

Supplementary Analysis Report: Power to set funding conditions for early childhood services

Coversheet

Purpose of Document	
Decision sought:	Amendment of the Minister of Education's power to set funding conditions for early childhood services under the Education and Training Act 2020
Advising agencies:	Ministry of Education
Proposing Ministers:	Hon Chris Hipkins, Minister of Education
Date finalised:	12 May 2021
Problem Definition	
<p>The Government has set out an action to improve the levels and consistency of teachers' salaries and conditions across the early learning sector.¹ A key mechanism to enable this action is to place conditions on grant funding provided to early childhood services. Section 548 of the Education and Training Act 2020 (the Act) allows the Minister of Education to specify conditions on grant funding.</p> <p>Conditions need to be made that are in keeping with the purpose of the Act.² The current purpose of the Act is for education purposes and does not clearly extend to the Minister setting funding conditions primarily for an employment relations³ purpose. One of the Government's Budget 2021 initiatives will rely on the power to set funding conditions to improve teacher salaries. Improving the levels and consistency of teachers' salaries and conditions most closely aligns with an employment relations purpose, though it is also likely to have educational benefits such as improved teacher recruitment and retention. We therefore consider it necessary to make a change to legislation to make it clear the Minister has power to put this in place.</p>	

¹ Action 3.4 in the *Early learning action plan 2019-2029* available at <https://conversation.education.govt.nz/conversations/early-learning-strategic-plan/>

² Section 4, Education and Training Act 2020.

³ Employment relations extends to the relationships between an employer and employee employed by the employer.

Executive Summary

Regulatory change is required to ensure the Minister of Education has a clear power to set funding conditions for early childhood services to improve pay for certificated teachers in education and care services⁴ as a matter of fairness, so which is primarily set for an employment relations purpose. This analysis:

- Considers two amendment options relating to the power to set funding conditions in the Act
- Determines that an amendment to the power to set funding conditions in s 548 of the Act (Option Two) is the optimal approach to enable funding conditions to be made for employment relations purposes in the early learning sector

Limitations and Constraints on Analysis

This supplementary analysis report does not extend to consideration of the appropriateness of using the power to set funding conditions to achieve employment relations objectives, for example, for pay and employment conditions. The use of funding conditions under the Act will be used as the mechanism to increase certificated teachers' pay as part of an initiative in Budget 2021.

The use of different options to influence employment relations in the early learning sector, for example, fair pay agreements, has also previously been carried out in regulatory analysis undertaken for the Early Learning Action Plan 2019 – 2029.

Responsible Manager(s) (completed by relevant manager)

Andrea Schöllmann
Deputy Secretary
Education System Policy



12 May 2021

Quality Assurance (completed by QA panel)

Reviewing Agency:	Ministry of Education (internal review)
Panel Assessment & Comment:	The Ministry of Education's RIA panel has reviewed the Supplementary Analysis Report (SAR) 'Power to set funding conditions for early childhood services' produced by the Ministry of Education and dated 10 May 2021. The review team considers that it partially meets the Quality Assurance criteria.

⁴ Education and care services are legally centre-based, teacher-led service but are distinguished for Ministry of Education funding purposes from kindergartens, which are also centre-based, teacher-led services.

Cabinet has already agreed to the use of funding conditions to increase certificated teachers' pay and the SAR covers the proposal to change legislation to confirm that funding conditions can be set for employment relations purposes.

The SAR acknowledges that analysis of the proposal is limited to the legislative change and does not consider the use of funding conditions as a mechanism. However, it is concise and a case has been made for the legislative change so that the intent of the previous decision to use funding conditions as the mechanism can be achieved. The MOE has not been able to consult on this proposed change.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

1. Action 3.4 of the Early Learning Action Plan 2019-2029 outlines the Government's aim to implement a mechanism that improves the levels and consistency of teachers' salaries and conditions.
2. The regulatory analysis conducted on Action 3.4⁵ considered options that could be used to improve teachers' salaries and conditions. One of these relied on the power of the Minister of Education to place conditions on grant funding provided to early childhood services in order to impose salary and employment conditions. This power is in section 548 of the Education and Training Act 2020.
3. As part of Budget 2021, the Government has allocated \$170 million over four years to increase education and care service funding rates, if these services agree to pay teachers at the first six of the eleven pay steps in the Kindergarten Teachers, Head Teachers and Senior Teachers' Collective Agreement. The agreement sets out pay for kindergarten teachers.
4. The Budget initiative responds to one of the known areas of inequity in pay and conditions in early learning. This is the disparity in pay between qualified and certificated teachers⁶ working in education and care services and their counterparts who work in kindergartens.⁷ Teachers in both kinds of services undertake essentially the same work. A recent Ministry survey showed that a certificated teacher in education and care services received median annual pay of \$55,324, while an equivalent teacher in a kindergarten received median annual pay of \$70,595.⁸

What is the policy problem or opportunity?

5. The policy problem can be considered a legal problem. The Budget initiative relies on the power to set funding conditions. It is not clear that the Minister's power to set conditions on grant funding clearly extends to the power to set conditions of an employment relations nature, when the main purpose of setting those conditions is to achieve employment relations objectives.

⁵ Impact Statement: Early Learning Action Plan 2019-2029 available [here](#).

⁶ Certificated teachers are registered teachers who hold a practising certificate issued by the Teaching Council of New Zealand.

⁷ Kindergartens are legally centre-based, teacher-led services but are distinguished for Ministry of Education funding purposes from education and care services, which are also centre-based, teacher-led services.

⁸ https://www.educationcounts.govt.nz/__data/assets/pdf_file/0015/206214/Early-Childhood-Education-Remuneration-Report-2020-Summary.pdf

6. Funding conditions must be consistent with the purpose of the Act. This means they must be primarily set to achieve an education purpose. The problem here is not that the conditions relate to pay or employment conditions but, rather, that the setting of such conditions in the Budget initiative is primarily for achieving an employment relations purpose. The main purpose of setting a condition on funding relating to pay for education and care service teachers is to allow education and care teachers to get paid fairly in comparison to kindergarten teachers.
7. While there is likely to be education-related impacts, for instance, greater stability of teacher employment, which is linked to better attachments with children, or improvement in teacher supply, it is the primary purpose for setting a funding condition that determines if the condition is being legally set.

What objectives are sought in relation to the policy problem?

8. The key objective sought in relation to the problem is to ensure that the Minister's power to set employment related conditions is clearly enabled and consistent with the Act. Without this, the funding condition cannot be set and the gap between education and care service teachers and kindergarten teachers' pay is unlikely to narrow.
9. While the funding condition contemplated in light of the Budget 2021 initiative relates only to pay for education and care service teachers, the regulatory solution also needs to enable future funding conditions for both remuneration and employment conditions, and potentially in relation to staff in any early childhood service type.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

10. The criteria used to compare options are:
 - The degree to which the option confirms the Minister of Education's power to set funding conditions for employment relations purposes under the Act
 - The degree to which the options enable the setting of funding conditions for employment relations purposes without unintentionally leading to changes or difficulties in the interpretation or scope of other provisions in the Act.

What scope will options be considered within?

11. The scope of options is limited to the status quo and amendments to the Act, to overcome issues with setting funding conditions primarily for an employment relations purpose.
12. Cabinet has also already agreed that placement of funding conditions under s 548 of the Act will be the mechanism used to alter levels of certificated teacher pay. Alternative mechanisms for improving teacher pay were previously considered as part of the [Early Learning Action Plan 2019 – 2029 Regulatory Impact Statement](#).

What options are being considered?

Option One – Act remains unchanged

13. The Act's provisions remain unchanged. The setting of a funding condition to achieve an employment relations objective is carried out under section 548 powers against the current (education) purpose of the Act.

Option Two – Specific amendment of power to set funding conditions

14. Section 548 of the Act is amended so the Minister is empowered to set funding conditions for an employment relations purpose. This change would not override the existing purpose of the Act but instead add a specific purpose where the Minister may set funding conditions for, and only in relation to the setting of employment relations conditions. This option will not allow a funding condition set for an employment relations purpose to be inconsistent with the current purpose of the Act.

Option Three – Amendment of Act purpose statement

15. The purpose section of the Act (section 4) is amended so that achieving early learning employment relations objectives is included as a general purpose.

How do the options compare to the status quo/counterfactual?

	Option One – Act remains unchanged (status quo)	Option Two – Specific amendment of power to set funding conditions	Option Three – Amendment of Act purpose statement
Degree to which the option confirms the Minister of Education's power to set funding conditions	- partially illegality remains in the setting of funding conditions for an employment relations purpose, given the existing purposes of the Act. The risk of legal challenge to the Minister also remains.	+ + Clearly confirms that the s 548 power can be used to set employment conditions in the context of furthering an employment relations purpose, even if not advancing the current purpose of the Act	+ Would likely enable funding conditions for employment relations purposes to be set legally.
Degree to which the option is limited to only enabling the setting of funding conditions for an employment relations purpose	- Low. Relies on the broad wording of the Act's purpose section and need to compare and understand the underlying reasons for setting of the funding condition.	+ + Amending the power to set funding conditions in the Act for an employment relations purpose clearly enables a range of such matters to be covered only by funding conditions. No risk of an employment relations purpose being applied to sections elsewhere in the Act.	+ Would enable employment-related funding conditions. Creates some risk that the purpose statement may be more widely construed than is intended across other sections of the Act eg, to enable licensing conditions for early childhood services focused primarily on employment relations purposes. Also introduces specificity into the purpose of the Act that is inconsistent with the broadly purposes as currently stated.
Overall assessment	- 2	+4	+2

Key

- ++** much better than doing nothing/the status quo/counterfactual
- +** better than doing nothing/the status quo/counterfactual
- 0** about the same as doing nothing/the status quo/counterfactual
- worse than doing nothing/the status quo/counterfactual

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

16. Amending the power for the Minister to set funding conditions in Section 548 of the Act (Option Two) best meets the objectives set out above. This is because it resolves the legal risk while also focusing the change to the Minister's powers on funding conditions only.

What are the marginal costs and benefits of the option?

Affected groups <i>(identify)</i>	Comment <i>nature of cost or benefit (e.g. ongoing, one-off), evidence and assumption (e.g. compliance rates), risks.</i>	Impact <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i>	Evidence Certainty <i>High, medium, or low, and explain reasoning in comment column.</i>
Additional costs of the preferred option compared to taking no action			
Regulated groups	There are no additional costs directly associated with the proposed regulatory change.	Low	High
Regulators	There are no additional costs directly associated with the proposed regulatory change.	Low	High
Children, parents and whānau	There are no additional costs directly associated with the proposed regulatory change.	Low	High
Non-monetised costs		Low	High
Additional benefits of the preferred option compared to taking no action			
Regulated groups (services)	There are no additional benefits directly associated with the proposed regulatory change.	Low	High
Regulators	The change avoids the potential cost of engaging in litigation should a challenge to	Low – removing risk of legal action would save the Government <\$1M.	High

	the legality of funding conditions occur.		
Teachers	<p>The change will allow teachers to receive better pay or conditions (considered in light of the regulatory change enabling a number of employment relations-based conditions to be set over time).</p> <p>There are likely to be some additional benefits associated with the proposed regulatory change in terms of reduced teacher turnover and more people considering becoming early learning teachers.</p>	\$10M+	High in relation to receiving better conditions but unclear how extensive the value of educational/workforce benefits may be.
Non-monetised benefits		Low	High

Section 3: Delivering an option

How will the new arrangements be implemented?

17. The Act would be amended to include an employment relations purpose in section 548 – the section that covers the Minister of Education’s power to set funding conditions for the early learning sector. This change to the Act would be necessary to implement the improved pay intended by the Budget 2021 funding and potentially other related funding conditions in the future.
18. Once the Act is amended, relevant funding conditions can be created. Funding conditions are usually promulgated in the ECE Funding Handbook published on the Ministry of Education’s website.

How will the new arrangements be monitored, evaluated, and reviewed?

19. The amendments to the Act will not be monitored per se. However, funding conditions set under the s 548 power are audited by the Ministry.