the Act.

Enabling the Minister of Education to appoint a deputy chair to the Teaching Council

- 48 I have become aware of a gap in the legislation providing for members of the Teaching Council. Six members of the Council are Ministerial appointments and seven are elected members. Currently the Minister appoints the chairperson of the Council, but the Minister has no ability to appoint a deputy chairperson.
- 49 I consider that it is desirable for the legislation to enable the Minister to appoint a deputy chairperson to the Council who could assume the responsibilities and powers of the chairperson in the event of the chairperson being unable to fulfil his or her duties. This would include the ability to exercise a casting vote when carrying out the duties and functions of the chairperson.

Consultation

- 50 The Treasury, Ministry of Social Development, Office of Disability Issues, Ministry for Women, Te Puni Kōkiri, Ministry for Pacific Peoples, Oranga Tamariki-Ministry for Children, Ministry of Justice, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Department of Corrections, New Zealand Police, Education Review Office, Tertiary Education Commission, New Zealand Qualifications Authority, and the Office of the Children's Commissioner, were consulted on this paper. The Teaching Council of Aotearoa New Zealand was consulted on the physical restraint proposals. The State Services Commission and the Department of the Prime Minister and Cabinet were informed.
- 51 The Office of the Children's Commissioner and the Ministry of Social Development expressed concerns about the proposed change from 'physical restraint' to 'physical

force'. The focus of these concerns was that physical force is much broader than physical restraint, and could include actions such as pushing or tripping.

- 52 Oranga Tamariki–Ministry for Children also expressed concerns about the use of the expression 'physical force'. Oranga Tamariki noted that 'force' was seen as being a more coercive term which did not speak to the intention of preventing students from hurting themselves or others. Oranga Tamariki–Ministry for Children noted that specific guidance around the use of physical force in serious situations would still be needed so teachers could be sure what they can and cannot do.
- 53 The Ministry of Social Development prefers definitions that recognise the "restrictive nature of the interventions. The Children's Commissioner commented that if the wording is going to change to "force" they are more supportive of a definition of "restrictive force" than "physical force" as it holds the reason why the intervention would be done.

Teaching Council Comment

- 54 The Teaching Council, on behalf of teachers, agrees with the proposal to create a purpose statement that physical force should only be used as a last resort; changing the authority from restrictive to permissive and changing the threshold to imminent harm.
- 55 However, the Teaching Council does not support the use of the terms "restricted physical force" or "physical restraint" or to the inclusion in primary legislation of a definition of any such term.
- 56 It is the Teaching Council's view that aligning the language with the Crimes Act, which uses "physical force," is the most appropriate language to avoid confusion and will assist in reinforcing the message that any force for correction or discipline is unlawful. In order to provide clarification to the profession about the use of force, the focus ought to be on the steps a person can take in the specific circumstances with which they are presented. These are captured in the legal test: justified, reasonable, risk of imminent harm, and last resort.
- 57 The Teaching Council also considers that situations when physical force might be necessary are highly unique and nuanced and the place for an explanation of what the primary legislation means is in guidance or in secondary legislation, and through scenarios of what good practice looks like in different situations. A definition in primary legislation cannot convey the degree of nuance required and would re-introduce the issues teachers currently experience with the definition of "physical restraint."

Financial Implications

- 58 There are no immediate financial implications resulting from this paper. However, proposals relating to licensing of early learning services may result in new costs in the future. Should this be the case, funding will be sought through budget processes and considered alongside other Government priorities.

Human Rights

- 59 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. A final determination as to the consistency of these proposals with the New Zealand Bill of Rights Act will only be possible when the Bill has been drafted.

Legislative Implications

- 60 I intend to progress these proposals through the Education and Training Bill, which holds s 9(2)(f)(iv) in the 2019 Legislation Programme. I intend to introduce the Bill in November 2019.

Regulatory Impact Analysis

- 61 The Regulatory Quality Team at the Treasury has determined that the proposal to shift the existing details relating to the Code of Practice for Pastoral Care of International Students, the Export Education Levy, and the International Students' Dispute Resolution Scheme operations from primary legislation to regulations is exempt from the requirement to provide a Regulatory Impact Assessment (RIA). The change is expected to have no impacts on students and education providers.
- 62 The Regulatory Quality Team at the Treasury has determined that the proposal to include a staff representative on the Te Kura board is exempt from the regulatory impact analysis requirements. The proposal would make this discretionary duty mandatory and is exempt on the grounds that it would have no or only minor impacts on businesses, individuals or not-for-profit entities.
- 63 The Ministry of Education's Regulatory Impact Analysis panel assessed the RIA on the *Education Review Office's powers in respect of parent entities* (assessed as 'meets'). The panel considered that "the RIA summary statement described the problem clearly, made a clear case for the proposed change and involved sufficient and appropriate stakeholder consultation leading into the legislation process".
- 64 The Ministry of Education's Regulatory Impact Analysis panel assessed the RIA on *Improving workability of physical restraint legislative framework*. The panel assessed this RIA as "partially meets" because "while the problem is concise, it is not compelling as the final solution has not been subject to sufficient consultation so we don't know if it meets all stakeholder's needs".
- 65 The Ministry of Education's Regulatory Impact Analysis panel assessed the RIA on *Clarification of Network Planning in Early Learning* as 'partially meets'. The panel's comment was that "while the problem is concise, it is not clear and therefore not compelling given the proposed change over time is based on limited information into the extent of any under or over supply of provision within the early learning market. The proposal starts with making more information available to assist services in their planning. This would then allow time to fill current information gaps and build the case for change".
- 66 The Treasury's Regulatory Quality Team has determined that the proposal enabling the Minister of Education to appoint a Deputy Chair to the Teaching Council is not subject to the RIA requirements on the grounds that it is an internal administrative or governance arrangement of the Government and would have no or only minor impacts on businesses, individuals or not-for-profit entities.

Gender Implications

- 67 There are no gender implications in relation to these proposals.

Disability Perspective

Restrictive physical force

- 68 The data shows that students who have disabilities and additional learning needs are over-represented in physical restraint incidents. The changes aim to more clearly show teachers and authorised staff members that they can use restrictive physical force to prevent harm, and puts safeguards in place to prevent physical force being used unreasonably or disproportionately.

Proactive Release

69 I intend to proactively release this Cabinet paper once the Bill is introduced, subject to redaction as appropriate under the Official Information Act 1982. Redactions will likely include references to the Education and Training Bill's priority in the 2019 Legislation Programme.

Publicity

70 I intend to announce these proposals after approves the introduction of the Education and Training Bill.

Recommendations

71 The Minister of Education recommends that the Committee:

1 **note** that the Education and Training Bill is on the 2019 Legislation Programme with a s 9(2)(f)(iv)

Changes to framework for restraint in schools

2 **note** that the education sector has been concerned about the physical restraint framework introduced in 2017, and in particular the lack of clarity about when and how school staff can use physical restraint, when and how to report incidents of physical restraint, and what types of other physical contact with students are acceptable

3 **agree** that the Education and Training Bill include provisions to amend the Education Act 1989 by:

3.1 adding a requirement to the physical force provisions to reinforce the expectation that physical force, such as restraint holds, are used only as a last resort

3.2 in sections 139AC, 139AD and 139AE of the Act, replacing the terms "physically restrain" and "physical restraint" with "physical force", with consequential amendments to relevant provisions

3.3 in section 139AC of the Act, changing the circumstances when a teacher or authorised staff member may use physical force from when they reasonably believe that "the safety of the student or of any other person is at serious and imminent risk" to when they reasonably believe that "physical force is necessary to prevent imminent harm" and defining harm as being to health, safety or welfare, including significant emotional distress to any person

3.4 in section 139AC changing the authorisation for the use of physical restraint from a restrictive approach to a permissive approach while also ensuring that:

3.4.1 it remains clear that using force for the purposes of correction or punishment is still prohibited; and

3.4.2 the force used would need to be reasonable and proportionate in the circumstances

Licensing framework for early learning services

4 **note** that the Ministry of Education is not permitted to decline a licence application for an early learning service when the applicant has a history of low quality provision or there is an oversupply of centres already within a community

5 **agree** that the Education and Training Bill include provisions to amend the Education Act 1989 by:

- 6.1 adding new provisions to allow the Minister of Education to approve or decline applications to open a new early learning service based on the following criteria:
 - 6.1.1 capacity of the network;
 - 6.1.2 the suitability of the applicant; and
 - 6.1.3 the licensing history of any existing services owned, or operated, by the applicant
- 6.2 adding a new section to give the Minister of Education the ability to request further information from applicants if an application is deemed to contain insufficient information to enable a decision to be made
- 6.3 in section 315 (3) of the Act, changing the penalty associated with a service provider operating without a licence from '\$200 for every day or part of a day on which the offence took place' to a maximum of \$50,000 where there is no reasonable excuse for operating without a licence
- 6.4 in section 317 of the Act, amending the regulation making power to give the Ministry of Education the ability to decline a licence to operate if a service cannot meet the licensing criteria

Proposed International Education Regulations

- 7 **note** that as part of ongoing structural work on the Bill, International Education provisions have been identified as appropriate for moving out of the primary statute
- 8 **agree** that International Education provisions be incorporated within the appropriate existing legislative instruments on the enactment of the Bill

Mandatory staff member on Te Aho o Te Kura Pounamu (Te Kura)

- 9 **note** that currently there is no requirement to have a staff member on the board of Te Kura
- 10 **agree** that the Bill include provision to amend the current section 95 of the Education Act 1989 to require any *Gazette* notice issued by the Minister of Education on the composition of the Te Kura board to include a staff member to be a board member

Changes to the Education Review Office's powers in respect of parent entities

- 11 **note** that ERO does not currently have the power to obtain governance and management information from parent entities where it relates to early learning services under their control
- 12 **agree** that the Bill include provisions to amend the interpretation of applicable organisation in section 323 of the current Education Act to include parent entities

Enabling the Minister of Education to appoint a deputy chairperson to the Teaching Council

- 13 **agree** that the legislation be amended to enable the Minister of Education to appoint a deputy chairperson to the Teaching Council of Aotearoa New Zealand

14

Legislative drafting

- 15 **invite** the Minister of Education to issue drafting instructions to give effect to the decisions in these recommendations

- 16 **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 policy decisions in this paper, and
- 17 **note** that the recommendations with drafting implications are subject to Parliamentary Counsel's discretion as to how best to express these in legislation.

Authorised for lodgement

Hon Chris Hipkins

Minister of Education



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.

Education and Training Bill: Fifth Tranche of Policy Approvals

Portfolio Education

On 23 October 2019, the Cabinet Social Wellbeing Committee, having been authorised by Cabinet to have Power to Act [CAB-19-MIN-0553]:

- 1 **noted** that the Education and Training Bill (the Bill) holds a **s 9(2)(f)(iv)**

Changes to framework for restraint in schools

- 2 **noted** that the education sector has been concerned about the physical restraint framework introduced in 2017, and in particular the lack of clarity about when and how school staff can use physical restraint, when and how to report incidents of physical restraint, and what types of other physical contact with students are acceptable;
- 3 **agreed** that the Bill include provisions to amend the Education Act 1989 by:
 - 3.1 adding a requirement to the physical force provisions to reinforce the expectation that physical force, such as restraint holds, are used only as a last resort;
 - 3.2 in sections 139AC, 139AD and 139AE of the Act, replacing the terms “physically restrain” and “physical restraint” with “physical force”, with consequential amendments to relevant provisions;
 - 3.3 in section 139AC of the Act, changing the circumstances when a teacher or authorised staff member may use physical force from when they reasonably believe that “the safety of the student or of any other person is at serious and imminent risk” to when they reasonably believe that “physical force is necessary to prevent imminent harm” and defining harm as being to health, safety or welfare, including significant emotional distress to any person;
 - 3.4 in section 139AC changing the authorisation for the use of physical restraint from a restrictive approach to a permissive approach while also ensuring that:
 - 3.4.1 it remains clear that using force for the purposes of correction or punishment is still prohibited; and
 - 3.4.2 the force used would need to be reasonable and proportionate in the circumstances;

Licensing framework for early learning services

- 4 **noted** that the Ministry of Education is not permitted to decline a licence application for an early learning service when the applicant has a history of low-quality provision or there is an oversupply of centres already within a community;
- 5 **agreed** that the Bill include provisions to amend the Education Act 1989 by:
- 5.1 adding new provisions to allow the Minister of Education to approve or decline applications to open a new early learning service based on the following criteria:
 - 5.1.1 capacity of the network;
 - 5.1.2 the suitability of the applicant; and
 - 5.1.3 the licensing history of any existing services owned, or operated, by the applicant;
 - 5.2 adding a new section to give the Minister of Education the ability to request further information from applicants if an application is deemed to contain insufficient information to enable a decision to be made;
 - 5.3 in section 315 (3) of the Act, changing the penalty associated with a service provider operating without a licence from ‘\$200 for every day or part of a day on which the offence took place’ to a maximum of \$50,000 where there is no reasonable excuse for operating without a licence;
 - 5.4 in section 317 of the Act, amending the regulation making power to give the Ministry of Education the ability to decline a licence to operate if a service cannot meet the licensing criteria;

Proposed International Education Regulations

- 6 **noted** that as part of ongoing structural work on the Bill, International Education provisions have been identified as appropriate for moving out of the primary statute;
- 7 **agreed** that International Education provisions be incorporated within the appropriate existing legislative instruments on the enactment of the Bill;

Mandatory staff member on Te Aho o Te Kura Pounamu (Te Kura)

- 8 **noted** that currently there is no requirement to have a staff member on the board of Te Kura;
- 9 **agreed** that the Bill include provision to amend the current section 95 of the Education Act 1989 to require any *Gazette* notice issued by the Minister of Education on the composition of the Te Kura board to include a staff member to be a board member;

Changes to the Education Review Office’s powers in respect of parent entities

- 10 **noted** that the Education Review Office does not currently have the power to obtain governance and management information from parent entities where it relates to early learning services under their control;
- 11 **agreed** that the Bill include provisions to amend the interpretation of applicable organisation in section 323 of the current Education Act to include parent entities;

Enabling the Minister of Education to appoint a deputy chairperson to the Teaching Council

- 12 **agreed** that the legislation be amended to enable the Minister of Education to appoint a deputy chairperson to the Teaching Council of Aotearoa New Zealand;

Legislative drafting

- 13 **invited** the Minister of Education to issue drafting instructions to give effect to the decisions in the minute under SWC-19-SUB-0157;
- 14 **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 policy decisions in the paper under SWC-19 SUB-0157;
- 15 **noted** that the recommendations with drafting implications are subject to Parliamentary Counsel's discretion as to how best to express these in legislation.

Vivien Meek
Committee Secretary

Present:

Rt Hon Jacinda Ardern
Hon Kelvin Davis
Hon Grant Robertson
Hon Dr Megan Woods
Hon Chris Hipkins
Hon Andrew Little
Hon Carmel Sepuloni (Chair)
Hon Dr David Clark
Hon Nanaia Mahuta
Hon Stuart Nash
Hon Jenny Salesa
Hon Kris Faafoi
Hon Tracey Martin
Hon Willie Jackson
Hon Poto Williams
Hon Julie Anne Genter
Jan Logie, MP

Hard-copy distribution:

Minister of Education

Officials present from:

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