

Cabinet Paper material

Proactive release

Minister & portfolio Hon Chris Hipkins, Minister of Education
Name of package Changes to the Education (Early Childhood Services) Regulations to Respond to COVID-19
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Cabinet Paper: Changes to the Education (Early Childhood Services) Regulations to Respond to COVID-19

21 April 2020

Ministry of Education

CAB-20-MIN-0130: Meeting of the COVID-19 Ministerial Group: Minute of Decision

21 April 2020

Cabinet Office

The material is released in full.

Decision paper:

CHANGES TO THE EDUCATION (EARLY CHILDHOOD SERVICES) REGULATIONS TO RESPOND TO COVID-19

To	Cabinet Committee on COVID-19 Response		
From	Ministry of Education	Date	16/04/2020

Purpose

1. This paper seeks agreement to a new power in the Education (Early Childhood Services) Regulations 2008 to enable the Secretary for Education to allow exemptions to specified requirements for early childhood services for a period of up to three months and extend licence expiry dates or other regulatory compliance dates for a period of up to three months. These powers would be able to be exercised during, and up to three months following, a state of emergency or epidemic notice.

Background

2. The Education (Early Childhood Services) Regulations 2008 (the Regulations) establish the parameters for the operation of licensed early childhood services. They outline minimum standards for the health, safety, wellbeing and education of young children while they are attending an early childhood service.
3. The Secretary for Education (the Secretary) has responsibilities for licensing early childhood services. Licensing actions include granting a licence, enforcement where non-compliance is identified, and the suspension and cancellation of licences.
4. The Regulations do not provide for situations where usual processes have been put on hold. It will be challenging for some early childhood services to comply with a number of provisions in the Regulations during Alert Level 4 and for some time after they reopen.
5. Furthermore, during Alert Level 4, it is not possible for the Ministry of Education's (the Ministry's) licensing staff to visit early childhood services to conduct licensing visits. Licences with fixed expiry dates will expire and compliance dates set under regulatory requirements will expire.

Proposals

6. Section 317 of the Education Act 1989 provides that regulations can be made in relation to licensing of early childhood services.
7. We propose to introduce a new power into the Regulations to empower the Secretary to allow exemptions to specified requirements for a period of up to three months and extend licence expiry dates or other regulatory compliance dates where necessary for a period of up to three months. This power would be able to be exercised during, and up to three months following, a state of emergency or epidemic notice.

8. A state of emergency refers to when a state of national or local emergency under the Civil Defence Management Act 2002 is in force. An epidemic notice refers to when an epidemic notice under section 5(1) of the Epidemic Preparedness Act 2006 is in force.
9. We propose the Secretary is able to exercise these powers for up to three months following the end of a state of emergency or epidemic notice, and that the extension or exception is permitted for a period of up to three months. This means the Secretary could exercise her power three months following the end of an epidemic notice, to extend the expiry date of a licence for a further three months.
10. This will enable the Ministry to work pragmatically with early childhood services to resume operations following periods of disruption. This will in turn allow education and care to be available to enable parents to return to work and children to return to normal routines.
11. We propose the boundaries for exercise of the power are limited to addressing the circumstances or effects of a state of emergency or epidemic notice, and that the Secretary will ensure that the safety of children is not compromised.

Proposed regulatory changes to enable service providers to operate

12. We propose allowing the Secretary the flexibility to extend or allow exemptions to specific regulatory requirements and Licensing Criteria when service providers are unable to meet these requirements due to the effects of a state of emergency or epidemic notice. This power could be exercised during, and up to three months following, a state of emergency or epidemic notice to enable the Secretary to:
 - allow for special conditions to be used as a tool to allow a service provider to resume or continue operations without full regulatory compliance for a period not exceeding three months
 - allow exemptions to compliance with specific Licensing Criteria where necessary for a period not exceeding three months
 - allow exemptions to some or all of the additional requirements for home-based education and care services, such as those relating to home visits, for a period not exceeding three months

Special conditions

13. Regulation 22(5) allows the Secretary to impose special conditions on a licence. However, what these conditions can relate to are tightly prescribed, such as limiting the numbers of children that may attend a service. We propose that the Secretary is permitted to impose special conditions on a licence to assist a service provider to resume or continue operations without full regulatory compliance for a period of up to three months.
14. It is intended that special conditions would be used as a tool to enable individual services to resume or continue operations and address any particular issue faced by that service, rather than provide for widespread regulatory noncompliance. At present the ability to use special conditions is directed at imposing certain additional requirements or restrictions rather than contemplating specified exceptions to regulatory compliance.
15. The new power would enable the Secretary to take a tailored approach to address the particular problems at a specific service as necessary. The Kaikoura earthquake provides an example of where a special condition could have been utilised. The earthquake had resulted in a service being unable to allow children to use the outdoor area, which was a breach of several licensing requirements. This meant the service's licence was reclassified as provisional.

16. We consider provisional licences to be an inappropriate mechanism as they are currently used to target poor performing services and trigger the risk of mandatory cancellation. A special condition would have provided an alternative solution to allow the service to carry on operating without access to an outdoor play area for a period of time.

Exemptions to compliance with Licensing Criteria prescribed under Regulation 41

17. Licensing Criteria are prescribed under Regulation 41 and are used by the Secretary to assess compliance against broader regulated standards. We propose that the Secretary have the power to permit exceptions to compliance with specific Licensing Criteria where necessary. This would be for a period of up to three months to allow sufficient time for the service to meet the Licensing Criteria.
18. An example of where this could be used is where the first aid certificates of required staff have expired over the lockdown period because staff have been unable to attend refresher first aid courses during the emergency period. Licensing Criteria stipulate that all home-based educators must have a current first aid certificate. In centre-based services, the requirement is that there must be one first aid-qualified person for every 50 children attending.
19. In this situation, the power to enable greater flexibility with the first aid requirement may need to be applied in a regional area or possibly on a larger scale for a limited period of time.

Ability to exempt home-based education and care services from specific requirements

20. Regulation 28 applies to home-based education and care services. It requires the coordinator (a registered and certificated early childhood teacher) to visit each educator in the service at least once per month. This may not be achievable if people in the home are high-risk, in isolation, or if there is a continued limit on travel. Some home-based services cover a large geographic region, for example the Far North or the West Coast.
21. We propose that the Secretary is empowered to make exceptions to this requirement in situations where there is a clear and safe rationale for doing so, for a period of up to three months.
22. It is possible that the Secretary could exempt individual services from this requirement through a special condition, as outlined in paragraph 13. However, we propose the Secretary has this specific power to apply it more broadly. For example, to all home-based services located in a specific region.

Proposed regulatory changes to extend time limits

23. There are a number of prescriptive provisions in the Regulations that specify time limits, primarily around the expiry or cancellation of licences.
24. We propose allowing the Secretary the ability to extend the maximum time period specified by no more than three months for the following provisions, where the circumstances necessitating an extension are clearly linked to a state of emergency or epidemic notice:
- expiry of probationary and temporary relocation licences
 - compliance with conditions on a provisional licence
 - compliance with conditions on a notice of suspension
 - processing a probationary licence.

Expiry of probationary and temporary relocation licences

25. If a service provider wishes to become a licensed education and care provider, they must apply to the Secretary for a licence to operate. A probationary licence is the first licence granted to a new service. Under Regulation 11(3), it remains in force for up to a maximum period of 12 months from when it is issued.
26. After the service has demonstrated full compliance with all regulatory requirements, a full licence is granted. Full licences are issued in perpetuity and have no expiry date. If a full licence is not granted, the probationary licence expires 12 months after the date of issue.
27. A temporary relocation licence is granted when a service provider needs to temporarily relocate the service to other premises. For example, due to renovations. Regulation 18(3) stipulates that temporary relocation licences can only be in force for a maximum period of 10 months and cannot be extended.
28. A number of probationary or temporary relocation licences will expire during or following the closures of services imposed at Alert Level 4. The duration of time that services are required to be closed may also be extended. Due to this, we propose that the Secretary is empowered to extend these types of licences by not more than three months beyond the maximum timeframe specified in the Regulations where necessary.

Compliance with conditions on a provisional licence

29. A service provider's licence is reclassified as provisional if the service provider is found to be non-compliant with the Regulations and/or Licensing Criteria. The provisional licence must specify the conditions to be complied with and by when.
30. Under Regulations 16(4) and 17(4), a provisional licence must be cancelled if conditions are not met by the specified time period and compliance with the condition is still required. This time period cannot extend beyond 12 months. We propose that the Secretary has the power to extend the maximum time period for compliance with conditions beyond the 12 month limit by no more than three months in certain circumstances where the reason for an extension is clearly linked to a state of emergency or epidemic notice.

Compliance with conditions on a notice of suspension

31. Under Regulation 30, the Secretary for Education can suspend a service's licence only for specified reasons, such as if it is not in the interests of the children attending the service for the service to continue to operate, or the service provider has physically ill-treated a child.
32. Regulation 31(3) requires that the notice suspending a licence must specify the conditions under which the suspension will be revoked, and time limits are set as part of the conditions to give the provider a reasonable time to comply. The licence must be cancelled if the suspension conditions are not met by the specified compliance date.
33. The imposition of a suspension assumes a single notice will be issued. A subsequent notice to extend the period of suspension is not provided for in the Regulations. We propose that the Secretary have the ability to extend suspensions by no more than three months in exceptional circumstances linked to a state of emergency or epidemic notice.

Processing a probationary licence

34. Regulation 11(2) requires all reasonably practicable steps to be taken to make a decision on whether to grant or refuse a probationary licence within 30 working days of a completed application being received.
35. We propose that the Secretary has the ability to extend this timeframe by no more than three months in exceptional circumstances linked to a state of emergency or epidemic notice. There could be a considerable delay if Ministry resources cannot meet demand (for example, where onsite licensing visits are required). Under the current framework this delay could result in the Ministry being challenged by applicants.

Proposed regulatory changes to allow for deferral of cancellation of a licence

36. The Regulations require mandatory cancellation of licences in some cases. For example, the Secretary must cancel a licence if a service provider does not comply with conditions on a provisional licence or suspension, or if particular situations exist, such as the service ceasing to operate (Regulation 17(4) and Regulation 32).
37. In some circumstances, deferring regulatory action may be appropriate if there are concerns that a service provider has been prevented from meeting regulatory compliance due to an emergency or epidemic and/or would be unable to access the usual rights of appeal. We propose that the Secretary has the power to defer regulatory action that would otherwise be required by the Regulations for a period not exceeding three months.

Risks

38. We envisage that the majority of service providers who request that exceptions are made to usual compliance with regulatory requirements will have a genuine need. However, some service providers could do so for their convenience or to avoid regulatory consequences that cannot be linked to an epidemic or emergency.
39. To mitigate this risk, licensing staff will ask for an explanation from the service provider when considering the request for an exemption, unless the need for an exemption is obvious.

Timing and 28-day rule

40. We propose that the COVID-19 Ministerial Group refer the Education (Early Childhood Services) Amendment Regulations 2020 (the Amendment Regulations) to the Executive Council on 21 April 2020. The Amendment Regulations will come into force on 22 April 2020.
41. We propose waiving the 28-day rule to allow the Amendment Regulations to come into force before the end of the lockdown period. This will enable the Secretary to immediately work with early childhood services to resume operations following the lock-down period. If the 28-day rule is not waived, it will be challenging for some early childhood services to comply with a number of provisions in the Regulations when they reopen.

Compliance

42. The Amendment Regulations comply with the following:
- a. the principles of the Treaty of Waitangi;

- b. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - c. the principles and guidelines set out in the Privacy Act 1993; and
43. The Amendment Regulations do not comply with the Legislation Guidelines (2018 edition) as we have been unable to undertake consultation due to the need to progress regulatory change before the end of the lockdown period.

Regulations Review Committee

44. There are no grounds for the Regulations Review Committee to draw the Amendment Regulations to the attention of the House under Standing Order 319.

Certification by Parliamentary Counsel

45. The Amendment Regulations were certified by the Parliamentary Counsel Office as being in order for submission to Cabinet.

Impact Analysis

46. The Treasury has determined that this is a direct COVID-19 response and has suspended the RIA requirements in accordance with CAB-20-MIN-0138.

Publicity

47. The Amendment Regulations will be notified in the New Zealand Gazette on 21 April 2020.

Proactive release

48. I intend to proactively release this paper in full (as required by CO (18) 4).

Recommendations

49. We recommend that you:
- a. **note** that the Education (Early Childhood Services) Regulations 2008 (the Regulations) and associated Licensing Criteria contain a number of prescriptive provisions that do not provide the flexibility required for dealing with the effects of a prolonged shutdown necessitated by COVID-19
 - b. **agree** to introduce a new regulatory power into the Regulations to give the Secretary for Education (the Secretary) the flexibility to:
 - i. allow for special conditions (enabled under Regulation 22) to be used to allow an early childhood education (ECE) service provider to resume or continue operations without full regulatory compliance for a period of up to three months
 - ii. allow exemptions to compliance with specific Licensing Criteria prescribed under Regulation 41 if a service provider is unlikely to be able to comply with such criteria for a period of up to three months

- iii. allow exemptions to some or all of the additional requirements for home-based education and care services contained in Regulation 28 for a period of up to three months, such as those that require coordinators to visit educators at least once a month
 - iv. extend any period specified for the expiry of a probationary licence for up to three months beyond the 12 month period set out in Regulation 11 and any period specified for the expiry of a temporary relocation licence for three months beyond the 10 month period set out in Regulation 18
 - v. extend any period set for compliance with conditions on a provisional licence for up to three months beyond the 12 month limit set out in Regulation 16
 - vi. extend any period set for compliance with conditions of a suspension for up to three months beyond those set in the notice of suspension required by Regulation 31
 - vii. extend the date within which applications for probationary licences would ordinarily be processed under Regulation 11(2) by up to three months
 - viii. defer regulatory action (such as cancellation of licences under Regulations 17(4) and 32) that would otherwise be required by the Regulations for a period not exceeding three months
- c. **agree** to limit the boundaries for exercise of the power outlined in (b) to circumstances related to a state of emergency or epidemic notice, for the time period during, and up to three months following, a state of emergency or epidemic notice
- d. **agree** that the Secretary will ensure that the safety of children is not compromised
- e. **note** that the Education (Early Childhood Services) Amendment Regulations 2020 (the Amendment Regulations) give effect to the decisions referred to in recommendation (b), (c) and (d) above
- f. **authorise** the submission to the Executive Council of the Amendment Regulations
- g. **agree** to waive the 28-day rule so that the regulations can come into force on 22 April 2020, before the end of the lockdown period



Meeting of the COVID-19 Ministerial Group

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.

Changes to the Education (Early Childhood Services) Regulations to Respond to COVID-19

The group of Ministers with Power to Act on COVID-19 matters [CAB-20-MIN-0130] convened on 21 April 2020 at 10.30am, and in accordance with their Power to Act:

- 1 **noted** that the Education (Early Childhood Services) Regulations 2008 (the Regulations) and associated Licensing Criteria contain a number of prescriptive provisions that do not provide the flexibility required for dealing with the effects of a prolonged shutdown necessitated by COVID-19;
- 2 **agreed** to introduce a new regulatory power into the Regulations to give the Secretary for Education (the Secretary) the flexibility to:
 - 2.1 allow for special conditions (enabled under Regulation 22) to be used to allow an early childhood education (ECE) service provider to resume or continue operations without full regulatory compliance for a period of up to three months;
 - 2.2 allow exemptions to compliance with specific Licensing Criteria prescribed under Regulation 41 if a service provider is unlikely to be able to comply with such criteria for a period of up to three months;
 - 2.3 allow exemptions to some or all of the additional requirements for home-based education and care services contained in Regulation 28 for a period of up to three months, such as those that require coordinators to visit educators at least once a month;
 - 2.4 extend any period specified for the expiry of a probationary licence for up to three months beyond the 12 month period set out in Regulation 11 and any period specified for the expiry of a temporary relocation licence for three months beyond the 10 month period set out in Regulation 18;
 - 2.5 extend any period set for compliance with conditions on a provisional licence for up to three months beyond the 12 month limit set out in Regulation 16;
 - 2.6 extend any period set for compliance with conditions of a suspension for up to three months beyond those set in the notice of suspension required by Regulation 31;
 - 2.7 extend the date within which applications for probationary licences would ordinarily be processed under Regulation 11(2) by up to three months;

IN C O N F I D E N C E

- 2.8 defer regulatory action (such as cancellation of licences under Regulations 17(4) and 32) that would otherwise be required by the Regulations for a period not exceeding three months;
- 3 **agreed** to limit the boundaries for exercise of the power outlined in paragraph 2 above to circumstances related to a state of emergency or epidemic notice, for the time period during, and up to three months following, a state of emergency or epidemic notice;
- 4 **agreed** that the Secretary will ensure that the safety of children is not compromised;
- 5 **noted** that the Education (Early Childhood Services) Amendment Regulations 2020 (the Amendment Regulations) give effect to the decisions referred to in paragraphs 2, 3 and 4 above;
- 6 **authorised** the submission to the Executive Council of the Amendment Regulations [PCO 22871/8.0];
- 7 **agreed** to waive the 28-day rule so that the Amendment Regulations can come into force on 22 April 2020, before the end of the lockdown period.

Rachel Hayward
for Secretary of the Cabinet

Distribution:

The Cabinet
Hon James Shaw

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