

Impact Summary: Clarification of the Education Review Office’s powers in respect of parent entities

Section 1: General information

Purpose
The Education Review Office and Ministry of Education are solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing key policy decisions to be taken by Cabinet.

Key Limitations or Constraints on Analysis
Due to the short timeframe to enable these changes to be included in the Education and Training Bill, there has been limited time in which to undertake the policy work for this proposal.
Responsible Manager (signature and date):
Dr Andrea Schöllmann  Deputy Secretary Education System Policy Ministry of Education 11/ 10 / 2019

Section 2: Problem definition and objectives

2.1 What is the policy problem or opportunity?

The Education Review Office (ERO) reviews early learning services to ensure children receive high quality ECE. ERO requires service providers to supply evidence of their governance, management and accountability practices as a way to assess the quality and effectiveness their systems and processes.

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.

However, the service provider can now be either the organisation providing the service, or a company that is a subsidiary of a parent entity.¹ 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. This has led to some situations where information provided to ERO has been inaccurate or incomplete.

The current legislation is unclear whether ERO's statutory powers extend to being able to obtain 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 or to assess the validity of the information provided. If ERO were to seek this type of information, there is a risk that some providers or parent entities could refuse the request due to unclear wording in the Act.

When reviewing services that were part of a governing organisation ERO would, for example, be able to gather evidence about the way a governing organisation was determining its priorities for building professional knowledge and capability, evaluating the impact of professional learning and development opportunities and planning for improvement (both short- and long-term planning).

Another example could be where ERO identified poor performance in one or more of the services, evidence could be accessed to inform judgements about why this might be so, particularly in relation to the organisational conditions contributing to poor performance. It would help ERO determine whether the governing organisations is allocating sufficient resources to address issues that are impacting on children and their learning.

ERO's Governing Bodies Trial

¹ Parent entity in this context means an entity that owns enough voting stock in another firm to control the management and operation of that entity.

From May to September 2018, ERO undertook a governing organisation methodology trial, which comprised 100 reviews of early learning services. The trial was a different approach to reviewing services that were part of a governing organisation largely focused on the regional management level. The trial focused on how ERO can influence improvement and accountability through an evaluation of the effectiveness of organisational functions/systems. This was particularly in relation to professional leadership and support to build leader/teacher capability at the individual service level. Individual service reports included evaluation findings about the organisation's effectiveness (at the regional level) and the impact of systems/support provided to individual services as shown in the following report on ERO's website:

<https://ero.govt.nz/review-reports/kindercare-learning-centre-albany-29-11-2018/>

At that time key insights from the trial included:

- that the methodology enables a rigorous, collaborative evaluation of how organisations determine the impact/difference their decisions make for children's learning;
- recognition of how organisations can make use of ERO's findings in individual service reports to influence organisational improvement initiatives;
- evidence of effective organisational systems and processes, but significant variability in how well these systems are being implemented at service level; and,
- organisations not knowing (through internal evaluation) what difference improvement initiatives are making for children.

The draft methodology had been adopted well by regional organisation managers. There is potential for ERO to increase its influence through national evaluations of governing organisations.

The trial also revealed the need for legislative clarification. During the trial ERO was reviewing a cluster of education and care services with the personnel from the national governing organisation involved in the process. Initial requests for information about the governing organisation, such as internal evaluation, strategic planning and reporting were challenged, but through further discussion and goodwill ERO was provided with the information it requested. This was largely due to the relationship the review team had established with those in the governing organisation and the level of trust that was being built in the relationship. ERO was able to use the information to make judgements and identify next steps for the organisation and the individual services. Both were reported in an individual service's report.

ERO has conflicting legal opinions about its current mandate and want this to be clarified.

2.2 Who is affected and how?

ERO is seeking to clarify its statutory powers in relation to parent entities supplying ERO with governance, management and accountability information where it relates to service providers under their control.

A small number of entities will be impacted by this change; however, one of the larger providers (Evolve Education Group) is structured in this way.

2.3 Are there any constraints on the scope for decision making?

The only constraint identified is the short timeframe in which to undertake the policy work for the proposed change. Changes to the Act would need to be included in tranche five of the Education and Training Bill that is set to have its first reading in November 2019.

These changes may have an impact on the Ministry's monitoring role and the work of the Provider Assessment Group². This will be mitigated by current work being undertaken between ERO and the Ministry to develop protocols with respect to information sharing and joint activities, particularly in situations where an entity or service provider is the subject of a review by ERO and also of concern to the Ministry.

² The Provider Assessment Group is a business unit within the Ministry of Education that identifies and responds to fraudulent activity in relation to government funding and non-compliance with licensing criteria.

Section 3: Options identification

3.1 What options have been considered?

- **Status quo:** Retain ERO’s powers in Part 28 of the Act as they currently stand. This would maintain the high trust, positive relationship that exists between service providers and ERO. However, the possibility of service providers providing inaccurate or incomplete information would remain. There is also a risk of refusal of access, and/or judicial review should ERO’s findings be unfavourable to a service provider.
- **Option one:** Clarification of ERO’s powers in respect of parent entities (the proposed option): clarify ERO’s powers to obtain governance and management information from parent entities where it relates to service providers under their control. This option would support ERO to gain insights into the entirety of governance and management structures. This may have potential in some circumstances to impact on relationships between some in the sector and ERO. However, ERO’s consultation with key industry players in its recent governing bodies methodology trial indicated that drive up quality in the sector they saw merit in ERO having better access to governance and management information. Most entities work willingly with ERO under current circumstances but the external reference group pointed out that not all parent entities may be as cooperative, and that ERO’s powers need to be clear to ensure that it can access information held by those who may be reluctant.
- **Option two:** Information sharing between the Ministry and ERO: the Ministry would collect governance, management and accountability information from service providers and parent entities on a regular basis, as a condition of granting a licence. This information would then be shared with ERO. This would not necessarily provide ERO with the information they require at the time of review, and would also impact on ERO’s statutory independence. It also poses risks of information gaps and double handling of sensitive information. ERO Review Officers have statutory designation that provides them with powers of entry, but also requires them to work within defined codes of ethical conduct and confidentiality. This is particularly important when dealing with matters of commercial sensitivity.
- **Option three:** Full search and seizure powers: ERO would have full search and seizure powers enabling them to gain access to the information they require for their assessment. However, this would result in low trust between the sector and ERO and potentially would be in breach of the Bill of Rights Act.

3.2 Which of these options is the proposed approach?

ERO considers that option one (Extension of ERO’s powers in respect of parent entities) to be the best option. This option allows ERO to have full visibility over the way service providers are governed – both at service level and at parent entity level.

The proposal is consistent with the Government’s “Expectations for the design of regulatory systems”.

Section 4: Impact Analysis (Proposed approach)

4.1 Summary table of costs and benefits

Affected parties	Comment	Impact
Additional costs of proposed approach, compared to taking no action		
Regulated parties – Parent Entities	Ongoing – parent entities would be subject to review, would have to provide documentation and may have to allocate resource towards supplying information to ERO.	Low
Regulators – ERO	Ongoing – ERO may have more documentation to review in some circumstances, with potential duplication of the same information – requiring some disentanglement in order to enable accurate interpretation.	Low
Wider government – the Ministry		Low
Non-monetised costs	-	Low
Affected parties	Comment	Impact
Expected benefits of proposed approach, compared to taking no action		
Regulated parties – Parent Entities	<p>Ongoing – increased scrutiny of subsidiary services may improve overall oversight for parent entities and thereby the quality and accuracy of reviews of services.</p> <p>There may be a reduction in the volume of information to be supplied to ERO if documents relate to a number of entities if they are being reviewed at the same time.</p> <p>Improvement in internal evaluation capability leading to ongoing continuous improvement across the sector.</p>	Medium
Regulators – ERO	<p>Ongoing – ERO would be able to access key documentation and people at organisation level, reducing duplication of effort examining the same documentation and discussions regarding individual services.</p> <p>ERO more likely to be able to dig deep in services where performance is poor, to understand the organisational conditions that need improvement to drive up quality of delivery.</p>	Medium
Wider government – the Ministry	Ongoing – better understanding of the quality of service providers.	Medium
Non-monetised benefits	-	Medium

4.2 What other impacts is this approach likely to have?

The intention of this proposal is to clarify ERO's role in relation to entering premises to require information; however, there could be some resistance from providers who may have reason to resist disclosure. These providers may see the changes as overly invasive as changes to this part of the Act would confirm ERO's mandate to enter premises and require information. Such scrutiny may be welcomed by the sector and may increase confidence between the sector and ERO overall.

Some parent entities undertake activities that are not completely related to running early learning services (providing tertiary education for example). These activities would currently not fall within ERO's mandate and would not be subject to these powers, apart from any observation of their impact on quality at service level.

Section 5: Stakeholder views

5.1 What do stakeholders think about the problem and the proposed solution?

To date, no consultation on this specific proposal has been undertaken and none is planned aside from the normal select committee process.

As outlined above, ERO conducted a Governing Bodies Trial in 2018 that involved reviewing a cluster of education and care services with the personnel from the national governing organisation. It was this trial that revealed the need for the legislative clarification.

As part of this trial ERO assembled an external reference group comprising key governing bodies from the early childhood sector including private service providers. Organisations involved included: Evolve Education, Best Start, NZ Kindergartens, Early Childhood Leadership, Playcentre Aotearoa, Provincial, Barnardos and Kindercare.

The external reference group was supportive of the direction ERO was taking and about ERO working with them to review performance at the organisational level. They could see the benefit of this approach for lifting evaluation capability for improvement across the sector.

Section 6: Implementation and operation

6.1 How will the new arrangements be given effect?

This approach would require legislative change for clarification to section 323 of the Education Act (1989).

ERO would be responsible for ongoing operation and enforcement of the new arrangements.

The arrangements would not affect the way ERO is currently working with the sector but would give more certainty about its mandate to request information at service provider level. The clarified mandate will allow ERO to move forward with its implementation of the Governing Bodies approach trialled successfully in 2018. The sector is already familiar with this approach through the external reference group involvement in the trial.

The arrangements would ensure that all parent entities have clarity about requirements to supply information to ERO, and would take effect after the legislation is enacted.

The changed arrangements will be communicated to ECE providers through:

- information on ERO's website
- information in ERO's letters of notification of a review.

Implementation will be progressive and ongoing as services are reviewed. Each service is reviewed on average once every three years.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

ERO will design and undertake a process of ongoing monitoring, review and evaluation of the impact of clarification of the legislation and, in consultation with stakeholders, address any issues that arise as part of its ongoing programme of methodology development.

7.2 When and how will the new arrangements be reviewed?

All ERO methodologies, tools and approaches are subject to a regular cycle of review and improvement. The request for clarification came from such a review.

ERO has embedded processes for stakeholders to respond and comment on its review processes. Any concerns raised either about the intent or delivery of its reviews are seriously considered and addressed.