

Cabinet Paper material

Proactive release

Minister & portfolio	Hon Chris Hipkins, Minister of Education
Name of package	Policy approvals for urgent amendments relating to the Teaching Council's fee setting powers
Date considered	2 August 2021
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These documents have been proactively released:

Cabinet Paper: Policy approvals for urgent amendments relating to the Teaching Council's fee setting powers

2 August 2021

Minister of Education

Cabinet Minute: CAB-21-MIN-0286

2 August 2021

Cabinet Office

Cabinet Minute: CBC-21-MIN-0064

12 July 2021

Cabinet Office

Some deletions have been made from the documents as the information withheld does not fall within scope of the Minister's portfolio responsibilities, and is not relevant to the proactive release of this material.

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<http://legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html>

In confidence

Office of the Minister of Education

Cabinet Business Committee

Policy approvals for urgent amendments relating to the Teaching Council's fee setting powers

Proposal

- 1 This paper seeks agreement to amend the Education and Training Act 2020 relating to the ability of the Teaching Council of Aotearoa New Zealand to set fees relating to its legislative functions.

Relation to government priorities

- 2 One of the Government's strategic objectives for education is quality teaching and leadership. The Council plays an essential role in achieving this priority, and this paper provides for its ongoing operation and financial sustainability.

Executive Summary

- 3 From 1 February 2021, the Teaching Council of Aotearoa New Zealand (Council) changed the duration of teachers' practising certificates from three years to one year and changed the related fee from a \$220 triennial fee to a \$157 annual fee
- 4 In considering a claim for judicial review of the Teaching Council's decision to change the teacher certification period and the associated fee, the High Court found that the changes the Council made are unlawful and quashed the annual certification and fee. The effect is that the previous triennial fee of \$220.80 is reinstated; the previous fee was insufficient for the Council to cover the cost of delivering all of its statutory functions.
- 5 The Court's finding that the Council is not mandated by the Act to charge for all of its functions under the Act could arguably be extended to apply to the previous (now current) triennial fee.
- 6 In order to enable the Council to set fees that cover all of its functions, urgent legislative change is required that gives the Council the power to set fees to cover all of its functions and to validate any earlier decisions to set fees.
- 7 I also propose further changes to the legislation to enable the Council to charge a fee in instalments, and to recover unpaid fees, to support its financial sustainability.

Background

- 8 The Teaching Council of Aotearoa New Zealand (the Council) is an independent statutory body responsible for the professional regulation of early childhood, primary and secondary schooling teachers. The Council's 16 functions, set out in section 479 of the Education and Training Act 2020, are focussed primarily on registration and certification, standard setting and professional leadership, and disciplinary processes. Section 480 of the Act enables the Council to fix and charge fees related to these functions. Both of these features are typical of professional regulation schemes.

- 9 In order to teach in New Zealand, a teacher must be registered and hold a current practising certificate. On 1 February 2021, the Council moved from three yearly to annual certification and raised certification fees in order to become financially independent from the Government.
- 10 Prior to this fee increase, fees had not changed since 2010. To support the transition to the new fee, the Government provided \$16.5 million of transitional funding in Budget 2020 (CAB-20-MIN-0155).

Judicial Review

- 11 On 9 November 2020, the New Zealand Post Primary Teachers' Association (PPTA) filed for judicial review of the Council's decisions to change the certification period and fee for practising certificates. On 30 June 2021, the High Court declared that the Council's changes to the certification period and fee were unlawful and upheld five of the six grounds of complaint brought by the PPTA.
- 12 If the Council wishes to increase its fee, it will need to make a new decision in a legally compliant manner.

Analysis

- 13 The court order that quashed the Council's decision to charge an annual fee from February 2021 has effectively resulted in a reversion to the previous fee. This is problematic because the Council had increased the fee (\$157 annually compared to \$220 triennially) in order to shift to a fully self-funded model.
- 14 The Council had not previously operated on a full cost recovery basis and had been part-funded by Government. The Court's findings also have implications for the validity of the previous fee.
- 15 As with other professional regulatory bodies, the Council uses registration and certification fees to cover the majority of costs associated with performing its functions. However, the Court found the Council was empowered to charge fees only for the eight purposes specified in section 383(1) of the Education Act 1989 (currently re-enacted in identical form as s480(1) of the Education and Training Act 2020). These are:
 - (a) *any addition or alteration to a person's registration as a teacher;*
 - (b) *any addition or alteration to a person's limited authority to teach;*
 - (c) *any addition or alteration to a person's practising certificate;*
 - (d) *inspection of the register of registered teachers or any other register or any other documents kept by the Teaching Council that are open to inspection;*
 - (e) *the supply of a copy of any entry in a register or any other document referred to in paragraph (d);*
 - (f) *the provision of professional leadership;*
 - (g) *costs relating to the performance of disciplinary functions;*
 - (h) *any other matter for which this Act provides that the Teaching Council may charge fees.*

- 16 This means that the Council is not empowered to charge fees for its functions, as set out in section 479(1), that are not provided for in section 480(1). The functions for which there is no mandate to set fees, are:

- (b) *to enhance the status of teachers and education leaders*
- (c) *to identify and disseminate best practice in teaching and leadership and foster the education profession's continued development in light of research and evidence of changes in society and technology:*
- (d) *to carry out the functions under Schedule 3 relating to teacher registration:*
- (e) *to establish and maintain any criteria for teacher registration under Schedule 3 that the Teaching Council considers necessary or desirable:*
- (f) *to review, at any time, the criteria for teacher registration established under paragraph (e) and, after consulting the Minister,—*
 - (i) *vary, delete, or replace 1 or more of the criteria; or*
 - (ii) *add 1 or more criteria; or*
 - (iii) *delete all of the criteria and substitute new criteria:*
- (g) *to establish and maintain standards for qualifications that lead to teacher registration:*
- (h) *to review, at any time, the standards for qualifications established under paragraph (g) and, after consulting the Minister,—*
 - (i) *vary, delete, or replace 1 or more of the standards; or*
 - (ii) *add 1 or more standards; or*
 - (iii) *delete all of the standards and substitute new standards:*
- (i) *to conduct, in conjunction with quality assurance agencies, approvals of teacher education programmes:*
- (j) *to establish and maintain—*
 - (i) *standards for ongoing practice; and*
 - (ii) *criteria for the issue of practising certificates of different kinds:*
- (k) *to establish and maintain a code of conduct for teachers under section 485:*
- (l) *to monitor and enforce the requirements relating to mandatory reporting in this subpart and Schedule 3:*
- (n) *to set the criteria for reporting serious misconduct and for reporting on competence issues:*
- (o) *to perform the functions in this subpart relating to teacher competence:*
- (p) *to co-ordinate a system providing for the vetting by the Police of all teachers:*
- (q) *to perform any other functions conferred on it by this Act or any other.*

- 17 This misalignment of functions with the fee-setting power is the unintended consequence of this power not being updated to reflect the addition of new functions for which the Council and its predecessors have been made responsible over the years.

- 18 Since 1 February 2021, approximately 13,000 one-year practising certificates have been issued.

Proposed amendments

- 19 I propose amending the Act to authorise the Council to fix a fee that covers the costs associated with carrying out all of its functions. This change would make the Council's fee-setting power consistent with that of other professional regulatory bodies and would enable the Council to operate on the full cost recovery basis envisaged by its agreement with the Government.
- 20 I consider that the Council should be allowed to retain the fees paid since 1 February 2021, despite the order to quash the related decision, if in each case the fee is offset against the amount the teacher will now be required to pay following the reversion to the previous fee. To enable this, I propose to amend the Act to validate the fees received since 1 February 2021.
- 21 While the Council will revert to issuing a triennial practising certificate fee of \$220.80, in view of the judgment, it is not clear whether that fee was set in a legally compliant manner. This creates a risk of people taking civil action against the Council to recover their fee and the Court finding that the \$220.80 fee was also *ultra vires*. I propose to amend the Act to retroactively validate the previous fee to avoid this risk.
- 22 The Council would like the ability to recover debt due from a teacher for unpaid fees if the Council chooses to charge fees in instalments in the future. I propose the Act be amended to allow this.
- 23 I am seeking to have legislation enacted as soon as is practicable this year because, until the legislation is amended, the Council cannot be sure that the validity of the previous (and now current) fee will not be challenged. It can set an alternative fee informed by the Court's findings that is limited to the functions for which it is authorised to charge, but that means it will be operating at a loss because it cannot recover costs for all of its functions. This would be inconsistent with the policy that the Council be fully self-funded.

Financial Implications

- 24 There are no financial implications associated with the recommendations in this paper. The Council will use the funding already appropriated through Budget 2020 to cover a proportion of its costs while it promulgates a new fee.

Legislative Implications

- 25 Legislation is required to implement the proposal. I propose that the Education and Training (Teacher Registration Fees) Amendment Bill be introduced and enacted this year.

Regulatory Impact Statement

- 26 Impact analysis requirements apply to the proposal to amend the Teaching Council's Fees in the Education and Training Act 2020, but there is no accompanying Regulatory Impact Statement and the Treasury has not exempted the proposal from the Impact Analysis Requirements. Therefore, it does not meet Cabinet's requirements for regulatory proposals. The Ministry of Education will provide supplementary analysis for the Cabinet Legislation Committee meeting subject to Cabinet approving these policy proposals and agreeing to the issuing of drafting instructions.

Climate Implications of Policy Assessment

- 27 The CIPA requirements do not apply to any of the proposals in this paper as the proposals have no climate implications.

Population Implications

- 26 There are no population implications.

Human Rights

- 27 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 will only be possible when the Bill has been drafted.

Consultation

- 28 The Teaching Council of Aotearoa New Zealand has been consulted and supports this proposal.

Communications

- 29 I have been clear that the Government will continue to support the Council to put it into a sound legal and financial position. I plan to continue to emphasise this message until the amending Bill is introduced.

Proactive Release

- 30 I intend to proactively release this Cabinet paper subject to redaction as appropriate under the Official Information Act once the Bill is introduced to the House.

Recommendations

- 33 The Minister of Education recommends that the Committee:
- 1 **note** that from 1 February 2021, the Teaching Council of Aotearoa New Zealand (Council) changed the duration of teachers practising certificates from three years to one year and changed the related fee from a \$220 triennial fee to a \$157 annual fee;
 - 2 **note** that in a recent judicial review action, the Court quashed the Council's decisions regarding annual certification and the new fee, and that this has

effectively resulted in a reversion to the previous triennial certification and fee of \$220;

- 3 **note** the Court's finding that the Council is not mandated by the Act to charge for all of its functions under the Act, and that this rationale arguably applies to the previous (now current) triennial fee;
- 4 **note** that since 1 February 2021, approximately 13,000 one-year practising certificates have been issued;
- 5 **agree** to amend the Act to:
 - 5.1 allow the Council to fix fees for all of its legislated functions, and to do so by way of a bundled amount like other professional regulatory bodies;
 - 5.2 validate the receipt of fees from 1 February 2021;
 - 5.3 validate any earlier decisions the Council, or its predecessor organisations, took in setting fees;
 - 5.4 enable the Council to charge a fee, and require payment, in instalments;
 - 5.5 allow the Council to recover debts for unpaid fees;
- 6 **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;
- 7 **invite** the Minister of Education to issue drafting instructions for a Bill to give effect to the decisions in these recommendations; and
- 8 **note** that the recommendations 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

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.

Report of the Cabinet Business Committee: Period Ended 16 July 2021

On 2 August 2021, Cabinet made the following decisions on the work of the Cabinet Business Committee for the period ended 16 July 2021:

CBC-21-MIN-0064 **Teaching Council's Fee Setting Powers: Urgent Amendments** CONFIRMED
Portfolio: Education

Out of scope

Michael Webster
Secretary of the Cabinet



Cabinet Business Committee

Minute of Decision

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Teaching Council's Fee Setting Powers: Urgent Amendments

Portfolio Education

On 12 July 2021, the Cabinet Business Committee:

- 1 **noted** that from 1 February 2021, the Teaching Council of Aotearoa New Zealand (the Council) changed the duration of teachers' practising certificates from three years to one year and changed the related fee from a \$220 triennial fee to a \$157 annual fee;
- 2 **noted** that, in a recent judicial review action, the Court quashed the Council's decisions regarding annual certification and the new fee, and that this has effectively resulted in a reversion to the previous triennial certification and fee of \$220;
- 3 **noted** that the Court found that the Council is not mandated by the Education and Training Act 2020 (the Act) to charge for all of its functions under the Act, and that this rationale arguably applies to the previous (now current) triennial fee;
- 4 **noted** that since 1 February 2021, approximately 13,000 one-year practising certificates have been issued;
- 5 **agreed** to amend the Act to:
 - 5.1 allow the Council to fix fees for all of its legislated functions, and to do so by way of a bundled amount like other professional regulatory bodies;
 - 5.2 validate the receipt of fees from 1 February 2021;
 - 5.3 validate any earlier decisions the Council, or its predecessor organisations, took in setting fees;
 - 5.4 enable the Council to charge a fee, and require payment, in instalments;
 - 5.5 allow the Council to recover debts for unpaid fees;
- 6 **invited** the Minister of Education to issue drafting instructions to the Parliamentary Counsel Office to draft a bill giving effect to the decisions in paragraph 5 above;

- 7 **authorised** the Minister of Education to make any further decisions that may arise during the drafting process, consistent with the above decisions.

Rachel Clarke
Committee Secretary

Present:

Rt Hon Jacinda Ardern
Hon Grant Robertson
Hon Dr Megan Woods
Hon Chris Hipkins
Hon Carmel Sepuloni
Hon David Parker
Hon Stuart Nash

Officials present from:

Office of the Prime Minister
Department of the Prime Minister and Cabinet

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