

Briefing Note

DATE:	1 July 2021	PRIORITY:	Urgent
TO:	Minister	FILE:	EC-2513
FROM:	Lesley Hoskin	SECURITY LEVEL:	In confidence

Impact on Teaching Council of PPTA judicial review decision

Executive summary

- Churchman J released his judgment on the Judicial Review proceedings on 30 June, with an expectation to act reasonably promptly to implement the decisions.
- The Council acted in good faith, within our interpretation of the law and followed the legal advice given by Chen Palmer, both during the fees consultation and the judicial review proceedings.
- Both the fee increase and annual certification decisions are quashed immediately.
- The Council has paused issuing practicing certificates.
- Senior Counsel [REDACTED] is considering an appeal for a stay or deferment of decision, to implement request by PPTA to have 6-month delay on the decision taking effect (Judge did not agree). The reason given, that as Ground 4 and 5 is upheld, the Gazette notice is deemed unlawful. However, the previous Gazette notice has the same error of law – in that it is an omnibus fee.
- \$11m provided by the Crown to transition to an annual certificate is needed to be retained by the Council while re-consultation occurs, or immediate insolvency will occur (Churchman J comments the government was likely to support the Council financially and so did not consider insolvency a real risk). The Funding Agreement could be renegotiated to allow the retention of funds.
- Law reform required urgently to align ability to charge fees to all statutory functions. Preferably this would occur before re-consultation, however this would require a stay or deferment of the decision. The misalignment has occurred iteratively since 2002 when the Teachers Council was established with increased functions, following the Teacher Registration Board dis-establishment.
- Re-consultation required on fee increase which is likely to take 6 months with implementation of new decision 1 Feb 2022.
- Continuing to move to an annual process may not be possible unless further funding for the transition was again made available.
- Council needs to decide how to move the teachers who currently hold a one-year certificate at \$157 (approximately 17,500 teachers) to a 3-year certificate of \$220.80. Possibilities are to refund in full and reissue, charge the difference at next renewal, or write off the difference (approximately \$1m), if the Crown chose to fund this.

Background

1. On 22 May 2020 the Council published a Gazette notice fixing new annual fees for registering teachers, issuing annual practising certificates, and granting limited authorities to teach. These new annual fees came into force on 1 February 2021. Appendix One sets out the background to how the 2020 decision on the setting of fees and annual certification was arrived at.
2. On 9 November 2020, teacher Evan Jones and the Post-Primary Teachers' Association | Te Wehengarua (PPTA) filed an application for judicial review of decisions relating to fees, and certification periods made by the Council, and the transitional funding from Government, and use of fees for the Leadership Centre (Rauhuia). The Council engaged ChenPalmer to act on its behalf.
3. On 30 June 2021 a High Court decision (CIV-2020-485-641 [2021] NZHC 1581) was released by Churchman J.
4. The Council has engaged with senior counsel, [REDACTED], on whether there are any options for staying or deferring the orders made by Churchman J. I expect advice on that early next week.

Summary of decision

5. Churchman J made a declaration that the Fees Decision and Certification Decision are unlawful and are quashed. The first five grounds for judicial review are upheld:

Ground	
One	the respondent's failure to consult before imposing annual certification
Two	failure to properly consider the merits of annual certification – not all schools will implement changes to Professional Growth Cycle, and this is out of the control of individual teachers so may adversely impact them
Three and Four	misconstruction and misapplication of key elements of the statutory regime relating to payment by instalment and the default three-year certification period when issuing a certificate for the first time
Five	setting a fee for issuing a practising certificate said to amount to an unlawful tax; noting the legislation describing what fees can be charged for, is out of step with the change to Statutory functions
Six (not upheld)	The sixth ground of judicial review was not upheld - failure to provide adequate information and options when consulting in relation to the practising certificate fee - is not upheld. The Leadership Centre Decision is lawful and the application for judicial review in respect of it is dismissed.

Immediate effect of the decision

6. The immediate effect of Churchman J's declaration that the Fees decision and Annual Certification decision are quashed is that:
 - the certification process has returned to the situation that existed before the decisions on 30 April 2020 were taken to fix new practising certificate fees and transition to the issuing of annual practising certificates from 1 February 2021

- the situation has been returned to triennial certification with three-year practising certificate fees fixed at the rate that existed before the decisions on 30 April and 10 November 2020 were taken. That is the Gazette Notice that came into force on 1 July 2015
- the previous triennial fee of \$220.80 would apply to teachers who have been certificated from 1 February 2021
- the Teaching Council will need to decide whether to:
 - (i) refund teachers who have paid an annual practising certificate fee of \$157 since 1 February 2021 and require them to pay the previous triennial fee of \$220.80 for the issue of a three-year practising certificate; or
 - (ii) hold the fee paid since 1 February 2021 for an annual practising certificate and require the teacher to pay the balance for the issue of a triennial practising certificate to replace the annual practising certificate already issued.
 - (iii) Government could consider funding approximately \$1m to write-off the difference between the \$157 for one-year and \$220.80 for 3-year certificates for the approximately 17,500 teachers.

Financial implications for the Teaching Council

7. Crown funding of \$16.5m was provided to the Council to transition from triennial to annual practising certificates and fees. This was included in Budget 2020.
8. The first \$11.0m of that funding was received by the Council on 1 February 2021 after annual certification / fees was successfully implemented. The second instalment is to be paid on 1 December 2021.
9. The need to reconsult on fees and practising certificate length will likely delay a fee increase until 1 Feb 2022. The Council will incorporate inflationary impacts since January 2020 when we reconsult.
10. Without an increase to our fees the Council has an annual operating deficit of approximately \$10.0m.
11. As at 30 June 2021, the Council had cash and short-term investments of \$10.5m. Deferring the fee increase to 1 February 2022, would reduce the cash and short-term investments to between \$4.5m and \$5.5m; however, this would not be sufficient to fund a transition to annual certification / fees from 1 February 2022 (refer to paragraph 14).
12. The Council would be insolvent now if the Crown sought to recover the initial \$11m. If the Crown agrees the Council can retain these funds while re-consultation occurs, the Council could not move to annual certification in the future, without additional funding for transition costs.
13. Approximately 17,500 teachers have been issued with an annual practising certificate since the change to increase the fee to \$157 on 1 February 2021. Issuing these teachers with a three-year certificate without seeking the difference between the \$220.80 and \$157.00 fee would cost the Council \$1.1m (\$0.970m excluding GST) in lost revenue. This is not factored in our forecasts.

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14. The Council has estimated that transitioning to an annual payment of fees with an annual certificate, would result in an operating deficit of between \$16.5m and \$18.0m from 1 February 2022 to 31 January 2024.
 15. The Council is not yet able to consider payment by instalments, however this work is underway. It would not be ready to include in the re-consultation.
 16. In order to allow the Council to re-consult the teaching profession on a proposal to fix new fees and payment by instalment for the future, including annualisation, the funding agreement could be renegotiated so that the funding remains allocated to the Council.
 17. The parties to the judicial review are required to negotiate costs within the next two weeks. The Council anticipates it may be required to pay costs in the order of [REDACTED]. The Council can meet this cost if it is able to retain the 11m of transitional funding already received.

Immediate actions to mitigate the effect of the decision

18. Churchman J's decision has signposted the process steps that need to be taken to remedy the errors that caused him to uphold the first five grounds for judicial review.

Repeating consultation

19. The Council needs to repeat the consultation process to ensure that teachers are consulted on separate proposals to increase fees and to move to annual certification, to enable teachers affected by the separate proposals to provide meaningful comment and feedback to the Governing Council before it makes its decisions on whether to fix new fees or move to annual certification. Churchman J notes that we are likely to end up at the same decision.
20. Churchman J's decision not to uphold the sixth ground of judicial review confirms that the Council did provide adequate information and options to teachers when consulting in relation to proposed increase to the practising certificate fee, so much of the information that had been prepared for the 2020 consultation can likely be updated and used again in the re-consultation.
21. A prompt consultation process would need to be based on fees that are specifically set out in section 480 (1) and therefore would not cover all the costs incurred by the Council. Discussions are underway to identify if a law change can be quickly implemented to allow the Council to charge fees for all of its statutory functions, or whether section 480(5) can be applied (see para. 30). These decisions may impact on the consultation process. The Judge ruled the Crown was likely to urgently seek to resolve this.
22. The timeline for a re-consultation process that provides appropriate opportunity for consideration, making and analysis of submissions, decision-making and required notifications, is likely to mean it is 1 February 2022 before a new fee structure could take effect.

Full payment of practising certificate fees

23. The Council needs to delete the incorrect statement that the Teaching Council cannot issue a practising certificate unless full payment of the practising certificate fee is received in advance. However, legislation will need to allow for a practising certificate to be cancelled for non-payment if payment by instalment was allowed for.

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24. The Council notes Churchman J's reference to the Council misleading the Minister by including this incorrect advice in its briefing of 18 May 2020. As previously advised, the Council wishes it noted, that the Minister's Office was verbally advised by the Chief Executive as soon as it became aware that this advice relating to part-payment of fees was incorrect.
25. The Council currently does not have systems capable of accepting part-payments. Work is currently underway to investigate and cost the implementation of such systems.

Fixing of fees

26. The Council needs to unbundle the component costs that make up the proposed new Teaching Council fees with specific reference to each relevant matter set out in section 480 (1) of the Education and Training Act 2020 (the Act) in respect of which the Council may fix fees so that the costs of any matters which are not set out in section 480 (1) of the Act are not included in the proposed new fees.
27. The Council needs to review whether any of the costs of providing the Council's services to teachers and the teaching profession in accordance with its functions, which cannot lawfully be included in any fee fixed under section 480(1), can be recovered by the fixing of charges under section 480(5) - which enables the Teaching Council to charge for any goods or services it provides in accordance with its functions. The Council needs to decide if this should be addressed following consultation or whether a legislative change is preferable.

Reviewing any annual certification decision against standards

28. If after consultation, a decision is made to move to annual certification, the Council will need to review the standards for ongoing practice and criteria for the issue of practising certificates of different kinds currently established and maintained under section 479(1)(j) of the Act. This will be needed to amend the standards and criteria to support the implementation of a one, or two-year teaching certification process in the manner Churchman J has foreshadowed to be necessary.

Possible legislative changes required

29. In light of Churchman J's observations about the need for legislative amendment, the Council is urgently consulting with the Ministry of Education and Parliamentary Counsel to explore and identify options for law reform to remedy the legislative deficiencies that the High Court has identified in this decision:
- (i) legislation to authorise the backdating of the annual certification fee to 1 February 2021 would only be sought if the outcome of the new consultation was a decision by the Governing Council to move to a new annual certification fee of the same amount
 - (ii) law reform that allows the Council to fix fees in respect of the performance of all its statutory functions, not just some of them.

Appendix One – Background to 2020 fees decision

When the Education Council¹ was established in 2015 it was not financially sustainable. This was because there had been no increase in fees since 2010, and the Teachers Council was disestablished in 2015 with a nearly \$500,000 deficit.

To ensure financial stability while the Education Council established itself, the Crown provided interim funding until 30 June 2019. In 2017, following extensive consultation and review, the Education Council planned to announce increased fees beginning 1 July 2019. However, the 2017 general election and subsequent review of the education sector meant that the new fees had to be delayed until 1 July 2020. The Crown extended the interim funding for a further twelve months to enable this.

In early 2019 the first Teaching Council election was held, and the new Governing Council reviewed the financial sustainability of the Council. They concluded that an increase in fees was still necessary. The Council consulted with the profession in early 2020 about how the increases should be made. Based on the profession's feedback and the Government providing funding in the Budget, the Governing Council resolved to increase fees and introduce annual fees and certification. However, the Governing Council was concerned about introducing the new annual fees from 1 July 2020 given the impact of COVID-19 on teachers and schools and so is using financial reserves to delay the start to 1 February 2021. The sixth Labour Government offered \$16.5 million in Vote Education 19/20 to support the Council's transition to annual certification. This appropriation was to cover the financial shortfall created by the transition. The Governing Council considered the Government's offer and decided to accept the funding to support moving to an annual certification process.

On 22 May 2020 the Council published a Gazette notice fixing new annual fees for registering teachers, issuing annual practising certificates, and granting limited authorities to teach. These new annual fees came into force on 1 February 2021. The Council met the financial deficit incurred between July 2020 and February 2021 from reserves.

¹ The predecessor to the Teaching Council, 2015-2019.