



COVERSHEET

Minister	Hon Brooke van Velden	Portfolio	Workplace Relations and Safety
Title of Cabinet paper	Holidays Act Reform: Consultation document for targeted consultation	Date to be published	14 October 2024

List of documents that have been proactively released

Date	Title	Author
August 2024	Holidays Act Reform: Consultation document for targeted consultation	Office of Workplace Relations and Safety Minister
August 2024	Appendix Two: Summary of key proposals and alternative options included in the consultation document	Office of Workplace Relations and Safety Minister
28 August 2024	Holidays Act Reform: Approval to Consult ECO-24-MIN-0177 Minute	Cabinet Office
17 June 2024	2324-3811 Holidays Act Reform: Decisions on sick leave for the exposure draft	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.



BRIEFING

Holidays Act Reform: Decisions on sick leave for the exposure draft

Date:	17 June 2024	Priority:	High
Security classification:	In Confidence	Tracking number:	2324-3811

Action sought		
Minister	Action sought	Deadline
Hon Brooke van Velden Minister for Workplace Relations and Safety	Indicate your preferred approach for pro-rating sick leave in the upcoming exposure draft	25 June 2024

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Alison Marris	Manager, Employment Standards Policy	(04) 901 8564	Privacy	✓
Simon Cooke	Principal Advisor, Employment Standards Policy	(04) 901 8173	N/A	

The following departments/agencies have been consulted					
<input type="checkbox"/> Treasury	<input type="checkbox"/> MoJ	<input type="checkbox"/> NZTE	<input type="checkbox"/> MSD	<input type="checkbox"/> TEC	<input type="checkbox"/> MoE
<input type="checkbox"/> MFAT	<input type="checkbox"/> MPI	<input type="checkbox"/> MfE	<input type="checkbox"/> DIA	<input type="checkbox"/> TPK	<input type="checkbox"/> MoH
		<input type="checkbox"/> Other:			

Minister's office to complete:

<input type="checkbox"/> Approved	<input type="checkbox"/> Declined
<input type="checkbox"/> Noted	<input type="checkbox"/> Needs change
<input type="checkbox"/> Seen	<input type="checkbox"/> Overtaken by Events
<input type="checkbox"/> See Minister's Notes	<input type="checkbox"/> Withdrawn

Comments:

Note: MBIE's recommendations in this briefing were for the limited purpose of determining a pro-rata sick leave option for consultation. They do not have the status of final policy recommendations or decisions. Further advice will be provided in due course taking into account consultation feedback and a wider range of options.



BRIEFING

Holidays Act Reform: Decisions on sick leave for the exposure draft

Date:	17 June 2024	Priority:	High
Security classification:	In Confidence	Tracking number:	2324-3811

Purpose

To seek decisions on your preferred approach for including a pro-rata approach to sick leave in the upcoming exposure draft Bill (the ED).

Executive summary

On 27 May 2024 Cabinet endorsed your next steps for Holidays Act reform: issuing an exposure draft Bill (ED) and consultation document for targeted consultation in September 2024 [ECO-24-MIN-0081]. The ED will largely be based on decisions made by the previous Government, with some policy changes to improve workability and reduce compliance costs. The consultation document will seek feedback on options that depart more significantly from the existing framework.

Cabinet decided that the provision of sick leave entitlement in the ED should include a pro-rata approach. This decision reflects employer feedback about the cost of the 2020 decision to increase sick leave from 5 to 10 days a year for all eligible employees, regardless of working pattern.

You have delegated authority to decide the detail of a pro-rata sick leave approach for the ED. While there is a large range of potential options for this (including hours- or weeks-based accrual as suggested by business stakeholders), the need to work within the ED's underlying framework to be ready for consultation in September limits the options significantly.

There are three main design choices: (1) whether to keep a base of 5 days for all employees, or scale the entire 10-day entitlement, (2) the basis for the scaling method (hours worked or days worked), and (3) the entitlement scale itself (ie how particular work patterns correspond to different numbers of days of sick leave). MBIE recommends the following choices (noting that more significant changes could be considered via the consultation document):

- **Retaining a 5-day 'floor' for all eligible employees, and scaling the remaining 5 days of entitlement based on work patterns.** Confidential advice to Government
[Redacted]
- **Basing the scaling method on the number of days per week on which work is performed.** Confidential advice to Government
[Redacted]
- **An entitlement scale that provides four tiers of entitlement:** Confidential advice to Government
[Redacted]

The Ministry of Business, Innovation and Employment (MBIE)'s complete recommended approach is summarised in **Annex Two**. Your decisions on this briefing can provide enough detail for MBIE to issue drafting instructions. This could be achieved either by agreeing to (or providing feedback on) Annex Two, or by indicating which of the discrete design choices you would decide differently. In the latter case, MBIE would report back to you to flesh out your preferred approach for the ED.

Recommended action

MBIE recommends that you:

- a **Note** Cabinet decided that the sick leave entitlement should be pro-rated so that there is “some proportionality between an employee’s sick leave entitlement and the quantum of work they perform each week” [ECO-24-MIN-0081 refers]

Noted

- b **Note** that you have delegated authority to make decisions on the detail of the pro-rata approach, so that this can be included in the upcoming exposure draft Bill (the ED) which you intend to release for targeted consultation in September 2024

Noted

- c **Note** that the timeframe for policy development and drafting require the ED’s pro-rata approach to remain consistent with the existing framework (see **Annex One**), but alternative options involving fundamental changes to the end-to-end system (such as an hours or weeks-based accrual model) can be explored through the consultation document that will accompany the ED

Noted

- d **Note** the three main design choices for the ED are:

- i. whether the entire entitlement (10 days) should be subject to scaling
- ii. the general basis for scaling different employees’ sick leave entitlements (based on either the number of hours or the number of days an employee works per week)
- iii. the entitlement scale itself (with a key choice being how closely the total entitlement should reflect work patterns)

Noted

- e **Note** that Cabinet agreed to a revised ‘accumulation profile’ for eligible employees to become entitled to the full sick leave entitlement over their first six months of employment (2 days at the start of employment, a further 4 days after 3 months, and the remaining 4 days after 6 months)

Noted

- f **Note** that a 5-day floor for all eligible employees would allow the agreed accumulation profile (described in recommendation e) to be retained with minimal adjustment and drafting complexity, but scaling the entire 10-day entitlement would require more fundamental reworking

Noted

- g **Note** the complete ‘straw person’ option for the ED (**Annex Two**), which adopts MBIE’s recommendations for each of the design choices described in recommendation d, with minimal change to the accumulation profile described in recommendation e, and includes the following scaled approach to the annual sick leave entitlement:

Work pattern	Annual entitlement
1-2 days per week	5 days
3 days per week	7 days
4 days per week	8 days
5 or more days per week	10 days

Noted

- h **For the purpose of the ED, either:**

- i. **Agree** to the complete ‘straw person’ option set out in **Annex Two**

OR

- ii. **Indicate** (by circling your preferred options below) the areas where your design choices differ from those recommended by MBIE:

Issue 1: Whether the entire entitlement should be scaled		
Option A Provide an entitlement of at least five days of sick leave for all eligible employees (only the remaining 5 days would be scaled to reflect work patterns) <i>MBIE preferred option</i>	Option B Scale the entire 10-day FTE entitlement to reflect work patterns (acknowledging that some employees would be entitled to less sick leave than the minimum standard that applied from 2003 to 2021)	
Issue 2: The basis for scaling employees' entitlements		
Option A Number of calendar days per week on which work is performed (an average would be used in some circumstances) <i>MBIE preferred option</i>	Option B Number of hours worked per week (an average would be used in some circumstances)	
Issue 3: The scaling approach		
Option A: Low precision For example, a binary model (5 days for part-time; 10 days for full-time) to maximise simplicity	Option B: Medium precision Three or four entitlement tiers depending on individual work patterns <i>MBIE preferred option (balancing simplicity and fairness)</i>	Option C: Maximum precision Multiple tiers (5+) to maximise proportionality between entitlement and work pattern

- i **Note** that in drafting the ED, an issue may arise about consequential changes to the 'maximum current entitlement' and 'maximum carryover' provisions (relating to employees' ability to retain unused sick leave at the end of an entitlement year)
- j **Agree** that the 'maximum current entitlement' should remain unchanged at 20 days, as per the status quo, and that consequential amendments may be required to related provisions.



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

Hon Brooke van Velden
Minister for Workplace Relations and Safety

..... / /

17 / 06 / 2021

Your decisions are needed to give effect to Cabinet’s direction on pro-rated sick leave

1. On 27 May, Cabinet agreed to your proposed policy changes related to the Holidays Act reform that will be included in the ED for consultation in September 2024 [ECO-24-MIN-0081 refers]. As part of these decisions, Cabinet agreed that the statutory sick leave entitlement – currently 10 days per year for all eligible employees¹ – should be pro-rated “so that there is some proportionality between an employee’s sick leave entitlement and the quantum of work they perform each week.” You have delegated authority to make decisions on the detail of a pro-rata approach for inclusion in the ED.
2. The ED will be accompanied by a consultation document designed to elicit feedback on the ED’s underlying policy choices, as well as to seek feedback on whether more significant policy changes are needed. Alternative pro-rata options to the one you select for the ED can be included in that document. Cabinet noted that you will report back on the content of the consultation document in August 2024.
3. Design decisions for a pro-rata approach are needed soon so that drafting of this aspect can get underway for the ED. We would also value an early steer on any alternatives you wish to seek feedback on through the consultation document (this will need to be ready for agency and Ministerial consultation by mid-July).

Cabinet’s decisions limit the range of practical options for the ED

4. The ED will retain the underlying sick leave entitlement framework of the existing *Holidays Act 2003* (the Act), based around the entitlement being expressed as a whole number of ‘days’. Based on the decisions made to date, it will include changes to the eligibility criteria, the timing of sick leave entitlements, and to the method for paying sick leave (the status quo and agreed changes are summarised in **Annex One**).
5. We have assumed that, for the ED, Cabinet’s intent is to design a pro-rata approach for consultation purposes that is consistent with this underlying framework. This reflects the need to finalise the ED before September 2024, and that more fundamental changes would need longer to design.
6. For the ED, these considerations rule out some pro-rata options that might be favoured by business stakeholders. Alternative options for achieving proportionality can, however, be described and assessed in the consultation document for stakeholder comment. [REDACTED]

Free and frank opinions
[REDACTED]

You have several design choices

7. Noting the need to work within the existing framework, the key policy and design choices are:
 - a) **Whether the entire sick leave entitlement (10 days) should be scaled to reflect working patterns,** Confidential advice to Government [REDACTED]
 - b) **The general basis for scaling different employees’ total entitlements.** Confidential advice to G [REDACTED]
 - c) **The entitlement scale itself** Confidential advice to Government [REDACTED]

¹ In 2020 the previous Government agreed to increase the minimum sick leave entitlement from five days to ten days per year [CAB-20-MIN-0474] and this was implemented through the Holidays (Increasing Sick Leave) Amendment Act in 2021.

8. The briefing also seeks direction on two more minor design issues:
 - a) Adjusting the sick leave 'accumulation profile' recently agreed by Cabinet (how new employees progressively accumulate sick leave when starting a job). Discussion of this matter is included in relation to the first design choice (paragraphs 18-20).
 - b) A consequential issue relating to the "maximum current entitlement" (a provision in the current Act).

Analysis: Design choices for the ED


9. Each of the main design choices is considered separately below. We have set out the viable options and stated MBIE's preferred option for each.
10. The design choices build on each other. The first two design choices have flow-on consequences for the range of options available for the third (the scaling approach). We have only described detailed options for the scaling approach that are consistent with MBIE's recommendations for the first two design choices. If you disagree with those initial recommendations, we will need to report back to you with more detail to flesh out the alternatives for the ED.
11. In making our recommendations we have applied criteria based on those that have guided Cabinet's recent decisions on the Holidays Act review.² The key criteria we have applied are *clarity and simplicity, ease of implementation, reducing the potential costs of sick leave for employers, and employee access to sick leave.*
12. We have referred to 'potential costs' because sick leave is a needs-based entitlement, so employers only incur costs when sick leave is actually used. A higher total annual entitlement does not necessarily translate to greater use by employees.
13. *Ease of implementation* refers both to implementation by end-users (including in payroll systems) and ease of implementation within the ED (drafting ease and minimal disturbance of other policy decisions).
14. **Annex Two** sets out a complete 'straw person' option, based on adopting all of MBIE's design recommendations.

Issue 1: Whether the entire sick leave entitlement (10 days) should be scaled to reflect work patterns

Confidential advice to Government



² Confidential advice to Government



Confidential advice to Government



Issue 2: The basis for scaling different employees' sick leave entitlements

Confidential advice to Government



Confidential advice to Government



Issue 3: How closely an individual's entitlement should reflect their work pattern

Confidential advice to Government



Confidential advice to Government

We also seek your confirmation of MBIE's intended approach to one minor issue

Treatment of the 'maximum current entitlement' (ie how unused sick leave from previous years is treated)

39. The current Act contains a provision (section 66) on carrying over unused sick leave to any subsequent 12-month period of employment. An employee may carry over up to 10 days of unused sick leave, to a maximum of 20 days' current entitlement in any year. This does not prevent parties from agreeing to carry over higher levels of unused sick leave. If this happens, any accumulated days of sick leave greater than 20 will be a contractual entitlement, rather than a statutory one.
40. In drafting the ED, the issue of whether consequential changes to this provision are needed is likely to arise. In MBIE's view, it is the maximum current entitlement of sick leave, rather than the maximum amount that can be carried over between years, that is the substantive policy

setting in the current Act (the 'maximum carryover' is a mathematical consequence of the maximum current entitlement). This was confirmed by the previous Government in its decision to adjust the 'maximum carryover' amount *downwards* (from 15 days to 10 days) when doubling the sick leave entitlement from 5 to 10 days. The maximum current entitlement remained unchanged (20 days).

41. We therefore recommend maintaining the maximum current entitlement at 20 days and noting that a consequential amendment may be needed in light of pro-rating (as different employees will become entitled to different 'new' amounts of sick leave on their respective 12-month leave anniversaries).

Next steps

42. We have structured this briefing with the aim of ensuring that your decisions provide sufficient detail to be used as the basis for drafting instructions. This is possible either by:
 - a) indicating your agreement to the 'straw person' complete option contained in Annex Two, or
 - b) providing feedback on any/all of the discrete design choices in this briefing (where your preference differs from MBIE's recommendation).
43. If you adopt the latter approach, we will provide you with an alternative complete option for your consideration as soon as possible, based on your design choices, with the aim of allowing drafting to begin as soon as possible.
44. Work is also underway on the consultation document, which will provide scope for considering options that would go further towards achieving the simplicity you have indicated you wish to prioritise. In the context of pro-rating sick leave, we think these options could include:
 - a) Weeks-based accrual Free and frank opinions
 - b) Hours-based accrual (used in Australian employment standards).

Annexes

Annex One: Summary of the current framework for the statutory sick leave entitlement

Annex Two: Complete 'straw person' option (adopting all MBIE's recommended design choices)

Annex One: Summary of the current underlying framework for sick leave

Current settings in the *Holidays Act 2003*

The basic framework

1. The Act provides a minimum entitlement of 10 days' paid sick leave per year for employees, which can be used when an employee (or their partner or dependant) is sick or injured. The entitlement for sick leave is not pro-rated, meaning a ten day entitlement per year applies regardless of whether the employee works full-time or part-time.
2. The entitlement to sick leave arises after an employee has worked for six months with the same employer, either continuously or, over a 6 month period, for an average of at least 10 hours a week, including at least one hour a week and 40 hours a month. The Act also states that employees can carry over up to 10 days of unused sick leave, to a maximum of 20 days' current entitlement in any year.
3. As with other minimum employment standards legislation, the sick leave provisions provide a 'bottom line' entitlement. Employers and employees are free to agree on more favourable sick leave arrangements and many workplaces do go above the minimum standard. Any changes to the minimum standard would not necessarily mean that more favourable terms (in employment agreements) would be unwound.

Taking sick leave

4. It is only possible to take sick leave on a day that would otherwise have been a working day. 'Sparse' working patterns should in themselves reduce the likelihood of sick leave being taken. Relatively generous entitlements for part-time employees do not necessarily result in disproportionate sick leave costs for those employees.

Payment for sick leave

5. Sick leave is paid by the employer at the rate of relevant daily pay (the amount of pay that the employee would have received had the employee worked on the day concerned), or in some circumstances may be paid at the rate of average daily pay (the employee's gross earnings for a defined period divided by the number of whole or part days the employee worked or was on paid leave during that period).
6. The payment methodology means that *payment for sick leave* is responsive to work pattern (even though the total entitlement, ie the number of yearly opportunities to be on paid sick leave, is not). 'Relevant Daily Pay' adjusts to the hours the employee would have worked on the specific day they are sick. For example, if an employee is sick on a day they would usually work four hours, they would be paid for four hours. If they are sick on a day they would usually work 8 hours, they would be paid for 8 hours. However, if Relevant Daily Pay cannot be calculated (eg because an employee's daily pay varies) sick leave pay will be based on a daily average.

Modifications to the sick leave framework already agreed to be included in the ED

7. In accordance with Cabinet policy decisions made to date, the ED will retain the underlying sick leave entitlement framework of the existing Act, based around the entitlement being expressed as a whole number of 'days'. Key changes currently agreed to the settings are sick leave availability from day one of employment, new eligibility criteria for Family Violence, Bereavement, and Sick (FBS) leave and a new single payment calculation.

Sick leave availability from day one of employment

8. Rather than the current six-month waiting period, under the ED eligible employees will begin to accumulate their sick leave entitlement from the first day of employment, reaching 10 days after six months of employment (note that the accumulation profile below will need to be adjusted to account for the agreed pro-rata approach).
 - a) For employees eligible for sick leave from the first day of employment, 10 days' sick leave will accumulate over a timeframe of six months. They will be entitled to two days

on day one, a further four days after three months and a further four days (ie the full entitlement) after six months.

- b) For employees eligible for sick leave after three months of employment, sick leave will accumulate over a timeframe of three months. They will be entitled to six days when they become eligible and then a further four days (ie the full entitlement) after six months.
- c) For employees eligible for sick leave after six months of employment, the full entitlement of 10 days will be provided upon becoming eligible (aligned with the current six-month timeframe).

- 9. From the second year of employment onwards, full sick leave entitlement is provided on eligible employee's 12 month employment anniversary date

New eligibility criteria for FBS leave

- 10. To support the provision of sick leave from day one of employment, the ED includes new criteria to determine whether an employee is eligible for FBS leave. All employees with agreed hours of work specified in their employment agreement will be eligible from the first day of employment, other employees will become eligible after three months if they have worked an average of 10 hours or more per week.

New consolidated payment methodology

- 11. The ED will include a new single payment calculation. It does not require employers to apply judgement, meaning that it can be used in all employment situations. It is based on the hours an employee would have worked on a day of sick leave, meaning that, like the current Relevant Daily Pay calculation it will be responsive to work that would have been formed on a specific day of leave.
- 12. The consolidated calculation comprises four parts: a base rate for wages or salary an employee would have earned on the day **plus** fixed allowances **plus** an hourly average of productivity or incentive payments received **plus** the cash value of board and lodgings.

Annex Two: Complete ‘straw person’ pro-rata option for the ED (adopting all recommended design choices)

Basis for the straw person option

1. The following option sets out, in full, how MBIE would propose to reflect Cabinet’s decision in the ED (to ensure “there is some proportionality between an employee’s sick leave entitlement and the quantum of work they perform each week” [ECO-24-MIN-0081 refers]).
2. The option adopts all of MBIE’s recommended design choices for the ED described in this briefing. It also:
 - a) assumes the underlying framework for the ED is retained (see Annex One), and
 - b) demonstrates a “minimum viable change” to the sick leave accumulation profile recently agreed by Cabinet (in the context of this set of design choices).

MBIE’s complete straw person option for building proportional sick leave into the ED

The basic framework

3. Rather than all eligible employees being entitled to 10 days of sick leave per year (as per the status quo), all eligible employees are entitled to **5 + n days** of sick leave per year, where n is a variable amount of days determined by reference to an individual employee’s work pattern.
4. The scaling calculation (to determine n) is based on:
 - a) The agreed number of calendar days per week on which work is performed (per the employment agreement), or
 - b) If there is no agreed number of days per week on which work is performed, or if the agreed number of days varies from week to week (which can occur under roster arrangements), an average number of days per week over the reference period.
5. The number of extra days (n) will vary according to employees’ work patterns as set out in the table below.

Work pattern	Entitlement outcome
1-2 days a week	0 extra days (total entitlement is 5 days)
3 days per week	2 extra days (total entitlement is 7 days)
4 days per week	3 extra days (total entitlement is 8 days)
5 or more days per week	5 extra days (total entitlement is 10 days)

6. For consistency with the underlying framework of the ED, an averaging method will sometimes be used. The following specifications will apply:
 - a) If an employee has an agreed number of days per week on which work is performed included in their employment agreement that are the same in each seven day period, their entitlement would be based on that number of days.
 - b) If an employee has an agreed number of days of work that vary between seven day periods (for example they work a nine day fortnight or a rotating shift cycle) their entitlement would be based on the average number of agreed days per week.
 - c) If an eligible employee does not have an agreed number of days in their employment agreement, their entitlement would be based on an average of the number of days per week on which work was performed over the last 52 weeks (or 26 weeks in the first year of employment).

- d) If entitlement is based on averages, the number of days would be rounded up. For example if an employee works a nine day fortnight and works an average of 4.5 days per week, this would be rounded up to five days.

The accumulation profile of sick leave entitlement for year one of employment

7. The accumulation profile is summarised in the table below (and compared to the May 2024 Cabinet decision). The recommended approach allows for minimal adjustment to the accumulation profile that Cabinet already agreed to.

Proposed approach for ED (reflecting partial scaling of entitlement)	Approach agreed by Cabinet in May 2024
<i>Day one of employment</i>	
Eligible employees receive 2 days	Eligible employees receive 2 days
<i>After three months of employment</i>	
Already eligible employees receive an extra 3 days (to total 5 days) Newly eligible employees receive 5 days	Already eligible employees receive an extra 4 days (to total 6 days) Newly eligible employees receive 6 days
<i>After six months of employment</i>	
Already eligible employees receive the extra number of days (n) that corresponds to their work pattern (to total 5 + n) Newly eligible employees receive the total number of days (5 + n) that corresponds to their work pattern	Already eligible employees receive an extra 4 days (to total 10 days) Newly eligible employees receive full entitlement (10 days)
<i>On each 12 month anniversary of receiving the full entitlement</i>	
All eligible employees receive their next full entitlement (5 + n days)	All eligible employees receive their next full entitlement (10 days)

8. The main adjustment needed is that employees who become eligible for sick leave on day one of employment, or during their first three months of employment, would become entitled to 5 days of sick leave at the 3-month point (rather than 6 days, as Cabinet had previously agreed).
9. Only the extra 5 days of entitlement that arises at the 6-month point would be subject to scaling (using the methodology described above). For employees who become eligible to sick leave for the first time at the 6-month mark, their entire yearly entitlement would be calculated at that point.