MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Brooke van Velden	**Portfolio**	Workplace Relations and Safety
Title of Cabinet paper	Holidays Act Reform: Further Policy Decisions	**Date to be published**	19 June 2024

List of documents that have been proactively released		
Date	**Title**	**Author**
May 2024	Holidays Act Reform: Further Policy Decisions	Office of Workplace Relations and Safety Minister
10 May 2024	Regulatory Impact Statement: Holidays Act reform – Further Policy Decisions	MBIE
22 May 2024	Holidays Act Reform: Further Policy Decisions – Minute of Decision ECO-24-MIN-0081 Minute	Cabinet Office
21 Dec 2023	Holidays Act Review: background, progress and next steps	MBIE
28 Mar 2024	Holidays Act Review: Policy decisions for an exposure draft of the Bill	MBIE

Information redacted **YES**

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reasons of privacy of natural persons, confidential advice to Government, free and frank opinions, and legal professional privilege.

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Holidays Act Review: Policy decisions for an exposure draft of the Bill

Date:	28 March 2024	**Priority:**	High
Security classification:	In Confidence	**Tracking number:**	2324-2225

Action sought		
	Action sought	**Deadline**
Hon Brooke van Velden **Minister for Workplace Relations and Safety**	**Agree** to the detailed recommendations set out in the attached papers **Agree** an overall approach to consultation on the exposure draft of the Bill	10 April 2024

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Alison Marris	Manager, Employment Standards Policy	04 901 8564	Privacy of natural persons	✓
Anna Spencer	Principal Advisor, Employment Standards Policy	04 901 3909		
Aleyce Thompson	Senior Advisor, Employment Standards Policy	03 940 4771		
Monique Barnes	Policy Advisor, Employment Standards Policy	04 897 6444		

The following departments/agencies have been consulted
Inland Revenue (on amendments to parental leave legislation only)

Minister's office to complete:

- ☐ Approved
- ☐ Noted
- ☐ Seen
- ☐ See Minister's Notes
- ☐ Declined
- ☐ Needs change
- ☐ Overtaken by Events
- ☐ Withdrawn

Comments

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Holidays Act Review: Policy decisions for an exposure draft of the Bill

Date:	28 March 2024	**Priority:**	High
Security classification:	In Confidence	**Tracking number:**	2324-2225

Purpose

This paper seeks your decisions on policy changes relating to the Holidays Act Review. Subject to your agreement, these changes will be included in a paper for Cabinet's consideration in May 2024, alongside the proposal to release an exposure draft of the Confidential advice to Government Bill, which is intended to replace the Holidays Act 2003 (the Holidays Act).

Executive summary

We briefed you in December 2023 and February 2024 on our work to review the Holidays Act, noting areas where improvements could be made that go beyond the previous decisions made by Ministers and Cabinet. Since then, we have focused on developing alternatives that would simplify obligations, reduce compliance costs for employers and address areas previously incomplete while broadly aligning with the Taskforce recommendations and existing entitlements model.

You requested that we seek decisions at one time, so this paper brings together our advice on new policy decisions to include in a paper for Cabinet's consideration in May 2024. The proposals, grouped into three areas, are outlined in this cover note, with detailed advice and recommendations set out in the annexed papers. In summary, the proposed changes will:

- simplify the framework for providing annual leave (AL) entitlement and for paying AL as a regular part of an employee's pay, and address liability risks arising from current decisions if employers have a closedown (Annex Two)
- consolidate the payment methodology for other leave types so that only one calculation is required, reduce the implementation requirements for determining the use of leave and refine the leave eligibility criteria and accumulation timeframe for sick leave (Annex Three)
- update the methodology for determining parental leave payments to reflect existing practice and enable parties to make choices regarding leave entitlements for employees in a restructuring situation (Annex Four).

In addition to your decisions on policy changes, we are seeking an early indication of your desired approach to consultation on an exposure draft of the Bill that would replace the existing Holidays Act. There are two broad options: public or targeted consultation. Under either option, we can reach out to various stakeholders to ensure a range of voices are heard. On balance, we favour a targeted approach as it will help ensure we are better positioned to deliver a Bill for introduction Confidential advice to Governm

Once we receive your decisions on this paper, we will incorporate them into a draft Cabinet paper and undertake consultation with other Government agencies. We will also finalise our regulatory impact analysis. We expect to provide a draft Cabinet paper for your consideration, and for Ministerial consultation, in mid-April.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Note** that since we met with you in late February, our focus has been on progressing alternatives to some of the previous policy decisions on changes to the Holidays Act, in order to simplify obligations, reduce compliance costs for employers, and address areas that were previously incomplete

Noted

b **Note** that detailed recommendations on alternative options are provided for your consideration in each of the three annexed papers, relating to annual leave (Annex Two), other leave types (Annex Three), and amendments to other legislation (Annex Four)

Noted

c **Note** that, if you agree, we will include the proposals in a paper for Cabinet consideration in May, alongside proposals for consultation on an exposure draft of the Confidential advice to Government Bill

Noted

d **Note** that, while both public and targeted consultation on the exposure draft would elicit the desired feedback, a more targeted approach consulting a variety of stakeholders identified in consultation with your office will help to ensure we are well placed to deliver a Bill for introduction Confidential advice to Government

Noted

e **Agree** to either:

i. public consultation (with targeted communications to identified stakeholders)

Agree / Disagree

OR

ii. targeted consultation only (based on a stakeholder list compiled in consultation with your office)

Agree / Disagree

f **Note** that we are continuing our engagement with a small working group of representatives from Business New Zealand and the Council of Trade Unions Free and frank opinions

Noted

g **Note** that we expect to provide a draft Cabinet paper (reflecting your decisions above and in the annexed papers) for your comment and Ministerial consultation in mid-April.

Noted

Alison Marris
Manager, Employment Standards Policy
Labour, Science and Enterprise, MBIE

28 / 03 / 2024

Hon Brooke van Velden
Minister for Workplace Relations and Safety

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Background

1. In late December 2023, we briefed you on the background and next steps for the Holidays Act Review [2323-0982 refers]. As you are aware, the Confidential advice to Government Bill[1] is partially complete, with drafting based on the policy decisions made by Cabinet and previous Ministers. Those decisions are summarised in Annex One.
2. Our December advice to you indicated there were opportunities to simplify the Bill and reduce compliance costs for employers and we proposed three options for the next stages of the review:
   a) proceed based on the existing recommendations made by the Holidays Act Taskforce and accepted by the previous Government,
   b) explore alternatives that broadly align with the Taskforce recommendations and the underlying entitlements model, or
   c) explore alternatives outside the Taskforce's recommendations.
3. We also proposed that you issue an exposure draft of the Bill, in order to seek feedback and test its workability. In subsequent discussions on your Workplace Relations and Safety work policy programme, you signalled your comfort with option b) above, and the release of an exposure draft of the Bill.
4. On 28 February 2024, we met with you to discuss the background to the review and our approach to the next stages. You indicated your preference to receive our advice in one package Free and frank opinions

Changes are proposed to simplify, reduce costs, and address gaps

5. Since we met with you in late February, our focus has been on progressing alternatives to some of the 2020 Cabinet policy decisions on changes to the Holidays Act. Our proposals are intended to simplify obligations, reduce compliance costs for employers, and address areas that were previously incomplete. They also address issues identified by our stakeholder working group during the 2021-2022 design process and considered out of scope, as they did not align with Cabinet decisions.
6. The changes proposed in this paper do not address all the potential issues and opportunities we are aware of but will help to improve the quality of the Bill before an exposure draft is released for consultation later this year. Together with technical refinements made so far, the changes will also demonstrate some progress from the previous Cabinet decisions.
7. This briefing provides a summary of the changes proposed, with more detailed advice and detailed recommendations provided in three attached papers.

Providing, taking, and paying annual leave (Annex Two)

8. The paper contained in Annex Two (Providing, taking and paying annual leave) covers three main areas:
   - **The framework for providing AL entitlement:** In 2020, Cabinet accepted the Holidays Act Taskforce recommendation that employees should continue to become entitled to four weeks' AL after 12 months continuous employment but that employees should be

[1] The Confidential advice to Government Bill is intended to repeal and replace the Holidays Act 2003. It is an omnibus Bill (a Bill that amends more than one Act).

able to take 'AL in advance on a pro-rata basis'. This adds complexity to the framework. We are proposing a weeks-based accrual system for AL, which would simplify the end-to-end process for providing AL entitlement and better support common practice. We also propose adjustments to other parts of the system to reconcile with this proposal.

- **Ability to take AL in advance during a closedown period:** Cabinet agreed that during a closedown period, an employer must allow an employee to take AL in advance above the pro-rata amount of leave in advance they have earned. We propose rescinding this decision to remove the liability risk it would create for employers. Free and frank opinions
- **Simplifying the framework for paying AL as a regular part of an employee's pay (pay-as-you-go (PAYG)):** Cabinet agreed to a new four-part test for using PAYG and a new requirement for employers to review its use every 13 weeks. This was intended to address the current lack of clarity and requirement for judgement. The agreed approach does not fully resolve these issues and will add administrative burden and cost. Proposals agreed by the previous Minister to provide clarity are complex. We propose a less restrictive and simpler framework for using PAYG.

9. The proposed changes are summarised in the table below.

Framework for providing AL entitlement	• Replace the previously-agreed approach with a weeks-based AL accrual system, along with a clear set of parameters to support its operation. • Adjust the rules for taking, allowing and requiring AL and for 'cashing up' AL entitlement to reconcile them with an accrual-based framework in a way that maintains the underlying intent of existing provisions and minimises complexity.
Ability to take AL in advance during a closedown period	• Rescind the decision to introduce a requirement for employers to allow employees to take AL in advance during a closedown.
Framework for paying AL as a regular part of an employees pay (pay-as-you-go (PAYG))	Confidential advice to Government *We are continuing to work on the details of these proposals*

10. More detail on these proposals and detailed recommendations for your consideration are provided in Annex Two.

Providing, taking and paying other leave types (family violence leave, bereavement leave, alternative holidays, public holidays, and sick leave) (Annex Three)

11. The paper contained in Annex Three (Providing, taking and paying other leave types) covers four main areas relating to family violence leave, bereavement leave, alternative holidays, public holidays, and sick leave (known as FBAPS leave):

- **Payment methodology:** In 2020, Cabinet accepted the Holidays Act Taskforce's recommendation to replace FBAPS payment methodologies. Initial feedback suggests the new calculations are still complex, burdensome and may inflate pay in some

circumstances. We are proposing a new consolidated single calculation for FBAPS leave payments.

- **Methodology for determining the hours an employee would have worked on a day of leave:** Cabinet also accepted the recommendation to introduce a new 'calendar day' methodology for determining the hours that an employee would have worked on a day of leave. Stakeholders raised concerns that implementing this methodology would require significant changes to payroll systems with high associated costs. We propose removing the calendar day methodology for both annual leave and FBAPS leave.
- **Eligibility criteria for family violence, bereavement and sick leave:** Cabinet also accepted the recommendation for new eligibility criteria to determine employees' eligibility for FBS leave from their first day of employment. The previous Minister made adjustments to these criteria to improve clarity, but the inclusion of an 'expectations-based' assessment which requires employer judgement, means the eligibility criteria remains complex. We propose removing the expectations-based assessment that occurs on the first day of employment.
- **Timeframe for accumulation of sick leave:** Cabinet also accepted the Holidays Act Taskforce's recommendation that eligible employees become entitled to the full minimum family violence leave and bereavement leave entitlements from their first day of employment, with an accumulation period of four months for sick leave. As sick leave entitlement has since increased from five to ten days per year, you may choose to reconsider the sick leave accumulation period..

12. The proposed changes are summarised in the table below.

Payment methodology consolidation	• A revised relevant daily pay calculation made up of base pay and fixed allowances (that will not otherwise be paid during the period of leave) and an average of productivity and incentive payments received.
Determining the hours that would have been worked on a day of leave	• Removing the 'calendar day methodology' for both annual leave and FBAPS leave (and instead using an average of hours worked across all days of the week).
Eligibility criteria FBS leave	• Removing the expectations-based assessment in the eligibility criteria for family violence, bereavement and sick leave (meaning that only employees with agreed hours will be eligible for FBS leave from day one and others will be subject to eligibility tests after three months).
Timeframe for sick leave accumulation	• Two options for accumulating sick leave – either proceeding with previous decisions or accumulating the full entitlement over six months (a longer period).

13. More detail on these proposals and detailed recommendations for your consideration are provided in Annex Three.

Amendments to parental leave and employment relations legislation (Annex Four)

14. The paper contained in Annex Four (Amendments to parental leave and employment relations legislation) covers two areas:

- **The methodology for determining parental leave payments:** The Parental Leave and Employment Protection Act 1987 relies on the existing Holidays Act definition of "ordinary weekly pay" to calculate parental leave payments. We are proposing to add a standalone formula to parental leave legislation, in order to "disconnect" it from the Holidays Act.

- **The treatment of leave entitlements in a restructuring situation:** There is currently a lack of legislative clarity regarding the treatment of leave entitlements for some employees in a restructuring situation. We are proposing a flexible approach for those employees, enabling treatment of entitlements to be negotiated by the incoming and outgoing employers rather than requiring them to be paid out.

15. The proposed changes are summarised in the table below.

Methodology for determining parental leave payments (amending the Parental Leave and Employment Protection Act 1987)	• Replace the current reference to "ordinary weekly pay" with a standalone formula that is aligned with the methodology Inland Revenue currently uses • Specify that the formula should reflect a four-week average of gross weekly taxable earnings before the start of parental leave (we are continuing to work with IR on the reference period details).
Treatment of leave entitlements in a restructuring situation (amending the Employment Relations Act 2000)	For employees specified in Schedule 1A of the Employment Relations Act 2000: Approach unchanged, employees are given the choice to transfer employment to the new employer, and if they choose to transfer employment, entitlements are transferred.
	For other employees: • require the treatment of leave entitlements in restructuring situations to be covered in employment agreements as a matter that will be negotiated between the outgoing and incoming employers, • require the apportionment of liability and the transfer of relevant employee information to be covered in employment agreements as matters that will be negotiated between outgoing and incoming employers, and • specify that the payment rate for transferred leave entitlements must not be less than what it would be if it were paid out in accordance with the Holidays Act at the time of transfer

16. More detail on these proposals and detailed recommendations for your consideration are provided in Annex Four.

There are options regarding consultation on the exposure draft

17. In addition to the changes proposed above, we propose to seek Cabinet approval for an approach to the exposure draft (in the May Cabinet paper). We discussed this with you briefly at our policy session in late February, and noted your preference to ensure that voices from small business owners are heard.

18. Releasing an exposure draft of the Bill provides an opportunity to test the Bill's clarity and workability with various interest groups, including those who will need to work with it on a day-to-day basis. It will provide an opportunity to surface issues early, so we can address as much as possible prior to introduction and anticipate feedback that might be raised in Select Committee submissions.

19. Aside from the decisions you make on the attached papers, the exposure draft will largely reflect decisions made by the previous Government, in line with the tripartite consensus-based approach. As discussed with you, we can use the consultation document to ask targeted questions [redacted] Confidential advice to Government [redacted]

There are choices to make around what is shared and how widely it is shared

20. There are options about whether to release the Bill in whole or in part. We propose to release a Bill that is close to complete – prioritising drafting in areas that are critical for employers. There may be some areas where drafting is incomplete, such as the transitional provisions and record-keeping requirements (which are dependent on other areas of the Bill). We can ensure this is explained in the consultation document. We anticipate consultation would be open for 6-8 weeks but welcome your views on this.

21. There are two broad options for consultation:

    - **Public consultation (with targeted communications):**
        - an exposure draft of the Bill and consultation document are published on MBIE's website, available to anyone who wishes to access it, and
        - officials contact a range of stakeholders to ensure they are aware of the consultation, connect them with the materials, and invite them to make a submission.
    - **Targeted consultation only:**
        - MBIE creates a list of stakeholders (in consultation with your office) that ensures a good mixture of sectors, different sized businesses, various working arrangements, payroll providers and practitioners, community groups, iwi, and worker representatives
        - we share an exposure draft of the Bill and consultation document with each of these stakeholders and invite them to make a submission**.**

22. We think both of these consultation options will deliver the desired feedback and increase the quality and workability of the Bill for introduction. A targeted approach has the advantage of keeping submissions to a more reasonable number, which will help ensure we are better positioned to deliver a Bill for introduction Confidential advice to Government

23. With a targeted approach, there is a risk of missing some stakeholders who would have liked to make a submission. However, if relevant stakeholders come forward during the consultation period, we can share the materials with them and invite them to make a submission. In addition, the wider public will also get an opportunity to make submissions at Select Committee stage.

Confidential advice to Government

24. Confidential advice to Government

Engagement continues with business and worker representatives

25. As agreed with you, we've continued discussions with a small working group of representatives from Business New Zealand and the Council of Trade Unions. We will continue to work through proposals with this group, Free and frank opinions

We worked with Inland Revenue on the parental leave amendments, with wider consultation to come

26. We worked with Inland Revenue (IR) to develop our advice on consequential amendments to the parental leave legislation. IR supports the recommendations contained in the Annex Four paper relating to parental leave. Consultation with wider Government agencies will be undertaken on the draft Cabinet paper and we will brief you on any concerns raised through that process.

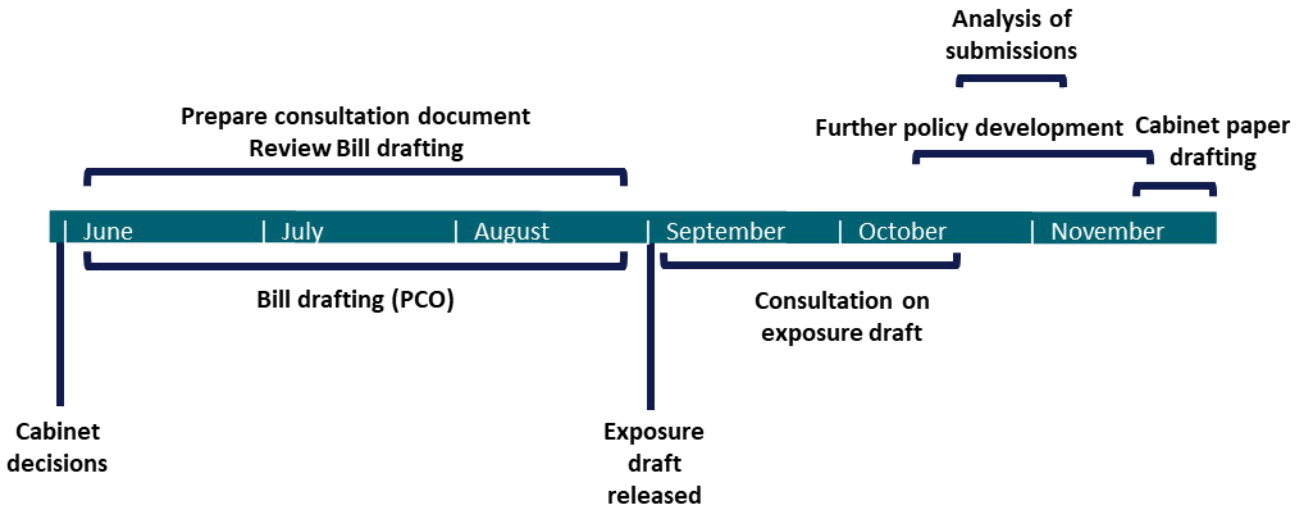
We are working towards a Cabinet paper for consideration in May

27. Once we receive your decisions on this paper, we will incorporate them into a draft Cabinet paper and undertake consultation with other Government agencies. We will also finalise our regulatory impact analysis and submit a Regulatory Impact Statement to the assessment panel.

28. We expect to provide a draft Cabinet paper for your consideration and for Ministerial consultation in mid-April. An indicative timeline for the May Cabinet paper is as follows:

Date	Milestone
Week of 15 April	Draft Cabinet paper provided to Minister's office
26 April – 9 May	Ministerial consultation
Tuesday 14 May	Final Cabinet paper provided for lodging
Thursday 16 May	Cabinet paper lodged
Wednesday 22 May	Cabinet Economic Policy Committee
Monday 27 May	Cabinet

29. After Cabinet decisions, officials will issue drafting instructions to Parliamentary Counsel Office (PCO) as soon as possible and work with PCO to review drafting and provide feedback. We will also prepare a consultation document to accompany the exposure draft. These stages are set out in the timeline below:



30. We are available to discuss any of the proposals contained in this paper at your convenience.

Annexes

Annex One: Summary of decisions to date

Annex Two: Providing, taking and paying annual leave

Annex Three: Providing, taking and paying other leave types

Annex Four: Amendments to parental leave and employment relations legislation

Annex One: Summary of decisions to date

Annex One: Summary of decisions to date

Summary of Cabinet decision	Intent behind decision	Key refinements agreed by previous administration
Annual leave – see Annex Two for further proposals		
Retain **weeks as the unit of entitlement**.	Avoid potential disadvantages to employees that moving to a different unit of entitlement may cause but provide prescription and clarity about calculations and processes.	N/A
Introduce a prescriptive method for determining the **use of annual leave** entitlement.	Provide clarity about what constitutes a week for each employee, so employers no longer have to rely on their judgement to determine what constitutes a week for employees with variable hours or work cycles that are different to 7 days.	• Simplify the method for determining the use of annual leave entitlement based on average hours to reduce costs and complexity for employers, so it is based on average hours worked on all days of work over the previous 13 weeks (instead of on that specific calendar day). • Adjust recommended audit requirement as this would be costly and time consuming for employers. • Clarify that in certain circumstances an employer and employee may agree to the employee using a whole week of annual leave for a seven-day period without work.
Introduce a new **payment method for annual leave** so it is paid at the greater of three calculations: Ordinary Leave Pay, Short Run Average Weekly Earnings and Long Run Average Weekly Earnings.	Provide a clear method for employers to accurately calculate annual leave payments.	• Specify how new payment methods should apply in other areas that specify rules for paying for annual leave (annual leave in advance, when employment ends, when annual leave is cashed up, closedowns). • Align when payment for annual leave must be made with common practice, so the default is to pay annual leave in the pay that relates to the period during which it is taken (and the alternative is to pay annual leave before it is taken).
Introduce **13-week reference periods** as the basis for Short Run Average Weekly Earnings calculations and calculations to determine the use of leave entitlements (also relevant for FBAPS leave below).	Provide a reference period shorter than 12 months that can be used across multiple calculations.	• Provide some flexibility around the exact number of weeks included in 13-week reference period calculations, to prevent payroll systems from having to split pay period data.
Replace current Relevant Daily Pay and Ordinary Weekly Pay calculations with **Ordinary Leave Pay** (also relevant for FBAPS leave below).	Provide a clear calculation that does not require employers to use judgement and discretion like Relevant Daily Pay and Ordinary Weekly Pay do currently.	• Clarify the payment types that must be included in the Ordinary Leave Pay base rate. • Reframe Ordinary Leave Pay as a weekly and daily rate, to enable it to be applied to annual leave and FBAPS leave in a way that is clear and logical within the framework of the new legislation.
Clarify the payment types that should be included in **gross earnings** - all cash payments an employee received, except direct reimbursements for costs incurred.	Make the definition of gross earnings easier for employers to understand and comply with.	• Clarify that the status quo exceptions to the payment types included in gross earnings continue to apply. • Exclude redundancy compensation payments because they have not been 'earned'. • Clarify that only payments that were earned over 13 weeks or less need to be included in the Short Run Average Weekly Earnings calculation, to prevent overinflation.
Pro-rate **annual leave in advance**.	Prevent employers from being able to unreasonably withhold consent to an employee's request to take annual leave in advance on a pro-rata basis, and also prohibit employers from requiring employees to take leave of this nature.	• Clarify that employers may choose to record the amount of pro-rata leave in advance available to an employee, but that they are not required to do so.
Introduce a clear set of parameters around the ability for employees to use **Pay-As-You-Go (PAYG)**.	Provide clarity about when an employee is eligible to receive PAYG, and increase the threshold for this, to ensure it is not used inappropriately.	• Refine criteria to determine whether an employee is eligible to use PAYG, to clarify parts of the original proposal that were unclear.
Require employers to give employees written notice regarding **closedown periods** and other periods in which work is discontinued, and allow employees to take annual leave in advance during a closedown period.	Provide certainty and transparency for employees about their rights and employers' obligations when establishing a new closedown period or having an existing closedown period, and remove complexity of the current requirements for employees who are not entitled to annual leave at the time of a closedown.	• Clarify that employers must also continue to give employees 14 days' notice of specific closedown dates and the annual leave arrangements that will apply, as per the status quo. • Specify the process for establishing a new closedown, as this was not clear in the original proposal.
Family violence leave, bereavement leave, alternative holidays, public holidays, and sick leave (FBAPS leave) – see Annex Three for further proposals		
Retain **days as the unit of entitlement.**	Avoid potential disadvantages to employees that moving to a different unit of entitlement may cause but provide prescription and clarity about calculations and processes.	N/A
Provide employees the ability to take **sick leave and family violence leave in part days** (with a minimum amount of a quarter of a day).	Align legislative requirements with common practice among employers, increase flexibility for employees, and prevent employees' sick leave and family violence leave entitlements from being deducted at a rate that does not reflect their use (currently an	• Provide employees the ability to take bereavement leave and alternative holidays in part days, as this is also common practice among employers and will increase flexibility for employees. • Remove the minimum amount of a quarter of a day, so actual hours of work and time off work are always recorded and paid as such.

	employer could deduct a full day of sick leave or family violence leave even if an employee worked for half a day).	
Make **sick leave entitlement** accumulate from the first day of employment, and **family violence leave and bereavement leave entitlements available** in full from the first day of employment, for eligible employees.	Ensure employees do not need to have worked for six months to have access to FBS leave, as these leave types are needs-based and when employees use them is typically outside of their control.	• Adjust the accumulation process for sick leave to align with the new minimum sick leave entitlement of 10 days per year. • Align the accumulation process for employees who become eligible after three months of employment with the process for employees who are eligible from their first day.
Introduce a new criteria to determine whether an employee is **eligible for FBAPS leave** (based on whether they have agreed hours, are expected to be continuously employed, or the average hours they work per week).	Update the FBAPS leave eligibility criteria so it aligns with the change to make FBS leave available to eligible employees from day one.	• Adjust the eligibility criteria and tests to remove complexity and provide clarity for employers and employees where there were gaps in the original proposal. • Remove proposed ability for employers to retest employees' eligibility to receive their second and subsequent entitlements.
Introduce a new prescriptive test to determine whether a day is an **Otherwise Working Day** for an employee.	Provide employers with a prescriptive test to use to determine whether a day is an Otherwise Working Day for an employee, so this is no longer based on employers' judgement.	• Specify how the prescriptive test should be applied in various circumstances, to ensure it is workable in practice and provides a definitive answer. • Clarify that the reference period for the prescriptive test should only be 13 weeks (rather than 4 and 13 weeks as originally proposed), to align with Cabinet's decision about Short Run Average Weekly Earnings.
Introduce a new **payment method for FBAPS leave** so it is paid at the greater of two calculations: Ordinary Leave Pay and Average Daily Pay.	Provide a clear method for employers to use so employees are paid at least what they would have been paid had they worked on the day of FBAPS leave (the current payment method may result in some employees with variable hours or commission payments not receiving what they would have been paid if they had worked).	• Adjust the payment method when it is based on average hours to provide some flexibility for employers, by allowing employers and employees to agree that FBAPS leave hours be based on average hours worked on all days of work over the previous 13 weeks (instead of on that specific calendar day). • Clarify which hours must be included as FBAPS leave hours when an employment agreement or roster is used to determine the hours of FBAPS leave taken, as this was not clear in the original proposal.
Extend **bereavement leave** so employees are entitled to three days for a wider scope of family members, including stepfamily, family-by-marriage, aunts, uncles, nieces and nephews, and cultural family groups.	Recognise that employees may have varied family arrangements or cultural practices, and could be equally bereaved by the loss of extended family and culturally recognised family members.	• Clarify that the extension is to a 'spouse or partner's family members' and not only 'family by marriage', and limit scope of 'spouse or partner's family members' the extension covers, to remove uncertainty for employers and employees. • Clarify 'cultural family groups' is limited to culturally recognised family members the employee has a relationship with that is similar to those listed in legislation, to remove uncertainty for employers and employees. • Specify that employees can use bereavement leave at any time and on non-consecutive days, to recognise that employees may need to use bereavement leave in different ways.
Leave in restructuring situations – see Annex Four for further proposals		
Enable employees to choose whether to transfer their leave entitlements or have them paid out when a **business is sold or transferred** and they transfer their employment to the new employer.	Align legislative requirements with common practice. Employers are currently required to pay out employees' annual leave and alternative holidays when their employment ends (if they are not a specified category of employee with additional protections set out in the Employment Relations Act 2000), but in practice these leave entitlements are often transferred with their employment.	N/A
Parental leave – see Annex four for further proposals		
Remove the **'parental leave override'**, which results in employees who take annual leave being paid less for annual leave they take in the 12 months following their return to work.	Ensure employees who take parental leave are not paid less for annual leave they take in the 12 months following their return to work.	• Also remove the override in relation to volunteers' leave, which follows the same framework as parental leave.
Other matters		
Update **record-keeping** requirements.	Align record-keeping requirements with the other changes being made.	• Refine list of record-keeping requirements to reflect final design details and ensure the requirements are clear.
Require employers to provide employees with a **pay statement** in each pay period, and allow employees to request their pay statement be provided in a specific format.	Increase transparency for employees regarding their pay and leave entitlements so they can better understand whether they have been calculated correctly.	• Specify how pay statement requirements would be set out in legislation. • Clarify that pay statements must be provided in either a physical or digital format that an employee has access to without needing to raise a request, to provide more flexibility to employers.
Consider issues that cause non-compliance in the design of **compliance and enforcement** mechanisms.	Support the implementation of the changes being made by ensuring they can be appropriately enforced.	• Specify a criteria to determine which provisions in the new legislation will have penalties for failure to comply.

Annex Two: Providing, taking and paying annual leave

ANNEX TWO: PROVIDING, TAKING AND PAYING ANNUAL LEAVE

Overview of the paper

1. This paper seeks your decisions on adjustments to some of the 2020 Cabinet decisions on changes to the annual leave (AL)[1] provisions in the Holidays Act 2003 (the Act). The proposals are intended to reduce complexity and compliance costs and to more closely reflect common practice and understanding of AL entitlements while maintaining alignment with the underlying weeks-based entitlement system.

2. Confidential advice to Government

Recommendations

Area	Recommendation	Decision	
AL entitlement framework	**Note** that in 2020, Cabinet agreed that employees should continue to become entitled to four weeks' AL after 12 months continuous employment but that an employer must not unreasonably withhold consent to an employee's request to take AL in advance of entitlement arising on a pro-rata basis and that this would add complexity and not support common practice.	*Noted*	
	Agree that, rather than retain the rule that four weeks AL entitlement arises as a single amount after 12 months continuous employment, a weeks-based accrual system be adopted with AL entitlement continuously accruing.	*Agree*	*Discuss*
	Parameters to support a weeks-based accrual system		
	Agree that AL entitlement accrues at a rate of not less than 0.0768 weeks per week of employment.	*Agree*	*Discuss*
	Agree that the weeks of employment that AL accrues during aligns with the weeks that are included and excluded from '12 months of continuous employment' under the Act.	*Agree*	*Discuss*
	Agree to the following formula to provide clarity about the amount of AL that would accrue during a part week of unpaid leave (when AL does not accrue): *Number of hours that the employee did work in the week unpaid leave was taken (up to the value of the denominator), divided by the employee's average number of guaranteed hours per seven-day period, multiplied by 0.0768.*	*Agree*	*Discuss*
	Agree that, aligned with the status quo, when it is agreed that AL entitlement will accrue during unpaid leave beyond the first week, the Average Weekly Earnings divisor must be reduced by that number of weeks.	*Agree*	*Discuss*

[1] The Bill amends the term 'Annual Holidays' in the Act to 'Annual Leave' to better reflect the range of purposes for which the entitlement is used (for example to care for dependants, attend to personal matters or if sick, bereavement or family violence leave entitlements are exhausted).

	Agree to the following formula to provide clarity about the Average Weekly Earnings divisor reduction for a part week of unpaid leave: *Number of hours of unpaid leave taken in the week (up to the value of the denominator), divided by the employee's average number of guaranteed hours per seven-day period.*	*Agree*	*Discuss*
	Adjustments to the rules for taking, allowing and requiring AL to reconcile them with an accrual-system		
	Note that the provisions in the Act for taking, allowing and requiring AL are based on entitlement arising after a fixed period, that we consider the current balance of interests is appropriate, and that the proposed adjustments below to reconcile them with an accrual system seek to maintain their underlying intent.	*Noted*	
	Agree that an employer must not unreasonably withhold consent to an employee's request to take accrued AL entitlement and may also agree to leave in advance of accrued entitlement but does not have to approve a request (this reflects the 2020 Cabinet policy decision on pro-rata leave in advance).	*Agree*	*Discuss*
	Agree to adjust the provisions for AL an employer must allow an employee to take so that, following the employee's first 12-month employment anniversary date: • Within each 12-month period an employer must not withhold consent to an employee taking four weeks of accrued AL entitlement (if an employee has it available), and • cannot withhold consent to an employee taking at least 2 weeks of their accrued AL entitlement in a continuous period.	*Agree*	*Discuss*
	Agree to adjust the provisions for AL an employer can require employees to take so that an employer can require employees to take accrued AL entitlement that is in excess of four weeks but only if: • they have sought to confer with the employee and genuinely tried to reach agreement about when the leave is to be taken and been unable to; or • they have an established annual closedown period and they give the employee at least 14 days' notice of the requirement to take AL entitlement.	*Agree*	*Discuss*
	Adjustments to the rules for 'cashing-up' AL entitlement to reconcile them with an accrual system		
	Note that an accrual system will require a consequential amendment to the period of 12 months of continuous employment specified in the Act as the timeframe within which an employee can cash up one week of AL and that the proposal below is designed to maintain the policy intent that only one week of AL can be cashed up per year regardless of whether AL has been cashed up in previous years.	*Noted*	
	Agree that, after the completion of the first 12 months of employment, an employee may request to exchange for payment ('cash-up') up to one week of AL entitlement in each subsequent 12-month period and that all other supporting provisions related to cashing up AL remain unchanged.	*Agree*	*Discuss*
AL in advance during a closedown period	**Note** that, in 2020 Cabinet agreed that, during a closedown period, an employer would not be able to refuse an employee's request to take AL in advance above the pro-rata amount of leave in advance (or accrued AL under an accrual system) an employee has 'earned' and that stakeholders have raised concern about the liability risk this creates for employers.	*Noted*	
	Agree to rescind the Cabinet decision above and maintain the status quo so that, during a closedown period an employer may agree to an	*Agree*	*Discuss*

	employee taking AL in advance, but an employer does not have to allow this.		
PAYG	**Note** that in 2020, Cabinet agreed to a new four-part test for paying AL as a regular part of an employee's pay (pay-as-you-go (PAYG)) and a new requirement to review its use every 13 weeks, that the previous Minister refined the criteria and parameters to improve clarity and certainty, but that the rules are still complex, with high compliance costs.	*Noted*	
	Confidential advice to Government	*Agree*	*Discuss*
		Agree	*Discuss*
	Note that we are continuing to work on the details of the criteria and mechanism for ensuring employees have time away from work which we will include in your May Cabinet paper and will report back to you if we need any further decisions before then.	*Agree*	*Discuss*
Confidential advice to Government			

We recommend simplifications to the framework for providing AL entitlement

Cabinet agreed to changes to provide employees access to AL before entitlement arises

3. Under the Act, an employee's entitlement to four weeks of annual leave (AL) arises after "each completed 12 months of continuous employment". An employee may also request to take AL in advance of it arising, but employers have no obligation to approve the request.
4. During the issue identification phase of the 2018 Holidays Act Review, some stakeholders raised concern about the waiting period for employees to access AL entitlements. Many employers do allow employees to take AL in advance of their entitlement arising but not all employees have access to annual leave during their first 12 months of work.
5. To address this, in 2020 Cabinet accepted the Holidays Act Taskforce (the Taskforce) recommendation that employees should continue to become entitled to four weeks' AL

after 12 months continuous employment but, in addition to AL entitlement, an employer must not unreasonably withhold consent to an employee's request to take 'AL in advance on a pro-rata basis' (the amount of the four-week entitlement they have 'earned' eg one week after three months, two weeks after 6 months etc) [CAB-20-MIN-0100].

The recommended implementation approach adds complexity, when opportunity exists to simplify

6. The Taskforce's recommended approach to providing earlier access to AL adds complexity to the legislative framework. It creates three separate concepts related to AL with different rules that apply to each:

    - AL entitlement that has arisen
    - pro-rata AL in advance, and
    - AL in advance of pro-rata AL in advance.

    It explicitly requires that when pro-rata AL in advance is taken it must be displayed as a negative AL balance in an employee's leave record.

7. The key reason the Taskforce recommended this approach was concern about the compliance issues that have been associated with accrual-based AL entitlement systems that do not maintain a clear separation between an employee's pot of entitled and accruing AL. Such systems have been used by many employers who already allow employees to take AL in advance on a pro-rata basis. The Taskforce viewed the separation between concepts as important for audit and compliance checking purposes. Problems that have arisen include:

    - employees being provided less than their four-week AL entitlement after 12 months continuous employment due to the use of incorrect leave accrual rates
    - underpayments for AL at the end of employment due to oversight and/or inability to distinguish and pay entitled and accruing leave out at the different rates
    - units of entitlement other than weeks being used and accrued balances not being adjusted when work patterns change to reflect the employee's working week.

8. The recommended approach reinforces the need for the complex work arounds many employers have needed to build into (well-intentioned) accrual systems to ensure compliance. These work arounds, especially the separation between entitled and accruing AL and the rules that apply to each, are also confusing for both employers and employees.

We recommend including a weeks-based AL entitlement accrual system in the exposure draft of the Confidential advice to Government bill)

9. The 2020 Cabinet decision misses an opportunity to make more substantial changes (within the underlying weeks-based entitlement system) to the end-to-end framework for the provision of AL entitlement that would help to simplify it and improve workability and ease of understanding Confidential advice to Government any of the compliance issues with accrual systems have arisen inadvertently because of the challenge of designing an accrual system that is compatible with the current rules.

10. We recommend including a proposal in your May Cabinet paper that, rather than retain the rule that four weeks AL entitlement arises as a single amount after 12 months continuous employment, we shift to a weeks-based accrual system. The system would treat all weeks of AL an employee has earned as a single, continuously accruing, pot of AL entitlement that an employer could not, without sound business reasons, withhold consent to an employee taking. This proposal would support the common practice of AL entitlement accrual by incorporating the concept within the legislative framework.

11. In addition to removing the concept of 'continuous employment' (discussed further below) from the legislation and clauses of the Bill that specify the rules about the calculation and taking of pro-rata leave in advance, other key areas a weeks-based accrual system would simplify include:

    - *The rules for paying employees for their AL entitlements when employment ends:* Under the Act, when an employee's employment ends, the employer must pay the employee for AL they have 'earned' but that has not yet arisen as entitlement at eight per cent of their gross earnings since they last became entitled to AL, less payments for any AL taken in advance. The employer must also pay the employee for untaken AL entitlement that has arisen using the normal 'greater of' payment methodologies.

      This issue was not addressed in the changes agreed by Cabinet in 2020, but the methodologies are a core source of compliance issues. Employers struggle to understand the requirements and employees struggle to understand their final pay. Over and under payments also arise when leave has been taken in advance during employment.

      A weeks-based accrual system would make the eight percent of gross earnings methodology redundant as the AL the payments cover would be AL considered entitlement and the second methodology would apply.[2]

    - *Closedown provisions:* Accrual would enable consolidation of the provisions as references in the framework to pro-rata leave in advance will all be covered by AL entitlement. It would also make the Cabinet decision to provide ability for employers and employees to nominate a date AL entitlement arises when the employer has a closedown custom redundant. The intent was to provide for employees to have AL entitlement to use during a closedown period that occurs in the first year of employment. An accrual system means an employee will already have the equivalent amount of AL entitlement at that date.

    - *Leave records and pay statements:* The requirement to maintain a distinction between entitled and accruing leave in leave records and in the new requirements for inclusions on a pay statement would be removed.

We recommend clear parameters to support a weeks-based accrual system

12. We recommend seeking Cabinet agreement to include a clear set of parameters that would support the operation of a weeks-based entitlement system and minimise the risk of the compliance issues the Taskforce was concerned about.

We recommend specifying a weekly accrual rate

13. To minimise legislative complexity, provide certainty and support compliance, we propose to specify a minimum number of weeks that accrue for each completed week of

[2] All AL entitlement weeks not taken would be paid at a rate that is the greater of Ordinary Weekly Leave Pay, Quarterly Average Weekly Earnings and Annual Average Weekly Earnings as if the AL was being taken at the end of employment.

employment.[3] We propose that AL entitlement accrues at a rate of not less than 0.0768 weeks per week of employment. This accrual rate means that employees AL entitlement per year of employment would continue to be approximately four weeks.[4]

We recommend the periods of employment AL accrues during reflects the status quo

14. For the exposure draft, we propose that AL entitlement would accrue during all weeks of employment that are included in '12 months of continuous employment' under the Act. It would accrue during any period an employee was on paid leave, unpaid sick, bereavement or family violence leave, parental leave, voluntary military service leave or was not working while receiving weekly accident compensation. AL entitlement would also accrue on the first week of any other period of unpaid leave but, unless the employer and employee agree otherwise, not on weeks beyond that (which currently extends the date an employee receives their AL entitlement).

15. Confidential advice to Government, Free and frank opinions

16. For the exposure draft we propose the inclusion of the following formula to clarify the amount of AL that would accrue during a part week of unpaid leave (the treatment of part weeks was identified as lacking clarity and causing confusion in the current rules by our stakeholder working group):

    Number of hours that the employee did work in the week unpaid leave was taken (up to the value of the denominator), divided by the employee's average number of guaranteed hours per seven-day period, multiplied by 0.0768.

17. Under the Act, if it is agreed that unpaid leave beyond the first week will be included in continuous employment, when the employee takes AL and the employer makes the payment calculation, they must also reduce the 52-week divisor for the Average Weekly Earnings (AWE) calculation[5] by the number of whole or part weeks of unpaid leave greater than one that fall in the 52 week reference period. This means that, weeks of unpaid leave beyond the first week also do not deflate the payment rate. This rule does not apply when periods of unpaid leave are not included in continuous employment.

18. Confidential advice to Government We propose that, when it is agreed that AL will accrue during weeks in a period of unpaid leave beyond the first week, the AWE divisor must be reduced by that number of weeks.

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[3] One alternative is to specify that an employee must be provided four weeks AL each 12 months and provide flexibility for employers to work out how to provide that. This would not provide certainty and carry high compliance risks. Another option would be to provide a formula to help employers calculate how much AL should accrue each year. This would avoid the minor discrepancy between four weeks and the actual amount a rate of 0.0768 results in (refer footnote 4) but adds complexity, administrative burden and risk of error.

[4] An accrual rate of 0.0768 would mean that an employee would accrue 4.005 weeks AL entitlement in a 365-day year, and 4.0155 weeks in a 366-day year (a leap year). An accrual rate of 0.00767 would mean that in a 365-day year an employee would accrue 3.999 weeks (which is just less than four weeks) and in a 366 day year they would accrue 4.0103 weeks AL entitlement.

[5] Average weekly earnings are worked out by calculating the employee's gross earnings over the 12 months prior to the end of the last pay period before the AL is taken and dividing that figure by 52. The Act defines gross earnings as including all payments that the employer is bound to make under the employment agreement or legislation (which differs from gross income for tax purposes).

19. To align with the proposal in paragraph 16 above, we propose the following formula to provide clarity about the AWE divisor reduction for a part week of unpaid leave:

    Number of hours of unpaid leave taken in the week (up to the value of the denominator), divided by the employee's average number of guaranteed hours per seven-day period.

The rules for taking, allowing and requiring AL would require adjustments to reconcile with weeks-based accrual

20. The provisions in the Act that set out employees' rights to take AL and when an employer may require an employee to take AL are based on entitlement arising after a fixed period. These are set out in column one of Table One below. They would require adjustments to reflect an accrual-based framework.

21. The intent of the provisions in the Act is to provide a balance between employer and employee interests. The scheme anticipates, in the first instance, an employee applying for AL and the parties attempting to agree.[6] It provides flexibility for employers to be able to withhold consent to an employee's request to take AL but that, within a window of 12 months after the date on which the entitlement arises, an employer must allow an employee to take the AL. It also allows an employer to require an employee to take AL that has arisen but only in specified circumstances.

22. We consider the current balance of interests is appropriate, and so we recommend seeking agreement in your May Cabinet paper to adjustments that are aligned with the general intent of the current provisions. Simplicity was also a key criterion, and we considered other options that would maintain precise alignment with the status quo but would have required employers to separate accrued entitlements into annual buckets to distinguish which rules applied to which AL entitlement. This would have added additional record-keeping requirements and complexity.

23. Our proposals are included in column two of Table One. The exposure draft will provide opportunity to seek feedback on the proposed adjustments.

Table One: proposed adjustments to the rules for taking and requiring employees to take AL

Status quo	Proposed rules to reconcile with an accrual system
When any AL is to be taken it *must be agreed* between the employer and employee.	When any AL is to be taken it *must be agreed* between the employer and employee.
An employer *must not unreasonably withhold consent* to an employee's request to take AL entitlement that has arisen (after 12 months continuous employment). An employer may also agree to leave in advance of entitlement arising, but does not have to approve a request.	An employer *must not unreasonably withhold consent to an employee's request to take any AL entitlement that they have accrued* during *employment* (this reflects the Cabinet policy decision on pro-rata leave in advance). An employer may also agree to leave in advance of accrued entitlement but does not have to approve a request.
An employer *must allow an employee to take AL* within 12 months after the date on which the employee's entitlement arises.	Following the employee's first 12-month employment anniversary date: *Within each 12-month period an employer must not withhold consent to an employee taking four weeks of accrued AL entitlement* (if an employee has it

[6] 2022-NZEmpC-141-E-Tu-Inc-and-ors-v-CHH.pdf (employmentcourt.govt.nz)

If an employee elects to do so, the employer *must allow the employee to take at least 2 weeks* of their AL entitlement in a continuous period.	available), and cannot withhold consent to an employee taking at least 2 weeks of their accrued AL entitlement in a continuous period.
Employers can require employees to take AL they have become entitled to if: • they cannot reach agreement with their employee about when AL will be taken or • they have a closedown period and they give the employee at least 14 days notice	If an employee's AL entitlement balance is greater than 4 weeks *an employer can require employees to take AL entitlement in excess of 4 weeks but only if:* • they have sought to confer with the employee and genuinely tried to reach agreement about when the leave is to be taken and been unable to or • they have an established closedown period and they give the employee at least 14 days' notice of the requirement to take AL entitlement.

24. The proposals mean that, from the second year of employment onwards, an employee must be provided the ability to take four weeks off work at an agreed time during each year (unless they took AL in advance the year before or had unpaid leave and did not accrue four weeks). They maintain the flexibility for an employer to refuse an employee's request to take AL on specific dates if they have sound business reasons. This maintains an employer's ability to negotiate with an employee about when during a year requested leave will be taken so that they can also manage their business operations.

25. The proposed adjustment to the rule that an employer can require an employee to take accrued AL in excess of four weeks is more restrictive than the status quo (which applies to all AL entitlement that has arisen after 12 months of continuous employment). It is the simplest option however and we think it likely reflects common practice and understanding for accrual-based systems in use.

The rules for 'cashing-up' AL entitlement would require adjustments to reconcile them with weeks-based accrual

26. Under the Act an employee may request (unless the employer has a policy stating otherwise) to 'cash up' (exchange for payment) up to one week of their AL entitlement in each entitlement year (the 12 months of continuous employment beginning on the date on which the employee most recently became entitled to AL).

27. An adjustment is required to reconcile the rules for the period within which AL entitlement can be 'cashed-up' with a weeks-based accrual framework. We recommend that your May Cabinet paper seeks agreement to the following:

    - After the completion of the first 12 months of employment an employee may request to 'cash up' (exchange for payment) up to one week of accrued AL entitlement in each subsequent 12-month period. All other supporting provisions related to cashing up AL would remain unchanged.[7]

28. This proposal maintains a waiting period to cash up a week of AL entitlement and a limit to the time period for doing so but changes the period from 12 months 'continuous employment' to 12 months. It also retains the existing policy intent that only one week of

[7] With the exception of one addition agreed by the previous Minister to provide clarity that, like if AL is cashed up when an employee has not requested it, if more than one week of entitlement is cashed up in an entitlement year the leave remains in force as if the payment had not been made. This is consistent with Cabinet's authority to make decisions on compliance and enforcement mechanisms to support the new Act.

AL entitlement can be cashed up per year, regardless of whether any has been cashed up in previous years.[8]

29. The implication of a change from 12 months continuous employment to 12 months is that, if an employee has accrued less than four weeks AL entitlement in a 12-month period (because they have had unpaid leave, they could cash up a higher proportion of their entitlement (eg six months unpaid leave would mean they can cash up one of two weeks entitlement). If, however, an employee has taken unpaid leave, we think it is unlikely they will have accrued AL entitlement left to cash up and, regardless, have had time away from work. We considered options that would address this but concluded that the small risk of misuse of the provision did not justify the legislative and administrative complexity they would add.

We recommend maintaining the status quo for AL an employee can take during a closedown period

30. In 2020 Cabinet agreed to a set of adjustments related to the framework for having closedown periods[9] that primarily focused on improving clarity and transparency. Our stakeholder working group's feedback on the detailed design of the framework was generally positive. The main concern they raised was the aspect of the Taskforce recommendation providing that, during a closedown period, an employer would not be able to refuse an employee's request to take AL in advance above the pro-rata amount of leave in advance (or accrued AL under an accrual system) an employee has 'earned'.

31. The concern centres around the liability for an employer if an employee takes this AL in advance and their employment ends soon after. The liability arises because leave in advance is 'unearned' and payment made for it is above what the employee would be entitled to be paid out for AL if employment ended. The group raised concern about the difficulties for employers to recover overpayments.[10]

32. The working group's concerns are likely to be raised by other stakeholders during consultation on the exposure draft. To address the liability risk and maintain the balance of interests between employers and employees, we recommend seeking agreement in your May Cabinet paper to rescind the decision to require an employer to agree to an employee's request to take AL in advance during a closedown period. We recommend the status quo is maintained so that, during a closedown period an employer may agree to an employee taking AL in advance if they do not have sufficient accrued AL entitlement to cover the closedown period, but an employer does not have to allow this.

[8] The policy intent is to ensure that employees still have at least three weeks paid time off work for each entitlement year (regardless of when they actually take it).

[9] A closedown period is one period per year when an employee customarily closes their business operations or discontinues the work of one or more employees and requires the employee to take all or some of their annual leave entitlement.

[10] Under the Wages Protection Act 1983 employers can include a general deductions clause in employment agreements enabling them to recover overpayments from an employee's final pay in some circumstances. In addition to this, before an employer makes any specific deduction from an employee's pay the employer must consult them before making a specific deduction and an employee must agree in writing.

We recommend simplifying the framework for paying AL as a regular part of an employee's pay (pay-as-you-go)

33. The Act provides that some employees may be paid for their AL as part of their regular pay (pay-as-you-go (PAYG)) instead of being provided with four weeks' AL entitlement each year if:
    - the employee is on a genuine fixed-term agreement of less than 12 months, or
    - the employee works so intermittently or irregularly that it is impractical for the employer to provide them with four weeks' AL.

34. In both of these situations:
    - the employee must agree to it in their employment agreement and
    - the AL pay must be no less than eight percent of their gross earnings in the pay period.

35. There are several areas of the current framework that are problematic in practice. Employers must exercise a high degree of discretion to make the assessment of whether an employee works on a basis that is so 'intermittent or irregular' that it is 'impractical' to provide four weeks AL as time off work. If PAYG is agreed, the framework for reviewing its use during employment and stopping it if the criteria no longer apply is also not clear. The lack of clarity has contributed to non-compliance.

36. To address these issues, in 2020 Cabinet accepted the Taskforce's recommendations for improving clarity and certainty around when PAYG can be used and a clear set of parameters to support its use. These included a new four-part test of an 'interment and irregular' working pattern and a recurring 13-week review period to determine if the definition continues to be met.

The recommended approach lacks clarity and adds administrative burden

37. The recommended test lacked clarity in several areas and still required a high degree of judgement. Amongst other things, it required an employer to make expectation-based assessments about work patterns before the start of employment and to make a subjective assessment at each review about whether an employee had an 'underlying pattern of work' in the previous 13 weeks (defined as an assessment that time at work had not repeated in a manner possible to anticipate).

38. The previous Minister agreed to a refined version of the criteria for using PAYG that made clear PAYG may be used from the start of employment if the employee does not have agreed hours of work in their employment agreement and there is no expectation that it would need to stop after the first 13-week review. An objective test for the 13-week review was also agreed.[11] The previous Minister also agreed to clarifications and additions to the recommended framework for the 13-week review process to address ambiguities, gaps and improve workability.

39. The refined test and framework reflected tripartite agreement that the proposals aligned with the underlying intent of the recommendation, including the intent to increase the

[11] The agreed test was that: employer must stop using PAYG if, at the three-month review, the employee has worked 10 hours or more on average per week over all the weeks in the review period, or the employee has performed work during six or more of the weeks in the review period (unless they have also had a continuous period of more than four weeks without work).

general eligibility threshold for PAYG and promote the actual taking of AL whenever possible.[12]

40. While they would provide greater certainty, the objective test and 13-week review requirements are complex, and drafting was challenging. A 13-week review period would also impose high compliance costs and onus on employers. In addition, it would mean that if an employee's hours of work passed the threshold in one 13-month period PAYG would have to stop indefinitely even if that was not a recurring work pattern.

We recommend a less restrictive and simplified framework for using PAYG

41. In cases where working arrangements are variable, and an employee genuinely has periods when they do not work, PAYG is a simple and fair way for employers to provide an employee with their AL entitlement. It avoids the need to determine what constitutes a week in these situations and to apply the more complex payment methodologies that apply when AL is taken.

We recommend simplified criteria for using PAYG…

42. We recommend including a proposal in your May Cabinet paper that is simpler than the four-part test for using PAYG and less restrictive.

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[12] The Taskforce also recommended removing the ability to use PAYG for fixed-term employees on contracts of less than 12 months

Free and frank opinions

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We are continuing to work on the details of the proposals

46. We will continue to work on the detail of the proposals above for inclusion in your Cabinet paper and we will report back to you if we need any further decisions before then. This work will include engagement with representatives of Business NZ and the New Zealand Council of Trade Unions to help test for unintended consequences.

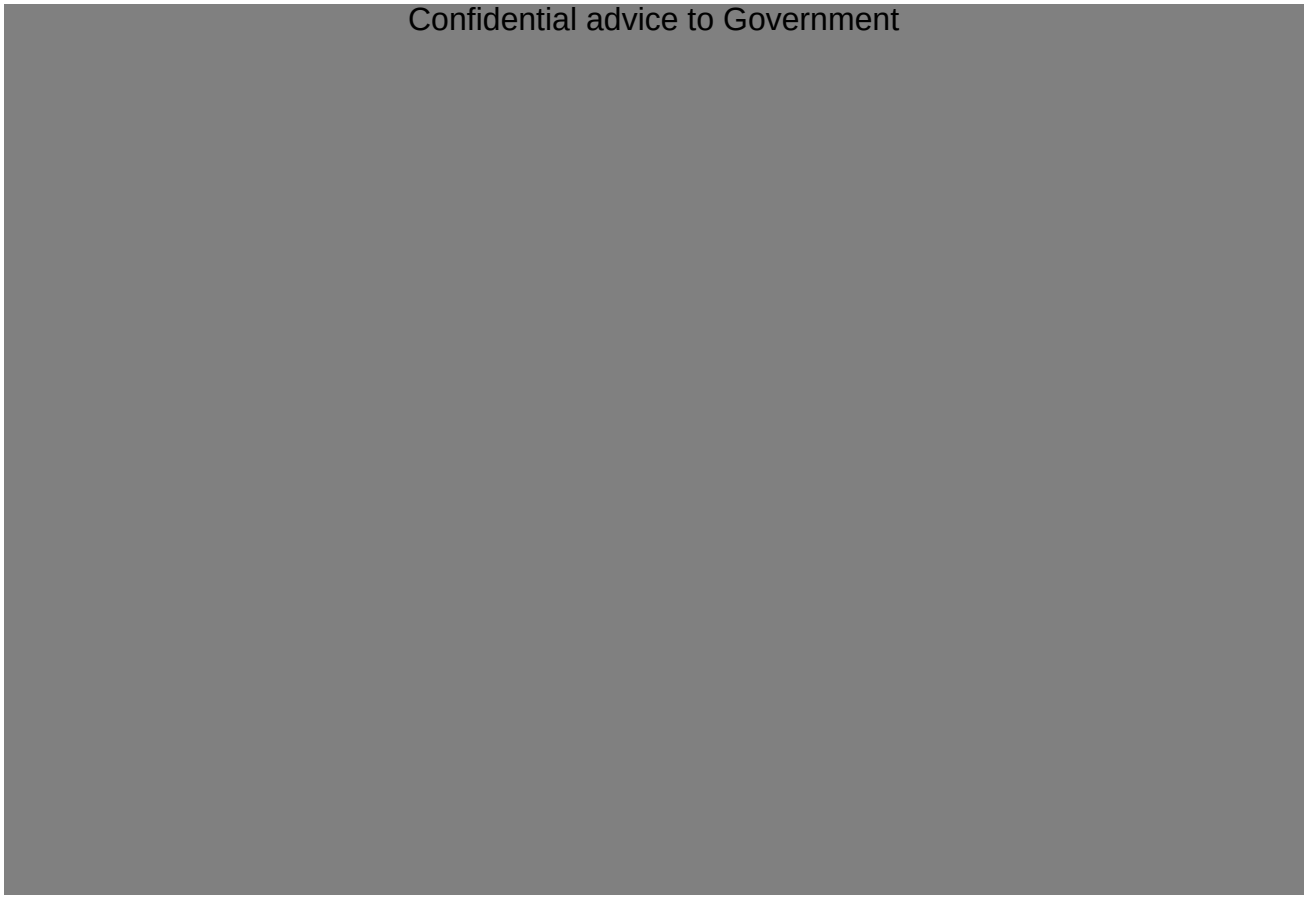
47. We also intend to engage with the United Kingdom to learn from their experience in this area. The United Kingdom's changes to their 'Working time Regulations' (that come into effect on 1 April 2024) include the introduction of 'rolled-up holiday pay' (a similar concept to PAYG) as an option for 'irregular hour' and 'part-year' workers. In its report back on the consultation on the reforms, the Department of Business and Trade states that it understands "rolled up holiday pay is already used in a lot of sectors due to the simplicity it offers to calculate holiday pay for irregular hours workers". It also states that, while it recognises that 'rolled up holiday pay' may disincentivise taking time off work it considered that "existing safeguards are proportionate in addressing the concerns".

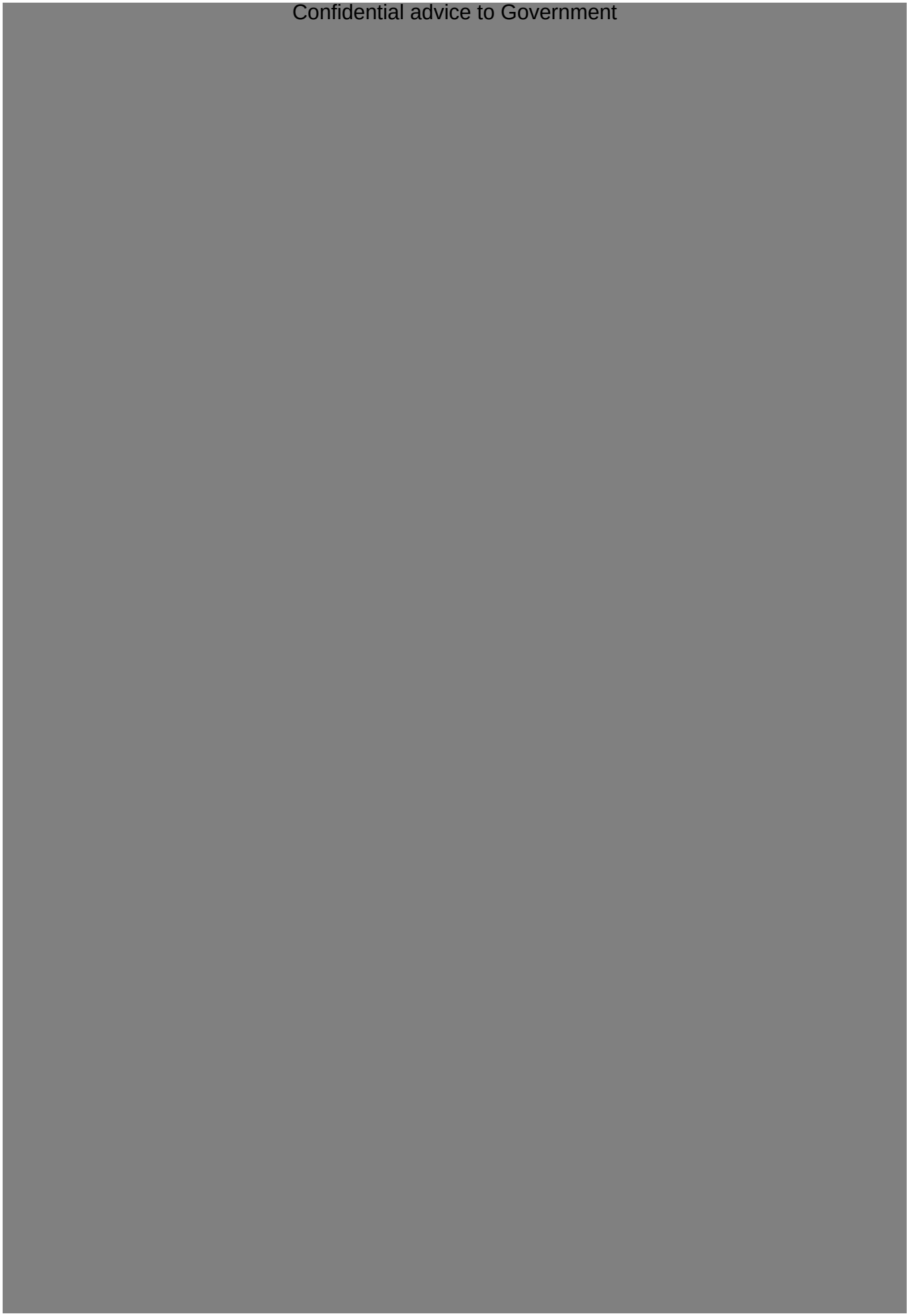
Confidential advice to Government

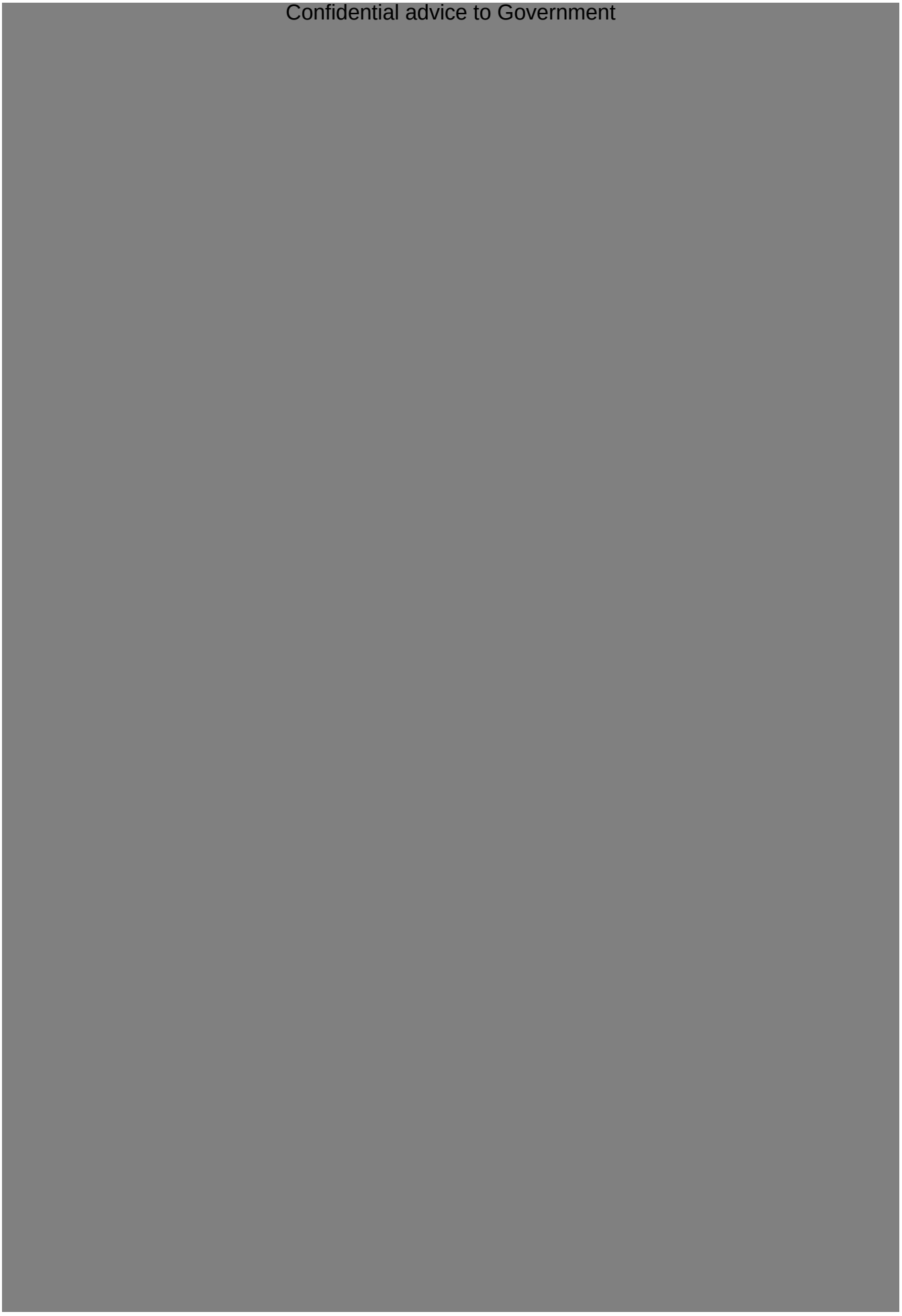
49. We have proposed that for the exposure draft, the rules for the periods of employment during which employees earn AL entitlement reflects the status quo (refer paragraphs 14 – 16 above). We have proposed the same with regards the rules for reducing the divisor for the AWE calculation to account for periods when an employee off work and receiving no or reduced pay (refer paragraph 17-19 above).

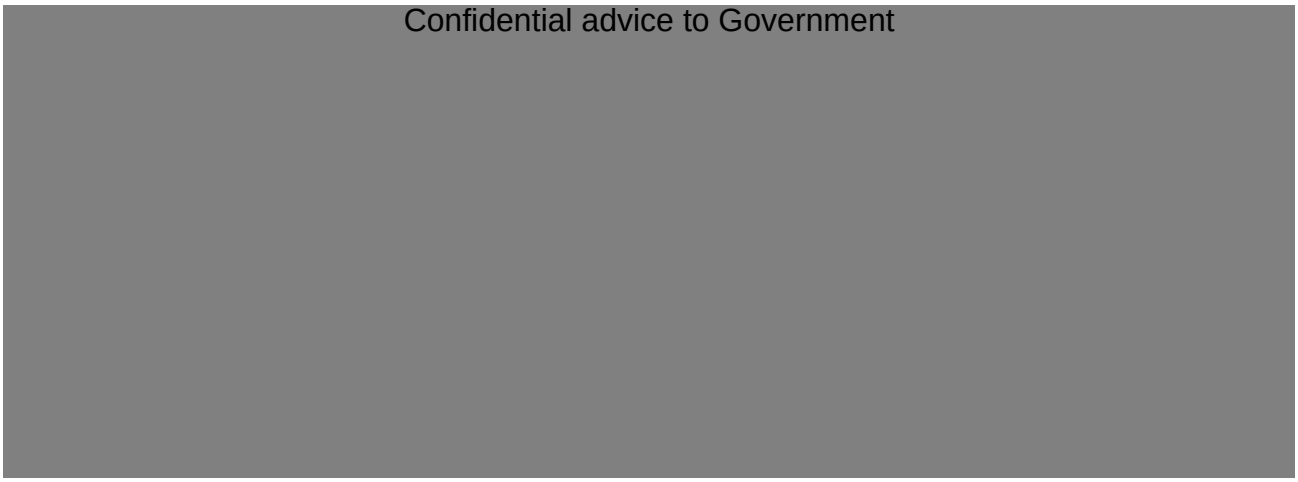
Confidential advice to Government

52. In 2020 Cabinet agreed that AL payments would be based on the greater of three rates: Ordinary Leave Pay (OLP) (a new calculation to replace the current Ordinary Weekly Pay (OWP) which has been problematic), Average Weekly Earnings (AWE) of the last 52 weeks or AWE over the last 13 weeks. The short run AWE adds a third calculation to the methodology in the Act.








Confidential advice to Government

Annex Three: Providing, taking and paying other leave types

ANNEX THREE: PROVIDING, TAKING AND PAYING OTHER LEAVE TYPES

Overview of the paper

1. This paper seeks your decisions on adjustments to some of the 2020 Cabinet policy decisions for changes to family violence leave, bereavement leave, alternative and public holidays, and sick (FBAPS) leave. The proposals are intended to reduce complexity and compliance costs associated with these leave entitlements and payment calculations. They all remain aligned with the underlying intent of the Taskforce recommendations.

2. There are three FBAPS proposals covered in this paper:

   - Part 1: Consolidation of FBAPS payment methodologies
   - Part 2: Calculation of hours to be assigned on day of FBAPS leave
   - Part 3: Refinement of sick leave criteria and set period for accumulation of entitlements.

Recommendations

Area	Recommendation	Decision	
Consolidation of FBAPS payment methodology	**Note** that, under the Act, FBAPS leave payments are based on an employee's relevant daily pay (RDP) or, if it is not possible to determine RDP or an employee's daily pay varies in the pay period, an employer may use average daily pay (ADP) which, in some circumstances, requires the employer to make a judgement about which to use.	*Noted*	
	Note the Taskforce recommendation requires the comparison of two calculations for all employees (ordinary daily leave pay and a new hours based average daily pay) to remove the need for judgement, reduce risks of gaming and ensure FBAPS payments reflect what an employee would have earned on a specific day.	*Noted*	
	Note that initial feedback suggests the new calculations are still complex and burdensome and that the new formulas could inflate FBAPS payments above what an employee would normally earn on a day in some circumstances.	*Noted*	
	Agree to a revised relevant daily pay calculation which is a single calculation for FBAPS leave payments involving: base pay and fixed allowances (that will not otherwise be paid during the period of leave) and an average of productivity and incentive payments received.	*Agree*	*Discuss*
	Note that we will continue to work on the exact detail of the revised RDP methodology to ensure that the calculation is clear and functional and will include this in your May Cabinet paper.	*Noted*	
	Note the exposure draft can to test the views of stakeholders, including those of payroll providers, on the ease of application.	*Noted*	
Calculation of hours to be assigned on day of FBAPS leave	**Note** that the Taskforce recommended, and Cabinet agreed to a new calendar day methodology for situations when employees do not have clear daily hours of work to determine the number of hours an employee would have worked on a day of annual or FBAPS leave.	*Noted*	

	Note concerns were raised by stakeholders, particularly payroll practitioners, about the complexity of the calendar day methodology and the extent and cost of system changes it would require.	*Noted*	
	Note that, in response, the previous Minister agreed to remove the calendar day aspect of the methodology for annual leave and allowed parties to reach a formal agreement not to use the default calendar day methodology for FBAPS leave.	*Noted*	
	Note the removal of the calendar day methodology for FBAPS leave means that assigned hours would instead be based on an employee's average hours across all days worked in the pay periods that started in the 13 weeks before the one in which the leave is taken.	*Noted*	
	Note there will be some scenarios where employees are paid for fewer hours than they regularly work on a particular day as a result of this change in calculation but we believe these situations are limited and outweighed by the significant information collection, storage and processing costs of the calendar day methodology.	*Noted*	
	Agree to include in your Cabinet paper a proposal to remove the calendar day methodology for both annual leave and FBAPS leave.	*Agree*	*Discuss*
Refinement of FBS (family violence, bereavement and sick) leave criteria	**Note** Cabinet agreed that for eligible employees become entitled to FBS leave from their first day of employment (removing the current six-month waiting period) and that other employees would become eligible if they met prescribed tests after three or six months of employment.	*Noted*	
	Note that the current FBS eligibility criteria (worked an average of 10 hours per week, and at least one hour in every week or 40 hours in every month) does not align with entitlement from day one.	*Noted*	
	Note that, to support access to FBS entitlements from the first day of employment Cabinet also agreed to new eligibility tests and that the previous Minister agreed to clarifications to these, including a criteria for eligibility from the first day of employment that requires a judgement about whether the employer expects the employee to meet the 'hours test" which will create uncertainty and potential for disagreement.	*Noted*	
	Note the removal of the expectations-based assessment that occurs on the first day of employment will mean that only employees with agreed hours in their employment agreement are eligible to FBS leave from their first day of employment, and all other employees are subject to the eligibility tests after three months of employment.	*Noted*	
	Agree to include in your Cabinet paper a proposal to remove the expectations-based assessment in the eligibility criteria for FBS leave.	*Agree*	*Discuss*
Refinement of sick leave accumulation profile	**Note** that Cabinet agreed that employees should be able to access their full entitlement of family violence and bereavement leave from day one but that sick leave entitlement should build up from day one so that an eligible employee can access the full allocation (five days at the time of decision) after four months**.**	*Noted*	
	Note the previous Minister agreed to change the accumulation profile for sick leave to reflect the increase in sick leave entitlement from five to ten days so that, for employees eligible from day one, 10 days would accumulate over the first three months of	*Noted*	

	employment and other employees would get their full 10 day entitlement when they become eligible after three months.		
	Note you have the option of proceeding with the previous Minister's decision on the accumulation profile or considering one with a longer timeframe.	*Noted*	
	Agree to an accumulation profile for 10 days sick leave: EITHER • Option 1: Proceed with the previous Minister's decision; OR • Option 2: Use a longer timeframe of six months: two days on day one, a further four days after three months and a further four days (i.e. the full entitlement) after six months.	*Agree* *Agree*	*Discuss* *Discuss*
	If you agree to option 2 above: **Agree** that those eligible for sick leave after three months are entitled to six days at that time and then a further four days (i.e. the full entitlement) after six months and that those eligible after six months would receive their full entitlement of 10 days at that time (aligned with the current six month timeframe).	*Agree*	*Discuss*
	Note that the accumulation profile may need to change if further amendments are made to sick leave entitlements e.g. pro rata for part-time workers.	*Noted*	

Part 1: Payment methodology consolidation

There are several issues with the current payment methodology for FBAPS leave

3. Under the Holidays Act 2003 (the Act), payment for FBAPS leave is an employee's relevant daily pay[1] (RDP) but, if it is not possible or practicable to work out RDP or an employee's daily pay varies in the pay period in question average daily pay[2] (ADP) may be used instead.

4. During the issue identification phase of the 2018 Holidays Act Review, several issues and concerns with the RDP and ADP definitions were raised. These included that:

   - determining RDP relies on an employer's judgement about whether an employee would have received commission or incentive and overtime payments on a specific day had they not been on leave and what the value of those would have been.
   - there are situations were either RDP or ADP could be used (for example where it is possible and practicable to determine RDP, but an employee's daily pay varies within the pay period in which the holiday or leave falls) and in these cases employers are required to a make a judgement about which calculation to use each time leave is taken, creating high compliance costs.
   - employers can game the rules by paying the lower of the ADP/RDP when either could be used (employer gaming).

[1] RDP is defined as what an employee would have received had the worked on the day concerned and includes productivity or incentive-based payments (including commission) and overtime payments the employee would have otherwise received had they worked on the day concerned and the cash value of any board or lodgings provided by the employer to the employee.

[2] ADP is a daily average of the employee's gross earnings (as per the definition in the Act) over the past 52 weeks. This is worked out by:

- adding up the employee's gross earnings for the period, and
- dividing this by the number of whole or part days the employee either worked or was on paid leave or holidays during that period.

- because ADP is calculated as an average across all days of work, its value is the same for any day of FBAPS leave regardless of how much an employee would have earned on a specific day. If an employee's hours and rates of pay vary between days of work, the methodology leads to them receiving more or less than they would have if they worked on a specific day.

Cabinet agreed to changes to the methodology for calculating FBAPS pay

5. To address the issues with FBAPS leave payments, in 2020 Cabinet accepted the Holidays Act Taskforce's recommended new methodology which includes two new calculations which employers must pay employees the greater of. The intent was to eliminate the requirement to choose which calculation to use, while ensuring that no employees would be financially disadvantaged by being on leave. The new calculations are:

    a. **Ordinary Daily Leave Pay (ODLP):** the amount an employer is required to pay an employee under their employment agreement for a relevant day. It includes wages/salary, fixed allowances and the cash value of board and lodgings.[3]

    b. **New Average Daily Pay (ADP):** ADP is also a new calculation that differs from the one with the same name under the current Act by changing the basis from days to hours. It aims to make the calculation result more specific to a particular day. It is calculated by multiplying an hourly rate[4] by the number of hours the employee would have worked on a day in question (determined in accordance with a prescribed methodology).

Issues with the Taskforce's proposals were identified during the policy design process

6. The 'greater of' comparison removes the requirement to apply judgement in deciding whether to use RDP or ADP, making it easier for businesses to comply in some situations. However, in other cases it would add complexity by introducing the requirement to make and compare two calculations. For employees whose hours of work are clear and who do not have variable components of pay, RDP is currently a very simple and fair calculation.

7. The new ADP calculation and comparison may inflate payments above what an employee would have expected to earn on the day in question and what would be considered fair in some situations. This is especially the case where payments are currently based on RDP with no comparison to an average rate that incorporates all gross earnings. Payments such as penal rates and overtime rates would be included in the average hourly rate and apply to all hours on any day, regardless of whether those rates would have actually applied.

Confidential advice to Government, Free and frank opinions

We propose a new single consolidated payment methodology

8. We recommend including a proposal in your May Cabinet paper to consolidate the greater of ODLP and ADP methodology Cabinet agreed in 2020 into a single calculation. We will continue to work on the exact detail to ensure that the calculation is clear and functional and may include some refinements to the details below in your May Cabinet paper.

[3] This is the refined definition of 'OLP' that the previous Minister agreed to, to address ambiguities around how components such as 'scheduled overtime' and 'incentive or 'commission payments that the employee would have received if they had worked for the relevant period' were to be included in the calculation.

[4] Hourly average rate of pay is based on gross earnings in the last 13 weeks divided by total weekly hours worked, or on paid or unpaid leave in the last 13 weeks

9. The methodology would include the components of the current Holidays Act RDP but would provide a formula that makes it clear and possible to calculate the variable components (eg. commission and overtime) in every case. In situations where RDP is currently straightforward to calculate, the aim is that there would be little change from how FBAPS payments are currently calculated. The consolidated calculation is designed to be applicable to both waged and salaried workers.

10. The consolidated calculation would be comprised of four parts: A base rate for wages or salary **plus** fixed allowances **plus** an average of productivity or incentive payments received **plus** the cash value of board and lodgings.

Base rate

11. **Waged employees:** Wages payable under the employee's employment agreement at the time leave is taken for each of the hours it has been determined the employee would have worked on the relevant day if they had not been on FBAPS leave. If overtime or penal rates would have applied to any of those hours, then those rates must be used for the relevant hours.

12. **Salaried employees:** Employee must continue to be paid the salary payable under their employment agreement for the day as if they had not been on FBAPS leave. Employees must also receive any additional wages payable under their employment agreement for any additional hours the employee would have worked on the day in question that are not compensated by salary.

Fixed allowances

13. Fixed allowances are an allowance of a non-variable amount that an employer would always be required by the employee's employment agreement to pay if the employee had worked the hours it has been determined they will be on FBAPS leave. This includes allowances such as fortnightly and daily allowances, a shift allowance or events-based allowance (such as a forklift driving allowance) that would always be payable under the employment agreement for those hours.

14. Fixed allowances would not have to be included if they are 'enduring' (will continue to be paid in full despite the employee being on leave, for example a fortnightly higher duties allowance)

Productivity or incentive-based payments (including commission)

15. The value to be included would be calculated as follows: productivity and incentive-based payments (including commission) received in pay periods that started in the 13 weeks before the one in which the day of FBAPS leave is taken, divided by the number of hours the employee has worked or been on paid leave in those pay periods, multiplied by the hours it has been determined would have been worked on the relevant day.

16. Cabinet has agreed that, if the payments were earned over a period longer than 13 weeks, or do not relate to a specific period of time, they do not have to be included (eg. an annual bonus or incentive payment or long service or sign on bonus). This would apply to the calculation.

Cash value of Board and Lodgings

17. For the exposure draft, this would be determined according to the current definition in the Act. Stakeholders have noted that the current definition lacks clarity about how it applies in various circumstances and can lead to 'double dipping' in cases where an employee continues to use board and lodgings during a period of leave. Confidential advice to Government

We think the revised RDP would result in fair outcomes for employees and employers

18. We think that the consolidated calculation will, overall, provide a fair outcome for both employers and employees. Appendix 1 includes some initial, hypothetical scenarios we have developed to illustrate how the calculation will apply and how the payment outcomes might compare to the status quo and to the 'greater of' methodology agreed by Cabinet in 2020.

19. There is no solution that will produce a payment outcome that reflects precisely what an employee would have earned on a specific day in all situations. We have therefore aimed for a methodology to test in the exposure draft that we think will produce an outcome that reflects, to the greatest extent possible, what an employee would have expected to receive on any given day. In some cases, this might mean that payments are lower than they would currently be under the status quo (due to the possible inflation of payments above what would have been earned using the current ADP calculation in some cases), but not lower than what the employee would have reasonably expected to receive on the day had they worked.

Part 2: Determining hours an employee would have worked on a day of leave

Cabinet agreed to a new calendar day methodology to assign hours to a day of leave

20. In 2020, Cabinet agreed to the new methodologies recommended by the Holidays Act Taskforce for FBAPS and annual leave (AL) to provide clarity about how to determine the portion of their entitlement an employee is using for a period of time off work. A key part of these methodologies is determining the number of hours an employee would have worked on a day of leave.

21. For employees who do not have specified daily hours of work, Cabinet agreed that for both AL and FBAPS leave, the calculation of the number of hours an employee would have worked would be based on the average number of hours that an employee has actually worked on the same day of the week over a 13-week period (the calendar day methodology). Using this methodology, if an employee took leave on a Monday, their employer would calculate the total hours they worked on each Monday over the previous 13 weeks, and divide the total hours by the number of Mondays they had worked in the previous 13 weeks.

Implementing the calendar day methodology would require extensive and costly system changes

22. The calendar day methodology has been one of the key areas of concern raised by stakeholders (particularly payroll providers) throughout the 2021-2022 policy design process. These concerns centre on the extent and cost of the payroll system changes that would be needed to implement the methodology, as payroll systems would be required to access and store data about daily hours of work and leave. Payroll providers have indicated that most payroll systems, particularly those used by small businesses, are currently only configured to store total hours for a pay period rather than a breakdown of daily hours of work and leave.

23. The methodology would also require employers to make numerous calculations when a period of leave is more than one calendar day, as a different calculation would need to be made for each calendar day of leave in a pay period.

The previous Minister agreed to remove the 'calendar day' aspect of the methodology for annual leave and provide greater flexibility for FBAPS leave

24. Before the 2023 General Election, the Minister for Workplace Relations and Safety agreed to simplify the methodology for determining the hours an employee would have worked on the day of annual leave by removing the 'calendar day' aspect of the methodology. In accordance

with this decision, the hours will instead be based on an employee's average hours across all days worked in the pay periods that started in the 13 weeks before the one in which the leave is taken. This means that employers will only be required to make one calculation for all days of annual leave in a pay period. Each day of annual leave will have the same number of hours assigned to it.

25. The same simplification was not made to the methodology for calculating the hours that would have been worked on a day of FBAPS leave. Free and frank opinions

26. Instead, to provide some flexibility to employers, the Minister agreed to retain the calendar day methodology as the default methodology for calculating the hours that would have been worked on a day of FBAPS leave, but provided the option for an employment agreement to specify that the employer will use the employee's average hours across all days worked.

27. This means that, while the methodology for calculating the hours that would have been worked on a day of leave would now be simpler for annual leave, payroll systems would still need to be capable of implementing the calendar day methodology for FBAPS leave for cases where agreement to depart from the default was not reached.

MBIE recommends removing the calendar day methodology for FBAPS leave

28. We recommend including a proposal in your May Cabinet paper to remove the 'calendar day' aspect of the methodology for determining the hours an employee would have worked on a day for both annual leave and FBAPS leave. In situations where an employee does not have clear daily hours of work, the hours an employee would have worked on a day of leave would, for all leave types, instead be based on an employee's average hours across all days worked in the pay periods that started in the 13 weeks before the one in which the leave is taken.

29. This change would prevent employers from needing to make the extensive and costly payroll system changes that have been a key area of concern for payroll providers. Confidential advice to Government, Free and frank opinions

30. In cases where the calendar-day methodology is used, the employee's average hours worked on a calendar day would only vary significantly from their average hours across all days worked when, despite not having agreed daily hours, the employee does have a discernible pattern of work whereby they work more hours on average on some calendar days than others.[5]

31. For FBS leave, the averaging methodology would only be used to calculate the hours an employee would have worked on a day of leave when those hours cannot be ascertained from an employee's employment agreement, roster, or other document or record used in the normal course of employment.

32. Due to the events-based nature of FBS leave, an employee would typically notify their employer of their intent to take it shortly before or on the day it occurs. This means that in many cases for employees with variable daily hours of work, their roster would have been set before they notify their employer. In these cases, their rostered hours would be used. The calendar-

[5] For example, an employee might work six to eight hours most Saturdays they work, but four hours most Sundays they work. In this case, the average hours the employee has worked across all days could be lower than their usual Saturday hours, but higher than their usual Sunday hours. If an employee has very variable daily hours of work or works a similar number of hours on any calendar day of work then there will be little difference.

day methodology would therefore only be used if the employee notified their employer of their intent to take leave before the roster was created (for example, if the employee has a scheduled medical procedure).

33. We consider the benefits to employers of removing the 'calendar day' aspect of the methodology for calculating the hours to assign to a day of FBAPS leave outweigh the disadvantages doing so may have for some employees in some scenarios.

Part 3: FBS leave eligibility criteria and accumulation of sick leave entitlement

Eligible employees currently become entitled to FBS leave after six months of employment

34. Currently under the Act, employees become entitled to family violence leave, bereavement leave and sick leave (FBS leave) if they meet the following eligibility criteria:

    a. they have completed six months of current continuous employment with the same employer, or

    b. they have worked for the employer for six months for an average of 10 hours per week, and at least one hour in every week or 40 hours in every month.

35. An employer may choose to allow an eligible employee to take FBS leave in advance before they have reached six months of employment, but there is no obligation for them to do so.

Cabinet agreed for eligible employees to become entitled to FBS leave from their first day of employment

36. In 2020, Cabinet accepted the Holidays Act Taskforce's (the Taskforce's) recommendation that eligible employees begin to accumulate the minimum sick leave entitlement, and become entitled to the full minimum family violence leave and bereavement leave entitlements, from their first day of employment. At that time, the minimum sick leave entitlement was five days per year. The recommended accumulation process was for eligible employees to become entitled to one day of sick leave on their first day of employment, and an additional day after every month of employment until the five days of minimum sick leave entitlement was reached after four months (1,1,1,1,1).

37. The intention behind the recommendation was to recognise that employees have little control over when they may need to take FBS leave and may therefore need to take it during their first six months of employment. It was also to recognise that not having access to FBS leave from the first day of employment may encourage employees to go to work sick, which raises health and safety concerns and is not in line with the key principle of the legislation to promote balance between work and other aspects of employees' lives.

Cabinet agreed to a new eligibility criteria for FBS leave

38. The current criteria in the Act to determine employees' eligibility for FBS leave (worked for the employer for six months for an average of 10 hours per week, and at least one hour in every week or 40 hours in every month), is based on eligible employees becoming entitled to FBS leave after six months of employment. Such eligibility criteria do not align with the recommendation that eligible employees begin to accumulate FBS leave from their first day of employment.

39. The Taskforce recommended a new criteria to determine employees' eligibility for FBS leave from their first day of employment, which Cabinet accepted in 2020. The new eligibility criteria included the following tests at various points of employment:

    a. **First day of employment:** Does the employee have agreed hours and an expectation of continuous employment (an expectation that the employee will not have any periods of unpaid leave that are longer than one week)?

    b. **After 13 weeks of employment:** Does the employee meet the 'hours test' (has the employee worked on average 10 or more hours per week during the last 13 weeks)? This test is to be repeated after each 13-week period.

    c. **After six months of continuous employment:** all employees are eligible.

The previous Minister also agreed to adjustments to make the new eligibility criteria for FBS leave clearer

40. The new criteria accepted by Cabinet to determine employees' eligibility for FBS leave did not include sufficient details explaining how it should be applied by employers ('continuous employment' is only defined in the Act for the purpose of annual leave and applying that definition would have introduced significant complex to FBAPS). In 2022, the previous Minister agreed to a number of clarifications to the new eligibility criteria, to ensure the steps involved in the tests that are included in the new eligibility criteria are clear. The clarifications resulted in the following tests:

    a. **First day of employment**: Does the employee have agreed hours specified in employment agreement or an expectation of meeting the three or six-month criteria (an assessment by the employer, based on any available employment information and conducted in good faith, of whether there is an expectation that the employee will meet the criteria)?

    b. **After three months of employment**: Does the employee meet the 'hours test' (has the employee worked on average ten or more hours per week during the last three months, including hours paid as any form of paid leave)?

    c. **After six months of employment**: Does the employee meet the 'hours test' or the 'ongoing work test' (has the employee had no more than two continuous periods without work that are longer than four weeks over the last six months)?

    If the employee does not meet the eligibility criteria after six months of employment, these two tests must be repeated after each subsequent three-month period (or more frequently if the employer chooses to do so).

The inclusion of an expectation judgement means the eligibility criteria remains complex

41. The test applied on the first day of employment involves a judgement about whether the employer expects the employee to meet the 'hours test". Such a judgement adds complexity and an opportunity for a difference of view between the employer and employee.

42. We recommend removing the expectations-based assessment that occurs on the first day of employment. This will mean that only employees with agreed hours in their employment agreement are eligible to FBS leave from their first day of employment, and all other employees are subject to the eligibility tests after three months of employment.

43. This would reduce the number of employees who employers would need to provide FBS leave to from their first day of employment and simplify the new eligibility criteria.

The previous Minister agreed to change the accumulation process for sick leave to reflect the increase in sick leave entitlement from five to ten days

44. In July 2021, the previous Government increased the minimum sick leave entitlement from five to ten days per year. In November 2021, the previous Minister considered how to adjust the accumulation process to reflect the increased entitlement. He agreed that employees who were eligible from their first day of employment would be entitled to two days of sick leave on their first day of employment, an additional two days after one and two months of employment, and an additional four days after three months of employment, so the ten days of minimum sick leave entitlement was reached after three months (2,2,2,4).

45. The previous Minister also agreed that employees who would become eligible after three months would receive their full ten days of minimum sick leave entitlement upon becoming eligible. This solution took into account feedback from our working group that aligning the accumulation points for these two groups of employees would help simplify the accumulation process and making it easier to understand and implement in payroll systems. They had raised concerns that the gradual accumulation process Cabinet agreed to would add complexity because it involved multiple points at which different groups employees would become entitled to different portions of the minimum sick leave entitlement.

You may wish to reconsider the accumulation profile

46. We recommend seeking Cabinet approval for the accumulation profile. However, you may wish to reconsider the accumulation profile and propose a different approach.

47. You may wish to lengthen the timeframe over which sick leave accumulates, considering the impact on employers of providing the minimum sick leave entitlement earlier than the current requirement of after six months of employment. For example, rather than accumulating over the first three months of employment, sick leave could accumulate over the first six months of employment.

48. There are a range of accumulation profiles you can choose depending on whether you placed greater importance on lengthening the timeframe over which this group of employees' sick leave accumulates, or on reducing the complexity and related costs to employers.

49. We recommend a profile for the exposure draft that lengthens the accumulation over six months. To respond to the stakeholder feedback about complexity, we propose that there are fewer accumulation points. Our proposal is two days entitlement on day one, four more days after three months and the remaining four days at the six-month point (2,4,4). This is a minimum and an employer (as many do now) could choose a simpler profile that is above it, for example by providing the full day entitlement from day one.

50. Accumulating sick leave over six months has the downside that to retain parity, employees who meet the eligibility criteria (the hours test) after three months, would also need to have an accumulation profile. These workers would receive six days when they become eligible and then the additional four days when they reach six months.

Stakeholders are likely to raise further concerns about the provision of sick leave

51. A longer timeframe over which sick leave accumulates in the first year of employment would go some way to address employer concerns about the costs of providing sick leave to employees from the first day of employment for eligible employees.

52. Despite this, a new requirement to give eligible employees the ability to take some sick leave from day one is likely to reinforce stakeholder concerns about the overall fairness of sick leave entitlements and the costs and risks to businesses. Several employers raised concerns in their submissions on the Holidays (Increasing Sick Leave) Amendment Bill in 2021 regarding the

fairness of the requirement to provide the full ten-day minimum sick leave entitlement to employees who work less than five days a week. A number proposed a pro-rata approach to sick leave for part-time employees. You have received correspondence from a number of stakeholders who have raised similar concerns and suggestions.

53. To provide an opportunity to seek stakeholder feedback, we can include some options for addressing the issues raised in the exposure draft consultation on this matter if you wish.

Appendix 1 – Hypothetical examples of FPABS calculations (for illustrative purposes only and with judgement exercised as to how methodologies would apply)

1. Marcus has 30 guaranteed hours per week but no agreed days or times of work. A normal shift is 8 hours and might be during the day or at night. His agreed pay is $27 for ordinary hours, but $35 for overtime and weekend work. Currently, he receives an enduring higher duties allowance of $80 per week as acting supervisor. He is also paid a night shift allowance of $35 and receives an incentive payment of $25 if he meets his targets for a shift. He receives a quarterly retention bonus of $500.

Scenario 1

2. A public holiday falls on an otherwise working day (OWD) for Marcus. He is not rostered to work and so is entitled to a paid 8.5-hour day without work (calculated based on 13-week average).
    a. Holidays Act RDP = Judgement required, but arguably cannot be calculated as Marcus had no rostered hours.
    b. **Holidays Act ADP = $298.25 –** Calculated as daily rate based on average gross earnings (including enduring allowances).
    c. **Taskforce ODLP = $233.5 –** Calculated as 8 hours at a rate of $27 plus 0.5 hours overtime at a rate of $35.
    d. **Taskforce hourly ADP = $279.57 –** Calculated as average of gross earnings, excluding higher duties allowance which is enduring.
    e. **Revised RDP = $252.62 –** Calculated as 8 hours at a rate of $27 per hour plus 0.5 hours overtime at a rate of $35 per hour (the same as ODLP) plus 8.5 hours at a rate of $2.25 per hour to reflect average incentive payments based on a 13-week average.

Scenario 2

3. Marcus notifies his employer he is sick before he starts a rostered 10-hour night shift.
    a. **Holidays Act RDP = $346.00** – Calculated as 8 hours at a rate of $27 plus 2 hours overtime at a rate of $35 plus fixed night shift allowance of $35 and likely incentive allowance of $25.
    b. **Holidays Act ADP = $298.25 –** Calculated as daily rate based on average gross earnings (including enduring allowances).
    c. **Taskforce ODLP = $321.00 –** Calculated as 8 hours at a rate of $27 plus 2 hours overtime at a rate of $35 plus a full night rate allowance of $35.
    d. **Taskforce hourly ADP = $328.90 –** Calculated as 10 hours at a rate of the hourly average of gross earnings ($32.89), excluding higher duties allowance which is enduring.
    e. **Revised RDP = $343.53 –** Calculated as 8 hours at a rate of $27 per hour plus 2 hours overtime at a rate of $35 per hour plus a full night rate allowance of $35 (the same as ODLP). RDP also includes 10 hours at a rate of $2.25 per hour to reflect average incentive payments based on a 13-week average.

Annex Four: Amendments to parental leave and employment relations legislation

ANNEX FOUR: AMENDMENTS TO PARENTAL LEAVE AND EMPLOYMENT RELATIONS LEGISLATION

Overview of the paper

1. This paper seeks your agreement to include amendments to parental leave and employment relations legislation in your May Cabinet paper. The proposals are intended to reflect current practice to reduce rates of non-compliance.
2. The Parental Leave and Employment Protection Act 1987 (PLEPA) relies on the existing Holidays Act 2003 (Holidays Act) definition of "ordinary weekly pay" (OWP) to calculate parental leave payments. We recommend disconnecting the PLEPA from the Holidays Act instead of using the replacement for OWP in the Confidential advice to Government Bill). We propose a standalone methodology which reflects the intent of current methodology but is more compatible with Inland Revenue (IR) systems.
3. There is a lack of legislative clarity regarding the treatment of leave entitlements for some employees in restructuring situations. As a result, common practice among employers does not align with requirements in the Holidays Act. We are proposing a flexible approach for those employees, enabling treatment of entitlements to be negotiated by the incoming and outgoing employers rather than requiring them to paid out in accordance with the Holidays Act.

Recommendations

Area	Recommendation	Decision	
Methodology for determining parental leave payments	**Note** that a consequential amendment to the methodology for calculating parental leave payment rates in the Parental Leave and Employment Protection Act 1987 (PLEPA) is required because it uses the Holidays Act 2003 'ordinary weekly pay' (OWP) calculation which is replaced in the Confidential advice to Government Bill and that this also presents an opportunity to better support the objectives of IR's online application system to make applications faster and easier for applicants and employers.	*Noted*	
	Agree that your May Cabinet paper seeks agreement to replace the reference to OWP in the PLEPA with a standalone formula that is aligned with the methodology IR uses for the calculated income estimate of OWP and the average weekly income calculation set out in S71CAA of the PLEPA.	*Agree*	*Discuss*
	Note that the proposed formula would use a four-week average of an applicant's gross weekly taxable earnings before parental leave payments start, and that we are continuing to work with IR on the details for the timing of the calculation which we will include in your May Cabinet paper.	*Noted*	
Treatment of leave entitlements in a restructuring situation	**Note** that, in March 2020, Cabinet agreed to the Holidays Act Taskforce's recommendation that "on the sale and transfer of a business, employees should have a choice about whether to transfer all of their leave entitlements or have them paid out and reset".	*Noted*	
	Note policy work on this recommendation has revealed that giving effect to the recommendation would impose a statutory constraint on the contractual arrangements businesses make during the sale and transfer of a business, which could discourage incoming	*Noted*	

	employers from offering employees the option to transfer their employment.		
	Agree that your May Cabinet paper seek agreement to provide that: • for employees not specified in Schedule 1A of the Employment Relations Act 2000 (ERA): o specified matters relating to the treatment of leave entitlements in restructuring situations must be included in employees' Employee Protection Provisions as matters employers will negotiate if they have negotiated for the employee to transfer their employment and the employee has chosen to do so, including: ▪ whether the incoming employer will recognise all or part of the employee's annual leave and alternative holiday entitlements not taken at the date of transfer or the outgoing employer will pay them out, and whether the employee will be given a choice about this (full details set out in option five of Appendix One), ▪ how liability will be apportioned between the employers in relation to what has been negotiated regarding the matter above, and ▪ how employee information needed in relation to what has been negotiated regarding the matter above will be provided to the incoming employer o the payment rate for transferred leave entitlements must not be less than what it would have been had it been paid out at the time of transfer • for employees specified in Schedule 1A of the ERA, the status quo related to the treatment of leave entitlements in restructuring situations remains unchanged.	*Agree*	*Discuss*

We recommend a consequential change to the Parental Leave payment methodology

The replacement of Ordinary Weekly Pay in the Holidays Act means a consequential amendment to the methodology for determining Parental Leave payments is required

4. The Confidential advice to Government Bill) replaces the 'ordinary weekly pay' (OWP) calculation that is part of the Holidays Act 2003 (Holidays Act) methodology for calculating annual holiday payments, with a new 'ordinary weekly leave pay' (OWLP) calculation. This change is intended to provide better certainty for employers.

5. During drafting, it was identified that replacing OWP with OWLP meant a consequential amendment would be required to the methodology in the Parental Leave and Employment Protection Act 1987 (PLEPA) for determining the rate of parental leave (PL) payment payable to an eligible employee.

6. Currently, the PL payment rate method set out in the PLEPA is the greater of the employee's OWP just before the commencement of parental leave payments or their 'average weekly income' (AWI), up to a maximum weekly amount of $712.17. The policy intent of including OWP is to reflect what an employee would have earned at the time payments start. The intent of AWI is to reflect earnings over a longer period (the AWI

calculation is set out in the PLEPA and is the weekly average of the employee's gross taxable earnings in 26 of the last 52 weeks in which those earnings were highest).

We've developed options for the amendment and recommend disconnecting the PL payment methodology from the Bill

7. During the election period, we worked with Inland Revenue (IR), the agency responsible for processing parental leave applications and making PL payments, to develop options for the consequential amendment to OWP. We aimed to retain the policy intent of the OWP and AWI comparison.

8. The two main options considered were to replace OWP with:

    a. **Option 1:** A reference to the new OWLP calculation in the Bill.

    b. **Option 2:** A standalone formula in the PLEPA which would disconnect the PL payment method from the Bill.

Option two provides an opportunity to remove a remaining pain point in IR's online PPL application system

9. MBIE and IR recommend option 2 as it supports the objectives of IR's online paid parental leave (PPL) application system which was rolled out in 2021[1]. The objectives were to make PPL applications faster and easier for applicants, reduce compliance costs for employers, and simplify processing for IR.

10. The online PPL application system includes a calculated income estimate (based on the employee's income information held by IR), intended to remove the responsibility for making the complex payment calculations from applicants and employers (which had been identified as one of the most significant pain points in the PPL application process).

11. The calculated income estimate is limited however, as it has not removed this burden from all applicants and employers because IR does not have access to the level of detail about an employee's pay that is required to calculate OWP in accordance with the Holidays Act[2]. Instead, it estimates OWP using a formula based on a four-week average of total gross taxable earnings. This impacts applicants who receive less than the maximum PL payment rate (10.8 per cent in the 2022/2023 financial year).

12. To avoid delays in the deployment of the online system when it was rolled out, resolving the issue was not prioritised. Currently IR has a notification to inform applicants that it may not have all the necessary information to calculate payment rates correctly. These applicants are given instructions about how they and/or their employers can manually check the calculations. They can update IR's figure if they determine that the payment rate that they are legally entitled to is different than the IR estimate. Just before PL payments are due to start, IR also sends a reminder to applicants who apply early to

[1] Prior to 2021, regulations required PPL applicants to fill in a form and verify supporting information through statutory declarations. In IR's research, parents identified this administrative process as a major pain point. IR holds most of the information applicants were asked to provide and verify, meaning much of the administrative burden was unnecessary. In 2021 IR integrated the PPL application process into its new tax system. After determining eligibility for PPL through SmartStart (a single joint agency online platform for services associated with the birth of a child) applicants are directed to their secure myIR account to complete and lodge the application (which includes the PL payment rate calculation).

[2] IR receives information about employee's gross taxable earnings and deductions each payday, but it does not have visibility of the payment types that make up the gross taxable amount. It cannot distinguish the components of OWP an employer is able to such as salary/wages, allowances and regular productivity and overtime payments.

confirm all the application details are still correct and up to date, including the income estimate.

13. Like OWP, the new OWLP calculation in the Bill requires information about the components of an employee's pay that IR does not have access to. Option One would therefore still require manual checking of estimated calculations for all applicants and employers.

We propose a standalone formula in the PLEPA that is aligned with the methodology IR currently uses to estimate income

14. MBIE and IR propose replacing the reference to OWP in the PLEPA with a standalone formula that is aligned with the methodology IR use for the calculated income estimate of OWP in the online application system and with the methodology for the AWI calculation specified in the PLEPA. The proposed formula would use a four-week average of an applicant's gross weekly taxable earnings before parental leave payments start. We are continuing to work with IR on the precise details for the timing of the calculation to ensure workability and will finalise this for inclusion in your May Cabinet paper.

15. We have assessed the proposal against the criteria of practicality, payment outcomes for PPL applicants and costs to government.

Practicality

16. The proposed formula uses information IR holds and would therefore mean that, for most applicants[3], the income estimate calculated through the online application system would be accurate.

17. Aligned with the objective of the including the calculated income estimate in the PPL application system, most applicants or their employers would therefore no longer need to run manual calculations to check the pre-populated figure, further reducing the compliance costs and administrative burden of PPL applications.

Payment outcomes for applicants

18. The majority of applicants will be unaffected as their OWP and/or AWI are above the maximum payment rate (89 per cent in the 2022/2023 financial year, 32,587 of 36,544 applicants). For applicants whose OWP and/or AWI are less than or close to the maximum rate (10.8 per cent in the 2022/2023 financial year or 3,957 of 36,544 applicants) the impact on their payment rate will be situation dependent. For applicants who do not have variable components of pay and work consistent hours each week, the outcome of the proposed four-week average formula will be very close to the legal status quo for OWP.

19. In other cases, because the proposed formula is based on gross taxable earnings which includes more payment types than OWP (eg. one-off bonuses and commission payments that are not a regular part of pay), it might produce a slightly higher payment rate compared to the legal status quo.

[3] There are a small number of situations, such as where IR's employment information is not up to date, an employee's work pattern/earnings change between the time of application and when parental leave payments start, or an applicant has multiple employments the calculated income estimate will still only produce an estimate and applicants and/or their employers will need to check the calculations.

20. In a small number of cases, it might produce a lower payment rate than OWP if the applicant's four-week average of gross taxable weekly earnings was lower than both their OWP in the week before PL payments commence and their AWI.

21. We consider that, overall, the use of a four-week reference period aligns with the intent of including OWP in the PL payment rate methodology for applicants, providing a significantly different reference period to the 52-week period used for the AWI calculation, and will provide a fair outcome for applicants.

Costs to government

22. **Costs of PL payments:** It is not possible to calculate an exact fiscal cost due to the number of variables (such as the pay and work arrangements of specific applicants) and unknowns (such as number of applicants in a given year). IR expects any changes in costs because of the proposal to be minimal however, and manageable within the existing appropriation. As discussed in paragraph 18 above, the amendment would only impact a small percentage of applicants and any increase in cost will be limited to the maximum payment rate for each applicant.

23. Although the formula includes more payment types than OWP, it is likely that at present many affected applicants are not changing the automated estimate where it is not correct, meaning that IR may currently be paying some applicants a higher or lower rate than their legal entitlement. In the 22/23 financial year, of the 2,994 PPL applications where OWP was used for the payment rate only 174 were adjusted. It is therefore likely there would be little change in the actual costs of PL payments as a result.

24. **Implementation costs:** IR implementation costs are expected to be minimal because the proposed formula is aligned with the one already being applied[4]. The proposed calculation reference periods would require some relatively minor system changes. Confidential advice to Government

We recommend changes to the treatment of leave entitlements in a restructuring situation (amending the Employment Relations Act)

Cabinet has agreed to changes to allow leave entitlements to be transferred in restructuring situations

25. During the issue identification phase of the 2018 Holidays Act Review the rules for how employees' leave entitlements must be treated in restructuring situations (when a business is sold, transferred or work is contracted in or out) were identified as lacking clarity and as an area where the current legal status quo may not provide an optimal outcome from both employer and employee perspectives.

26. In a standard restructuring situation (involving types of employees not specified in Schedule 1A of the Employment Relations Act 2000 (the ERA)), employment with the outgoing employer ceases at the point of restructuring. It is common for the incoming employer to reach a contractual agreement with the outgoing employer to offer positions to current employees. To the employee, it appears as though their employment has

[4] This is a high-level assessment based on officials' preferred option.

transferred from one employer to the other but in reality they have entered a new employment relationship with the incoming employer.

27. Our view is that in these situations, the outgoing employer is legally required to pay out untaken annual leave and alternative holiday entitlements under the Holidays Act when the employee's employment with them comes to an end, and the employee's leave entitlements reset with the incoming employer. The outgoing employer is not required to pay out untaken family violence leave, bereavement leave or sick leave (FBS leave) entitlements when employment ends, but may choose to do so.

28. However, in practice the outgoing and incoming employers often allow employees to transfer all or part of their leave entitlements (including annual leave and alternative holidays) and come to an agreement about who takes on the liability for that leave. This outcome is beneficial for both employers and employees. It provides employers flexibility in relation to business arrangements and liabilities, and means employees do not always have to wait to become entitled to paid time away from work because their leave entitlements have been reset by the incoming employer. However, it is technically a breach of the Holidays Act.

29. Because of this, there is currently no legal framework to support common practice when it comes to apportioning liability between them and transferring the employee information needed to calculate employees' leave entitlements and pay to the incoming employer. This causes confusion and issues with the calculation and payment of leave following restructuring.

30. Our view is that the new legislation should legitimise the common practice. However, the Taskforce's recommendation (which Cabinet accepted in 2020) seeks to go further than this and require employers to offer employees the choice as to whether they have their annual leave and alternative holidays paid out or transferred if they are transferring to the incoming employer.

Giving effect to the Taskforce's recommendation would be complex

31. It is unclear whether the Taskforce's recommendation was intended to apply to the types of employees specified in Schedule 1A of the ERA. Part 6A of the ERA already sets out that these types of employees must be offered choice to transfer employment to the incoming employer, and if they do choose to transfer, their leave entitlements must be automatically transferred. This explicitly overrides the Holidays Act requirement that the outgoing employer must pay out untaken annual leave and alternative holiday entitlements.

32. The Part 6A provisions are intended to account for these employees' lack of bargaining power and greater risk of losing their job or having their terms and conditions undermined. We consider it strikes an appropriate balance between the Employment Relations and Standards regulatory system's objectives of flexibility, certainty and worker protection, and recommend the situation for specified employees remains unchanged.

33. It is also unclear how the Taskforce's recommendation was intended to be implemented in standard restructuring situations. For types of employees not specified in Schedule 1A, the decision by employers to offer employees the opportunity to transfer their employment in a restructuring situation is a contractual choice. Part 6A of the ERA requires employment agreements to contain an Employee Protection Provision (EPP) that sets out the process employers will follow in restructuring situations, however this process can be decided by parties to the employment agreement. The EPP must also

include the matters employers will negotiate regarding the affected employee's employment, including whether they will have the choice to transfer employment on the same terms and conditions.

34. A literal approach to operationalising the Taskforce's recommendation would mean that employers would be required to offer employees a choice about whether to have their leave entitlements transferred or paid out by the outgoing employer, as a downstream decision of something they are voluntarily agreeing to. Imposing this statutory constraint on employers' contractual arrangements could discourage the incoming employer from offering employees the opportunity to transfer their employment.

35. Due to the additional policy work required, work to implement this recommendation was put on hold and it is not currently included in the Bill. During the election period we have progressed work to develop options for addressing the underlying issues the recommendation was intended to address.

36. We are seeking your agreement to include an adjustment to the current Cabinet decision accepting the Taskforce's recommendation in your May Cabinet paper. This will enable your preferred option to be included in the exposure draft of the Bill, providing the opportunity to test it with stakeholders for practicality and any unintended consequences or further complexities we may not have considered.

Options to address the issues identified in restructuring situations defined in Part 6A of the ERA

37. We have identified five options to clarify how leave entitlements should be treated in restructuring situations (as defined in Part 6A of the ERA) where employees who are not specified in Schedule 1A of the ERA transfer employment to the incoming employer. These are summarised in Table 1 below and more detail is included in Annex One.

Table 1 – options for addressing issues related to the treatment of leave entitlements in restructuring situations defined in Part 6A of the ERA

Option	Description
1	**No legislative change but improved MBIE guidance** (there currently is none) to improve understanding of the current legal status quo to pay out and reset annual leave and alternative holiday entitlements. *This would require rescinding the Cabinet decision to accept the Taskforce's recommendation.*
2	**Improved MBIE guidance** (same as option one) **and legislative amendments** to clarify the legal status quo. *This would also require rescinding the current Cabinet decision.*
3	**Legislative change that requires employers to *automatically transfer* employees' annual leave and alternative holiday and FBS leave entitlements** if they negotiate for the employee to be offered the choice to transfer employment and the employee chooses to do so. *This would require a minor adjustment/clarification to the current Cabinet decision, but it would be difficult to draft a legislative amendment to achieve this.*
4	**Legislative change that requires employers to *offer employees the choice* to transfer all or part of their annual leave and alternative holiday and FBS leave entitlements** if they negotiate for the employee to be offered the choice to transfer employment and the employee chooses to do so. *This would require a minor adjustment/clarification to the current Cabinet decision, but it would be difficult to draft a legislative amendment to achieve this.*

5	**<u>Recommended option</u>** **Legislative change that requires the treatment of leave entitlements to be included in Employee Protection Provisions as a matter that the outgoing employer will negotiate with the incoming employer.** The specific matters are set out in detail in Appendix One and include whether the incoming employer will recognise all or part of the employee's annual leave and alternative holiday entitlements not taken at the date of transfer (instead of the outgoing employer paying them out in accordance with the Holidays Act provisions). They also include whether an employee will be provided a choice in the matter, or it will be automatic. *This option would require a more significant adjustment to the current Cabinet decision as, unlike options three and four, it departs from the Taskforce's recommendation to require employers to provide a choice to employees.*

38. We have assessed the options against the core objectives of the Employment Relations and Standards regulatory system:

- **Regulatory flexibility:** provides scope for parties to adopt a range of approaches to meet legal obligations relating to the treatment of leave entitlements in the event of restructuring.
- **Worker protection:** enables employers to give employees whose employment is being transferred the option to retain all or part of their leave entitlements to take paid time away from work.
- **Certainty:** provides clarity about the treatment of leave entitlements in restructuring situations.

We recommend option five because we consider it strikes the most appropriate balance between the objectives

39. Option five provides the flexibility for employers to adopt a range of approaches that best suit their specific business circumstances, which the other options do not provide. It also provides employers the ability to negotiate for all or part of employees' leave entitlements to be transferred and, where this is negotiated, whether employees are offered a choice in the matter. It would override the Holidays Act requirement that annual leave and alternative holiday entitlements must always be paid out at the end of employment, and provide a legal framework for employers to follow.

40. Option five reflects common practice (unlike the other options) and would provide certainty regarding the legal obligations in restructuring situations. It would also require Employee Protection Provisions in employees' employment agreements to include the apportionment of liability and the transfer of relevant employee information as matters employers will negotiate.

41. In terms of worker protection, option five does not ensure that employees will always have their leave entitlements transferred or that they will have a choice in the matter, but it does provide the ability for this to happen. It includes a safeguard for situations where an employee transfers employment on a lower rate of pay, ensuring that the payment they receive for transferred leave entitlement is not less than what it would have been if it were paid out and reset at the time of the restructuring.

42. Option five also minimises the risk of distorting the negotiation process between employers. The mandatory nature of the requirement to provide employees the choice to transfer their leave entitlements in options three and four may discourage the incoming employer from offering employees the opportunity to transfer their employment if large leave liabilities were involved.

Appendix One: Options for addressing issues related to the treatment of leave entitlements in standard restructuring situations

Implementation option	Certainty	Regulatory flexibility	Worker protection
1. **No legislative change but improved MBIE guidance** (there currently is none) to improve understanding of the current legal status quo to pay out and reset annual leave and alternative holiday entitlements. *Requires rescinding the Cabinet decision to accept the Taskforce's recommendation.*	✓ Legislation does not provide clarity but guidance will provide greater certainty about legal requirements.	×✓ The common practice of including transfer of leave entitlements as part of negotiations between employers remains non-compliant and this would be clarified in guidance. No risk of introducing distortions to wider negotiations.	✓× Employees are financially compensated for leave not taken but, as entitlement to time away from work must be reset, employees must wait to become entitled to time away from work again.
2. **Improved MBIE guidance** (same as option one) **and legislative amendments** to clarify the legal status quo. *Requires rescinding the Cabinet decision to accept the Taskforce's recommendation.*	✓✓ Legislation provides clarity about legal requirements.	×✓ As above.	✓× As above.
3. **Legislative change that overrides the Holidays Act provisions and requires employers to *automatically transfer* employees' leave entitlements** if they negotiate for the employee to be offered the choice to transfer employment and the employee chooses to do so. *Requires a minor adjustment/clarification to the current Cabinet decision, but it would be difficult to draft a legislative amendment to achieve this.*	✓✓ Legislation provides clarity about legal requirements.	×× Despite financial liability being transferred from the outgoing employer, recognising annual and alternative holiday balances is a resourcing liability. This may be a disincentive for an incoming employer to offer existing employees the choice to transfer employment. Does not provide flexibility for employers to continue the common practice.	✓ Employees who are offered and choose to transfer employment do not lose leave entitlements and do not have to wait to become entitled to time off work. Does not provide the choice between payment and time that option four does as transfer of entitlement is part of the choice to transfer employment.
4. **Legislative change that overrides the Holidays Act provisions and requires *employers to offer employees the choice to transfer all or part of their leave entitlements*** if they negotiate for the employee to be offered the choice to transfer employment and the employee chooses to do so. *Requires a minor adjustment/clarification to the current Cabinet decision, but it would be difficult to draft a legislative amendment to achieve this (most aligned with taskforce recommendations).*	✓ Legislation provides clarity, but would introduce greater complexity framework than option three.	×× As above. The two-tiered choice for employees may create a further disincentive for employers to negotiate transfer of employment.	✓✓ Provides employees a clear-cut choice following a choice to transfer employment, between receiving payment for outstanding leave entitlements or having them recognised by incoming employer and retaining the ability to take the time off work.
5. **Legislative change that requires the treatment of leave entitlements to be included in Employee Protection Provisions** as a matter that the outgoing employer will negotiate with the incoming employer. The matters that will be negotiated would be expanded from the transfer of employment on the same terms and conditions to also include: • whether or not employment will be treated as continuous for the purpose of determining the employee's service-related entitlements (including leave entitlements under the Holidays Act and rights and benefits under the PLEPA), • whether or not the new employer will recognise all or part of the employee's annual and alternative holiday entitlements not taken or exchanged for payment before the date of transfer (instead of the outgoing employer paying them out in accordance with the Holidays Act provisions), • whether or not the new employer will recognise all or part of an employee's FBS leave entitlements not taken or exchanged for payment before the date of transfer, • whether or not, where recognition of annual leave and alternative holiday and FBS leave entitlements is negotiated, an employee will be provided a choice in the matter or it will be automatic if they choose to transfer their employment, • how liability will be apportioned between the employers in relation to what employers have negotiated (guidance could also be provided to support this), and • how relevant employee information in relation to what employers have negotiated will be provided to the incoming employer (guidance could also be provided to support this). Provide that the payment rate for transferred leave entitlements must not be less than what it would be if it were paid out in accordance with the Holidays Act at the time of the transfer. *Requires a more significant adjustment to the current Cabinet policy decision as, unlike options three and four, it departs from the Taskforce's recommendation to require employers to provide a choice to employees.*	✓✓ Legislation provides clarity about legal requirements. Provides a clear framework to support transfer of entitlements when it is negotiated.	✓✓ The legal framework would provide for the common practice of including the transfer of leave entitlements as part of negotiations. Employers can adopt a range of approaches to meet their legal obligations that best suit their circumstances.	✓ Employees may or may or not have entitlement transferred. And may or may not have the option whether to have entitlements recognised or paid out. There will be no distortions to incoming employer's decisions as to whether or not to transfer employment. Protects the financial value of transferred entitlements for employees who may transfer on terms and conditions less than their existing terms and conditions.