

Education and Training (Teaching Council Fees and Costs) Amendment Bill

Government Bill

As reported from the Education and Workforce Committee

Commentary

Recommendation

The Education and Workforce Committee has examined the Education and Training (Teaching Council Fees and Costs) Amendment Bill and recommends by majority that it be passed. Further by majority, we recommend all amendments.

About the bill

This bill would amend the Education and Training Act 2020 to enable the Teaching Council of Aotearoa New Zealand to fix fees so that it can recover costs for all of its functions and powers. The bill would make clear the manner in which fees are payable, such as by instalments, and that the Council can recover unpaid fees as debts.

The bill would retrospectively validate the receipt of payments by the Teaching Council since 1 February 2021 under an annual fees notice that was quashed by the High Court after judicial review. The bill would not, however, validate the invalid fees. Payments received for the invalid fees would be credited to the teacher concerned, toward future fee payments. The bill would also validate any previous fees fixed and received by the Council and its predecessor organisations.

In June 2021, the High Court found that the Act does not authorise the Council to fix fees for all of its functions. The bill would address this anomaly and enable the Council to recover the full costs of its functions through the charging of fees.

What the Teaching Council does

The Council is an independent statutory body responsible for the professional regulation of primary and secondary school teachers, and some early childhood education

teachers. The Council's 16 statutory functions are set out in section 479 of the Act. Its primary functions include:

- registering and certifying teachers
- setting standards for qualifications that lead to registration
- performing disciplinary functions when misconduct occurs
- providing leadership to teachers and direction for the education profession.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We wish to bring the House's attention to some issues relating to clause 480, which we discuss in more detail later in this commentary.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Including a power to set levies

We recommend inserting a levy-setting power into the bill and making it clear which functions and powers can have costs recovered through fees, and which functions and powers can have costs recovered through a levy.

The legislative scrutiny memo we received from the Office of the Clerk noted that the bill was unclear as to whether it was empowering the imposition of a fee or a levy. The memo suggested that some of the Council's fees would effectively be operating as levies. Fees are charged for goods or services, but some of the Council's functions are neither. Charging for those functions would be more akin to a levy, which is like a tax collected for a specific purpose.

A letter from the Regulations Review Committee explained that some of the Council's costs would be more appropriately recovered through levies rather than fees. It is appropriate to use levies when the service is provided to the community as a whole and the person paying the levy does not have a choice whether they receive the service.

Some of the functions of the Council are provided to the whole education profession and, under the bill, teachers would have no choice about whether to pay for these services. An example is the Council's disciplinary functions. We therefore consider it appropriate for the bill to provide for the Council to set levies as well as fees.

Our recommendation would amend clause 5, proposed section 480(1), to make it clear that the Council may, by notice, fix fees and impose a levy. New paragraphs (a) and (b) would set out which matters and functions can be the subject of fees or a levy.

We also recommend deleting proposed section 480(2) and replacing it with new section 480(2A). This new subsection would set out what notices issued under section 480(1) may do.

Consequential change to the bill's title

As a consequence of these amendments, we recommend that the name of the bill be changed to include levies. Also, the word “levy” or “levies” would need to be added wherever fees and costs are mentioned.

Ensuring that the Council does not set unreasonable fees or levies

We recommend amending clause 5 to make it clear that the Council could not set fees or levies higher than needed to cover the costs of its statutory functions.

Some submitters raised concern about clause 5, section 480(1)(d), as introduced, which would give the Council the power to fix fees for “any other matter that relates to anything the Teaching Council is required to do in order to perform or exercise its functions and powers”. Submitters were concerned that this section would give the Council unconstrained power to charge fees.

We note that this type of “catch-all” clause is standard and that there are already measures to ensure that the Council does not overcharge teachers. However, in view of the strong concerns expressed by submitters, we recommend explicitly stating in the bill that fees and levies could be fixed only to cover actual and reasonable costs.

Our recommendation would insert section 480(2) to provide added certainty that the fee-setting power would be limited to recovering only as much as is necessary for the Council to meet its statutory obligations.

Council must consult before fixing fees or imposing levies

We recommend amending clause 5 to make it clear that the Council must consult the teaching profession about any proposed fees or levies.

There is no requirement under the Act for the Council to consult when making decisions about fees or levies. However, well established principles of administrative law require the Council to consult before setting fees and levies. Even so, we think our amendment would help the Council to conduct good quality consultation in the future. It would also help to reassure people that proper consultation will take place.

Our recommendation would insert section 480(3A) to clearly set out that the Council must consult registered teachers and holders of a limited authority to teach before making decisions about fees or levies. Our amendment would also impose an explicit requirement for the Council to receive the views presented to it with an open mind and give those views due consideration when making a decision on the proposed fees or levies.

We acknowledge the significant contribution made through submissions from across the teaching profession, including peak bodies such as NZEI Te Riu Roa and the PPTA. This guidance enabled the committee to make amendments to the bill to support improved fee and levy setting processes in the future.

We note that the Council provided a supplementary submission after the hearings for this bill took place. The submission explains the Council's intention to conduct future

consultation in a different way. The Council intends to “invite the peak bodies and unions to co-design a new consultation process to ensure all voices are heard”.

We appreciate the Council’s willingness to improve its process, and expect it to move forward in good faith.

Minister intends to amend the Council’s leadership functions

We received a letter from the Minister of Education just before we completed our work on this bill. The letter explained that he has heard submitters’ concerns and understands that teachers do not want their compulsory fees to fund the Council’s leadership functions. While the change was out of scope for our committee to consider, the Minister intends to introduce a Supplementary Order Paper at the Committee of the whole House stage to separate the Council’s leadership functions from its other functions. It would also make those functions optional and only to be undertaken by agreement from the Minister and the costs of those functions would not be recovered by the Council through fees or levies.

Green Party differing view

The Green Party welcomes changes made to the Education and Training (Teaching Council Fees and Costs) Amendment bill in response to the concerns raised in submissions. In particular, provisions which will ensure the Council consults with the teaching profession and turns its mind to the “actual and reasonable” costs of carrying out its functions when setting fees and levies. This will hopefully provide reassuring checks on powers of the Council.

Despite these changes, the Green Party remains concerned the Council is now expected to fund core functions independently, having received partial funding from the government for long periods of time. Fee increases, even those that are reasonable and actual, will be necessary and we remain concerned about the subsequent financial burden this will represent for Aotearoa’s teachers.

It is clear that mistrust and opposition to the Council also remains. A longer period of consultation over the changes this bill proposes and the future of the Council may be constructive and help to alleviate concerns.

Should the government’s policy that the Council be independently funded remain, further government funding for the Council’s core functions should be provided until affordable “step increases” for fees can be phased in. This would also allow time for more clarity to be established as to the Council’s functions and powers with the sector. The limits of the powers and functions could then be bedded in legislatively if required.

National Party differing view

National members welcome some improvements to the bill through the select committee process but maintain the view that it should not have been rushed through with urgency. The government could have extended transitional funding to ensure a normal and robust parliamentary process had been carried out. National members also note

widespread dissatisfaction with the performance of the Council, particularly its financial performance, and remain concerned that this rushed legislation lets them off the hook for poor consultation and relations with the sector too easily.

We note staff costs at the Council have increased from \$5.3 million in 2016 to \$8.2 million in 2020. Finally, the bill still allows too much scope for the Council to involve itself in activities beyond registration and the certification of teachers.

Appendix

Committee process

The Education and Training (Teaching Council Fees and Costs) Amendment Bill was referred to the committee on 12 August 2021. We invited the Minister of Education to speak on the bill. He did so on 25 August 2021.

The closing date for submissions on the bill was 22 August 2021. We received and considered 1,033 submissions from interested groups and individuals. We heard oral evidence from 112 submitters at hearings held remotely by videoconference.

We received advice on the bill from the Ministry of Education. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legislative drafting. The Regulations Review Committee wrote to us about the powers contained in clause 5 (new section 480).

Committee membership

Marja Lubeck (Chairperson)

Chris Baillie

Camilla Belich

Hon Paul Goldsmith

Jan Logie

Jo Luxton

Ibrahim Omer

Angela Roberts

Erica Stanford

Education and Training (Teaching Council Fees and
Costs) Amendment Bill

Key to symbols used in reprinted bill

As reported from a select committee

text inserted by a majority

~~text deleted by a majority~~

Hon Chris Hipkins

Education and Training (Teaching Council Fees and Costs) Amendment Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Education and Training (Teaching Council ~~Fees and Costs~~ Fees, Levies, and Costs) Amendment Act **2021**.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

3 Principal Act

This Act amends the Education and Training Act 2020.

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Part 1 Teaching Council fees and costs

4 Section 479 amended (Functions of Teaching Council)

(1) In the heading to section 479, replace “**Functions**” with “**Functions and powers**”.

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(2) After section 479(1), insert:

(1A) The Teaching Council may, by written notice to a governing body, require the governing body to give the Teaching Council, within a time specified in the notice, any information specified in the notice, and the governing body must within that time give the Teaching Council in writing all information so required that is reasonably necessary or desirable for the Teaching Council to have for the proper administration of this subpart.

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(1B) The Teaching Council has and may exercise all other powers conferred by this Act or reasonably necessary for the purposes of performing its functions.

(1C) For the purposes of **subsection (1A), governing body** means the board of a State school or a service provider that operates any licensed early childhood service or any certified playgroup or the managers of a private school.

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(3) In section 479, replace the compare reference with:

Compare: 1989 No 80 ss 382, 383(6)–(8)

5 Section 480 replaced (Powers of Teaching Council)

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Replace section 480 with:

480 Teaching Council ~~fees and costs~~ fees, levies, and costs

(1) ~~The Teaching Council may, by notice, fix 1 or more fees payable for the following matters for the purpose of funding all of its functions and powers under this Act:~~

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~~(a) registration as a teacher;~~

~~(b) the issuing of a practising certificate;~~

~~(c) the granting of a limited authority to teach;~~

~~(d) any other matter that relates to anything the Teaching Council is required to do in order to perform or exercise its functions and powers under this Act.~~

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- ~~(2) Different fees may be fixed under **subsection (1)**—~~
- ~~(a) in respect of registration effected in different circumstances; and~~
- ~~(b) for practising certificates of different kinds.~~
- (1) The Teaching Council may, by notice,—
- (a) fix fees payable for— 5
- (i) registration as a teacher;
- (ii) the issuing of a practising certificate;
- (iii) the granting of a limited authority to teach;
- (iv) any other matter associated with those matters (for example, inspection of the register of registered teachers or supplying a copy of an entry in the register); 10
- (b) impose a levy payable by registered teachers, holders of a limited authority to teach, and applicants for registration as a teacher or a limited authority to teach for the purpose of funding the Teaching Council’s functions set out in section 479(1). 15
- (2) Fees fixed and levies imposed under **subsection (1)** must recover only the actual and reasonable costs incurred by the Teaching Council in performing and exercising its functions and powers.
- (2A) A notice under **subsection (1)** may fix different fees or provide for different amounts of levy payable— 20
- (a) by registered teachers, holders of a limited authority to teach, and applicants for registration as a teacher or a limited authority to teach; and
- (b) for registration effected in different circumstances; and
- (c) for practising certificates of different kinds.
- (3) Fees fixed and levies imposed under **subsection (1)** are payable in the manner (for example, by instalments) prescribed in the notice and are recoverable as a debt due to the Teaching Council. 25
- (3A) Before issuing a notice under **subsection (1)**, the Teaching Council must—
- (a) consult registered teachers and holders of a limited authority to teach on any proposed fees or levies; and 30
- (b) receive the views presented to it with an open mind and give those views due consideration when making a decision on the proposed fees or levies.
- (4) Despite anything in this Act, the Teaching Council may refuse to register a person as a teacher, issue a practising certificate, or grant a limited authority to teach until the appropriate fee or levy has been paid in the manner prescribed by the notice. 35
- (5) If the Teaching Council cancels a teacher’s registration or limited authority to teach, it may, by written notice to the teacher or person concerned, require the

teacher or person to pay the Teaching Council any reasonable costs specified in the notice that were incurred by the Teaching Council in dealing with the proposal to cancel the registration or authorisation, or with the cancellation itself.

- (6) A notice made under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

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Compare: 1989 No 80 ss 364, 372, 383(1)–(3)

6 Schedule 3 amended

In Schedule 3, repeal clauses 13 and 22.

Part 2

Validations and other transitional provisions

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7 Schedule 1 amended

In Schedule 1,—

- (a) insert the Parts set out in the **Schedule** of this Act as the last Parts; and
(b) make all necessary consequential amendments.

Schedule
New Parts 3 and 4 inserted into Schedule 1

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Part 3	
Provisions relating to Education and Training (Teaching Council Fees and Costs Fees, Levies, and Costs) Amendment Act 2021	5
73 Interpretation	
In this Part,—	
2015 fees means fees fixed or purportedly fixed by the Education Council of Aotearoa New Zealand Fees for Registration, Practising Certificates and Limited Authorities to Teach notice published in the <i>Gazette</i> on 25 June 2015, 2015-gs3644	10
2020 fee means a fee fixed or purportedly fixed by the Teaching Council of Aotearoa New Zealand Fees for Registration, Practising Certificates, and Limited Authorities to Teach notice published in the <i>Gazette</i> on 22 May 2020, 2020-gs2144	15
commencement means the commencement of the Education and Training (Teaching Council Fees and Costs Fees, Levies, and Costs) Amendment Act 2021	
former Council means any predecessor of the Teaching Council.	20
74 Validation of specified fees	
(1) This clause applies to the 2015 fees and any previous fees fixed by a former Council for registration as a teacher, the issuing of a practising certificate, or the granting of a limited authority to teach (specified fees).	
(2) The specified fees, and all actions of a former Council in fixing the specified fees, are valid and declared to be and to always have been lawful.	25
(3) All money received by the Teaching Council or a former Council in payment of the specified fees is to be treated as having been lawfully paid to, and received by, the Teaching Council or the former Council.	
75 Recovery of unpaid 2015 fees	30
Any 2015 fee, or part of a 2015 fee, that applies to a person and that has not been paid before commencement—	
(a) is declared to be lawfully payable to the Teaching Council; and	
(b) may be recovered by the Teaching Council on and after commencement as if the 2015 fee had always been lawfully payable by the person.	35

76 Payment of 2020 fees

- (1) This clause applies to a person who has paid a 2020 fee to the Teaching Council on or after 1 February 2021.
- (2) The payment must be treated on and after commencement as a part-payment of the appropriate 2015 fee payable by the person.

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Part 4
Provisions relating to Legislation Act 2019

77 Application of Part

This Part applies until the main commencement date (as defined in clause 2 of Schedule 1 of the Legislation Act 2019).

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78 Teaching Council ~~fees and costs~~ fees, levies, and costs

- (1) This clause applies to a notice made by the Teaching Council under **section 480** (as replaced by the Education and Training (Teaching Council ~~Fees and Costs~~ Fees, Levies, and Costs) Amendment Act **2021**).
- (2) The notice—
- (a) must be published in the *Gazette* and on an Internet site maintained by or on behalf of the Teaching Council; and
- (b) must state where printed copies of it are available free; and
- (c) is a disallowable instrument, but not a legislative instrument, for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.
- (3) The Teaching Council must make printed copies of every notice made under **section 480** that is in force available free at the place stated in it.

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Legislative history

9 August 2021
12 August 2021

Introduction (Bill 60–1)
First reading and referral to Education and Workforce Committee