

Regulatory Impact Statement: Disciplinary processes for teachers

Coversheet

Purpose of Document	
Decision sought:	<i>Analysis produced for the purpose of informing final Cabinet decisions</i>
Advising agencies:	<i>Ministry of Education</i>
Proposing Ministers:	<i>Minister of Education</i>
Date finalised:	<i>3 August 2021</i>
Problem Definition	
Matters of teacher conduct are taking too long to reach a disciplinary outcome.	
Executive Summary	
<p>Despite changes to some of the Teaching Council's disciplinary processes, such as appointing more deputy chairs to hold more hearings, matters of teacher conduct are still taking too long to resolve – The average Complaints Assessment Committee (CAC) case takes 9 months to be resolved and a significant proportion of cases that are referred to the Teachers Disciplinary Tribunal (DT) take a further year to reach determination.</p> <p>The Teachers' Disciplinary Tribunal is dealing with a high proportion of cases that could be dealt with more efficiently by the Complaints Assessment Committee (CAC), which is the lower of the two disciplinary bodies. This is causing delays in decisions on complaints and reports of misconduct, delaying resolution for all involved.</p> <p>Under the current law, the CAC must refer to the DT any matter that the CAC considers may possibly constitute serious misconduct. The phrase "may possibly" is a low threshold for referral.</p> <p>The proposal aims to allow the CAC to resolve a greater number of matters more quickly by:</p> <ul style="list-style-type: none">• reducing the number of matters the CAC is required to refer to the DT;• removing the requirement for the CAC to reach agreement with the teacher and the initiator before imposing a sanction; and• allowing CAC decisions to be appealed to the DT. <p>While the vast majority of submitters agreed with the overall aims of the proposal, some wanted to promote greater efficiency by raising the referral threshold further and removing</p>	

initiators' influence over CAC outcomes. Others thought that the current regime is adequately protecting the public interest and should be retained.

On balance we believe the proposal ensures the new regime complies with principles of natural justice, protects the public interest, and clarifies the roles of the two disciplinary bodies.

Limitations and Constraints on Analysis

We have not identified any constraints on this analysis.

Responsible Manager(s) (completed by relevant manager)

Dr Andrea Schöllmann
Deputy Secretary
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03/08/2021

Quality Assurance (completed by QA panel)

Reviewing Agency:	The Ministry of Education's Quality Assurance Panel has reviewed the Regulatory Impact Statement: <i>Disciplinary processes for teachers</i> dated 2 August 2021. The panel considers that it meets the Quality Assurance criteria
Panel Assessment & Comment:	The Regulatory Impact Statement (RIS) provides a clear and convincing case for amending legislation to improve the timely resolution of complaints under the Teaching Council disciplinary regime. The proposals to alter the threshold for matters referred to the Disciplinary Tribunal (DT), the removal of a requirement for the Complaints Assessment Committee (CAC) to reach agreement, and a consequent new provision to allow appeals of CAC decisions to the DT strikes an appropriate balance between the rights and interest of parties to proceeding and protects the public interest. Stakeholder views on these proposals have been sought and are reflected. As noted in the RIS, it will be important that the Council gives consideration to how its rules are amended to realise the benefits of these changes. This includes how the appeals process will work.

Section 1: Diagnosing the policy problem

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

1. The Education and Training Act 2020 (the Act) empowers the Teaching Council of Aotearoa New Zealand (the Council) to manage disciplinary processes for teacher conduct. The Council has told us that matters of teacher conduct are currently taking too long to reach a disciplinary outcome and this denies timely resolution for all those involved. A significant number of low-level conduct cases are being dealt with through a disciplinary process that was intended to deal only with the most serious cases. We are proposing to streamline the disciplinary processes to allow the Complaints Assessment Committee (CAC) of the Council to resolve a greater proportion of matters.
2. Concerns about teachers' conduct and competence are usually brought to the Council via mandatory reports from employers, criminal convictions, or complaints made to the teacher's employer or directly to the Council.

The Triage Committee

3. Concerns are initially considered by the Council's Triage Committee. The Triage Committee decides whether to take no action, or refer the concern to either the teacher's employer, a Professional Practice Evaluator (to consider competence matters), the Governing Board of the Council (if immediate action is needed), or the CAC.

The Complaints Assessment Committee (CAC)

4. The CAC considers conduct matters that may require a disciplinary response. A CAC panel generally contains one lay member and three registered teachers. An investigator is appointed on behalf of the CAC who produces a report and the teacher being investigated is given the opportunity to respond to this report and meet with the CAC before a decision is made. Where the CAC considers there may possibly have been serious misconduct, it must refer the matter to the Disciplinary Tribunal (DT) (Refer s497(5) of the Act). The CAC may also refer any other case to the DT that it decides to.
5. If the CAC considers that a case amounts to misconduct (but not serious misconduct) it may impose a range of sanctions but only with the agreement of the teacher and the person who made the complaint or mandatory report. With such agreement, the CAC can censure the teacher, impose conditions on a teacher's practising certificate or limited authority to teach (LAT), annotate the register, direct the Council to impose conditions on subsequent practising certificates, or suspend a practising certificate or LAT for a fixed period or until specific conditions are met. When there is no agreement, the CAC may refer the matter to the DT.
6. The requirement for the CAC to refer certain cases to the DT together with the requirement for the CAC to reach agreement with parties, means that the CAC exercises its powers to impose a sanction in relatively few cases.

The Disciplinary Tribunal (DT)

7. The DT is a quasi-judicial body independent of the Council. It has the power to call witnesses, hear evidence, and to unilaterally impose sanctions. Cases are usually heard by a three-person panel (chaired by a lawyer) and the CAC is the prosecuting body (represented by its lawyer).
8. The DT can impose all the sanctions available to the CAC as well as cancelling a teacher's registration, practising certificate or LAT, and imposing a fine of up to \$3,000. The CAC prosecutes the teacher before the DT. The teacher and the CAC can appeal DT decisions to the District Court
9. The Council appoints the members of the CAC and the DT and funds their activities. Further detail about the Council's disciplinary processes is available on the Council's website. <https://teachingcouncil.nz/professional-practice/conduct-concerns/>

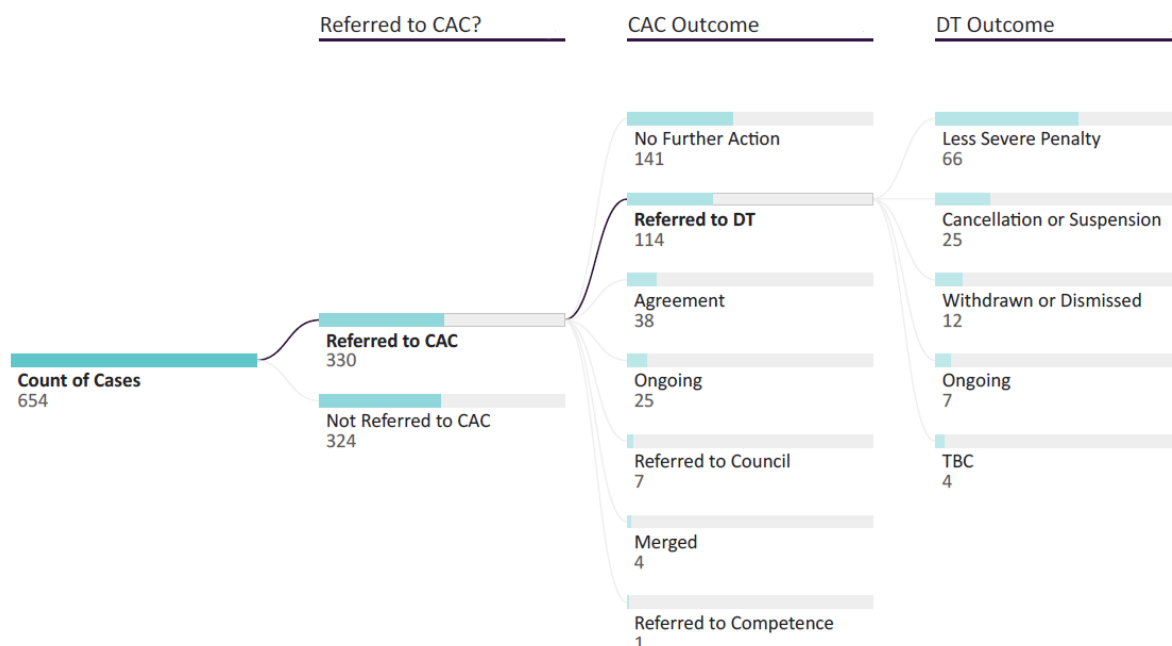
What is the policy problem or opportunity?

Problems with the current state

Problem 1 – too many matters are being referred to the DT that could be appropriately resolved by the CAC

10. The current “may possibly constitute serious misconduct” threshold for when the CAC must refer a case to the DT was introduced in 2015.
11. The definition of serious misconduct is broad. It requires conduct to meet one of three high-level categories in the Act:
 - a. may negatively affect the wellbeing of a student, or
 - b. reflects poorly on a person’s fitness to teach, or
 - c. conduct that may bring the profession into disrepute.
12. In addition, conduct must meet the requirement for reporting serious misconduct set out in the Council’s rules. The reporting requirement centres on whether there has been a ‘serious breach’ of the Teaching Council’s Code of Professional Responsibility and sets out specific examples of conduct that are a serious breach. While described as ‘serious misconduct’, the breadth of this definition results in it capturing more than conduct of a truly serious nature.
13. The policy intention behind the current settings was for the DT to deal with all cases of serious misconduct. This was in response to concerns that the CAC was failing to refer too many cases that were of a serious nature. A finding of serious misconduct is now the most common finding made by the DT. The DT makes the lesser finding of misconduct rather than serious misconduct in fewer than 10% of cases.
14. While a finding of serious misconduct is common, cases where the conduct is so serious that a teacher is restricted from practising are less common. The DT imposes a sanction that falls short of suspension or cancellation of a teacher’s practising certificate or registration over two thirds of the time. Conditions, censure and annotation of the register are by far the most common penalties imposed. All of these less severe penalties are available to the CAC.
15. The following diagram shows outcomes for cases received by the Council in 2018 as of March 2021. It shows that of the 330 cases referred to the CAC 114 cases were referred from the CAC to the DT, and only 38 cases were resolved by agreement with the teacher and the initiator at the CAC. While the total number of cases referred to the DT in 2019 and 2020 is less than in 2018, the proportions of cases being resolved at different parts of the disciplinary process are comparable.

Diagram: Outcomes for matters received by the Council in 2018



16. We believe some of the lower-end cases resolved by the DT are more appropriately dealt with by a lower disciplinary body. Those cases typically resulting in less severe penalties could be resolved by the CAC, in terms of the sanction imposed, if it was within the jurisdiction of the CAC to handle them.

17. There are two main advantages of having the CAC resolve more cases. Firstly, it avoids duplication of process. After the CAC has considered whether a case should be referred to the DT, the CAC must then lay a charge before the DT in its role as the prosecutor. Secondly, the CAC can resolve cases through a less resource intensive process. The CAC currently considers most cases on the papers, and this has the potential to be less costly and faster than a quasi-judicial process. Drawn out timeframes for resolution can also extend and intensify an already stressful process for teachers and other parties involved.

Problem 2 - the requirement that the CAC reach agreement before imposing a sanction for misconduct is contributing to delays in the regime

18. Currently the CAC must have the agreement of the person who engaged in misconduct and the person who raised concerns before imposing sanctions. If agreement is not reached but the CAC believes that a certain sanction is appropriate, the only way to have that sanction imposed is to refer the case to the DT which has the power to do so.

19. The Council estimates that only a few cases (approximately four in the last two years) are being referred to the DT from the CAC for this reason. However, the Council is concerned that excessive amounts of CAC time and resources are going into trying to reach agreement between the parties. In 2019, it took the CAC an average of 9 months

to resolve a case. Further, due to the low threshold for referral to the DT, currently there are relatively few cases in which the CAC has jurisdiction to attempt a resolution by agreement. It is anticipated that this number would increase with an appropriate adjustment to the point at which matters are referred to the DT.

20. In response to the 8-week public consultation process on the proposals, the majority of submitters supported the objectives of the proposals, particularly around reducing the time it takes to reach a resolution. Organisations representing people with disabilities or cognitive impairment expressed concern about reducing the thresholds for matters to be referred to the DT as this risks undermining the protections of vulnerable people. Both major teacher unions (NZEI and the PPTA) strongly agreed that too many cases were being referred to the DT, but both disagreed with the proposal to remove entirely the requirement to reach agreement in order to resolve matters before the CAC. The PPTA felt that requiring reasonable steps to reach agreement before imposing a penalty would achieve the timeliness objectives.
21. Our proposal to provide for an appeals process is designed to address the concern expressed about both the changes to the threshold for referral and the CAC's ability to impose a penalty without reaching agreement.

What objectives are sought in relation to the policy problem?

Problem 1 – The mandatory threshold for cases to be referred to the DT is too low

22. The proposals relating to changing the mandatory threshold for cases to be referred from the CAC to the DT seek to achieve the following objectives:
- a. All the most serious cases are dealt with by the DT. This is to ensure that the public interest (including the safety of children) is adequately protected, and the level of scrutiny is proportionate to the seriousness of the matter.
 - b. Only the most serious cases are dealt with by the DT. Because the DT is more time and resource intensive, can result in significant impacts for teachers' ability to teach, and is more stressful for the participants, we suggest it should be reserved for the most serious cases.
 - c. Consistent and transparent application of the legislation. Any changes should be easy for the relevant disciplinary bodies to apply and be transparent to the public.
23. The first two objectives are in tension - we want an option that means that all and only serious cases are referred to the DT and this requires a balanced judgement when decisions are made about referral to one or other body.

Problem 2 – The powers of the CAC to resolve cases results in undue delay

24. The proposals relating to changing the CAC's powers to resolve cases seek to address the following objectives:
- a. Ensure timely resolution. Cases should be able to be resolved as quickly as possible and in a manner that reduces any unnecessary delay for the sake of all parties involved.
 - b. Protect the public interest. If the referral threshold is raised, and the CAC is dealing with a higher number of more serious cases, it is important that an outcome that gives consideration to the public interest can be reached. This means that students, their whanau and the public at large do not suffer harm as a result of misconduct by the teaching profession.

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

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

25. Options have been considered using criteria that are the same as the objectives stated above.

What scope will options be considered within?

26. We have considered a range of options, both legislative and non-legislative, for achieving more balance between the number of cases considered by the DT and the CAC. On balance, we are basing the proposed threshold for referral of matters to the DT on whether the DT may need to consider, as a starting point, suspension or cancellation of a teacher's registration or practicing certificate.
27. The tethering of the referral threshold to the potential penalty is not a novel approach in the professional disciplinary context. Legislation governing the health and disability practitioners, veterinarians, and social workers disciplinary regimes have similar provisions.
28. The non-legislative option we considered and dismissed was to tighten the definition of serious misconduct in the Council's Rules. We have rejected this option because:
 - a. We were unable to arrive at a revised definition that tightens the scope of serious misconduct and still captures all the conduct that might be of a serious nature and warrant consideration through the Council's disciplinary processes.
 - b. Because employers are required to report to the Council where they have "reason to believe that the teacher has engaged in serious misconduct" (s491 of the Act), changing the definition of serious misconduct would also change the mandatory reporting criteria. It is important that the mandatory reporting criteria casts a wide net so that the Council is made aware of all the conduct that may require a disciplinary response. Moreover, employers are already familiar with the mandatory reporting criteria. While these problems could be mitigated by introducing separate definitions for the referral threshold and mandatory reporting, it could be confusing to have two similar definitions playing different roles.
 - c. Amending the definition of serious misconduct would make the case law that has developed around the current definition of serious misconduct less applicable.

What options are being considered?

Problem 1 - Referral threshold

Option One – Status Quo

29. Currently the CAC refers cases to the DT when the matter may *possibly* be ‘serious misconduct’ – this approach provides a test to determine the most serious cases that must be referred to the DT. However, case history shows that many of these cases are not deemed to be the most serious as fewer than a third of cases heard by the DT result in cancellation or suspension.

Option Two – using a determination of the matter being *likely* to be considered to be ‘serious misconduct’ as the threshold for referral

30. This option would see the CAC refer cases to the DT when the matter is *likely* to be ‘serious misconduct’. This is a higher threshold than the status quo as being *likely* to be something is a sub-set of things that could *possibly* be something. Judgement can be made by looking at previous case history. Around 1 in 10 cases heard by the DT result in a finding of misconduct rather than serious misconduct so this threshold would likely result in some of these cases remaining with the CAC. However, this option still utilises the definition of serious misconduct which is too sensitive as evidenced by the less severe penalties being imposed following findings of serious misconduct.

Option Three – Using the potential for a penalty of suspension or cancellation of a practicing certificate as the threshold for referral

31. In this option matters are referred to the DT when the CAC believes that the DT *may need to consider suspension or cancellation as a starting point* for a penalty. The Starting point penalty is the penalty considered before mitigating factors are accounted for. It is likely to better approximate a case’s true seriousness than the current threshold and option 2) above. The main drawback of this option is that it introduces a degree of discretion to the CAC that it does not currently have. It requires the CAC to assess the starting point penalty rather than applying a definitional standard to the facts, which is more demanding.

Problem 2 - Powers of the CAC

Option One – Status Quo

32. Retain requirement to reach agreement (status quo) -- Cases will continue to take a long time to resolve and there will continue to be cases where agreement cannot be reached. This problem will only worsen if the threshold for referral of cases to the DT is raised, as one of the above options to change the threshold would do.

Option Two – Removing the requirement to get initiators agreement

33. We could retain a requirement to reach agreement with teacher but remove requirement to reach agreement with an initiator. The CAC would be required to take reasonable steps to obtain and have regard for the views of initiators.

Option Three – removing requirement to reach agreement with the teacher and the initiator, allowing the CAC to resolve matters using other means

34. We could give the CAC power to impose a penalty without agreement and provide for other ways that the CAC can resolve a case including by agreement or mediation . This would enable the CAC to resolve certain cases more quickly where other methods are inappropriate or not successful. However, natural justice requires an appeal right to be included for teachers because their rights are affected by the decisions (eg conditions on their practicing certificate are imposed). An appeal process also provides for protection of the public interest (represented by the initiator) which has been diminished through removal of the requirement to reach agreement with the teacher and the initiator.

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

Problem 1: Referral threshold

	Option One – <i>Status Quo</i>	Option Two – Likely ‘serious misconduct’	Option Three – Suspension or cancelation starting point
All serious cases are dealt with by the DT.	++ It is likely that serious cases are dealt with by the DT as the status quo promotes referrals by the CAC.	+ There is a slight risk that some serious cases could be dealt with by the CAC rather than the DT	+ This lifts the threshold for referral but provides a more reliable criteria for judging whether cases are serious or not. There is a small risk that some serious cases may not be referred to the DT.
Only serious cases are dealt with by the DT.	0 Many cases that are determined by the DT to not be serious are dealt with by the DT	+ “Likely” is a higher threshold than “possibly”, We would expect this to reduce the number of cases that are not serious misconduct being dealt with by the DT	++ We predict that this option will exclude most misconduct cases being referred as well as a subset of cases currently found to be serious misconduct but result in penalties that fall well short of suspension or cancelation.
Consistency and transparency	0 It is difficult to determine how a judgement that a case possibly is or possibly isn’t serious is arrived at as so many cases are referred to the DT that don’t meet that threshold	++ “likely” is easier to apply than “possibly” as it can be operationalised as being more likely than not.	++ It is easier to judge the seriousness of a case by considering penalty than the current threshold. People can see more readily the application of a penalty threshold than the more subjective concept of <i>serious misconduct</i> .
Overall assessment	+	+	++

Problem 2: Powers of the CAC

	Option One – <i>Status Quo</i>	Option Two – Removing initiator's agreement	Option Three – removing requirement to reach agreement with teacher and initiator
Ensure timely resolution	0 Teachers and initiators can drag out the time it takes to reach an outcome. Either party can force a case to the DT by not agreeing to the outcome.	++ This option performs stronger than the status quo against this objective. It supports natural justice (for teachers) in the absence of an appeal (as in option (1)) and it removes the ability of the initiator to force a case to the DT.	+ This option allows for the fastest way the CAC can achieve an outcome. However, natural justice and protection of the public interest requires an appeals pathway to the DT. This will increase the workload of the DT.
Protect public interest	0 Protects the public interest by giving initiators control over the CAC outcome in the absence of a DT hearing. Forcing the case to the DT effectively asks that the case be reconsidered.	- Influence of initiators over CAC outcomes is reduced. Leaves initiators with nowhere to go if they disagree with CAC outcome.	0 Appeals pathway gives initiator opportunity to have CAC decision reviewed. Reduces incentives for CAC to revise sanction if agreement with teacher not reached.
Overall assessment	0	+	++

Example key for qualitative judgements:

- ++ 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
- much 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?

Referral threshold

35. Introducing a threshold based on a suspension or cancellation starting point penalty will likely have the effect of reducing the number of less serious cases being referred to the DT. This is because we think the kind of sanction that a matter may attract is likely to be a better predictor of a case's true seriousness than can be achieved through a legislated definition of serious misconduct.

CAC powers

36. Giving the CAC the ability to resolve cases as it sees fit will support it to resolve more cases faster and stop a few cases going to the DT that don't really need to go there. Under all the identified options, the requirement for CAC panels to have a lay member would remain. This goes some way towards protecting the public interest. Unlike the status quo, the initiator of a matter will need to articulate their disagreement with the CAC's decision rather than simply not agree and force that case to the DT where the CAC are burdened with needing to prosecute.

Other changes deemed necessary (options analysis is not provided)

37. There are some consequential legislative changes needed to address issues arising from the primary changes to the way the CAC considers matters to be referred to the DT and to its powers to impose sanctions without needing to reach agreement.

Providing a right of appeal for the teacher and the initiator

38. Removing the requirement for the CAC to reach agreement with the teacher and the complainant (initiator) means an appeal right would be needed in cases where the CAC imposes a penalty. The most natural place to appeal is the DT, which has the relevant professional knowledge. In the interests of natural justice, a teacher should have a right to appeal if a CAC decision adversely affects them. Any part of a CAC decision should be open to appeal with several restrictions.
39. We do not consider it appropriate to be able to appeal a CAC decision to take no further action or refer a case on to another body such as the DT. Currently, the Triage Committee of the Council can decide to take no further action on a case and there is no right of appeal to this (although it can be judicially reviewed). It would not make sense to create a right of appeal of such a decision at a later stage. Also, the CAC should feel free to refer a case to another body it deems is more appropriate to resolve the case without the fear that this decision can be appealed.
40. We think that both the teacher and the initiator involved in a CAC decision should be able to appeal. This would protect the interests of teachers as well as initiators who may be dissatisfied with the CAC's decision. This is important as initiators will be losing a measure of influence over the CAC outcome that they have currently, if the provision that the CAC must reach agreement is removed.

Suspension

41. While the CAC can theoretically suspend a practising certificate under section 497(3)(c) of the Act, it does not happen in practice as suspension is reserved for only the most serious cases. Cases that attract suspension are almost certainly captured by the current definition of serious misconduct and so are referred to the DT. Therefore, it is inappropriate and potentially confusing for the CAC to retain this power.

Nature of finding

42. Currently, the CAC can only attempt to resolve matters that are misconduct and not serious misconduct. Should any option to raise the referral threshold progress, the CAC will need to be able to deal with some matters that the DT may previously have found to meet the legal definition of 'serious misconduct'. Following such a change, the restriction on the CAC against making findings of serious misconduct should be removed.

What are the marginal costs and benefits of the option?

Affected groups (identify)	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			
Regulators	Initial increase in cost to Council associated with implementing changes. These include training CAC panels to appropriately apply the new threshold, design and implement a new appeals pathway. There will also be some initial costs if the CAC adopts alternative resolution methods such as sending a matter to mediation.	Low	Medium While some training and processes are required by changes, the intensity of these will be determined by the Council.
Others (e.g. wider govt, consumers, etc.)			
Total monetised costs		N/A	
Non-monetised costs		Low	
Additional benefits of the preferred option compared to taking no action			
Regulated groups	Teacher have conduct cases dealt with faster	Medium	Medium
Regulators	There may be some small longer-term savings for the Council associated with fewer DT hearings.	Low	Low The explicit aim of the proposal is not cost saving.
Others (e.g. wider govt, consumers, etc.)	Public involved in conduct matter benefit from timelier resolution.	Medium	Medium
Total monetised benefits		N/A	
Non-monetised benefits		Medium	

Section 3: Delivering an option

How will the new arrangements be implemented?

43. The Teaching Council has changed its disciplinary processes in the past and have the capability to change processes including providing training to members of the CAC to ensure they are able to apply the new legislative provisions. The Council will need to make appropriate adjustments to its rules.
44. Section 474(7) requires the CAC and DT to act in accordance with the rules of natural justice when performing their functions. The Council will need to give consideration to how its rules need to be amended to accommodate the proposed legislation. This includes how the appeals process will work, how the CAC will operate with the power to impose penalties, and how the public interest in CAC cases is protected. On the latter consideration, the Ministry will work with the Council to provide for a way for CAC cases that are in the public interest to be communicated in some way.

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

46. We expect annual DT case numbers to decrease following this change. The Council will monitor this change.
47. There are no plans to review the legislation following this change. We think that the changes provide a balance between giving the CAC the ability to adapt its processes to achieve timely results and minimising risk to the public interest.