

Consultation on tranche two of the Early Learning Regulatory Review:

Implementing the new network
management function for early
childhood services

SEPTEMBER 2021

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How to have your say

If you want to provide feedback on the proposals in this document, you can complete a survey in English [here](#), or in te reo Māori [here](#). You can also send a more detailed written submission to either:

earlylearning.regulatoryreview@education.govt.nz or this postal address:

Early Learning Regulatory Review (Tranche Two – Network Management)
Ministry of Education
PO Box 1666
Wellington 6140

The Ministry of Education requires feedback by 13 October 2021.

If you have any questions about making a submission or would like more information please email: earlylearning.regulatoryreview@education.govt.nz

Process

The information provided in submissions will be incorporated into the Ministry's policy development process and will inform advice to the Minister of Education and Cabinet.

Your submissions will become public information. This means that a member of the public may ask for a copy of your submission under the Official Information Act 1982. Any submission summary we create as a result of this consultation may also mention your submission. Please tell us in your submission if you do not want your name included.

Please also set out clearly in the cover letter or email accompanying your written submission if you have any objection to the release of any information in the submission. It would also be helpful if you outlined which parts you consider should be withheld, together with the reasons for withholding the information. The Ministry will take this into account and will consult with submitters when responding to requests under the Official Information Act and if a summary of submissions is published.

Introduction

What is network management?

In 2019, as part of *He taonga te tamaiti: Every child a taonga - the early learning action plan* the Government set an objective that early learning services are part of a planned and coherent education ecosystem that is supported, accountable and sustainable.

One of the actions to support this objective is network management. **Network management** requires a person or entity wanting to establish a licensed early childhood service to apply for the Minister of Education's approval that a proposed service is needed, before any application for a licence can be made.

Under the network management policy every applicant will need to outline:

- information relevant to the National and Regional Statements (page 5)
- relevant attributes of the areas to be served (including community need and availability of services)
- capability to provide the service (page 9)
- suitability to provide the service (including being fit and proper)
- financial position (page 8)
- licensing history (page 8)
- any other matters that the Minister of Education requires.

Network management only applies to early childhood services that:

- are required to hold a licence (all education and care centres such as Education and care, Kindergartens, Kōhanga reo and Playcentre); or
- wish to operate as a licensed service (home-based and hospital-based services). It does not apply to playgroups.

An applicant is a person or entity that intends to govern and operate the service.

How will it work?

To establish a new licensed early childhood service an applicant will need to:

1. Firstly, seek network approval from the Minister of Education to apply for a licence to operate a proposed early childhood service. Approval may last for up to two years.
2. Secondly, apply for a licence and meet all licensing application requirements under the Education (Early Childhood Services) Regulations 2008 (licensing regulations). Licensed services are entitled to receive government funding.

Network management phase

An applicant will submit an application to the Ministry of Education.

The Secretary for Education will assess if the applicant meets the fit and proper test and assess financial viability. If the applicant is considered to be fit and proper the assessment of fit and proper and financial viability will be provided to the Minister.¹

The Minister of Education will decide whether to approve the application, enabling the applicant to apply for a licence. The Minister of Education will consider the Secretary's assessment and also consider matters such as alignment with the National and Regional Statements, community need and availability of services, financial position and licensing history.

Anyone wishing to establish a new licensed early childhood service needs to go through network management, even if they already operate another service.

¹ If the applicant is assessed as not fit and proper than the applicant can appeal the decision in the District Court (discussed later).

Licensing phase

When the service is ready to start operating the approved applicant will apply to the Secretary for Education for a licence.

Note – Only approved applicants and their governance members can apply for a licence. Network approval is not a guarantee the applicant will be subsequently granted a licence. The applicant must still meet all the application requirements set out in the licensing regulations and maintain their fit and proper status.

The applicant and circumstances (service type and offering) must remain the same

The applicant that is given network management approval must be the same applicant that applies for an early childhood licence.

In addition, the type of service proposed at the network management phase must remain the same.

Changes to the applicant or approved type of service will result in the Minister cancelling network management approval.

Period of network approval

Applicants that have been given network approval will have up to two years to apply for a licence. If an applicant plans to achieve licensing earlier than two years, the date of expiry will be set at that date.

If an applicant needs more time to prepare the service before applying for a licence due to other factors beyond the control of the applicant, the applicant can apply for an extension (discussed later in consultation document).

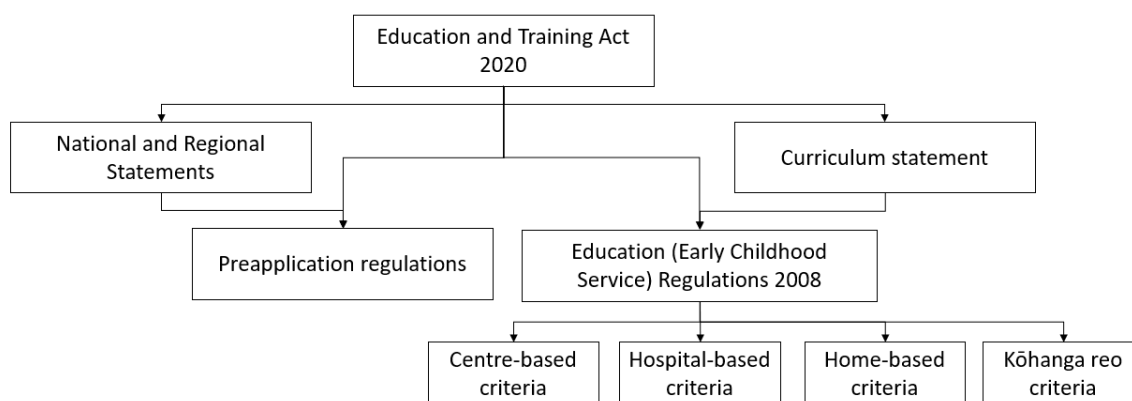
Failure to obtain a licence within the network approval period will result in cancellation of the approval.

What will the regulatory framework look like?

The new network management function is enabled by new sections 17 and 18 in the Education and Training Act 2020 (the Act).

The structure of the regulatory framework will be similar to what we have now with the Act, regulations and criteria for licensing, but we will also have a new set of regulations for network management as well as National and Regional statements (covered later in this consultation document).

The following diagram outlines how the framework will look for licensed early childhood services.



Key guiding principles

To guide the development of this new function we have used the following principles:

- Honours Te Tiriti o Waitangi and supports Māori-Crown relationships.
- The requirements maintain the quality of education and care and put children's health, safety and wellbeing first.
- The impacts on parents and whānau take account of matters such as labour market participation and continuity of provision and choice.
- Costs and compliance faced by providers are proportionate and involve limited or no duplication of effort.
- Costs and compliance faced by government are reasonable and able to be implemented.

When will network management start?

Network management will commence on 1 August 2022. Any person or entity proposing to establish a new early childhood service and seek a licence will need to apply for network approval from 1 August 2022.

It is proposed that services that have construction underway but are not ready to open and therefore have not applied for a licence, would need to go through the network management process.

It is not intended that the network management requirements would apply to any person or entity that has applied for a new licence prior to 1 August 2022 **provided that** the application has been received and accepted as complete by the Ministry of Education.

Keeping it consistent with licensing

Our intention is that any requirements that apply to both network management and licensing will be consistent. For example, in this document we propose changes to the fit and proper test. These changes would be mirrored in the licensing regulations.

In this document we also propose setting network management conditions. It is intended that any relevant conditions of network management approval would be carried through to the grant of any licence, by way of a condition or limitation expressed on the licence under the licensing regulations.

Our network management proposals

National and Regional Statements

We propose the introduction of National and Regional Statements to guide the implementation of the network management function. These proposals will require changes to the Act.

The National and Regional Statements would:

- **outline strategic priorities** for government
- **identify areas** of undersupply and areas where new services are not required by analysing multiple data sets (including population projections and existing services)
- provide additional **information about the legislative requirements**, such as what information is required as part of applications.

An example National Statement is outlined in Annex 1. Regional Statements would provide more granular information about a particular region, although we may not have the capacity to develop Regional Statements for all areas so we will likely focus on areas of population growth or undersupply first.

Before the Minister of Education publishes a National or Regional Statement we propose the Minister should consult with:

- the early learning sector and
- Māori.

Why?

The intention of the National and Regional Statements is to provide more information about the early childhood network so all potential applicants have up to date, quality information about the state of the network, including areas of oversupply or undersupply. Statements are often used across government to guide investment and new development. For example, the National Policy Statement on Urban Development and Government Policy Statement on Land Transport.

If we didn't have the National and Regional Statements everyone would need to obtain their own information about demand for new services. Applicants may also waste effort and resources on applications that are unlikely to be successful.

Questions for you

1. Do you agree with the proposal to introduce National and Regional Statements?
2. Do you agree with our proposal to consult the early learning sector and Māori before issuing National and Regional Statements?
3. Is there anything else that the National and Regional Statements should include in addition to matters listed in Annex 1?

Te Tiriti o Waitangi

As part of developing the network management function we need to consider how we will give effect to Te Tiriti o Waitangi.

We have developed three initial proposals prioritising the:

- **analysis of the current provision of te reo Māori pathways in early learning** and where potential gaps and opportunities in provision are located. This proposal would involve setting aside dedicated resource in the Ministry of Education to analyse all the available information and intelligence including from stakeholders.
- **establishment of new Māori immersion and Iwi-led early learning services, such as kōhanga reo.** We propose that new Māori immersion and Iwi-led early learning services are specified as a government priority in the National Statement (if this proposal is agreed by Government).
- **interests of Māori in particular applications for approval.** Where an application for approval engages Tiriti rights or interests, for example those under a Tiriti settlement, or the interests of Māori in a particular community it would be necessary that such decisions are properly informed by these considerations.

These initial proposals do not need express reference in the Act but may be referred to in the National or Regional Statements, or in regulations (as appropriate).

Why?

The Government has an enduring focus on improving education outcomes for Māori learners and giving effect to Te Tiriti o Waitangi and its principles. The Act currently reflects this. Section 4(d) states that the purpose of the Act is “to establish and regulate an education system that honours Te Tiriti o Waitangi and supports Māori-Crown relationships.” It is a requirement that we look for ways to meet this obligation.

Questions for you

4. Do you agree with our three proposals to give effect to our Te Tiriti obligations under the Act?
5. What other ways could the Crown give effect to Te Tiriti o Waitangi as part of the design and implementation of the network management function?
6. What are some other ways the Crown could better support Māori-Crown relationships as part of the design and implementation of the network management function?

Changes to fit and proper

Applicants demonstrating that they are fit and proper is an important part of the process of establishing an early childhood service. We are proposing some improvements to the current fit and proper requirements to ensure they are consistent with other sectors and in line with best practice.

We propose to:

- clarify the application of the test to both the applicant and every person involved in the governance of the proposed service
- include consideration of all personal convictions of an applicant and any governance members relevant to providing an early childhood service
- include any relevant convictions of an organisation that an applicant or governance member has been associated with

This proposal will require changes to the Act. As noted earlier in this document our intention is that the final fit and proper test would be mirrored in the licensing regulations, so the requirements are consistent and maintained during licensing.

Why?

There are currently limitations in our fit and proper test when you compare it to other New Zealand sectors and other jurisdictions, like Australia.

Currently the test is restricted to convictions for offences involving harm to children, violence and fraud, but there are other relevant convictions such as those under the Health and Safety at Work Act 2015 or Education and Training Act 2020. Our proposed changes will capture this.

Questions for you

7. Do you support our three proposals to improve the fit and proper test?
8. Are there other matters that should be included as part of the fit and proper test?

Assessing financial position and licensing history

The Act currently outlines the Minister's obligation to take account of the financial position of the applicant and the licensing history of the applicant and its governance members as part of making a decision whether to approve an application for network approval.

It is proposed that the Secretary for Education will conduct an assessment of both matters and advise the Minister. We need to determine what information should be used to assess these matters.

The purpose of these requirements is to ensure consideration is given to how well placed the applicant is to establish and operate a new service.

The way we assess financial position and licensing history does not need to be expressed in legislation.

Financial position

To assess financial position we propose that the applicant provide any financial information that demonstrates the applicant has either sufficient finances to establish the service and/or a business plan to show how sufficient finances will be attained to achieve licensing. Evidence may include an annual report or statements from appropriate financial institutions, and/or a business plan.

Why?

It is unrealistic to require all services to have sufficient funding at the network management stage which may be two years out from licensing (and therefore government funding). But it is important that applicants have a suitable plan in place to establish a service.

Questions for you

9. Do you support our proposal to request financial information and/or a business plan to show how sufficient finances will be attained to achieve licensing?
10. Are there any other factors we should take into account relating to financial position?

Licensing history

To assess licensing history we propose to ask for a list of services that the applicant has been in control of or had any role as governing member. The applicant would also need to provide the relevant years of the association.

The Secretary would provide any relevant information relating to those listed services to the Minister of Education.

Why?

At present the Ministry does not collect information about governance members so without our proposal it may be difficult for the Secretary and the Minister to determine if the applicant and its governance members have a suitable licensing history to establish a new service.

Questions for you

11. Do you support our proposal to ask for a list of services that the applicant (and governing members) have been associated with?
12. Are there any other factors we should take into account relating to licensing history?

Capability to deliver the service

We propose a new aspect to the Ministers' assessment – demonstrating capability to deliver the proposed service.

This requirement would cover matters such as understanding the regulatory framework for early childhood services and specific expertise to deliver the type of service the applicant is proposing to offer.

An applicant would demonstrate capability by including information and capability relevant to the specific service type being proposed.

This proposal will require changes to the Act.

Why?

Capability to provide the proposed service is an important indicator of likely success. It is important that those most capable to deliver the services can be prioritised ahead of those that are less capable.

Questions for you

13. Do you support our proposal to include an assessment of the capability of the applicant to deliver the service?
14. Are there any other matters that should be considered as part of a capability test?

Setting of conditions

We propose the introduction of conditions to any network approval granted by the Minister of Education.

The conditions would specify:

- matters that the application for network approval has relied on such as the nature or size of the service proposed and the site (if known)
- a requirement to provide regular updates to the Ministry on milestones and progress
- a requirement to notify any significant changes in circumstances.

The intent of setting conditions is to outline the expectations on the applicant to progress towards obtaining a licence and allow new approvals to be granted where an approved applicant is not making the expected or promised progress.

Depending on the circumstances, failure to meet conditions could result in the network approval being cancelled by the Minister.

The relevant conditions of network planning would apply to any licence subsequently granted. For example, if an applicant is approved to establish an early childhood service in a specified area, then any licence granted would be for an early childhood service in that specified area.

This proposal will require a change to the Act as well as consequential changes to the licensing regulations.

Why?

Conditions are an important way of setting out the obligations on the applicant to move towards licensing. Conditions will also help ensure that the applicant proceeds with the application that the Minister of Education has relied on in giving network management approval.

If we do not have the ability to set conditions progress and significant changes, up to two years may elapse before the approved pre-application expires and no service has been established in a community where we have identified a need. Other applicants will be disadvantaged by this unnecessary delay and a community need will not be met.

Questions for you

15. Do you support our proposal to set conditions on approved applications?
16. Are there any other matters you think we should consider in the setting of conditions (for example, how long conditions should apply for during licensing)?

Challenging decisions

A general principle outlined in the Legislation Design and Advisory Committee's Legislation Guidance is that: "Where a public body makes a decision affecting a person's rights or interest, that person should generally be able to have the decision reviewed in some way".

Applicants should have a right to challenge a decision that could affect the proposed new service or any existing service the applicant may operate.

We are proposing two separate ways to challenge decisions:

- Judicial review in the High Court in respect of decisions of the Minister of Education not to approve an application for network management.
- A right of appeal in the District Court in respect of a determination by the Secretary for Education that the applicant is not fit and proper and/or financially viable.

Judicial review

Judicial review involves a High Court judge considering the lawfulness of a decision (including the process followed).

Judicial review is already provided in law and can be quicker than the District Court process. It is also more suitable for a Ministerial decision that is discretionary such as network management.

Right of appeal in respect of fit and proper and financial viability

We propose that prior to the Secretary for Education making any adverse decision about a person's fit and proper status or the financial viability of the applicant, the Secretary would first issue a notice of intention to make such a decision, the grounds on which this intention is made, and invite a response from the applicant. This will give an applicant the opportunity to provide any additional information or reconsider the involvement of any particular person.

Following a final determination by the Secretary an applicant would have a right to appeal in the District Court.

If the applicant is considered to be fit and proper this assessment will be provided to the Minister.

We considered other review and appeal options and establishment of a separate appeal or review authority. Our proposed options were assessed as the most cost effective and appropriate review or appeal options for the type of decision being made.

Why?

We have proposed different pathways for challenging a decision because the Minister of Education and Secretary for Education have different roles and responsibilities. The Minister's role is discretionary, and the Secretary for Education's role is administrative. A discretionary decision-making power is more appropriately reviewed in the High Court. An administrative process is more appropriately appealed in the District Court.

Questions for you

17. Do you support our two proposed pathways relating to challenging decisions?
18. Are there any other factors we should take into account relating to challenging decisions?

Extensions

The Act currently enables the Minister of Education to extend approval of a network management application beyond two years. This means that an applicant can be allowed more time to set up a new service than originally agreed.

We recommend making it more explicit when extensions are likely to be considered. We propose that extensions are considered where:

- The area was subject to a natural disaster.
- For new builds, the building is nearly complete, but there is unavoidable delay beyond the applicant's control (for example, delays in construction materials).
- There are other exceptional circumstances beyond the applicant's control (for example significant vandalism to the building or site).

The Minister would make the decision whether to extend the duration of the network approval and may choose not to do so.

This proposal will require a change to the Act.

The alternative option would be to leave the extension provision as it currently stands, where extensions are made on a case by case basis. This is not our preferred option as it is not clear what matters are most relevant to the Ministers decision to extend.

Why?

We think it is important to provide clarity to the sector on the circumstances in which extensions will be considered.

Granting extensions impacts on the ability of other applicants to set up in an area, so clear criteria limiting extensions ensures services are established as quickly as they can be in the areas where they are needed.

Questions for you

19. Do you support our three proposals to clarify when extensions will be considered?
20. Are there other grounds that the Minister should consider granting an extension?

Fees

For pre-applications we propose to introduce a minimal fee of around \$500 (plus GST) to partially recover costs incurred by the Minister of Education and Ministry of Education to assess each application.

Fees would be set out in the new regulations for network management.

Why?

The Guidelines for Setting Charges in the Public Sector, 2017 provides that private goods should be funded by their users or beneficiaries. Charging a minimal fee recognises that there is both public and private benefit in new services being established.

We considered other options such as no fee or a full cost recovery fee. No fee would not recognise the costs faced by government and would not deter applicants from submitting 'holding' applications intended to limit competition.

A full cost recovery model would be difficult to implement for a newly introduced provision where there is no guarantee of a licence and therefore government funding. Full cost recovery would also be inconsistent with our current licensing fee that is not full cost recovery given it was set in 2008 when costs were lower.

Questions for you

21. Do you support our proposal to introduce a minimal fee of around \$500 (plus GST) to partially recover costs?
22. Are there any other factors we should take into account relating to the setting of fees?

Annex 1: Draft National Statement on the Network of Early Childhood Services (example)

Vision

Purpose

[this section sets out the purpose of the national statement]

The purpose of this statement is to guide the establishment of new early childhood services in New Zealand. This statement does not apply to licensed early childhood services.

Legislative Framework

[this section sets out the legislative framework for this policy – Education and Training Act, Early Learning Action Plan]

This statement is enabled by sections 17 and 18 of the Education and Training Act 2020 which requires providers of new early childhood services to seek approval of the Minister of Education before they can apply to be licensed.

Contextual information

[this section sets out other contextual information]:

This is a new function of the Government in response to:

- Limited network growth in some areas resulting in some communities being under-served.
- Excessive network growth in some areas resulting a detrimental impact on existing services.

More active management of the network is intended to help ensure all children have access to quality early learning settings and prevent unintended consequences of over-supply.

We have 5401 licensed services. Growth has primarily occurred in education and care and home-based services.

Roles and responsibilities

[this section sets out the roles of the: Minister of Education, Ministry of Education and other relevant parties – clarify where decision making sits for pre-application, right of appeal etc]

Strategic priorities for government

[this section would set out the priorities for the network]

Data

[this section would set out key data]

Strategic areas for government

[this section would set out the regional areas in more detail]

High growth areas where ECE likely to be required	Average growth where ECE may be required	Low growth areas where ECE unlikely to be required
Below are areas where population growth is known, or known service gaps already known exist	Below are areas where the MoE is unsure if new early childhood services are required, information is mixed or there may be limited service type availability	Below areas where no new early childhood services are required (e.g. due to significant population decline, stable ECE network)
<ul style="list-style-type: none"> Area X Area Y 	<ul style="list-style-type: none"> Area B Area E 	<ul style="list-style-type: none"> Area C Area F

Pre-application requirements

To apply for network management approval you must provide information on the attributes outlined in the table, as well as demonstrate:

- capability to provide the service (new and discussed later)
- suitability to provide the service (including being fit and proper)
- financial viability and provide information on licensing history.

Relevant attribute <i>Including what this means</i>	Mandatory information you must provide	Optional information you may provide
Description Overview of your expected service type, philosophy and relationship to any other early childhood organisations	<ul style="list-style-type: none"> • What type of service do you intend to provide? • Describe how many licensed places you intend to provide, and intended hours of operation. • Describe any specific features of your service, eg philosophy (if any). • Describe any affiliation to an existing service or other organisation (if any). 	<ul style="list-style-type: none"> • Support from an existing service or organisation.
The demography of the area Where you propose to provide your service and your expected catchment area of families	<ul style="list-style-type: none"> • Describe or identify your proposed site or physical location. • Describe or identify your proposed catchment area of families. 	<ul style="list-style-type: none"> • A site map of your proposed physical location. • A map identifying your proposed catchment area of families.
The needs of the communities in the area The community you intend to provide early childhood services for and their needs	<ul style="list-style-type: none"> • Describe your expected community. • Describe what the community might need and why you are well positioned to meet that need? 	<ul style="list-style-type: none"> • Evidence of engagement with local iwi or hapū. • Evidence of engagement with organisations representing parents of children aged 0-4.

		<ul style="list-style-type: none"> • Evidence of engagement with schools in the area. • Statement on any particular specific features of your service operation.
<p>The needs of the children in the area</p> <p>The children you intend to provide early childhood services for and their needs</p>	<ul style="list-style-type: none"> • Describe what needs you have identified of children in the area to be served? • Describe why you are well positioned to meet that need? • Statement on whether there are any health and safety or special features of your proposed location or offering, eg close to tsunami zone (if relevant). 	<ul style="list-style-type: none"> • Statement on which children you are proposing to cater for, and why your offering is required.
<p>The availability of services in the area with different offerings (for example, the provision of te reo Māori)</p>	<ul style="list-style-type: none"> • Describe how your offering relates to other services in the area. • Describe what impact you might have on other existing services, if any. 	<ul style="list-style-type: none"> • A map identifying your proposed catchment area of families alongside other existing ECE services. • Evidence of engagement with other services in the area you intend to operate.
<p>Any other attribute that you consider may support your application</p> <p>Any other factor that you consider is important to consider in your application</p>	<ul style="list-style-type: none"> • Describe any other factor that you consider is important to consider in your application. 	<ul style="list-style-type: none"> • Any evidence you meet a strategic priority.

We **shape** an **education** system that delivers
equitable and **excellent outcomes**

He mea **tārai** e mātou te **mātauranga**
kia **rangatira** ai, kia **mana taurite** ai ōna **huanga**