



Complaint about eligibility of Early Childhood Education Graduates

Ombudsman's opinion

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Agency:	New Zealand Teachers Council
Ombudsman:	Professor Ron Paterson
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Background

The New Zealand Tertiary College ('the Tertiary College') is a private training establishment based in Auckland which is approved and accredited by the New Zealand Qualifications Authority ('NZQA') to deliver a range of early childhood education qualifications.

In August 2012, the Tertiary College learnt that the New Zealand Teachers Council ('the Teachers Council') was not progressing the registration of the Tertiary College's graduates from the Bachelor of Teaching (Early Childhood Education) programme, on the basis that the Tertiary College's graduates had not demonstrated sufficient English language proficiency. On 18 July 2013, counsel for the Tertiary College, Chen Palmer, complained to the Ombudsman.

Ombudsman's role

1. Under section 13(1) of the Ombudsmen Act 1975 (OA), I have the authority to investigate the administrative acts, decisions, omissions and recommendations of agencies scheduled under the Act, including the Teachers Council.
2. My role is to consider the administrative conduct of the Teachers Council, and to form an independent opinion on whether that conduct was fair and reasonable (section 22(1) and (2) of the OA refer).
3. The relevant text of these statutory provisions is set out in Appendix 1.
4. My investigation is not an appeal process. I would not generally substitute my judgment for that of the decision-maker. Rather, I consider the substance of the act or decision and the procedure followed by the Teachers Council, and then form an opinion as to whether the act or decision was properly arrived at and was one that the Teachers Council could reasonably make.

Complaint

5. On 9 October 2013, I notified the following complaint against the Teachers Council:
"NZTC [Tertiary College] has complained as follows:
 1. *The Teachers Council has changed its policy regarding the language requirements for teachers and sought to retrospectively apply the new policy to 120 students who were admitted to the programme prior to the change. It is now imposing an additional requirement for graduates to undergo English language testing prior to registration.*
 2. *The Teachers Council has failed to follow its Registration Policy under which a person is satisfactorily trained to teach if they (a) have a tertiary level qualification that includes sufficient elements of teacher education, and (b) can demonstrate that they meet the graduating teacher standards. The*

Registration Policy states that by successfully graduating from a Teachers Council approved Initial Teacher Education Programme, the Teachers Council will consider that those requirements are met.

In commenting on its complaint, NZTC [Tertiary College] has acknowledged that the New Zealand Teachers Council Standards for Qualifications that lead to Teacher Registration: Guidelines for the Approval of Teacher Education Programmes state that entry standards and processes must ensure that a graduating teacher attains ‘a level of 7 in all components of the academic version of the IELTS test when they are immigrants to New Zealand and English is their second language’. However, it maintains there is no requirement for the College to retest students prior to graduation, and further that ‘the Panel determined in November 2006 that the College’s requirement that on entering the course the student must have an IELTS score of 6.5 overall or equivalent, was sufficient to ensure that on graduating, the student would attain a level of 7.0 in the components of IELTS.’

Chen Palmer is of the view that the requirement to language test the graduating students is:

- 1. A breach of the Teachers Council’s duty to act fairly.*
- 2. A breach of a legitimate expectation that the Teachers Council would comply with its Registration Policy by registering the graduates.”*

Tertiary College’s desired outcome

6. By letter dated 30 May 2013 to the Teachers Council, the Tertiary College stated:

“We consider that the only sensible and legally consistent solution is for the Council to register the students or graduates affected by this issue in line with its unambiguous statements and past practice.”

7. Similarly, by email dated 13 September 2013 to the Deputy Ombudsman, the Tertiary College stated:

“Remedy sought

The Tertiary College wants the Teachers Council to apply its Registration Policy consistently, and register the 120 individuals who have or are soon to graduate from the Bachelor of Teaching (ECE), without requiring additional English language testing.”

Investigation

8. On 9 October 2013, the Teachers Council was notified of the Tertiary College’s complaint.
9. On 15 November 2013, the Teachers Council responded to the notification.

10. On 17 December 2013, I advised the parties of my provisional opinion that the Teachers Council had not acted unreasonably.
11. On 23 December 2013, the Teachers Council responded to the provisional opinion.
12. On 7 February 2014, the Tertiary College responded to the provisional opinion.
13. Following concerns raised by the Tertiary College in its response to the provisional opinion, further information was obtained from the Teachers Council and NZQA.

Summary of opinion

14. I have concluded that the Teachers Council has not acted unreasonably. The basis for my opinion is set out below.

Analysis and findings

English language proficiency

15. The Tertiary College's complaint to the Ombudsman stated that the Teachers Council's "*conduct in relation to the issue of the English language competency of the College's graduates appears contrary to law, unreasonable and unjust*". It submitted that the Teachers Council is "*disputing its clearly documented approval of the College's English language entry requirements and is refusing to progress the registration of 120 graduates.*" It further claimed "*the Council has adopted a series of further inconsistent positions with respect to the English language standard it says applies*".
16. It is important to note that although the Teachers Council has a policy on English language proficiency 'exit' requirements, (the 'Guidelines for the Approval of Teacher Education Programmes'), it does not have a policy on 'entry' requirements. The Teachers Council's English language proficiency exit requirements are summarised below.

English Language proficiency exit requirement

The 2005 Guidelines

17. In February 2005, the Teachers Council issued its 'Guidelines for the Approval of Teacher Education Programmes' ('the 2005 Guidelines'). The 2005 Guidelines (clause 3.11) state that an application for approval of a teacher education programme which leads to registration:

*"... needs to demonstrate **how entry standards and processes ensure that the graduating student teacher:***

- *meets the registration criteria of good character and fit to be a teacher*

- *achieves at the level of a bachelors degree or a graduate diploma*
- *can communicate clearly in English or in Maori in a way that will be effective when working with children and that will model good language*
- ***attains a level of 7 in all components of the academic version of the IELTS test when they are immigrants to New Zealand and English is their second language***
- *has the qualities and dispositions which enables them to meet the registration criteria of the Satisfactory Teacher Dimensions.*

Evidence will be provided that shows how the institution will ensure that entry into the qualifications programme meets the expectations of the NZ Qualifications Authority publication The New Zealand Register of Quality Assured Qualifications (August 2001). The Teachers Council has agreed that the holders of a Diploma of Teaching can be admitted into a Graduate Diploma of Teaching Programme.” (emphasis added)

18. By letter dated 15 November 2013, the Teachers Council advised the Ombudsman:

1. *“Accordingly, the 2005 Guidelines make it clear that the expectation of the Teachers Council is that, on graduation, a student who does not speak English as a first language will be able to achieve a score of at least 7 in all four components or bands of IELTS (academic version). These components are listening (i.e. comprehension of spoken English), reading, writing and speaking.*
2. *The reason for this is plain. A person who does not speak English as a first language and is going to learn how to teach in a New Zealand institution, and then teach children in New Zealand early childhood centres and schools, must have a minimum level of competence in each of those four components. Achieving the minimum in, say, reading and writing, will not be sufficient if the person cannot also understand spoken English and speak English at that minimum level.”*

Comment

19. It is clear that the English language proficiency requirement is an exit standard of *“level of 7 in all components of the academic version of the IELTS test”*.

Language Requirements for Teaching in Aotearoa New Zealand

20. In March 2006, the Teachers Council finalised its ‘Language Requirements for Teaching in Aotearoa New Zealand’ Registration Policy (‘Language policy’). The Language policy remains in force, although in a revised form from December 2011. The Language policy states:

“The Policy

7. **The policy applies to all those making an application for either teacher registration or a Limited Authority to Teach.**
8. The Council is **satisfied that teachers making their initial application hold a sufficient level of English or Maori proficiency, if:**
 - a. They have **completed initial teacher education in New Zealand, or**
 - b. Any overseas applicants have completed teacher education in the medium of English and in a country where English is an official language, or
 - c. English or Maori is their first language and it has been the medium of instruction in their primary and secondary schooling, and all schooling qualifications have been completed in English or Maori.
9. That the Council require all teachers making an initial application, who **do not meet the above requirements, to satisfy the requirements of (a) and (b) below:**
 - a. Undertake and pass an approved test of language proficiency.
 - b. That the approved tests and required pass rates in these tests be;
For English:
 - i. **IELTS: A minimum score of 7 in each category of the academic version of the test.**
 - ii. ISLPR: accept 4 in all modules
 - iii. CAE: Grade B.
 - iv. CPE: Pass.
 - v. PEAT: Band A (not available in NZ).For Te Reo Maori:
 - vi. (vi) NMLPT / Whakamātauria Tō Reo: accept level four....
14. **In all cases the Council retains discretion for exceptional or compelling cases to be considered on a case by case basis.” (emphasis added)**

Comment

21. Consistent with the 2005 Guidelines, the Teachers Council’s Language policy provides that applicants for registration, who have not completed initial teacher education in New Zealand, must obtain a stipulated minimum score in an approved language proficiency test. The approved English language proficiency tests are IELTS, ISLPR, CAE, CPE, and

PEAT. The minimum IELTS (International English Language Testing System) is a score of 7 in each of the four components of the academic version of the test.

Tertiary College's application for degree approval and accreditation

22. The Tertiary College was granted degree approval and accreditation for its Bachelor of Teaching (Early Childhood Education) subsequent to the creation of the above policy documents. The relevant language standards are outlined in the Tertiary College's October 2006 'Application for Degree Approval and Accreditation' (version 2) for the Bachelor of Teaching (Early Childhood Education). Page 59 of the application states:

"Applicants must demonstrate that they have sufficient skill in English or Maori to successfully achieve at degree level study. International applicants whose first language is neither English nor Maori, the two official languages of Aotearoa/New Zealand, must provide evidence of meeting the following English language requirements:

- ***Level 7 degree and diploma programs [including the Bachelor of Teaching (Early Childhood Education) programme] approved by the NZ Teachers Council and enabling graduates to apply for registration as a teacher - an IELTS (Academic) results card issued within the last two years with a minimum band score of 7.0 across all bands.*** (emphasis added)

23. Page 60 of the application also states:

"Applicants need to be aware that the current requirements of teacher registration are:

Either

An IELTS (Academic) results card with a minimum score of seven in each of the modules of listening, reading, writing and speaking is required at the one sitting.

Or:

An International Second Language Proficiency Ratings (ISPLR) minimum score of four in each of the macro skills of listening, reading, writing and speaking is required.

Or:

The Professional English Assessment for Teachers (PEAT) test result of Band A in all four components of listening, reading, writing and speaking is required. (emphasis added)

Comment

24. It is clear that the Tertiary College understood and accepted that one of the key English language proficiency exit requirements was an IELTS (Academic) results card with a

minimum score of seven in each of the bands (or 'modules') of listening, reading, writing and speaking (achieved at one sitting).

25. It was noted by the NZQA and Teachers Council Panel ('the 2006 Panel'), which was convened to consider the Tertiary College's application for approval and accreditation of its Bachelor of Teaching (Early Childhood Education) programme, that page 59 of the application documentation was ambiguous as to whether a score of 7.0 across all bands was also an entry requirement to the Tertiary College. However, subsequent clarification was provided by the Chief Executive of the Tertiary College to the Panel on 6 November 2006, which indicated that this was the exit requirement.

26. In response to my provisional opinion, the Tertiary College expressed concern about the use of the term 'exit' standard. The Tertiary College submitted:

"It is not correct to characterise this as an 'exit standard' in the sense of a standard each graduate is tested against before they are eligible for registration."

27. The term 'exit' standard is used simply to differentiate between the standard required of a student when applying for entry into a particular course or qualification, and the standard, set out in the 2005 Guidelines, which a graduate student must be capable of attaining in order to apply for registration as a teacher. I note that the entry/exit terminology is used throughout the respective parties' correspondence, including in the Tertiary College's original complaint to the Ombudsman.

28. During the course of this investigation, I asked the Teachers Council to consider complementing the guidance about the English language proficiency exit requirements, with explicit guidance on appropriate entry requirements. I observed that, if the Council had had a clearly articulated policy pertaining to the entry requirements, much of the confusion in this case might have been avoided.

29. In responding the Teachers Council advised:

"You have recommended that we 'consider complementing the guidance about the English language proficiency exit requirements, with explicit guidance on appropriate entry requirements'. This has already been actioned ..."

English language proficiency entry requirement

30. As a step towards ensuring that the stipulated English language proficiency minimum standards on exit are obtained, minimum standards on entry are set by agreement with the 'Approval Panel'. The panel's general role is to evaluate the proposed qualification and submit a report to the NZQA Board for formal degree approval. The applicable entry requirement has proved to be a contentious issue in this case, and has been the focus of the respective parties' correspondence. As noted by the Tertiary College in its letter of 30 May 2013:

“The problem arises out of a difference in view between the College and the Council as to what English language proficiency [entry] requirement was approved by NZQA and the Council in 2006; and re-approved in 2008.”

31. I will briefly outline the respective positions and my opinion on the basis of the available information. By way of background, the IELTS (International English Language Testing System) Academic test is comprised of four bands (or ‘modules’) listening, reading, writing and speaking. Candidates receive scores on a scale from 1 to 9. A score is reported for each band. The four individual band scores are averaged and rounded to produce an overall score.

Tertiary College’s position

32. By letter dated 30 May 2013 to the Teachers Council, the Tertiary College states:

*“It is clear from the evidence that the English language standard applicable to students entering the Bachelors programme prior to 1 January 2011 was a score of **6.5 overall in IELTS or equivalent.**”* (emphasis added)

33. More specifically, in the same letter the Tertiary College states:

*“The College maintains that the requirement was an **entry score of 6.5 overall IELTS or equivalent.** There was **no minimum score for individual components and alternatives to IELTS were permitted.** The requirement was an entry requirement.”* (emphasis added)

34. The basis for the Tertiary College’s position is set out in detail in its letter of 18 July 2013 to the Ombudsman and its letter of 30 May 2013 to the Teachers Council.

35. The key submission advanced by the Tertiary College is that the Tertiary College’s Academic Regulations, dated November 2006, state at clause 3.3 that students must *“have an English proficiency level equivalent to IELTS 6.5”*. It is submitted that these Academic Regulations were circulated to, and subsequently approved by, the Panel considering the Tertiary College’s application for accreditation and approval of the Bachelor of Teaching (Early Childhood Education) in 2006.

36. The Tertiary College also notes that, at clause 4(b) of the ‘NZQA Degree Approval and Accreditation Report’, the Panel stated *“NZTC does currently comply with the NZ Teachers Council standards”*. It is, therefore, submitted:

“Thus the Panel determined in November 2006 that the College’s requirement that on entering the course the student must have an IELTS score of 6.5 overall or equivalent, was sufficient to ensure that on graduating, the student would attain a level of 7.0 in all components of IELTS.”

37. In its letter to the Teachers Council of 30 May 2013, the Tertiary College acknowledges:

“It is correct that the College stated in its written response to Panel feedback dated 6 November 2006 ... that: ‘the language standard for entry to the degree is 6.5 with 6.0 in all bands’ (clause 5.1 page 20).”

38. However, the Tertiary College submits:

“... on further consideration and based on feedback from the Panel, this English language entry requirement was revised to an IELTS score of 6.5 overall or equivalent (with no minimum). The revised requirement formed the basis of the November 2006 Academic Regulations which was circulated to all Panel members, was discussed at the Panel’s meeting from 8 to 10 November 2006 and formed the basis of its recommendation for approval for the programme.”

39. I also note the points made by the Tertiary College in its letter of 30 May 2013 to the Teachers Council, in which it is stated that *“the Council understood and endorsed the College’s English language criteria for the Bachelor of Teaching (Early Childhood Education)”*.

Teachers Council’s position

40. In its letter of 15 November 2013, which responded to notification of the complaint, the Teachers Council states:

*“The entry standard agreed was an **overall score of 6.5 in the IELTS (academic) test, with a minimum of 6.0 in each band.**”* (emphasis added)

41. In the Appendix to its letter of 15 November 2013, the Teachers Council provides a detailed contextual analysis in support of its submission that the correct English language proficiency entry requirement was an *“overall score of 6.5 in the IELTS (academic) test, with a minimum of 6.0 in each band”*. I will briefly summarise the arguments; they are included in full in Appendix 2.

42. The Teachers Council focuses on the context surrounding the assessment, undertaken by the NZQA and Teachers Council Panel (‘the 2006 Panel’), of the Tertiary College’s application for approval and accreditation of its Bachelor of Teaching (Early Childhood Education). In particular, it emphasises the written statement made by the Chief Executive of the Tertiary College, on 6 November 2006, in response to the 2006 Panel’s feedback, in which she states:

*“**The language standard for entry to the degree is 6.5 with 6.0 in all bands.** This is a consistent entry point with a similar degree program given by the Auckland University of Technology.”* (emphasis added)

43. The Teachers Council submits that on the basis of this *“unequivocal advice to the 2006 Panel”*, the language standard on entry was an overall score of 6.5 in IELTS, with no less than 6.0 in all bands.

44. The Teachers Council argues that the context surrounding the '2007 monitor's report', the Tertiary College's application to amend its entry regulations in February 2008, the correspondence about the 'B115 course', and the '2008 Panel review', support its position on the applicable English language proficiency entry requirement.

Decision on applicable entry requirement

45. On the basis of the available evidence, I accept that the 2006 Panel had set and notified an English language proficiency entry requirement of IELTS (Academic) 6.5 overall with 6.0 in all bands, in approving and accrediting the Bachelor of Teaching (Early Childhood Education). I am also satisfied that the entry standard has since been revised upwards by the Tertiary College, to a minimum band score of 6.5 in each band.
46. I have taken note of the fact that the Tertiary College's Academic Regulations (version 3), which were circulated to the 2006 Panel, state that students must *"have an English proficiency level equivalent to IELTS 6.5"*. I have also noted that the NZQA Deputy Chief Executive's memorandum of 18 December 2006 states that *"NZTC does currently comply with the NZ Teachers Council standards"*. However, in light of the wider context, I do not consider these factors to be determinative.
47. In 2006 NZQA convened a Panel to assess the Tertiary College's application for approval and accreditation ('the 2006 Panel'). The 2006 Panel also consisted of two Teachers Council representatives. Of particular relevance is the written statement made by the Chief Executive of the Tertiary College, quoted in paragraph 42 above, that the *"language standard for entry to the degree is 6.5 with 6.0 in all bands."*
48. In its letter of 26 June 2013 to the Teachers Council, the Tertiary College seeks to minimise the import of this statement by asserting that *"[The Chief Executive of the Tertiary College] has explained to the Teachers Council, on four separate occasions, that this proposal was superseded by an IELTS score of 6.5 overall or equivalent (with no minimum)"*.
49. The Tertiary College's letter of 30 May 2013 to the Teachers Council further states:
- "[O]n further consideration and based on feedback from the Panel, this English language entry requirement was revised ... The revised requirement formed the basis of the November 2006 Academic Regulations which was circulated to all Panel members, was discussed at the Panel's meeting from 8 to 10 November 2006 and formed the basis of its recommendation for approval for the programme."*
50. I understand that the above quote is referring to the replacement of the Tertiary College's Academic Regulations version 2 with version 3. Although there appear to be very few differences of substance between version 2 and version 3, it seems that the entry criteria for Level 7 Diploma and Degree Programmes were collapsed under one generic heading, entitled 'Admission to Level 7 Degree Programs'. The entry language standard in version 3 was stated as being *"an English proficiency level equivalent to IELTS 6.5"*.

51. The first page of the Academic Regulations (version 3) provides some context for the above amendments. It states:

“Draft 2 [version 2] of the Academic Regulations was previously forwarded to the panel with the original application. These regulations have since been submitted to the [Tertiary College’s] Academic Board for consultation. As a result of this process, feedback has been received, acknowledged and incorporated into Draft 3 [version 3].”

52. In its letter of 30 May 2013, the Tertiary College states that the Academic Regulations (version 3) were circulated to Panel members and *“discussed at the Panel’s meeting from 8 to 10 November 2006”*. This was only two to four days after the Chief Executive of the Tertiary College’s written response, of 6 November 2006, to the 2006 Panel, which clarified the entry requirements. There is no evidence that the Chief Executive of the Tertiary College retracted her response before the Panel’s meeting of 8 to 10 November 2006, nor of her retracting her response before the NZQA Deputy Chief Executive’s memorandum of 18 December 2006, which recommended that the Bachelor of Teaching (Early Childhood Education) be approved and the Tertiary College accredited. Given that the Academic Regulations (version 3) were circulated only a few days after the Chief Executive of the Tertiary College’s response, it would seem entirely inconsistent for these amended regulations to set a different and lower entry requirement than the one so recently discussed.
53. Furthermore, in the NZQA Deputy Chief Executive’s memorandum of 18 December 2006, it was recommended that the Tertiary College *“consider reviewing the entry IELTS requirement **upwards** to Level 7 at least in the Speaking band, and a minimum of 6.5 across the rest of the bands”*. (emphasis added) Given this recommendation that the entry requirement be revised upwards, it would seem highly improbable that the Panel would have agreed to a lower IELTS entry standard than that advised by the Chief Executive of the Tertiary College on 6 November 2006, by removing the minimum band scores.
54. The Panel also needed to be cognisant of the fact that students graduating from the Bachelor of Teaching (Early Childhood Education) programme would, in accordance with the Teachers Council’s 2005 Guidelines, need to be able to attain at least 7 in all IELTS (Academic) components. Such a consideration would clearly militate against a downwards revision of the entry criteria.
55. The Teachers Council advises that it has *“no documentary or other record of any such reconsideration or downwards revision”*. I too have seen no such evidence in the extensive material before me. It seems inconceivable that the Panel would have agreed to such a downward revision, without any record of the discussion or rationale.
56. Given the Chief Executive of the Tertiary College’s earlier unequivocal statement, intended to clarify a perceived inconsistency identified by the 2006 Panel, it seems probable that the Panel understood the reference, in the Tertiary College’s Academic

Regulations (version 3), to “*English proficiency equivalent to IELTS 6.5*” to mean IELTS 6.5 overall with 6.0 in all bands.

57. In any event the Tertiary College has, since 2006, explicitly lifted its entry standards to a minimum score of 6.5 in each band. I understand this would have been the applicable entry requirements of all currently graduating students, given the length of the relevant teaching courses. The Tertiary College’s 2008 Academic Regulations, submitted for approval to the Teachers Council in 2008 (in the context of the Tertiary College’s request to amend its entry regulations for the Early Childhood Education bachelor programme), state that the entry requirement into the Level 7 Early Childhood Education course is “*an IELTS (Academic) results card issued within the last two years **with a minimum band score of 6.5***”. (emphasis added)
58. In summary, I confirm my opinion that:
- a. the entry standard agreed to in 2006 was an IELTS (Academic) score of 6.5 overall with a minimum of 6.0 in all bands; and
 - b. that standard has since been raised to an IELTS (Academic) minimum score of 6.5 in all bands.

Response to provisional opinion

Approval and Accreditation Process

59. In response to the provisional opinion, the Tertiary College indicated that it was “*concerned that the provisional opinion misunderstands how the degree approval and accreditation process relating to initial teacher education programmes works*”. It provided a copy of a sworn affidavit from A, a former Quality Assurance Analyst at NZQA. A’s affidavit provides a useful outline of the NZQA degree approval and accreditation process. This material places in context the above discussion, of the correct English language proficiency standard.

60. A explains:

“The degree approval and accreditation process

4 *The process for seeking approval and accreditation from NZQA for a new qualification is lengthy and involved. In my experience, it would usually take a minimum of six months from submission of an application to approval by the NZQA Board.*

5 *When a provider makes an application to NZQA for degree approval and accreditation, they are required to submit formal documentation that is prepared on the basis of NZQA and, where relevant, professional body guidelines. Once received by the NZQA, this documentation is analysed by an NZQA analyst. If the NZQA analyst considers, in their professional opinion, that the documentation is sufficiently comprehensive, then the analyst will (in consultation with the applicant, the professional body*

and the Universities Committee) convene a panel. The panel's role is to evaluate the proposed qualification and submit a report to the NZQA Board for formal degree approval. When selecting the panel to consider an application for approval and accreditation, NZQA includes representatives from industry regulators, such as the Nursing Council or the Teachers Council. Many of these bodies have their own guidelines for registering individuals to their professions, and they need to have confidence in the qualification. For this reason and to ensure that the proposed qualification will meet the professional body standards, providers generally seek advice from the relevant professional body while preparing the application. However, it is NZQA that has statutory responsibility for granting and approving accreditation of degrees. NZQA considers the criteria of regulatory bodies; but these are guidelines only.

- 6 Once convened, the application documentation is sent to each panel member together with a pro-forma analysis form which sets out the key degree approval criteria which both NZQA and the relevant professional body require to be met. Each panel member reads the documentation and undertakes a fairly quick initial analysis of it. The panel member may then make notes on the pro-forma analysis form, detailing positive and negative aspects of the application, as well as aspects which require clarification. It is expected that these areas will be discussed during the formal evaluation visit. The NZQA analyst collates each panel member's response and circulates it to the provider and to the panel; and the provider then prepares a written response to the panel's initial comments. The response from the provider is circulated to panel members prior to the evaluation visit.*
- 7 Once this preliminary process is completed, the panel convenes for the formal component of the evaluation process: the evaluation visit. This visit will usually take two to three days. During the evaluation visit, each approval and accreditation criterion is worked through by the panel. The panel will reach a decision as to whether each criterion is met, and any decision must be unanimous (although on very rare occasions this has not been possible, and both a majority and minority report have been presented to the NZQA Board). When reaching its decision as to whether or not a degree should be approved, the panel may consider imposing a 'requirement', 'recommendation' or 'suggestion' as part of the final approval. A 'requirement' is something that the provider must complete within a certain timeframe to the NZQA's and/or the degree monitors satisfaction, before approval of the degree will be given. A 'recommendation' is a proposal for change (often to be overseen by the degree Monitor), and while it is not compulsory that a provider implement a recommendation, the provider will require a good reason*

not to. A 'suggestion' is a proposal that the provider may or may not adopt at their discretion.

- 8 *At the end of the evaluation visit, a report is compiled which is circulated to each panel member and to the provider to ensure that it is factually correct. Each panel member must sign a statement that the report is an accurate record of the process and confirm the findings that is, each panel member must endorse the recommendation to the NZQA Board that the degree be approved, and the provider accredited to offer it. The report, together with the signed statements, is then submitted to the NZQA Board which is the only body which can legally approve and accredit a degree."*

61. I note that this investigation was not intended to scrutinise the overall process by which the Tertiary College's Bachelor of Teaching (Early Childhood Education) programme gained approval and accreditation, but rather to examine the aspects of the process which shed light on the respective parties' understanding of the English language proficiency entry requirement.

Testimonial evidence

62. In response to the provisional opinion, the Tertiary College advised:

"Leaders and managers of early childhood services have sent NZTC letters of support and endorsement, specifically around the level and appropriateness of the English language proficiency of some of these graduates."

...

"NZTC submits that these testimonials show that the graduates in question are well qualified people and have a very good command of the English language. Although the individual affected students will themselves appeal if the Ombudsman's provisional report is upheld and they need to prove an IELTS score of 7, NZTC wishes to emphasise that the graduates concerned are not inadequate English speakers, and submits that this is of general relevance to the question of the exercise of the Teachers Council's discretion and to the complaint at issue."

63. This material is of general relevance only. The focus of the investigation is on the reasonableness of the Teachers Council's decision not to register a number of graduates from the Tertiary College. The investigation is not concerned with the merits of individual decisions on individual cases. These matters would more appropriately be the subject of an appeal to the District Court, under section 126 of the Education Act 1989, by any applicant dissatisfied with a decision by the Teachers Council relating to registration.
64. The testimonial evidence is also too general to make a finding that the students meet the required English language proficiency standards.

Tightening of entry standard

65. In response to the provisional opinion, the Tertiary College also submitted:

“if the NZQA/Teachers Council panel had considered it necessary for there to have been a minimum score of 6.0 in each component of IELTS or equivalent (in addition to an overall score of 6.5), the Panel would have made this a written requirement in its Panel Report, to be monitored on an ongoing basis.”

66. Essentially, the Tertiary College appears to be arguing that the 2006 Panel should have recorded any tightening of the entry standard. However, given my opinion that the Panel would have understood that the standard was 6.5 overall with 6.0 in each band, I am not persuaded that there was any tightening of the entry standard and, therefore, any need to make a written comment.

2008 Regulations

67. In responding to the provisional opinion, the Tertiary College submitted:

“At paragraph 38 of your provisional opinion you state that the NZTC lifted its English language entry standard in 2008. In fact, there was no change to this entry standard until 2011, when the Teachers Council changed its policy. The nomenclature changed in the 2008 version of the Regulations, and states that: Level 7 programs – an IELTS (Academic) results card issued within the last two years with a minimum band score of 6.5. While the wording changed, the entry standard remained the same: an overall IELTS score of at least 6.5 with no requirement of a minimum score in each component.”

68. I sought the Teachers Council’s response to this issue. It advised:

“In our view, the best interpretation is that the 2008 Academic Regulations provided for a minimum entry standard of 6.5 in all bands. That is what the Regulations say.”

69. In my opinion the reference in the 2008 regulations to *“a minimum band score of 6.5”* can only be read as meaning a minimum score of 6.5 in each band. Furthermore, such a revision would have been consistent with the recommendation contained in the Deputy Chief Executive of NZQA’s memorandum of 18 December 2006, that the Tertiary College *“consider reviewing the entry IELT requirement **upwards** to Level 7 at least in the Speaking band and a minimum of 6.5 across the rest of the bands.”* This upwards revision is of considerable importance because the 2008 Academic Regulations would have been in force at the time the affected students entered the Bachelor of Teaching (Early Childhood Education) programme. Therefore, even if my interpretation of the original English language proficiency entry standard is contested, the subsequent upwards revision in 2008 clearly sets a standard that the affected Tertiary College graduates do not meet.

Emphasis on certain evidence

70. In response to the provisional opinion, the Tertiary College expressed concern that “*while the provisional opinion places considerable emphasis on certain evidence; it places none at all on other, highly relevant evidence*”. In particular, the NZTC queried “*why [B]’s evidence was not given any weight in the provisional opinion, which is what the failure to mention it signals*”. The Tertiary College submitted that the “*opinion places great emphasis on the preliminary, pro-forma panel question and answer given by [the Chief Executive of the Tertiary College] on 6 November 2006, as against the formal Academic Regulations and Panel Report*”.

71. As noted by the Tertiary College in its letter of 30 May 2013:

“The problem arises out of a difference in view between the College and the Council as to what English language proficiency [entry] requirement was approved by NZQA and the Council in 2006; and re-approved in 2008.”

72. During the course of this investigation, it has been necessary to weigh all the available evidence in order to form an opinion. Given the volume of evidence submitted, it was not practicable or desirable to incorporate references to each piece of evidence in this report. I have sought to identify the key pieces of evidence relied on. Ultimately, it is for me, as Ombudsman, to determine what is relevant and persuasive evidence. In this case, it was important to consider the Academic Regulations (version 3) in context. Thus, the “*pro-forma panel question and answer given by [the Chief Executive of the Tertiary College] on 6 November 2006*” was important contextual evidence.

73. The first part of the provisional opinion specifically assessed the respective parties’ positions on the applicable English language proficiency entry requirement; specifically, whether it was IELTS (Academic) 6.5 overall with 6.0 in all bands or IELTS (Academic) 6.5 overall, with no minimum band score. Although B’s evidence is of general relevance, at paragraph 12 of his affidavit he states:

*“At the end of this discussion we all agreed to the College’s proposed English language entry criteria. The agreement was unanimous. **I have no specific recollection of the actual detail of the English language criteria that were approved**, but I expressly remember that we had all agreed that IELTS was not the be all and end all, and we recognised that the College could use a range of methods to gain sufficiency of evidence in order to determine the English language proficiency of applicants to the degree.”* (emphasis added)

74. B’s evidence does not assist in determining the key factual issue, namely what the specific English language proficiency entry requirement was at the relevant time.

Conclusion on applicable entry requirement

75. As explained above, the Teachers Council does not have a policy pertaining to English language proficiency entry requirements; it has only a policy pertaining to exit requirements. While there appears to be no dispute that an applicable English language

proficiency exit requirement is an IELTS (Academic) results card with a minimum score of 7.0 in each of the bands of listening, reading, writing and speaking (achieved at one sitting), there is significant dispute as to what the relevant entry requirement was.

76. For the reasons outlined above, I confirm my opinion that the correct English language proficiency entry requirement approved in 2006 was IELTS 6.5 overall with 6.0 in all bands, which has since been revised upwards to a minimum of 6.5 across all bands. It follows that the Tertiary College has applied, and continues to apply, the incorrect English language proficiency entry requirement.
77. Notwithstanding the submissions by counsel (Ms Gardiner's email of 24 October 2013) that *"it is unclear exactly what that policy is because the Council keeps changing its position"*, in my opinion the Teachers Council has consistently maintained that the applicable entry standard agreed to in 2006 was IELTS 6.5 overall with 6.0 in all bands. As noted in the Tertiary College's letter of 30 May 2013, the *"Council appears to maintain that the standard approved was IELTS 6.5 overall with a minimum score of 6.0 in each component. This is the message taken from the Council's 13 May 2013 letter and, we understand, the position taken in meetings with the College."* Arguably, any perceived lack of clarity about the agreed standard was due to the Teachers Council's willingness to explore a compromise. For example, in its letter of 5 June 2013, the Teachers Council indicated that it would register a student who *"can now attain a total score of 6.5 in the IELTS test, with a minimum of 6.0 in each component"*, in spite of the exit standard being 7.0 in each band. (underlining added)
78. In response to the provisional opinion, the Tertiary College also submits:
- "that the Teachers Council does not have probative evidence to support a conclusion that each of the graduates is not competent in English. Teachers Council's discretion must be used on the basis of probative evidence, and in the light of the approved Academic Regulations."*
79. In Appendix 2 of its letter to the Tertiary College of 9 August 2013, the Teachers Council explains:
- "10. In early September 2012, the Council and NZQA held a panel to begin a review and approval of changes to the Bachelor of Teaching (ECE) programme. At the September panel meeting, an inquiry was made about the English entry proficiency levels of EAL (or 'English as a second language') candidates into the programme in previous years and if the EAL graduate's English proficiency levels were checked prior to them graduating. That is that graduates were able to meet the Council's exit proficiency requirements for English language, as per the 2005 Standards for Qualifications That Lead to Teacher Registration. College staff members were vague in their responses about this requirement.*
- 11. Following the review and approval panel, the Manager Teacher Registration, Ms Thomas, and Ms Benson, requested the details of EAL students who had been enrolled on the Bachelor of Teaching (ECE) since its approval in 2006.*

The College provided spreadsheets of these students and graduates in both the Graduate Diploma and Bachelors programmes to the Council. These included the admission dates and the candidate's English language proficiency results. There were IELTS results that were well below the '6.5 overall with no component lower than 6.0', which was the Council's understanding of the entry level for EAL candidates that the College was using. Copies of these spreadsheets are attached. (emphasis added)

80. The spreadsheets, referred to in the Teachers Council's letter, demonstrate that some students did not meet requisite entry standard. If the Tertiary College can furnish the Teachers Council with probative evidence which demonstrates that an individual student has attained the correct English language proficiency entry requirement, there would appear to be no impediment to that student successfully applying for registration, subject to meeting any other relevant registration criteria.

Legitimacy of further testing

81. The Teachers Council has indicated that it would be prepared to register an applicant who can show that they met the English language proficiency entry standard at the time the course was approved (IELTS 6.5 overall with 6.0 in all bands). Alternatively, it will register an applicant who can prove that they now meet the English language proficiency exit standard (level of 7 in all components of the academic version of the IELTS test).
82. In the Tertiary College's letter of 18 July 2013, it is submitted that the *"Council's refusal to register graduates ... without further testing of their English language proficiency is a breach of its duty to act fairly."*
83. I confirm my opinion that if applicants cannot prove that they meet the correct English language proficiency entry standard, it is reasonable for the Teachers Council to require them to undertake further testing to ensure that they now meet the clearly articulated English language proficiency exit standard.

Legitimate expectation

84. One of the key arguments made by the Tertiary College is that the Teachers Council's 'Registration Policy' gives advanced rise to a *"legitimate expectation"* that, where a student successfully graduates from a Teachers Council approved Initial Teacher Education ('ITE') programme, he or she will be registered.
85. In the Tertiary College's letter of 30 May 2013, it submitted:

"Legal position

39 *The Council's refusal to register graduates from the College's Bachelor of Teaching (Early Childhood Education) without further testing of their English language proficiency is a breach of its duty to act fairly. The Council has already provisionally or finally registered 135 graduates from the programme. Now it is changing its policy without consultation,*

and purporting to apply a new policy to the 120 prospective applicants who have completed the degree and are awaiting registration or are soon to complete their studies. The Council is acting inconsistently and therefore unfairly.

- 40 *The Council's actions are also inconsistent with its unequivocal statement of policy contained in its Registration Policy. This statement of policy gave rise to a legitimate expectation that the Council would follow the policy. The legitimate expectation was that the Council would consider an applicant who had graduated from the College's approved Bachelor of Teaching (Early Childhood Education) as satisfactorily trained to teach, and register them (unless they failed to meet another of the grounds under the Education Act, such as good character and fit to teach).*
- 41 *In addition, the unequivocal statement of policy in the Language Requirement for Teaching in Aotearoa in New Zealand section of the Registration Policy gave rise to a legitimate expectation that the Council would consider graduates from the College's Bachelor of Teaching programme to have a satisfactory level of English.*
- 42 *This legitimate expectation was supported by the Council's course of conduct described above, including:*
- *formally approving the College's Bachelor of Teaching programme in December 2006;*
 - *monitoring its implementation through external monitors (and not raising any issues with the English language entry criteria being applied); and*
 - *formally re-approving the Bachelor programme in September 2008.*
- 43 *Further, the Council has provisionally or fully registered 135 students from the College's Bachelor of Teaching (who entered on the basis of the English language criteria which the Council now disputes). This past practice is consistent with the legitimate expectation that students would, on graduating from the programme, be accepted for registration.*
- 44 *The Council is now acting inconsistently with this legitimate expectation. In doing so the Council is acting unfairly and in breach of the principles of natural justice."*

86. To assess this matter fully, it is necessary to outline:

- the statutory framework which defines the role and functions of the Teachers Council;

- the relevant policy framework; and
- the basis for the Teachers Council's concerns about the Tertiary College's graduates.

Statutory framework

87. The Education Act 1989 ('the Act') sets out the role of the Teachers Council and the statutory framework for the registration of teachers in New Zealand.

88. Section 139AE of the Act sets out the functions of the Teachers Council. It states:

"139AE Functions of Teachers Council

The functions of the Teachers Council are as follows:

- (a) to provide professional leadership to teachers and others involved in schools and early childhood education:*
- (b) to encourage best teaching practice:*
- (c) to carry out the functions under Part 10 relating to teacher registration:***
- (d) to determine standards for teacher registration and the issue of practising certificates:***
- (e) to establish and maintain standards for qualifications that lead to teacher registration:***
- (f) to conduct, in conjunction with quality assurance agencies, approvals of teacher education programmes on the basis of the standards referred to in paragraph (e):***

..." (emphasis added)

89. Under section 122 of the Act, the Teachers Council shall register an applicant as a teacher in New Zealand if satisfied that the applicant is of good character, is fit to be a teacher, **is satisfactorily trained to teach**, and has satisfactory recent teaching experience:

“122 Full registration

The Teachers Council shall register an applicant under section 121 if satisfied that the applicant—

- (a) is of good character; and*
- (b) is fit to be a teacher; and*
- (c) **is satisfactorily trained to teach**; and*
- (d) has satisfactory recent teaching experience.” (emphasis added)*

90. Similarly, section 123 of the Act provides:

“123 Provisional registration

(1) Subject to subsections (2) and (3), the Teachers Council shall register an applicant under section 121 who is not eligible for registration under section 122 or section 124 if satisfied that the applicant—

- (a) is of good character; and*
- (b) is fit to be a teacher; and*
- (c) **is satisfactorily trained to teach**; and*
- (d) either—*
 - (i) has not previously been registered; or*
 - (ii) is likely to be a satisfactory teacher...” (emphasis added)*

91. In determining whether or not a person is satisfactorily trained to teach, section 124A(1) of the Act provides that the Teachers Council “*may take into account **any relevant matters***”. It states:

“124A Determining whether or not training satisfactory

- (1) In determining whether or not a person is satisfactorily trained to teach, the **Teachers Council may take into account any relevant matters**.*
- (2) In determining whether or not a person is satisfactorily trained to teach, the Teachers Council shall take into account—*
 - (a) the person’s qualifications; and*
 - (b) whether or not the person has satisfactorily completed training recognised by the Teachers Council as suitable for people who want to teach ...”. (emphasis added)*

Comment

92. It is clear that the Teachers Council has a wide statutory discretion to determine whether an applicant is satisfactorily trained to teach.

Policy framework

Registration Policy

93. Although the Act sets out the statutory role and functions of the Teachers Council, the Teachers Council's 'Registration Policy' (effective from January 2012), outlines how the Teachers Council "*will interpret and apply*" the legislative requirements. The Registration Policy states:

"Requirements

7. *In order to become provisionally registered a person must be:*

- (a) **satisfactorily trained to teach; and***
- (b) of good character and fit to be a teacher; and*
- (c) likely to be a satisfactory teacher; and*
- (d) committed to the Code of Ethics for Registered Teachers – Ngā Tikanga Matatika mō Ngā Pouako kua Rēhitatia; and*
- (e) **proficient in English or te reo Māori.**" (emphasis added)*

94. The 'Satisfactorily Trained to Teach Policy', which forms part of the overarching Registration Policy states that, for registration purposes, the Council considers a person 'satisfactorily trained to teach' if they:
- a. have a tertiary level qualification that includes sufficient elements of teacher education; and
 - b. can demonstrate that they meet the Graduating Teacher Standards (or equivalent).

95. The Satisfactorily Trained to Teach Policy goes on to state that by successfully graduating from a Council approved ITE programme (such as the Tertiary College's Bachelor of Teaching (Early Childhood Education)) the Teachers Council will consider an applicant to meet these two requirements and be 'satisfactorily trained to teach'. The Satisfactorily Trained to Teach Policy states:

"For gaining registration

12. *When making an application to gain registration for the first time (or if the Council has no record of having seen and accepted an applicant's qualifications) **the applicant is required to provide evidence of being satisfactorily trained to teach by:***

- **having evidence of having graduated from an approved New Zealand ITE programme (in the form of a certified copy of their qualification/s, including entry level qualifications for graduate diploma programmes); or**
- *having evidence of holding an overseas teaching qualification that has been recognised by NZQA as comparable to an approved ITE programme (in the form of an International Qualifications Assessment report) or*
- *having evidence of holding an overseas teaching qualification that has been recognised by NZQA as having the core components of an approved ITE programme (in the form of an International Qualifications Assessment report) or*
- *provides sufficient information to enable the Council to consider making a decision (discussed further at paragraph 19 below) that the applicant is satisfactorily trained to teach.” (emphasis added)*

96. The Satisfactorily Trained to Teach Policy also states:

“In exceptional circumstances only, the Council may consider that a person who does not meet the requirements set out in paragraph 9 above [have a tertiary level qualification that includes sufficient elements of teacher education; and can demonstrate that they meet the Graduating Teacher Standards (or equivalent)] may be satisfactorily trained to teach ...”.
(emphasis added)

97. The ‘Language Requirements for Teaching in Aotearoa New Zealand’ policy, which also forms part of the overarching Registration Policy, states that, for registration purposes, the Council considers a person to “hold a sufficient level of English or Maōri proficiency.” if they “have completed initial teacher education in New Zealand”. The Language Requirements for Teaching in Aotearoa New Zealand policy states:

“The Council is satisfied that teachers making their initial application hold a sufficient level of English or Maōri proficiency, if:

- a. They have completed initial teacher education in New Zealand, or***
- b. Any overseas applicants have completed teacher education in the medium of English and in a country where English is an official language, or*
- c. English or Maōri is their first language and it has been the medium of instruction in their primary and secondary schooling, and all schooling qualifications have been completed in English or Maōri.” (emphasis added)*

98. The Language Requirements for Teaching in Aotearoa New Zealand policy also states:

“14. In all cases the Council retains discretion for exceptional or compelling cases to be considered on a case by case basis.” (emphasis added)

99. It is also important to note the self-stated purposes of the Registration Policy, which include:

“1. Teacher registration is one of the main ways that employers, colleagues, learners and the wider community can be assured that a teacher is qualified, safe and competent.

2. To be lawfully employed in schools, kura, kindergartens and in many positions in early childhood education settings, teachers are required to be registered and to hold a current practising certificate.

3. A practising certificate indicates that a teacher has recently demonstrated that they met the requirements for registration and can be lawfully employed in a teaching position.” (emphasis added)

100. Part C of the Registration policy provides further guidance about the importance and purpose of teacher registration, it states:

“2. Being registered and holding a current practising certificate is a signal of a teacher’s professionalism and integrity. It is one of the main ways that employers, colleagues, learners and the wider community can be assured that a teacher is qualified, safe and competent

3. Teacher registration on its own cannot guarantee teacher quality. However registration provides a consistent and professional foundation of standards on which expectations of continual learning and improvement for teachers can be built.” (emphasis added)

Comment

101. On the face of it, the wording of the Registration Policy suggests that the Teachers Council will always register an applicant who has *“graduated from an approved initial teacher education programme (ITE)”*.

102. The Satisfactorily Trained to Teach Policy does, however, allow the Teachers Council to consider *“a person who does not meet the requirements ... satisfactorily trained to teach”* in *“exceptional circumstances”*. Furthermore, the Language Requirements for Teaching in Aotearoa New Zealand Policy provides that *“[i]n all cases the Council retains discretion for exceptional or compelling cases to be considered on a case by case basis”*.

103. The Tertiary College submits, in its letter of 30 May 2013, that the wording of the Teachers Council’s Registration Policy is an *“unequivocal statement”* which gives rise to a *“legitimate expectation”* that the Teachers Council will register an applicant who has *“graduated from an approved initial teacher education programme (ITE)”*.

104. In its letter of 5 June 2013, the Teachers Council submits:

“On the basis of that analysis any student who graduates from a Council approved programme would be satisfactorily trained to teach, even if the provider had demonstrably failed to apply the standards and requirements it agreed to apply at the time of approval and accreditation for the programme in question. That cannot be the law.”

105. I agree with the Teachers Council. Such an interpretation would appear to render registration a ‘rubber stamp’ which, regardless of the circumstances, must be granted simply because an applicant has graduated from an approved ITE programme.

106. The Tertiary College’s interpretation of the Registration Policy, as set out in its letter of 30 May 2013, was predicated on a very strict and narrow interpretation of the wording. When one considers that the purpose of registration is to assure key stakeholders that a teacher is *“qualified, safe and competent”* and *“provides a consistent and professional foundation of standards on which expectations of continual learning and improvement for teachers can be built”*, such an interpretation cannot be accepted. Plainly, a registration body, such as the Teachers Council, must be able to decline to register an applicant where an approved ITE provider has not applied the correct English language proficiency entry requirements. Such discretion is crucial for safeguarding the integrity of the registration regime and ensuring that registrants are competent to practise.

107. I understand, from its response to my provisional opinion, that the Tertiary College now accepts that:

“... the Teachers Council must retain the discretion not to register individual applicants on a case-by-case basis, even if they have completed an approved initial teacher education qualification in New Zealand.”

108. I have advised the Teachers Council that the wording of the discretion, preserved in respect of the Satisfactorily Trained to Teach Policy, could be revised to better reflect the breadth of its statutory discretion to take into account *“any relevant matters”*.

Basis for Teachers Council’s concerns

109. Before considering the implications of the Registration Policy further, it is important to appreciate the basis for the Teachers Council’s concerns about the English language proficiency of the Tertiary College’s graduates.

110. In Appendix 2 of its letter of 9 August 2013, the Teachers Council outlined the *“information which gave rise to the Council’s serious concerns about the English language proficiency of some of the College’s graduates”*. I will briefly outline the key points:

“7. In the period 2010-2011, anecdotal evidence was beginning to emerge. Various phone conversations occurred between Council staff and recent graduates of the College in which their spoken and listening comprehension in English caused the Council staff to have concerns about their proficiency

levels. This was raised at the weekly team meetings of the Registration Officers.

8. In June 2012, the Council was dealing with an application for provisional teacher registration from [C]. The Council investigated the process by which she was granted recognition for prior learning (RPL) as part of the Bachelor of Teaching (ECE). She was transferring from the Certificate in ECE. On seeking evidence of her English language proficiency at the time of graduating from the bachelor's programme, Council staff learned that she had been granted entry on the basis of the Oxford Quick Placement Test (QPT). This was the first time the Council had heard of this test being used. It was not one that had been used by any provider previously; nor had it been approved by the Council. The College later informed the Council they regarded this as a test that would provide an equivalent to IELTS academic test (attached).

...

10. In early September 2012, the Council and NZQA held a panel to begin a review and approval of changes to the Bachelor of Teaching (ECE) programme. At the September panel meeting, an inquiry was made about the English entry proficiency levels of EAL (or 'English as a second language') candidates into the programme in previous years and if the EAL graduate's English proficiency levels were checked prior to them graduating. That is that graduates were able to meet the Council's exit proficiency requirements for English language, as per the 2005 Standards for Qualifications That Lead to Teacher Registration. College staff members were vague in their responses about this requirement.

11. Following the review and approval panel, the Manager Teacher Registration, Ms Thomas, and Ms Benson, requested the details of EAL students who had been enrolled on the Bachelor of Teaching (ECE) since its approval in 2006. The College provided spreadsheets of these students and graduates in both the Graduate Diploma and Bachelors programmes to the Council. These included the admission dates and the candidate's English language proficiency results. There were IELTS results that were well below the '6.5 overall with no component lower than 6.0', which was the Council's understanding of the entry level for EAL candidates that the College was using. Copies of these spreadsheets are attached.

12. Ms Benson and Ms Thomas then visited the College on 10 October 2012 and 17 December 2012 and viewed the files of selected students at the College.

13. In some cases, the original files at the College contained information that was different from that in the provided spreadsheets. For instance an IELTS score of 8.5 overall for [D] was recorded on the spreadsheet, but 6.5 overall was recorded in the file at the College. In another case, the College file for [E]

showed she had sat the General Training version of the IELTS test, not the Academic Version, as recorded in the spreadsheets provided to the Council. These inconsistencies were concerning to the Council staff.

...

19. As the Teachers Council probed into the issue of the level of English language proficiency of EAL graduates from the Tertiary College, an accumulation of evidence has, steadily built that has raised the level of concern about their English language proficiency."

Comment

111. Based on the information provided by the Teachers Council, I am satisfied that it had a reasonable basis for its concerns about the English language proficiency of the Tertiary College's graduates.
112. In response to the provisional opinion, the Tertiary College has expressed concern that *"the Teachers Council may have made submissions to the Ombudsman about NZTC's [Tertiary College's] graduates that are highly prejudicial; and that these submission (sic) have been material to the opinion. NZTC would like confirmation that all relevant, prejudicial, information submitted by Teachers Council, has been put to it to respond to"*.
113. Any *"prejudicial"* submissions were either contained in the Teachers Council's response to the Tertiary College's Official Information Act 1982 (OIA) request for *"evidence"*, or in the Teachers Council's response to the Ombudsman's notification of the complaint, which was included as an appendix to the provisional opinion. I am satisfied that all material submissions made by the Teachers Council have been provided to the Tertiary College, in accordance with section 18(3) of the OA and the principles of natural justice.

Discussion

114. In this case, I am satisfied that:
- the Teachers Council has a wide statutory discretion to determine whether an applicant is satisfactorily trained to teach;
 - the wording of the Registration Policy should not be construed so narrowly as to exclude the possibility that the Teachers Council could decline to register an applicant, irrespective of the fact that the applicant *"graduated from an approved initial teacher education programme (ITE)";* and
 - the Teachers Council has a reasonable basis for its concerns about the English language proficiency of the Tertiary College's graduates.

Fettering discretion

115. Even if I were convinced that the wording of the Registration Policy obliged the Teachers Council to register an applicant who has *"graduated from an approved initial teacher education programme (ITE)"*, I would regard such a policy as a fetter on the Teachers

Council's statutory discretion to "take into account any relevant matters." (Section 124A of the Act).

116. The law relating to the fettering of a statutory discretion is well summarised in *Taylor's Judicial Review: A New Zealand Perspective* (2nd ed, 2010):

"The topic of fettering discretion is essentially one of charting the principles that identify the line between legally acceptable limits on the exercise of discretion and those which are not legally acceptable. Those which cross the line into unacceptability are said to 'fetter' the discretion ...". (page 770)

117. The type of discretion fettering suggested in this case would fall within Taylor's classification of "overriding policy". This is where policies or rules limit the exercise of discretion to an unacceptable extent. As Taylor explains:

"The development of policy is almost invariably undertaken when actions under the same power are expected to be taken more than occasionally. This is both desirable (to ensure consistency of action) and necessary (for regulating delegated authorities). Reliance on policy is not unlawful. What is unlawful is the blind following of policy: 'the policy cannot deny the power which the law has conferred'. The general principle is that each case must be considered on its own merits; a claim that the policy should not be followed in a particular case must be considered. This does not mean that an exception to policy must be made, but only that the authority should be open to persuasion in deciding that if the policy is so phrased as to admit no exceptions, it is unlawful ... Policy may not be inconsistent with any enactment, and a detailed set of legislative criteria may be held to exclude or restrict power to develop and apply policy. Equally, any policy must be based on factors and purposes relevant to the power, and must not be unreasonable." (page 775)

118. Taylor's perspective was cited with approval in *Criminal Bar Association of New Zealand Inc v Attorney-General* [2013] NZCA 176.

119. Furthermore, in *Weal v Legal Services Commissioner* [2013] NZAR 753, the High Court stated:

"A policy can legitimately assist a decision-maker when exercising a statutory discretion but a policy cannot prevail over or usurp the power conferred upon a decision-maker by a statute or regulation. I do not think that public law principles allow a policy to 'fetter' a statutory power of discretion. I cannot see how there can be a 'lawful' fettering of a statutory power of discretion. If a statutory decision-maker has allowed a policy to fetter their statutory discretion then the decision-maker has failed to discharge its statutory duties and powers." [26]

120. I also note *Patel v Chief Executive of the Department of Labour* [1997] NZAR 264, where, in the context of immigration instructions, the Court of Appeal stated:

“A policy document, such as the one in issue, is not to be construed with the strictness which might be regarded as appropriate to the interpretation of a statute or statutory instrument. It is a working document providing guidance to immigration officials and to persons interested in immigrating to New Zealand or sponsoring the immigration of a person to this country. It must be construed sensibly according to the purpose of the policy and the natural meaning of the language in the context in which it is employed, that is, as part of a comprehensive and coherent scheme governing immigration into this country.” (page 272)

121. In light of the above, even if the strict interpretation of the wording of the Registration Policy were to be accepted, I would consider the Registration Policy an *“overriding policy”* and, therefore, a fetter on the Teachers Council’s statutory discretion to *“take into account any relevant matters”* (section 124A(1) of the Act).

Past practice

122. The Tertiary College has also argued that because the Teachers Council has *“provisionally or fully registered 135 students from the College’s Bachelor of Teaching (who entered on the basis of the English language criteria which the Council now disputes). This past practice is consistent with the legitimate expectation that students would, on graduating from the programme, be accepted for registration.”*

123. The Teachers Council addresses this point in its letter of 5 June 2013, where it states:

“Likewise, the Council’s position cannot be impacted by the fact that it has previously registered students who, unbeknown to it, were insufficiently proficient in English. This was merely the high trust model at work. Once the issues around English language proficiency arose, the Council made further enquiries. This in turn has led to its current position, ie of needing to be satisfied appropriately in relation to these students’ English language proficiency.”

124. I am not persuaded that simply because the Teachers Council has registered graduates previously this creates an obligation to continue to do so in the face of their concerns about the English language proficiency of the graduates.

Conclusion

125. Based on the information before me, I have formed the opinion that:

- the Teachers Council has not changed its policy regarding the English language proficiency requirements for teachers, the correct requirement being an entry standard of IELTS 6.5 overall with 6.0 in all bands, and the correct exit standard being *“level of 7 in all components of the academic version of the IELTS test”*;
- it is reasonable for the Teachers Council to require applicants to undergo English language testing prior to registration, and attain the accepted exit standard (*“a*

level of 7 in all components of the academic version of the IELTS test”), where it is not satisfied that an applicant has met the relevant entry criteria; and

- *the Teachers Council has the necessary statutory discretion to consider “any relevant matters”.*

126. It would, therefore, be open to the Teachers Council to decline to register an applicant from the Tertiary College who cannot demonstrate that they met the English language proficiency entry requirement of IELTS 6.5 overall with 6.0 in all bands, or an equivalent standard.

Other issues

Oxford QPT

127. During the course of the investigation, a further issue arose in relation to ‘alternative’ English language testing regimes.

Tertiary College’s position

128. In its letter of complaint to this Office dated 18 July 2013, the Tertiary College submitted:

“The Council introduced a new concern, and is now maintaining that it will not register graduates who entered the Bachelor of Teaching on an equivalent English language entry requirement. In its letter of 5 July the Council states that it does not accept that the College could undertake various assessments for determining English language proficiency on entry to the Bachelor of Teaching, and this is reiterated in its letter of 9 July. This is inconsistent with the Council’s earlier letters of 5 June and 14 June.”

129. As an appendix to its letter of 30 May 2013 to the Teachers Council, the Tertiary College advised:

“Appendix 15: Criteria applied by the New Zealand Tertiary College to grant equivalence

The College applied the following criteria to grant equivalence to an overall IELTS score of 6.5 when admitting students to the College’s Bachelor of Teaching prior to 1 January 2011:

- *the Council approved alternate entry criteria for students who pathwayed into the Bachelor of Teaching from the College’s Certificate qualification, and specifically an IELTS (Academic) score in each component of 5.5 and the successful completion of course B115 English for Early Childhood during the Certificate course;*

- *a combination of the Oxford University's QPT (Quick Placement Test), two written and timed essays and an oral interview. These assessments were conducted by the academic staff teaching on the College's Bachelor of Teaching;*
- *previous study at tertiary level in either New Zealand or Australia; or*
- *in circumstances where English was equivalent to a candidate's first language (i.e. where a candidate had completed all their schooling in English and English was a primary language at home), a candidate could be granted special admission by the College. We note that the Council recognises this as a first language."*

130. In its response to the provisional opinion, the Tertiary College submits:

"36 NZTC maintains that the Academic Regulations (version 3) specifically envisage the use of alternative assessment measures – through the use of the word 'equivalent'. Based on these approved Academic Regulations, NZTC used alternative assessment techniques for domestic students. This was well understood by the approval panel in 2006 (we refer to paragraphs 10 to 12 of the affidavit of B and paragraph 16 of the affidavit of [A]), and the review panel in 2008 (we refer to paragraph 11 of the 2008 monitor's report). [B] has reiterated to us in the course of preparing this response, that during the time of the panel visit to NZTC in 2006, there was discussion of the use of a 'portfolio of evidence' to assess the English language proficiency of applicants to the degree. The Panel was satisfied with the portfolio approach proposed by NZTC. Had it not been, it would not have approved the qualification.

37 The Teachers Council has never raised any objection to the use of alternative assessment techniques before, despite the fact that it was represented on both the approval panel and the review panel. Teachers Council is now acting unfairly by refusing to progress the registration of students who entered the degree on the basis of equivalent assessment techniques, specifically anticipated in the Academic Regulations which it approved."

Teachers Council's position

131. In its letter of 15 November 2013, the Teachers Council states:

"The College applied a different test to a large number of its students, namely the Oxford QPT, and did not use the accepted IELTS (academic) test. The College also had some students complete essays and an oral interview as part of assessing their English language competency, but did not require them to sit IELTS or an equivalent test. No approval to apply the QPT test, or any other self-devised method of English language assessment, was sought. Also, the

Teachers Council's position is that neither are equivalent to the IELTS (academic) test.

The College undertook to 'urgently provide the Council with evidence for its position that the Oxford QPT is equivalent to IELTS' (Chen Palmer's letter of 5 June 2013) (see annexure 25 to Appendix 1). This is yet to occur, despite the Teachers Council's repeated requests. The College has also not provided any evidence for its proposition that other tests it applied allowed it to establish that applicants had English language abilities equivalent to IELTS 6.5 overall (much less 6.0 in each band of IELTS)."

132. In the Appendix to its letter of 15 November 2013, the Teachers Council states:

*"In March 2006, the Teachers Council finalised its Language Requirements for Teaching in Aotearoa New Zealand policy (**Language policy**) (which remains in force, although in a revised form from December 2011)*

- 6. Consistent with the 2005 Guidelines, the Language policy provides that applicants for registration who have not completed initial teacher education in New Zealand must obtain a stipulated minimum score in an approved test of language proficiency. The approved English language proficiency tests are IELTS, ISLPR, CAE, CPE, and PEAT. The minimum IELTS score is 7 in each of the four components of the academic version of the test.*
- 7. The Language policy states that the Teachers Council will be satisfied that an applicant for registration is sufficiently proficient in English if he or she has completed initial teacher education in New Zealand. However, implicit in that is the understanding that teacher education programmes which are intended to lead to registration will be run on the basis approved by the Teachers Council, including that minimum agreed entry standards will be maintained ...".*

133. In its letter of 5 June 2013, the Teachers Council states:

"High trust model

Once a provider has obtained approval and accreditation for a particular programme the model works on a high level of trust. The provider is expected to deliver on the agreed standards and, subject to its monitoring or complaints, the Council is entitled to assume that on graduation those students are satisfactorily trained to teach and are able to meet the Graduating Teacher Standards.

In particular, the College, on its view of the standards, was required to ensure that each student entering the Early Childhood Education programme met the IELTS language standard (or equivalent). Had the College adequately applied this language standard on entry, there is little doubt that all its students

would, at the very least, continue to meet that standard. All other things being equal, those students would be satisfactorily trained to teach.

Based on what the Council is now seeing, it has significant concerns about the manner in which the College has been administering its entry requirements, including concerns about the accuracy of the College's recordkeeping in relation to the English language proficiency of its students."

134. In its letter of 9 July 2013, the Teachers Council states:

"Oxford QPT

Having assessed the documentation we do not think it was open to the College to apply the general assessment process to which you now refer."

135. In its letter of 9 August 2013, the Teachers Council states:

"The College has said it 'made an overall assessment as to whether the candidate had an English language proficiency equivalent to an overall IELTS score of 6.5 ... the Council seeks objective and verifiable evidence that the alternative method was equivalent to the IELTS academic test."

Discussion

136. The Ombudsman's jurisdiction is limited to investigating complaints about any act, decision or omission relating to a matter of administration. There are, therefore, limits to the extent to which an Ombudsman may review decisions made where professional expertise is required. One example is where a qualified educator uses professional knowledge in assessing the level of competence required in the academic sector.

137. Lacking the same degree of specialist expertise as professionals in the particular area, it is not the Ombudsman's function to make judgments as to whether a specialist decision was right or wrong. In this case, the Tertiary College appears to be asking me to substitute my judgement of whether Oxford QPT (and other components) is an English language proficiency equivalent to IELTS for that of the Teachers Council. This is not a matter which I am in a position to investigate or review.

138. It seems that, if the Teachers Council is not satisfied that Oxford QPT (and other components) is an English language proficiency equivalent to IELTS (and it is considered reasonable to retest to ensure that applicants meet the approved exit standard), it would be open to the Teachers Council to retest applicants who gained entry into the Bachelor of Teaching (Early Childhood Education) on the basis of Oxford QPT to ensure that they meet the approved exit standard (IELTS (Academic) 7.0 in all components).

139. In response to the provisional opinion, the Tertiary College submits:

"NZTC accepts that it is not appropriate for you to make a finding as to whether Oxford QPT (together with other assessment techniques) is equivalent to IELTS. However, NZTC seeks your opinion on whether the

Teachers Council is acting unfairly by not accepting that the Academic Regulations specifically allowed NZTC to use alternative assessment techniques to IELTS.”

140. I note that the Language Requirements for Teaching in Aotearoa New Zealand Registration Policy refers to a number of “*approved test[s] of language proficiency*”. The discussion contained in the affidavits of A and B also suggests that ‘equivalent’ tests were allowed.
141. However, I do not believe that the Teachers Council is explicitly ruling out the use of any ‘equivalent’ tests; rather, it has decided that the Oxford QPT (and other components) testing regime, implemented by the Tertiary College, is not an ‘equivalent’. The Teachers Council states:

“Oxford QPT

Having assessed the documentation we do not think it was open to the College to apply the general assessment process to which you now refer.”

142. The Teachers Council has also requested:

“objective and verifiable evidence that the alternative method was equivalent to the IELTS academic test.”

143. It does not appear the Tertiary College has provided any such evidence, in support of its contention that Oxford QPT (and other components) is equivalent to IELTS.
144. In the circumstances, I do not consider that the Teachers Council has made a blanket decision not to allow “*alternative assessment techniques to IELTS*”. Rather, the Teachers Council has decided not to accept that the Oxford QPT (and other components) is equivalent to IELTS, in the absence of the proof that it has sought as to its equivalency. As explained above, this is a specialist decision, and not a matter which I am in a position to investigate or review.

Number of students affected

145. It is useful to outline the exact number of students affected by this matter. In its letter of 30 May 2013 to the Teachers Council, the Tertiary College states:

“36 We understand that 128 students have graduated and been given provisional registration by the Council. Seven students have graduated and received full registration. Another 68 have graduated and their applications for registration are on hold while this issue is resolved. A further 52 are yet to complete the programme. All of these 52 students were admitted to the Bachelor of Teaching programme prior to 1 January 2011. Some 38 of these began their studies prior to that date and, 14 commenced their studies after 1 January 2011.

37 We understand that 34 students entered the Bachelor programme with an IELTS score of 6.5 overall but not 6.0 in each component. Of these, 12 have graduated and have been granted provisional registration by Teachers Council, 8 have graduated and are waiting for provisional registration, and 14 are current students.

38 We are told that 167 students entered the programme based on an equivalent to IELTS ... Of the 135 graduates registered already, 73 of these entered on the basis of the Oxford University QPT. Of the 120 awaiting registration or still completing their studies, 57 took the Oxford University QPT. The majority of the balance did IELTS. Others were entered through Special Admission based on successful tertiary study in New Zealand. International students entered almost exclusively on IELTS. Domestic students entered almost exclusively under the Oxford University QPT. All were required to have additional oral interviews and undertake essay writing."

146. I understand there are 34 students who entered the Bachelor programme with an IELTS score of 6.5 overall but not 6.0 in each component. It would, therefore, be open to the Teachers Council to require each of these 34 students to be retested to ensure that they meet the exit standard of 7.0 before being granted provisional or full registration.
147. I understand there are 57 students who were accepted on the basis of the Oxford University QPT (and other elements). It would, therefore, be open to the Teachers Council to require each of these 57 students to be retested to ensure that they meet the exit standard of 7.0.
148. In an email dated 19 March 2014, the Tertiary College updated the statistics. They advised that "... the current number of NZTC graduates waiting for registration, or at risk upon graduation, as a result of the Teachers Council's stance ..." are:

<i>"Domestic</i>	<i>53</i>
<i>International</i>	<i><u>18</u></i>
<i>Total</i>	<i>71."</i>

Status of the Teachers Council

149. On 1 November 2013, the Minister of Education, Hon Hekia Parata, announced that the Teachers Council was to be disestablished and replaced by a new independent statutory body called the Education Council of Aotearoa New Zealand. These changes, which require legislative amendment, are not expected to come into effect before late 2014.
150. The Education Amendment Bill (No 2) was introduced to Parliament on 10 March 2014, and passed its first reading on 13 March 2014. The Bill has since been referred to the Education and Science Committee, which is due to report on the Bill on 21 July 2014.

Rights of appeal

151. Section 126 of the Education Act gives applicants a right of appeal to the District Court, if an applicant is unhappy with a decision by the Teachers Council relating to registration. The section provides:

“126 Appeals from decisions of Teachers Council

- (1) A person who is dissatisfied with all or any part of a decision of the Teachers Council under sections 122, 123, 124, 129(1)(a) or (b), or 130 (whether a decision to act or a decision to refuse to act) may, within 28 days of receiving notice of the decision from the Teachers Council or any longer period the court, on application made before or after the end of the period, allows, appeal to a District Court against the decision.***
- (2) [Repealed]*
- (3) The court shall hear the appeal as soon as is practicable, and may confirm, reverse, or modify the decision concerned, or may refer the matter back to the Teachers Council in accordance with rules of court, or may give any decision that the Teachers Council could have given.*
- (4) Nothing in this section gives the court power to review any part of the Teachers Council’s decision that the appellant has not appealed against.*
- (5) Subject to any order of the court, every decision of the Teachers Council continues in force and has effect pending the determination of an appeal against it.*
- (6) On any appeal under this section, the court may order the Teachers Council or the appellant to pay the costs incurred by the other party in respect of the appeal.*
- (7) The Teachers Council or the appellant may, with the leave of the High Court or the Court of Appeal, appeal to the Court of Appeal against any decision on a question of law made by the District Court on an appeal under this section.” (emphasis added)*

152. Accordingly, I would be precluded from investigating individual complaints from applicants about any decision by the Teachers Council relating to registration by section 13(7)(a) of the OA, unless there are special circumstances which would make it unreasonable to expect an applicant to have resorted to those rights.

Ombudsman’s opinion

153. For the reasons set out above, I conclude that the Teachers Council has not acted unreasonably.

Postscript

154. Since this investigation was concluded I am advised that the Tertiary College has made contact with each of the students affected by the Ombudsman's decision and is supporting them to prove to the Teachers Council that they have the IELTS level the Teachers Council requires. The process is going well, with a number having re-submitted their English language proficiency evidence. Supported by the College, all affected students are re-taking their IELTS.

Appendix 1: Relevant statutory provisions

Ombudsmen Act 1975

13. Functions of Ombudsmen

- (1) Subject to section 14, it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the departments or organisations named or specified in Parts 1 and 2 of Schedule 1, or by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part 3 of Schedule 1, or by any officer, employee, or member of any such department or organisation in his capacity as such officer, employee, or member.
- (2) Subject to section 14, and without limiting the generality of subsection (1), it is hereby declared that the power conferred by that subsection includes the power to investigate a recommendation made, whether before or after the passing of this Act, by any such department, organisation, committee, subcommittee, officer, employee, or member to a Minister of the Crown or to any organisation named or specified in Part 3 of Schedule 1, as the case may be.
- (3) Each Ombudsman may make any such investigation either on a complaint made to an Ombudsman by any person or of his own motion; and where a complaint is made he may investigate any decision, recommendation, act, or omission to which the foregoing provisions of this section relate, notwithstanding that the complaint may not appear to relate to that decision, recommendation, act, or omission...

22 Procedure after investigation

- (1) The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject matter of the investigation—
 - (a) appears to have been contrary to law; or
 - (b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
 - (c) was based wholly or partly on a mistake of law or fact; or
 - (d) was wrong.
- (2) The provisions of this section shall also apply in any case where an Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that, in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.

- (3) If in any case to which this section applies an Ombudsman is of opinion—
- (a) that the matter should be referred to the appropriate authority for further consideration; or
 - (b) that the omission should be rectified; or
 - (c) that the decision should be cancelled or varied; or
 - (d) that any practice on which the decision, recommendation, act, or omission was based should be altered; or
 - (e) that any law on which the decision, recommendation, act, or omission was based should be reconsidered; or
 - (f) that reasons should have been given for the decision; or
 - (g) that any other steps should be taken—

the Ombudsman shall report his opinion, and his reasons therefore, to the appropriate department or organisation, and may make such recommendations as he thinks fit. In any such case he may request the department or organisation to notify him, within a specified time, of the steps (if any) that it proposes to take to give effect to his recommendations. The Ombudsman shall also, in the case of an investigation relating to a department or organisation named or specified in Parts 1 and 2 of Schedule 1, send a copy of his report or recommendations to the Minister concerned, and, in the case of an investigation relating to an organisation named or specified in Part 3 of Schedule 1, send a copy of his report or recommendations to the mayor or chairperson of the organisation concerned.

Appendix 2: Full response of the New Zealand Teachers Council to the complaint

“... ”

October 2006: College application for approval

9 In October 2006, the College applied for approval of its ECE Bachelor of Teaching programme (annexure 4). Page 59 of its application referred to ‘Language standards’, and stated:

‘Applicants must demonstrate that they have sufficient skill in English or Maori to successfully achieve at degree level study. International applicants whose first language is neither English nor Maori, the two official languages of Aotearoa/New Zealand, must provide evidence of meeting the following English language requirements:

- *Level 7 degree and diploma programs [including the ECE bachelor programme] approved by the NZ Teachers Council and enabling graduates to apply for registration as a teacher score of 7.0 across all bands. [...]*

10 The application also stated, on page 59, that students wishing to transfer from a certificate programme to a diploma or degree programme had to resit IELTS ‘and achieve a minimum band score of 7.0 across all bands.’ On page 60, the application referred to ‘the current requirements of teacher registration’, and three types of English examination: ISPLR, PEAT, and IELTS.

11 It went on to state the minimum requirement for registration, where IELTS was the test sat, as follows:

‘An IELTS (Academic) results card with a minimum score of seven in each of the modules of listening, reading, writing and speaking is required at the one sitting.’

12 Attached to the College’s application was a draft version (‘Version 2’) of its Academic Regulations for the ECE bachelor programme (dated September 2006) (annexure 5). Clauses 3.3 and 4.3 of the Academic Regulations (page 4) stated that the eligibility criteria for admission to the Level 7 diploma and degree included that: ‘International students must have an English proficiency equivalent to IELTS 6.5.’

13 Accordingly, there was an inconsistency between the language entry standard referred to in the College’s application (a minimum score of 7.0 in each component) and Version 2 of the College’s Academic Regulations (English proficiency equivalent to IELTS 6.5).

2006 Panel

- 14 *The New Zealand Qualifications Authority (NZQA) and the Teachers Council convened a panel (**the 2006 Panel**) to assess the College's application.*

6 November 2006 College document

- 15 *On 6 November 2006, the College, through its Chief Executive ... responded to feedback the 2006 Panel had given on its application (annexure 6). On page 20 of the response, [The Chief Executive of the Tertiary College] responded to a query about the inconsistency referred to above. That query was as follows: 'Admission requirements are stated but there is an anomaly in the IELTS entry criteria. Page 60 of the application document states that the entry for international students is 7.0, but the regulations state 6.5. Which is correct? Our understanding is that the student teachers/ graduates must have achieved a level of 7.0.'*

- 16 *[The Chief Executive of the Tertiary College] replied:*

"Language Standards

*The application document incorrectly stated the entry criteria for the degree program. The confusion resulted from the standard necessary for graduates of the degree as opposed to the standard for entrants to the degree. **The language standard for entry to the degree is 6.5 with 6.0 in all bands.** This is a consistent entry point with a similar degree program given by the Auckland University of Technology.' [second emphasis added]*

- 17 *Accordingly, [the Chief Executive of the Tertiary College's] unequivocal advice to the 2006 Panel was that the College's language standard on entry would be an overall score of 6.5 in IELTS, with no less than 6.0 in all bands.*

Provision of further draft of Academic Regulations

- 18 *In November 2006 (the Teachers Council does not know which date exactly), the College provided the 2006 Panel with a further draft of its Academic Regulations ('Draft v3') (annexure 7). Page 1 of that document states: 'Draft 2 of the Academic Regulations was previously forwarded to the panel with the original application. These regulations have since been submitted to the Academic Board for consultation. As a result of this process, feedback has been received, acknowledged and incorporated into Draft 3.'*

- 19 *It is clear that the reference to the 'Academic Board' in the excerpt set out above was a reference to the College's Academic Board (see the further references to the Academic Board in clause 3.5 of Schedule 3, on page 7, and clause 5.8 of Schedule 5, on page 10).*

- 20 *There appear to be very few differences of substance between the second and third drafts of the Academic Regulations. One difference, however, was that the entry criteria for Level 7 Diploma and Degree Programmes had been collapsed under one generic heading, entitled 'Admission to Level 7 Degree Programs'. The entry language standard was stated as being 'an English proficiency level equivalent to IELTS 6.5'.*

18 December 2006 memorandum

- 21 *On 18 December 2006, the Deputy Chief Executive of the NZQA proposed in a memorandum to the NZQA Board that the College's ECE bachelor programme be approved (annexure 8). The same recommendation was made to the Teachers Council (and accepted).*
- 22 *Page 2 of the 18 December 2006 memorandum refers to, amongst other matters, the 2005 Guidelines. On page 4 of the memorandum, a recommendation by the 2006 Panel is recorded as follows:*
- '[...] (b) the NZ Tertiary College consider reviewing the entry IELTS requirement upwards to Level 7 at least in the Speaking band, and a minimum of 6.5 across the rest of the bands while noting that NZTC does currently comply with NZ Teachers Council standards.'* [underlining in original]
- 23 *This memorandum was drafted after [the Chief Executive of the Tertiary College] provided her 6 November 2006 response to the 2006 Panel's feedback, including her express advice that the language standard for entry into the ECE bachelor programme would be a minimum of IELTS 6.0 in all bands, and 6.5 overall. Accordingly, that was one of the bases upon which approval for the ECE bachelor programme was granted.*
- 24 *The Teachers Council also notes that the above is not a full quote of the 2006 Panel's recommendation. The 2006 Panel's 'Approval and Accreditation Report' is attached to the 18 December 2006 memorandum, and page 6 of that report refers to 'Regulations' (i.e. the College's November 2006 Academic Regulations). The following is also stated:*

'Comment

Entry requirements for admission to the organisation and the course are clearly stated and comply with the requirements set by the NZ Teachers Council; however the panel recommends that the NZ Tertiary College consider reviewing the entry IELTS requirement upwards to Level 7 at least in the Speaking band and a minimum of 6.5 across the rest of the bands. The panel would encourage a move towards raising all bands to Level 7.' [emphases in original]

- 25 Further, and finally, in a document which is undated but relates to the 2006 Panel's work, the above recommendation is recorded (at paragraph 1.5). The following is then stated (annexure 9):

'These recommendations must be acted on by NZTC and will be evaluated by the external monitor during the monitoring visit in 2007.'

Claim in 30 May 2013 Chen Palmer letter

- 26 In a 30 May 2013 letter to the Teachers Council (annexure 25), the College's lawyers claim (in paragraph 19) that after [the Chief Executive of the Tertiary College] provided her 6 November 2006 response, 'on further consideration and based on feedback from the Panel, this English language entry requirement was revised to an IELTS score of 6.5 overall or equivalent (with no minimum).' It is further claimed that 'this revised requirement formed the basis of the November 2006 Academic Regulations...'
- 27 The Teachers Council has no documentary or other record of any such reconsideration or downwards revision, and the College has not produced any such record. Also, as set out above, while the note on Draft 3 of the Academic Regulations referred to consultation, that was with the College's Academic Board, not the 2006 Panel.
- 28 Also, given that the 2006 Panel needed to be satisfied that students graduating from the ECE bachelor programme would be able to attain at least 7 in all IELTS components, it is improbable that the 2006 Panel would have agreed to a lower IELTS entry standard than that advised by [the Chief Executive of the Tertiary College] on 6 November 2006, with no minimum band scores. It is also improbable that it would have made such an agreement without recording it in writing. This is particularly so given that all of the written information before the 2006 Panel relevant to the issue (being the 2005 Guidelines, presumably the Teacher Council's Language policy, the College's October 2006 application, and [the Chief Executive of the Tertiary College's] 6 November 2006 response) referred to higher standards and minimum band scores.
- 29 Instead, the Teachers Council considers that the 2006 Panel would have understood the reference in the Academic Regulations to 'English proficiency equivalent to IELTS 6.5' as meaning IELTS 6.0 in each component, 6.5 overall. This was what [the Chief Executive of the Tertiary College] told the 2006 Panel, when the matter was specifically raised with her.
- 30 Also, [the Chief Executive of the Tertiary College] had advised that this minimum standard was consistent with a similar degree programme offered by the Auckland University of Technology. The College is asserting that the 2006 Panel agreed to let it meet a lesser standard, without explaining why the Panel thought that was permissible.

- 31 *Finally, such an agreement would have been inconsistent with the 2006 Panel's IELTS recommendation, which was that 'the entry IELTS requirement' should be revised up to at least 7 in speaking, 6.5 in listening, reading and writing, and preferably 7 in all components (i.e. greater minima than 6.5 overall, 6.0 in all components). As set out above, the 2006 Panel envisaged that this recommendation would be acted on. Clearly, the reason for it was because the 2006 Panel considered the entry criteria should be raised to give greater certainty that graduating students would achieve the minimum score of 7 in all IELTS components by the time they had completed the course.*
- 32 *It is very unlikely that the 2006 Panel would have made such a recommendation if it had only just agreed that the College could apply a lower entry standard than that stated by [the Chief Executive of the Tertiary College], with no minimum component scores.*

2006 approval: summary

- 33 *Accordingly, the Teachers Council considers that, consistent with the documents referred to above, the entry language standard approved for the College's ECE Bachelor Programme was a minimum of 6.0 in the listening, reading, writing and speaking components of the IELTS (academic test), and a minimum of 6.5 overall. In a meeting with the College on 21 February 2013 the Teachers Council said that if a student from this time period could show that he or she had met this standard, that would suffice.*

2007 monitors report

- 34 *In 2007, a monitor reported to NZQA and the Teachers Council on the ECE bachelor programme (and another programme) (annexure 10). That report recorded, at paragraph 7.2.3 (page 12), that:*

'A new written interview procedure has been introduced, and continuing work is occurring on ensuring that the English standards of applicants for whom English is not a first language, is of appropriate standards.'

- 35 *There was no reference in the report to any discussion about the standards the College was in fact applying, including whether the relevant standard was IELTS 6.5 overall, with no minimum component score, or 6.0 in each component, 6.5 overall.*

February 2008: application for change to regulations

- 36 *In February 2008, the College applied to amend its entry regulations for the ECE bachelor programme. The reason for this was that the College wished to allow students who did not speak English as a first language to take a pre-requisite course (B115) rather than meeting the language entry standard. Students who passed B115 would then be able to transition into the ECE bachelor programme without needing to obtain the usual IELTS standard*

(which was, for the reasons set out above, a minimum of 6.5 overall, with a minimum of 6.0 in each component).

- 37 *On page 4 of the College's application (annexure 11), it was stated there was a desire to provide students 'with an alternative to the IELTS examination'. The rationale for this was then set out.*
- 38 *Page 14 of the application set out the proposed additions to the College's Academic Regulations. The standard for Level 7 degree and diploma programmes (including the College's ECE bachelor programme) was said to be 'an IELTS (Academic) results card issued within the last two years with a minimum band score of 6.5'.*
- 39 *This was a direct quote from page 2 of the College's 2008 Academic Regulations (these had apparently been amended from the versions provided to the 2006 Panel, and the amended copy was attached to the College's application as Appendix G (annexure 12)). Accordingly, from 2008, the Teachers Council understands that the College's Academic Regulations no longer referred to 'an English proficiency level equivalent to IELTS 6.5' for applicants applying for direct entry to the ECE bachelor programme.*
- 40 *The 2008 Academic Regulations also stated on page 2 that '[a] student who wants to apply to transfer from certificate program to a degree or diploma program must demonstrate an IELTS equivalency of 6.5.'*
- 41 *In the College's application document the proposed changes to the 2008 Academic Regulations were set out in bold, as follows (page 14):*
- 'Students entering the Level 7 degree from a certificate program at level 5 or 6 may successfully complete the degree prerequisite B115 English for Early Childhood Education to meet the degree program English language requirement.'*
- 42 *There was a note following the above, which stated '[i]n order to enter B115, a student teacher must have entered his / her program with a minimum IELTS score of 5.5 and have studied at an early childhood program at level 5 or level 6.'*

Correspondence about B115

- 43 *On 8 April 2008, the Teachers Council wrote to [the Chief Executive of the Tertiary College], and advised that the application had been approved (annexure 13). This approval however was based on the Teachers Council's understanding that a student could not do a certificate programme (without which a student could not transition into the ECE bachelor programme or do B115) unless he or she had scored 'at least 5.5 in each mode of the IELTS (Academic) [...].'*

- 44 *Further communications and correspondence subsequently occurred, and on 22 May 2008 [the Chief Executive of the Tertiary College] wrote to the Teachers Council (annexure 13). In that letter, [the Chief Executive of the Tertiary College] provided her view that, with the addition of the B115 course, 'a student teacher with an overall score of 5.5 with no band lower than 5.0 could realistically expect to attain a score of 7.0 with no band lower than 7.0' after completing the three-year ECE Bachelor programme.*
- 45 *In an e-mail dated 11 August 2008 (also annexure 13), Dr Lind of the Teachers Council advised [the Chief Executive of the Tertiary College] that the Teachers Council had been declining applications for registration from overseas teachers who had not met the 'IELTS minimum requirement of 7.0 in each band.' This was consistent with the Teachers Council's Language policy. He also stated that he was not aware of any other ECE bachelor programmes which allowed international student entry with 'a minimum of 5.0 across all bands.' Dr Lind said that [the Chief Executive of the Tertiary College] would need to provide evidence for her statement that 'students do actually increase their IELTS score to the extent you believe possible' (evidence which to date has not been provided). He referred to assessing students who had completed B115 to see whether they had obtained a 6.5 before beginning the College's ECE bachelor programme.*
- 46 *These exchanges between the Teachers Council and the College about B115 demonstrate the Council's ongoing expectation and understanding that minimum IELTS band scores were required on entry to programmes. Why have a minimum component score requirement for students wishing to do B115, but not for others such as the ECE bachelor programme? And the College itself had stated, in its 2008 Academic Regulations, that the entry standard for the ECE bachelor programme was 'a minimum band score of 6.5'.*
- 47 *Finally, what is also clear is that the College and the Teachers Council understood that the standard which students needed to reach by graduation was a 7.0 minimum band score (i.e. at least 7.0 in each component), as provided for in the 2005 Guidelines and the Language policy.*

2008 review

- 48 *In 2008, the College's ECE bachelor programme was reviewed by another panel (the 2008 Panel).*
- 49 *As part of that, the College produced a document entitled 'Panel Review: Competence in English, Staffing, Research' (July 2008) (annexure 14). In the 'Competence in English' section, it was noted that the 2006 Panel 'recommended raising the IELTS entry level' (as set out above, to at least 7 in Speaking, and at least 6.5 across the other bands). The document then*

records a query by the 2008 Panel about why this recommendation was not followed.

- 50 *The College's response referred to the process its Selection Panel undertook in assessing applicants, stating that its role 'is to identify first whether the applicant meets the entry criteria'. Following that, the aspects Selection Panel assessed were set out, such as academic qualifications, referee recommendations, and 'where required, an IELTS score of 6.5'. The Teachers Council considers that 'where required' is a reference to cases in which the applicant is not a first language English speaker. Applicants who are from New Zealand and who have been educated here, for example, are not required to do IELTS.*
- 51 *The response then set out the overall IELTS scores obtained by nine international students enrolled in the College's ECE bachelor programme. It finished by stating that: 'NZTC [the College] continues to monitor the progress of the international students but, to date, there has been no issue with their performance in the Bachelor of Teaching (Early Childhood Education) and thus the College feels that the student teachers are demonstrating proficiency with the English language consistent with national guidelines.'*
- 52 *The Teachers Council understands that the reference to national guidelines in the response was a reference to the 2005 Guidelines.*
- 53 *On 4 August 2008, the 2008 Panel reported to the Teachers Council and the NZQA (annexure 15). Page 4 of the report referred to the 2006 Panel's recommendation that the College should consider revising upwards 'the entry IELT requirement' to Level 7 in the Speaking component at least and to a minimum of 6.5 in the other components, as well as encouraging it to raise all components to Level 7. It then recorded the College's response to that recommendation, being the recruitment of two TESOL lecturers, its reference to the nine international students who had enrolled in the College's ECE bachelor programme since it began and their IELTS scores, and its reference to 'the 6.5 IELTS (Academic) score'. The report also stated that 'the NZ Tertiary College's entry criteria remain consistent with current national guidelines published by the New Zealand Teachers Council.'*
- 54 *The report's conclusion was that 'this criterion continues to be met' (i.e. no change).*
- 55 *As above, the Teachers Council understands that the 2008 Panel's reference to national guidelines was a reference to the 2005 Guidelines (which refer to entry standards which will ensure that a graduating student teacher attains 7.0 in all components of IELTS (academic version)).*
- 56 *On 9 September 2008, the Teachers Council advised the College that the College's ECE bachelor programme had been approved until November 2013.*

2008 review: summary

- 57 *Given the College's 2008 Academic Regulations stated that the language entry standard for the ECE bachelor programme was 'an IELTS (Academic) results card issued within the last two years with a minimum band score of 6.5', the Panel may well have understood that the standard the College was applying was a minimum of 6.5 in each of the bands.*
- 58 *Even if it did not, the Teachers Council considers that there is nothing in the above which demonstrates that the 2008 Panel understood that some change had occurred to the entry language standard since the approval of the College's ECE bachelor programme in 2006, and agreed to that. At most, the 2008 Panel was allowing what had been previously approved to continue (6.0 in each band, and 6.5 overall). If the College was no longer applying a minimum band score, it should have expressly advised the 2008 Panel of that. This is particularly so given:*
- (a) the reference to a minimum band score of 6.5 in the College's 2008 Academic Regulations;*
 - (b) the exchanges which were going on at the time between the Teachers Council and the College regarding minimum band scores for students who wished to do the B115 course (i.e. not just minimum overall scores).*

2009 monitoring report

- 59 *In March 2009, Lyn Lewis, a NZQA-appointed monitor, reported to NZQA and the Teachers Council on the College's ECE bachelor programme and the College's ECE Diploma. At page 12 of her report (annexure 16), the following is stated: 'The entrance criteria of an IELTS score of 6.5 for International students is applied for the Degree, with the option of study within the Certificate courses available for those who fail to reach this target level of proficiency. In the case of fewer than 1% of students, exceptions may be granted for International students to follow the domestic student enrolment process. Such exceptions apply to cases where students hold English-level qualifications which indicate potential success in the degree programme.'*
- 60 *It does not appear that there was any focus on or discussion about minimum component scores.*

2009 correspondence

- 61 *In May 2009, a NZQA/Teachers Council panel reviewed the College's Graduate Diploma in Teaching (ECE). On 7 September 2009, [the Chief Executive of the Tertiary College] wrote to Kathy Smith, the Teachers Council Chair, raising various concerns about the review. One of these was the Teachers Council's request that the College make sure that all of its students who did not speak English as a first language would, on graduation, have attained 7.0 in all*

bands of the IELTS (academic) test. [The Chief Executive of the Tertiary College] was concerned, amongst other things, that the College was being treated differently to other institutions (annexure 17).

- 62 *On 16 September 2009 Ms Smith replied to [the Chief Executive of the Tertiary College's] letter. On page 2 of her letter, Ms Smith stated '[a]t this time, the IELTS assessment is the only English language proficiency which the Council recognises for entry into ITE programmes'. This was consistent with the College's 2008 Academic Regulations.*
- 63 *Ms Smith also stated that the Teachers Council was seeking an assurance from the College that it had a process in place which allowed it to be certain that graduates had reached the minimum graduating standard of IELTS 7.0 in each band, and 'that this has been confirmed by the ITE provider.' Ms Smith further stated that this assurance was something the Council was seeking from all providers that had 'an entry level for a qualification with a score below 7.0 in any band of the academic version of IELTS.'*
- 64 *The letter finished by stating that the Teachers Council looked forward 'to receiving your confirmation that you will be checking on the English language IELTS level of 7 for your graduands who are immigrants to New Zealand and English is their second language' (annexure 18)."*