

Supplementary Analysis Report: Education and Training (Teaching Council Fees And Costs) Amendment Bill

Coversheet

Purpose of Document	
Decision sought:	<i>Analysis produced for the purpose of informing Cabinet Legislation Committee decisions to approve the introduction of the Bill</i>
Advising agencies:	<i>Ministry of Education</i>
Proposing Ministers:	<i>Minister of Education</i>
Date finalised:	<i>27 July 2021</i>
Problem Definition	
<p>Following the High Court’s determination that the Council is not able to charge a fee to cover all of its functions, urgent legislation is required to enable the Teaching Council to fix fees that cover the costs of all its statutory functions, and to validate the current and previous fees. These are the minimum changes necessary to enable the financial sustainability of the independent statutory body charged with the professional regulation of teachers. Effective regulation of the profession is essential to ensure teaching quality and child safety.</p>	
Executive Summary	
<p>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 increased the related fee from a \$220 triennial fee to a \$157 annual fee i.e. the cost to a teacher over three years would be \$471. In a recent High Court judicial review decision, the Court quashed the certification and fee decisions resulting in reversion to the previous (and now current) fee. That fee is too low for the Council to recover all of its costs which is problematic as it is required by government to operate on a fully self-funded basis. The Court’s finding that the Council is not mandated by the Act to charge for all of its statutory functions has also raised doubt as to the validity of the previous (and now current) triennial fee as well as any fees charged prior to that by the Council and its predecessors.</p> <p>Government policy is that the Council should be financially independent as with other professional regulatory bodies. Urgent legislative change is required that gives the</p>	

Council the power to set fees to cover the costs of all of its statutory functions, validates any earlier decisions to set fees (so has a retrospective element) and enables the Council to credit fees collected under the quashed annual certification and fees decisions, in part-payment of the fee for a triennial certificate. Further changes to the legislation are also proposed to clarify that the Council can collect fees in instalments, and recover unpaid fees, to minimise financial risk in the future.

Limitations and Constraints on Analysis

Constraints posed by acceptable legislative practice and Government policy include that any new fee set after the commencement of the amendments cannot be backdated, the government will not provide further funding to the Council and the legislation will not validate annual certification.

We need to make these changes quickly because until the Act is amended, the Council is at risk of legal challenge in relation to the fee which it is currently charging as a result of the quashing of the February 2021 fee, and in relation to earlier fees. As the fee currently charged is too low to meet its costs, it will continue to run at a loss. It cannot set a new fee to recover all its costs until the law is amended to enable cost recovery for all of its statutory functions.

Assumptions include that cost cutting is, on its own, not a viable option for addressing the problem. Cost savings that allow the Council to continue to carry out all of the functions required under the Act, would be negligible. For the reasons outlined later in the paper, removing council functions is not an option.

Because of the tight timing, we have only consulted the Council. However the analysis is also informed by stakeholder views from the consultation carried out by the Council when it changed the fees.

Responsible Manager(s) (completed by relevant manager)

Dr Andrea Schöllmann
Deputy Secretary
Education System Policy
Ministry of Education



27 July 2021

Quality Assurance (completed by QA panel)

Reviewing Agency: Ministry of Education

Panel Assessment & Comment: The Ministry of Education's Quality Assurance Panel has reviewed the Supplementary Analysis Report *Education and Training (Teaching Council Fees) Amendment Bill* produced by the Ministry of Education and dated 27 July 2021. The panel considers that it **partially meets** the Quality Assurance criteria. The Supplementary Analysis Report (SAR) is clear, concise and makes the case for limited legislative change to secure the financial stability of the Teaching Council while ensuring it

continues to be self-funding. Given the need for urgency there has not been time to seek the views of stakeholders on the specific proposals beyond the Teaching Council itself, including those of the teaching profession. It will be important that the Teaching Council implement and monitor these changes to its fee setting powers effectively and communicates clearly with the teaching profession.

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 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. In order to teach in New Zealand, a teacher must be registered and hold a current practising certificate issued by the Teaching Council.
2. Section 480 of the Act enables the Council to fix and charge fees related to these functions.
3. The fees set by the Council had not changed since 2010. On 1 February 2021, the Council raised certification fees in order to become financially sustainable, and completely self-funded (the Council has to date been part-funded by government). It also at the same time moved from a three yearly to annual certification period. This was because it mistakenly believed that the Act did not allow it to collect fees annually because certification is triennial. The Court confirmed that the Council can collect fees annually under the current legislation without moving to annual certification, via payment by instalment.
4. To support the transition to the new fee, the Government provided \$16.5 million of transitional funding in Budget 2020 (CAB-20-MIN-0155).
5. 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 quashed the related decisions.
6. The effect of quashing these decisions is reversion to the previous three-year certificate and triennial fee. The Council has reissued all the annual certificates issued from 1 February 2021, as three-year certificates. The proposed amendments will not backdate any new fee set post-enactment. This means that teachers issued with certificates prior to the commencement of a new fee, cannot be subject to fee increases for at least three years from the date of their certificate.
7. The status quo is that the legislation is not amended. The Council's options would be to keep charging the \$220 fee that currently applies, or to reconult on a new fee in accordance with the Court's findings. The Court's findings will not allow the Council to charge a fee to cover all its functions. The current \$220 fee will result in a shortfall of

approx. \$10.86M for the year from 1 February 2021 in relation to the Council's budgeted income for that year. The table below explains the estimated shortfall.

Income period	Fee (incl GST)	Annual income (incl GST)
Three-year fee prior to 2021 - covers about 40,000 applications on average per year	\$220 for 3 years	\$8.8M
Annual fee effective from 1/02/2021 – it was estimated that 120,000 applications would be received per year for the new annual certificates	\$157 per year	(estimated) \$18.84M
Estimated shortfall for year from Feb 2021 – Jan 2022r		
Between 1 Feb 2021 and 30 June 2021 a fee of \$157 was received for 13,000 applications	\$2.041M	
Between 1 July and 31 December it is estimated that a fee of \$220 will be received for 27,000 applications (On average, 40,000 applications are received annually and 13,000 have already been received leaving a remainder of 27,000).	\$5.94M	
	Total estimated fee income for 2021	\$7.98M
	Shortfall compared with average income in previous years	\$0.819M
	Shortfall compared with 2021 projections	\$10,859,000.00

8. The Council has an existing funding agreement through which the Ministry provides funding to support the Council to transition to a new fees regime. The Ministry estimates that this is sufficient for the Council to remain solvent until legislative changes are made.

What is the policy problem or opportunity?

10. 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.
11. The Council had not previously operated on a full cost recovery basis and had been part-funded by Government since 2015. The Court’s findings also have implications for the validity of the previous fee.
12. 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 a limited number of 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).
13. While the Court focussed on the 1989 Act, the practical effect of its determination is that the Council is not empowered to charge fees under the 2020 Act, which re-enacted relevant provisions from the 1989 Act, for a number of its core functions including but not limited to sharing best practise with the profession, establishing and maintaining standards, and teacher competence functions.
14. 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.
15. Since 1 February 2021, at least 13,000 one-year practising certificates have been issued on the receipt of the fee of \$157. These certificates have been re-issued as three-year certificates which have the associated previous fee of \$220. The Council needs explicit powers under the Act to retain the unlawfully collected annual fee and credit it to the triennial fee, and to collect the remaining unpaid portion of the triennial fee.

What objectives are sought in relation to the policy problem?

16. To enable the financial sustainability of the Council so that it can regulate the teaching profession, on a self-funded basis, to ensure the quality of teaching and safety of children.
17. To provide legal certainty to the Council and to teachers in relation to the status of fees currently and previously collected by the Council and its predecessors.

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

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

18. **(1) Consistency with the Council’s purpose and functions.** The Council is able to fulfil its purpose to “ensure safe and high-quality leadership, teaching, and learning for children and young people in early childhood, primary, secondary, and senior secondary schooling in English-medium and Māori-medium settings through raising the

status of the profession” (s 478 of the Act) and is able to carry out all its functions, as set out on pages xx of this report (s 479 of the Act).

(2) Financial sustainability. The legislation enables the Council to operate on the fully self-funded basis required by government.

(3) Proportionality. As the proposed changes are being progressed through urgent legislation, they are limited to the minimum intervention necessary to address the funding shortfall.

(4) Certainty. The Council and teachers have legal certainty in relation to the status of fees currently and previously collected by the Council and its predecessors.

(5) Fairness. The policy is that the Council should be able to recover the costs of all its statutory functions. Inability to do so is the result of oversight in relation to updating the legislation. It is unfair if teachers who paid the \$157 fee benefit from a windfall caused through that oversight and are not required to at least pay the \$220 that would have been required had the fee not been changed.

What scope will options be considered within?

19. Non-regulatory options have not been considered because the problem arises directly from the Court’s findings regarding provisions in the Act and not, for example, the Council’s consultation process. Options will only address the specific findings of the High Court as they relate to fee setting powers of the Council.
20. Options must address the need for the Council to be self-funding. The Council has been funded since 2015 on the condition that it would become self-funding. This Government policy position is not altered by the High Court decision.
21. We have considered and discounted an option to reduce the Council’s functions enabling its costs to be covered by a lower fee. This is a significant policy change that has implications beyond the Council’s financial sustainability.
22. The functions and form of the Teaching Council, including its governance arrangements, are designed primarily to protect students and the public from the harm caused by misconduct or incompetence, and the risks of poor-quality teaching to children’s whole of life outcomes.
23. The professional leadership aspects of the Council’s work, encompass matters such as promoting inclusion, discouraging racism, and affirming the need to have high aspirations for all students.
24. Without a leadership function, the Council’s role in ensuring the quality of the teaching profession would be limited to a negative focus – through the conduct and competence processes. This risks the Teaching Council being seen as a policing body rather than a professional body that helps ensure teaching is positive rather than negative for students. Overall, amending the Council’s functions is not a proportionate response to the problem and not appropriate for urgent legislation.
25. As noted in the commissioning constraints section, we have not considered options to backdate any fee increase post-enactment to those issued with certificates from 1 February 2021, and options that would require more government funding.

What options are being considered?

Option One – *Status Quo*

26. The status quo could either be the Council retains the current fee indefinitely or that it transitions to a fee informed by the Court's determination. Either way the Council could not continue to perform all of its functions, which means the criterion of consistency with Council purpose and functions is not met.
27. The Council would continue to charge the \$220 fee until such time as it is able to raise the fee on a basis that is informed by the Court's findings. Regardless of if and when it raises the fee, it will be subject to the risk of legal challenge because the validity of that fee and previous fees is in doubt. This option does not meet the criterion of financial sustainability because the Council cannot recover the costs of all its functions without amending the Act. It does not meet the criterion of certainty because it will be at risk of legal challenge
28. There is also a risk that those who paid the \$157 for an annual certificate could refuse to pay the remaining \$63 owing for the \$220 three-year certificate with which they have now been issued. This does not meet the criterion of fairness.
29. Any determination that any or all of the fees are invalid threatens the Council's financial sustainability. The Council can set fees for a limited set of functions determined valid by the Court including its registration, disciplinary and professional leadership functions but would need to get funding for its other functions from other sources (excluding government). The Court found that funding from alternative sources was not a realistic option.

Option Two – update fee setting powers to cover all functions and reduce immediate financial risks.

30. This is a package of proposals to:
 - 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;
 - validate the receipt of fees from 1 February 2021;
 - validate any earlier decisions the Council, or its predecessor organisations, took in setting fees;
 - allow the Council to recover debts for unpaid fees.
31. (1)(b)-(d) are necessary to minimise financial risk to the Council. These proposals reduce the financial risk for the Council by allowing it to keep fees received since 1 February 2021, charge for the balance of the new fees for certificates that are now deemed or issued for a three year period, and to recover unpaid fees.
32. As set out in the table below, this is a proportionate response that enables the Council to fulfil its purpose and carry out its functions on a fully self funded basis. It is the preferred option.

How do the options compare to the status quo?

	Option One – <i>Status Quo</i>	Option Two – fee setting powers align with current functions
Consistent with purpose and functions	0	++
Financial stability	0	++
Proportional	0	0
Fairness	0	+
Certainty	0	++
Overall assessment	0	preferred option

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

33. Option two. This is a proportionate response that is likely to best address the problem, meet the policy objectives and deliver the highest net benefits.

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	Teachers will probably have to pay higher fees after the law is changed	High	High. The Council has to significantly increase the fees to remain solvent
Regulators	Nil	Low	High. Increasing the fees has no costs for the Council additional to the status quo of retaining a lower fee
Others (e.g. wider govt, consumers, etc.)	Nil	Low	High. Increasing the fees has no costs for others additional to the status quo of retaining a lower fee
Total monetised costs			
Non-monetised costs	<i>Nil</i>	<i>Low</i>	<i>High</i>
Additional benefits of the preferred option compared to taking no action			
Regulated groups	Teachers are regulated by an independent professional body that is able to carry out its full range of regulatory functions	High	Medium. There is a high degree of certainty that the proposals will provide the financial stability needed for the Council to carry out all its functions but less certainty around effectiveness. There is dissatisfaction

			within the profession with the Council. Teachers overwhelmingly opposed the now quashed annual certification and related fee decisions. The PPTA has recommended the removal of some Council functions.
Regulators	Increased likelihood of the Council remaining solvent in the long term	High	Medium. The Council is an independent statutory body with limited government oversight.
Others (e.g. wider govt, consumers, etc.)	Public is served by quality teaching and a professional regulatory body to ensure the safety of children.	High	Medium. Financial stability is not the sole determinant of the Council's effectiveness in meeting these objectives.
Total monetised benefits			
Non-monetised benefits		<i>High</i>	<i>Medium</i>

Section 3: Delivering an option

How will the new arrangements be implemented?

34. The Council will be responsible for the ongoing operation and enforcement of the new arrangements. The Council understands and supports the proposal and it will communicate with the profession about any developments including its fee setting powers should it choose to consult on a new fee following this change.

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

35. These changes will be monitored through existing BAU processes. There will not be separate reviews for these arrangements.