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.

Note: updated version published 27 February 2025

In Confidence

Office of the Minister for Workplace Relations and Safety

Cabinet Economic Policy Committee

HOLIDAYS ACT REFORM: FURTHER POLICY DECISIONS

Proposal

1 The lack of clarity and certainty provided by the Holidays Act 2003 (the Act) has been a longstanding issue. This paper seeks agreement to changes and additions to some of the previous Government's policy decisions on the reforms [CAB-20-MIN-0100] before release of an exposure draft for targeted consultation later this year.

Relation to Government priorities

2 The Coalition Government's Action Plan for the period 1 April – 30 June 2024 includes taking Cabinet decisions on the reform of the Act. The proposals in this paper also relate to the Government's priority to improve the quality of regulation.

Executive Summary

3 Issues with the Act have been a longstanding concern for employers and payroll providers. The lack of clarity around the processes and calculations required to determine leave entitlements and payments makes the Act difficult to apply in practice. Even with the best intentions, most employers will have found themselves non-compliant at some point in time.

4 In 2018 the previous Government set up a Holidays Act Taskforce (the Taskforce) to make suggestions for improvements to the Act and in 2020 endorsed all of the Taskforce's 22 recommendations. Before the 2023 General Election drafting of the Employment (Leave Entitlements) Bill (the Bill)[1] began, but was not completed.

5 I am concerned the previous Government's decisions were not on track to improve the simplicity and workability of the legislation. In fact, in some areas I believe the previous Government's decisions would *add* complexity and compliance costs.

6 I am seeking Cabinet's agreement to make further policy decisions in order to address some of the opportunities the Ministry of Business, Innovation and Employment (MBIE) has identified to increase simplicity, reduce costs and improve workability. My proposals at this time focus on areas where policy and drafting work can be undertaken quickly so that this Government can demonstrate timely progress.

7 I plan to release an exposure draft of the Bill for targeted consultation in September 2024, along with a consultation document. Releasing an exposure draft for consultation this year will demonstrate this Government's commitment to resolving this longstanding issue. The exposure draft Bill would incorporate the changes proposed in this paper but would largely reflect decisions made by the previous

[1] The Bill was intended to replace the Act, its name more accurately reflects the purposes of all leave types it (like the Act) provides minimum entitlements to: annual leave (which employees use for a variety of purposes broader than holidays), public and alternative holidays, and sick, bereavement and family violence leave.

administration. Making significant changes at this time would extend the timeframe for policy development and legislative drafting before an exposure draft could be released.

8 I also intend to use the exposure draft consultation document to seek feedback on alternative policy options in some areas. The exposure draft consultation would be a good opportunity to gain feedback on whether more substantial shifts from the previous Government's decisions are needed and merit extending the timeframes for delivering completed legislation. I believe that seeking feedback from the various stakeholders who are impacted by the legislation, including those who work with it on the ground, will be the most effective way of ensuring the Bill we introduce is robust and will resolve the longstanding issues.

9 I will bring a separate Cabinet paper seeking agreement to release the consultation document. After consultation, I intend to report back to Cabinet in December 2024 following analysis of stakeholder feedback on the exposure draft and may seek further policy decisions at this time. Depending on the nature of feedback and the extent of changes proposed, I intend that a Bill will then be introduced in May 2025.

Background

10 The Act sets out an employee's minimum entitlements to annual holidays, public holidays and sick, bereavement and family violence leave and the rate of payments for them. There are longstanding and well-known compliance issues with the Act (summarised in Appendix One), to which problems with the Act itself are a core contributor. The issues have resulted in significant costs for employers as a result of remediating historical underpayments and implementing system changes to support future compliance. This has impacted both the private and public sectors.

11 While the Act largely works for those employees who have traditional working hours, it is not fit for purpose and is complex to apply in the context of modern and constantly evolving working and remuneration arrangements.

12 In May 2018, Cabinet agreed to establish a tripartite Holidays Act Taskforce, comprised of government, business, and union representatives, to recommend improvements to the Act [CAB-18-MIN-0250]. Of the 12 members, six were unions, two were Business New Zealand representatives, MYOB was the only payroll provider representative, and Bell Gully the only legal expert. In contrast with this approach, I believe it is important to seek input and feedback from a wider range of payroll providers, legal experts and small businesses to reinforce this Government's commitment to the workability of legislation.

13 In March 2020, Cabinet agreed to endorse the Taskforce's 22 recommendations in full as the basis for a substantially amended Act [CAB-20-MIN-0100 refers]. The approach to reforming the Act agreed by Cabinet in 2020 retained its underlying framework[2] but included new detailed processes and prescriptive methodologies. While these were intended to provide more certainty about how to calculate entitlements, they do not simplify the Act.

[2] Under the Act, entitlements to annual leave are held and paid in units of weeks and entitlements to other leave types are held and paid in units of days. Entitlements (apart from public and alternative holidays) arise as a single amount after specified periods of employment.

Work on the Bill progressed but was paused before the 2023 General Election

14 The previous Government directed officials to draft legislation that reflected the Taskforce's recommendations. Between 2021 and 2022 MBIE completed a policy design process to develop the technical details required for drafting a Bill. MBIE brought together a small working group of payroll providers and practitioners to support this process.

15 From 2021 to 2023, the then Minister for Workplace Relations and Safety (WRS) used the authority delegated by Cabinet to make decisions on technical changes to supplement the Taskforce's recommendations. These were intended to address areas in the recommendations where the working group had identified ambiguities, gaps, opportunities for simplification and workability issues.[3] Drafting of the Bill, which would repeal and replace the Act began in late 2022 but was paused in June 2023 due to reprioritisation of projects before the 2023 General Election.

There are opportunities to achieve a better balance between objectives

16 The previous Government had a bottom line of maintaining tripartite consensus. To achieve that, it traded-off simplicity for ensuring that no employee would be worse off than under the current Act, in any circumstances. This commitment constrained the options available for simplification, which, in the New Zealand context, would likely have required a direct trade-off with employee entitlements. The simpler the rules for providing and paying leave entitlements, the more extensive this trade-off with existing entitlements becomes, particularly for employees with non-standard work and pay arrangements.

17 The Australian National Employment Standards are often referenced as an example of a simpler model that could be adopted in New Zealand, however, this would likely result in a significant reduction in entitlements for many New Zealand employees. In New Zealand, leave payments reflect variable hours of work and extra payments (such as overtime rates, commission, and allowances). This results in higher leave payments than under the Australian legislation, where annual leave (AL) entitlements and leave payments are based only on an employee's ordinary hours of work and pay, which are easier to calculate.

18 Despite refinements agreed by the then Minister for WRS before the 2023 General Election, the detailed methodologies and processes agreed by Cabinet in 2020 result in an inevitable amount of complexity. In some cases, they would also still not be readily implementable in payroll systems (particularly those used by small businesses) and would increase the cost of compliance and of providing leave entitlements.

19 Further simplification is possible. It is my view that there are opportunities to simplify the provisions while still maintaining employees' overall level of entitlement and the underlying entitlements model, which is what I am proposing in this paper. To make the provisions substantially simpler would require redefining the trade-offs between the objectives and would result in some groups of employees facing reductions in entitlements. It would also take substantially longer before stakeholders see any progress because officials would need to revise key aspects of the design work.

[3] For example, the Taskforce recommended a reference period of the 'previous 13 weeks' for several calculations. A literal interpretation would mean that employees would need to split pay period data to calculate back 13 weeks from when the period of leave began. The Bill, like the Act, provides for the basis of all reference periods to be complete pay periods.

I propose changes to simplify, reduce costs and address gaps

20 As discussed below (para 31-33), I propose to release an exposure draft of the Bill for consultation in September this year. Before I release an exposure draft, I am seeking Cabinet's agreement to make additional policy decisions. The proposals in this paper are intended to address some of the known issues with the previous Government's decisions, by simplifying obligations, improving workability, better supporting common practice and reducing implementation requirements and compliance costs for employers. They also address some areas where decisions were previously incomplete.

21 My proposals are all broadly aligned with the current drafting and underlying framework of the Act to enable faster progress towards the release of an exposure draft (which will enable this Government to demonstrate its commitment to resolving the issues with the Act). Developing and testing options for changes beyond this scope would require significant additional time as end-to-end system changes would be required.

22 I am confident my proposed changes provide greater simplicity, but I am also aware that there are further opportunities for simplification within the current framework and that businesses may also call for more foundational changes to the legislation (which would require more time for policy development and drafting). I intend to use the exposure draft consultation document to ask targeted questions about alternative options in some areas, such as a simpler payment methodology for annual leave, different entitlement accrual models (such as hours-based) and pro-rata sick leave for part-time employees, which have been raised by a number of stakeholders. I intend to report back to Cabinet in December 2024 following analysis of stakeholder feedback on the exposure draft and may seek further policy decisions at that time.

23 The proposals are grouped into three areas and summarised below, with full details and analysis provided in **Appendices Two, Three and Four. Appendix One** provides an overview of the full package of changes that will be included in the exposure draft.

Area One: Earning, taking and paying annual leave (full details in Appendix Two)	
The proposals focus on simplifying the way that employees earn and take AL. A key change is moving to a weeks-based accrual system to simplify the end-to-end system **for providing** and paying **AL entitlement** and better support common practice. Other changes focus on reducing the extent of payroll system changes required by the new methodology for determining the use of AL entitlement and on ensuring the framework for paying AL with regular pay provides the certainty that is currently missing from the Act.	
1	**Moving from a weeks-based entitlement system to a weeks-based accrual system for providing AL entitlement:** employees would accrue their four-week AL entitlement continuously during employment rather than becoming entitled to four weeks' AL after '12 months' continuous employment'. This is similar to the approach in comparable countries.[4] It would align with the way many payroll and accounting systems already account for AL entitlements and resolve issues in other areas of the AL provisions which are a key source of compliance issues.

[4] For example, in the UK a worker's 5.6-week annual leave entitlement begins to build up as soon as they start their job. A 'regular worker' receives one-twelfth of their leave in each month. In Australia an employee (who is not a 'casual' employee) accumulates four weeks of paid annual leave for each year of service with the employer. An employee's entitlement to annual leave accumulates continuously based on the number of ordinary hours they work.

2	**Removing the requirement to allow employees to take AL in advance during a closedown period:** This reduces a liability risk for employers should the employee's employment end as leave in advance is above AL an employee has 'earned'.
3	**Simplifying and reducing the implementation requirements of the new methodology for determining the use of AL entitlement:** I propose removing the 'audit requirement' for employees with actual hours that differ from guaranteed hours which would have a high compliance burden and result in uncertainty for employers and employees. I also propose replacing the requirement to calculate average daily hours of work based on specific calendar days to reduce the extent of payroll system changes required.
4	**Simplifying the framework for paying AL as a regular part of an employee's pay (pay-as-you-go (PAYG)):** I seek Cabinet's agreement to design objective criteria for using PAYG that do not require the use of judgement and will provide the certainty that is currently lacking. I also propose lengthening the period for reviewing the use of PAYG in order to reduce administrative burden and compliance costs.

Area Two: Paying and accumulating other leave types (family violence, bereavement and sick leave and alternative and public holidays) (Full details in Appendix Three)	
The proposals focus on reducing the complexity of the payment methodologies by removing the requirement to make two calculations and avoiding the overinflation of payments that they could have caused in some situations. They also update the profile for accumulating sick leave from the first day of employment.	
1	**Simplifying the payment methodologies so that only one calculation is required:** This proposal will replace the 2020 decision to introduce a requirement to make two calculations and pay the greater of them. The proposed calculation will achieve the intended objective of removing the need for employers to apply judgment and will reduce the complexity of the methodology. It should avoid the overinflation of payments the current proposal may lead to and provide overall payment outcomes that can be considered a fair reflection of what an employee would have earned on a day had they been at work.
2	**A longer and simpler timeframe for accumulation of sick leave:** In 2020 Cabinet agreed that eligible employees' annual entitlement to five days sick leave should begin accumulating from the first day of employment with full entitlement reached after four months (one day each month). Sick leave entitlement has since increased to 10 days per year. I propose an accumulation profile over six months with fewer accumulation points.

Area Three: Amendments to other legislation (Full details in Appendix Four)	
I am proposing a consequential amendment to the *Parental Leave and Employment Protection Act 1987* (PLEPA) that disconnects parental leave payment calculations from the Holidays Act. I am also proposing to adjust the policy regarding the treatment of leave entitlements in restructuring situations to provide flexibility and support common practice.	
1	**A consequential amendment to the parental leave payment methodology in the PLEPA:** this is required because the PLEPA relies on the existing Holidays Act definition of "ordinary weekly pay" (OWP) to calculate parental leave payments. Cabinet agreed that OWP be replaced. I propose a standalone formula in the PLEPA which is more aligned with the methodology Inland Revenue (IR) currently uses for the calculated income estimate of OWP**.**

2	**Adjusting the policy decision regarding the treatment of leave entitlements in restructuring situations:** Giving effect to the existing policy decision, that all employees should have a choice about whether to transfer all of their leave entitlements to the new employer, would impose a statutory constraint on the contractual arrangements businesses negotiate when restructuring takes place. I propose a flexible approach, enabling treatment of entitlements to be negotiated by outgoing and incoming employers in standard restructuring situations.

Providing an implementation period to support the transition to a new Act

24 In 2020, when it endorsed the Taskforce's recommendations, Cabinet directed MBIE to develop a transition plan and report back to Cabinet [CAB-20-MIN-0100]. MBIE undertook this work as part of the 2021-2022 policy design process. The three parts of the transition plan are an implementation period, transition and savings provisions (which are not a priority for the exposure draft) and information and education to support implementation. Confidential advice to Government

I propose an implementation period of 18 months is included in the exposure draft Bill

25 An implementation period between the date the Bill receives Royal assent and the date on which it comes into force will be required to support a smooth transition to the new rules. I seek Cabinet's agreement that the exposure draft includes an 18-month implementation period.

26 Payroll providers and payroll practitioners MBIE consulted were of the unanimous view that, given the scale and complexity of the changes required by the 2020 Cabinet policy decisions, 18 months would be the minimum time required for changes to payroll systems and business processes. Eighteen months may not be enough time for all employers. Some stakeholders estimated the implementation process could take up to 28 months. This would depend on a range of factors including the type of payroll system, the size of the business, the employer's access to payroll expertise and the nature of the workforce.

27 Confidential advice to Government

28 Including an 18-month implementation period in the exposure draft will provide an opportunity to test whether this timeframe is sufficient as a general commencement date for stakeholders (who will be able to consider a Bill that includes the proposals in this paper which are intended to help reduce implementation requirements) Confidential advice to Government

I propose shorter implementation periods for some changes that can stand alone

29 I propose that changes the Bill makes to the availability provisions in the *Employment Relations Act 2000* (ERA) (to clarify their interaction with leave entitlements), and changes to remove the AL payment overrides in the PLEPA and *Volunteers Employment Protection Act 1973*, come into force two months after the date the Bill

receives Royal assent. Payroll providers MBIE consulted confirmed that these changes can be implemented independently from the other changes in the Bill and would not require a major system change.

30 I propose that the consequential amendment to the PLEPA to replace the Holidays Act OWP calculation comes into force from the start of the financial year (1 July) following the date on which the Bill receives Royal assent and that it applies to parental leave applications received on or after that date.

I plan to release an exposure draft for targeted consultation

31 I plan to release an exposure draft of the Bill with an accompanying consultation document in September 2024. The exposure draft would largely reflect the previous Government's decisions, with the amendments proposed above (refer paragraphs 20 – 23 above) to improve workability in areas where officials can progress policy and drafting work quickly. I expect to bring a separate Cabinet paper seeking agreement to release the consultation document in August 2024.

32 Releasing an exposure draft of the Bill would enable technical and workability issues to be surfaced, stakeholder concerns with policy decisions to be identified and for changes to be made before the Bill is introduced. Waiting for Select Committee to gain feedback increases the risk of further delays to delivery if significant drafting changes are needed.

33 I propose that the exposure draft is a near-complete version of the Bill although there may be some areas (such as transitional provisions which are dependent on other areas of the Bill) where drafting is not able to be completed by September 2024. Officials will work with Parliamentary Counsel Office (PCO) to prioritise drafting resource on the core provisions of the Bill to ensure that feedback can be sought on those areas.

Consultation

34 Feedback provided by payroll providers and practitioners during MBIE's 2021-2022 policy design process has helped to inform the proposals included in this paper. MBIE has also continued to engage with nominated representatives of Business New Zealand and the New Zealand Council of Trade Unions to seek their perspectives. They have indicated that they are supportive of the work undertaken to simplify the Taskforce's recommendations.

35 The following Public and non-Public Service departments and agencies were consulted on this paper: Department of the Prime Minister and Cabinet (Policy Advisory Group), the Treasury, Public Service Commission, IR, Office of the Privacy Commissioner, MoE, Ministry of Health, Ministry of Justice, Ministry of Social Development, Ministry for Culture and Heritage, Department of Internal Affairs, Ministry of Defence, Ministry for Women, Ministry of Disabled People, Te Puni Kōkiri, Te Arawhiti, Ministry for Pacific Peoples, Oranga Tamariki, Ministry for Ethnic Communities, PCO, New Zealand Police and the New Zealand Defence Force.

36 Health New Zealand - Te Whatu Ora (Health NZ) has been consulted on the paper due to the size and complexity of the workforce it employs and funds, and the potentially significant costs to government of implementing the changes in the

government-funded health sector, especially considering the scale and complexity of the remediation process it is currently undertaking.[5]

37 MoE intends to consult Education Payroll Limited (EPL) on the proposed changes. EPL provides state schools' payroll services on behalf of MoE which is the largest single payroll in the country.[6] Confidential advice to Government MoE has also raised concerns about the risk of future workability issues that reform of the Act may have for the unique schooling sector work and holiday arrangements.

38 I am aware that there are other government agencies with operational arms that have complex working arrangements that have not yet been consulted. I will ensure they, like private sector employers, are included in the exposure draft consultation process.

Legislative Implications

39 The Bill is proposed to repeal and replace the Act because the proposed changes represent a fundamental change to the legislation and this approach provides scope to modernise the legislation. Non-legislative actions aimed at resolving Holidays Act compliance issues have been progressed[7] but have been constrained by the ambiguity within the legislation itself. The Bill retains provisions in the Act unaffected by Cabinet decisions. The Bill will be binding on the Crown but, like the Act, will not apply in respect of the Armed Forces as defined in section 2(1) of the *Defence Act 1990*.

40 Confidential advice to Government I propose that, following Cabinet decisions on the proposals in this paper, drafting instructions be issued to PCO in order to support release of an exposure draft (refer para 31-33 above) in September 2024.

Regulatory Impact Statement and Climate Implications

41 In 2020 MBIE prepared a full Regulatory Impact Statement (RIS) which accompanied the Cabinet paper that sought agreement to endorse the Taskforce's recommendations [CAB-20-MIN-0100]. MBIE has prepared further impact analysis to accompany the decisions in this paper, which serves as an addendum to the 2020 RIS. This analysis is attached in **Appendix Five**.

42 MBIE's Regulatory Impact Analysis Review Panel has reviewed the Impact Statement. The panel considers that the information and analysis summarised in the Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper. The panel notes the technical nature of the proposed changes and the intention to consult. It will be important for the consultation document to set out the issues in a clear and accessible way.

[5] The Government-funded health sector has longstanding challenges complying with the Holidays Act 2003 – owing to the flexible, 24/7 nature of work in health, and to the large number of complex allowances payable under health collective agreements. Health NZ is New Zealand's largest employer with around 85,000 full time employees and also supports a large, price sensitive, funded sector of up to 60,000 employees. There are 23 pay systems across Health NZ which, along with the level of payroll competence, vary significantly in quality. The capacity of funded organisations to implement changes also varies.

[6] The schools payroll pays approximately 100,000 employees in around 2,500 schools across 14 collective agreements. This amounts to approximately $251 million per pay period and $6.5 billion per annum.

[7] Between 2015 and 2018 the Labour Inspectorate delivered a programme of work focussed on remediation of historical underpayments, industry engagement and better provision of information and education.

43 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply.

Financial Implications

44 The methodologies for determining leave entitlements agreed by Cabinet in 2020 would necessitate significant changes to every payroll system used by New Zealand employers, including Government payroll systems.[8] The proposals in this paper are intended to reduce the changes that would be required, thereby reducing the financial implications of the reforms for employers. This includes the costs that would be incurred by government as an employer.

45 The cost of implementation will vary for employers depending on a range of factors, including the type of payroll systems they currently use to manage pay and leave. I intend to ask targeted questions to elicit more details about the implementation costs as part of the exposure draft consultation process and will provide further information in my December 2024 report back to Cabinet.

46 While there may be benefits in terms of implementation costs, the proposals in this paper will not significantly alter the costs employers will incur in terms of providing entitlements (refer to Appendix One for more information). The 2020 RIS estimated that the total additional cost to employers of those proposals could be up to $310.3 million per year.[9]

Cost-of-living Implications

47 Employers may pass on the implementation costs and increases to the costs of leave entitlements to consumers. That is why my proposals are intended to reduce the total costs of reforms to the Act incurred by employers. Simpler and clearer obligations will also help to ensure employees receive their statutory entitlements.

Human Rights

48 The 2020 Cabinet policy decisions on amendments to the Act were assessed to appear to be consistent with the *New Zealand Bill of Rights Act 1990* and the *Human Rights Act 1993*. The changes to those decisions proposed in this paper maintain broad alignment with those decisions and do not alter that assessment. The exposure draft consultation process will provide opportunity to gain further insights into the distributional impacts of the changes and any issues for specific population groups.

Communications

49 Following Cabinet decisions on the proposals in this paper I propose to announce the Government's intent to release an exposure draft for targeted consultation. To ensure a variety of stakeholders are included and represented in targeted consultation, I will encourage anyone who is interested in having input to contact MBIE within a defined time period. Depending on how much interest there is, MBIE will select a

[8] As noted in the September 2022 final report back to Cabinet on the All of Government Payroll Programme to improve government payroll systems, many government agencies' payroll systems are bespoke and aging, and already struggling to adapt to ongoing changes [GOV-22-MIN-0036].
[9] MBIE considers that the $310.3 million estimate is an overestimation as employees with variable work patterns were overrepresented in the sample. The estimate assumes that all employers currently provide minimum leave entitlements to their employees, however many already provide entitlements in line with the proposed changes.

representative sample for the main stakeholder groups. This strategy is particularly intended to target small businesses, who will adopt a range of working arrangements and who often do not have the same payroll infrastructure as larger organisations.

Proactive Release

50 I intend to proactively release this Cabinet paper (subject to redactions in line with the Official Information Act 1982). I will consider the timing of the proactive release of this paper alongside my announcement about the release of an exposure draft.

Recommendations

The Minister for Workplace Relations and Safety recommends that the Committee:

1 **note** that, in March 2020, Cabinet agreed to endorse in full the recommendations of the Holidays Act Taskforce [CAB-20-MIN-0100] (which it had established in 2018 [CAB-18-MIN-0250]) as the basis for a substantially amended Holidays Act;

2 **note** that, from 2021 to 2023, the then Minister for Workplace Relations and Safety made some decisions under the authority delegated by Cabinet to address technical issues and the Parliamentary Counsel Office (PCO) commenced work on drafting the Employment (Leave Entitlements) Bill, but work has been on hold since June 2023;

3 **note** that, despite refinements made, the detailed methodologies and processes Cabinet agreed to result in inevitable complexity, would require significant changes to payroll systems, and represent a significant and costly compliance burden;

Changes to existing Cabinet policy decisions

4 **note** that the following policy changes and additions to the 2020 Cabinet decisions (set out in detail in **Appendices Two, Three and Four**) would simplify obligations and reduce compliance costs while broadly aligning with the existing policy decisions and underlying entitlements model;

Annual leave (AL) (Appendix Two)

4.1 **agree** to rescind the decision that employees continue to become entitled to four weeks' annual leave (AL) after 12 months' continuous employment and replace it with a weeks-based accrual system with a clear set of parameters to support its operation;

4.2 **agree** to adjustments to the provisions in the Act that relate to employees' rights to take AL, employers' rights to require an employee to take AL and to the rules for exchanging AL for payment to reconcile them with a weeks-based accrual system;

4.3 **agree** to rescind the decision that employers must allow employees to take AL in advance beyond their 'pro-rata entitlement' during an annual closedown period;

4.4 **agree** to rescind the decision that the methodology for determining the hours an employee would have worked on a day of leave (AL and other leave types) be based on a 'calendar day' average and replace it with a formula that uses an average across all days of work in pay periods that started in the previous 13 weeks;

4.5 **agree** to rescind the decision to introduce an audit requirement for employees who have guaranteed hours of work and work additional hours so that, in these situations, guaranteed hours are used as the basis of leave calculations;

4.6 **agree** to amend the decision to introduce a four-part test for paying AL as a regular part of an employee's pay (pay-as-you-go) and to require employers to review its use every 13 weeks;

4.7 **authorise** the Minister for Workplace Relations and Safety to make decisions on the detail of provisions for using pay-as-you-go in order to align with the following approach:

4.7.1 provide objective criteria for using pay-as-you-go that do not require the application of judgement;

4.7.2 reduce the administrative burden and compliance costs of the review process during employment.

Other leave types (Appendix Three)

4.8 **agree** to rescind the decision to require the comparison of two leave calculations for other leave types and replace it with a consolidated single calculation;

4.9 **agree** to a revised accumulation profile for sick leave to take into account the increase in sick leave from five to 10 days since the 2020 Cabinet decisions;

Amendments to other Acts (Appendix Four)

4.10 **agree** to replace the reference to Ordinary Weekly Pay (OWP) in the *Parental Leave Employment Protection Act 1987* (PLEPA) with a standalone formula that is aligned with the methodology Inland Revenue currently uses for the calculated income estimate of OWP;

4.11 **agree** to rescind the decision 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; and

4.11.1 for employees specified in Schedule 1A of the *Employment Relations Act 2000 (*the ERA), retain the status quo which requires the automatic transfer of entitlements if employment is transferred;

4.11.2 for all other employees, replace the decision with a flexible approach that ensures incoming and outgoing employers have to consider the treatment of entitlements when employees transfer rather than always being paid out under the Act;

Implementation period

5 **note** that, in 2020, Cabinet directed MBIE to develop a transition plan and report back to Cabinet [CAB-20-MIN-0100] and that MBIE completed this work during its 2021-2022 policy design process in consultation with its stakeholder working group;

6 **agree** that the commencement clause provides that the changes agreed by Cabinet in 2020 to the PLEPA and the *Volunteers Employment Act 1973* that remove the exceptions to the AL payment rules, and the changes to the availability provisions in the ERA, come into force two months after the date the Bill receives Royal assent;

7 **agree** that the commencement clause provides that the consequential amendment to the PLEPA to replace the Holidays Act OWP calculation comes into force from the start of the financial year (1 July) following the date on which the Bill receives Royal assent and that it applies to parental leave applications received on or after that date;

8 **agree** that the commencement clause of the Bill provides that the rest of the Bill will come into force 18 months after the date the Bill receives Royal assent;

Exposure draft

9 **note** that the Minister for Workplace Relations and Safety plans to release an exposure draft of the Bill in September 2024 for targeted consultation, and will seek Cabinet's agreement to the content of the consultation document in August 2024;

Drafting of legislation

10 Confidential advice to Government

11 **invite** the Minister for Workplace Relations and Safety to issue drafting instructions to PCO as soon as possible, in order to support the release of an exposure draft in September 2024;

12 **authorise** the Minister for Workplace Relations and Safety to make further decisions on minor and technical matters that are in line with the policy decisions in this paper and existing Cabinet decisions where necessary;

13 **note** that, subject to the report back referred to in recommendation 10 and the extent of any further policy changes it results in, I anticipate issuing further drafting instructions to PCO by early 2025 to finalise the Bill for introduction in May 2025; and

14 **note** that the Bill will be binding on the Crown but, like the Holidays Act, will not apply in respect of the Armed Forces as defined in section 2(1) of the *Defence Act 1990*.

Authorised for lodgement

Hon Brooke van Velden
Minister for Workplace Relations and Safety

Appendix One: Summary of issues with the Holidays Act and proposed response

(green text represents changes proposed in the paper, black text in right column represents areas where the previous Government's decisions are being progressed for the exposure draft)

		Key issues with the Holidays Act 2003	Response in the Employment (Leave Entitlement) Bill
Entitlement to Annual Leave (AL)	*Earning annual leave*	**4-weeks entitlement arises after 12 months 'continuous employment'** meaning employees may have to wait to take leave and the framework does not support accrual-based systems which many employers use.	• **A weeks-based accrual system** with entitlement accruing continuously during employment, with clear supporting parameters.
	Using annual leave	• The meaning of **a week of AL entitlement requires judgement** and agreement each time an employee takes leave when work does not fit a traditional seven-day cycle.	• **A new methodology for determining use of AL entitlement** that provides certainty for all working arrangements.
	Pay-as-you-go	• **Judgement and discretion are required** to determine eligibility for employers to receive holiday entitlement in their regular pay.	• **New objective criteria** for determining eligibility for using pay-as-you-go along with a **clear framework for reviewing its use** during employment.
	Closedown periods	• Provisions for having a closedown period **lack clarity, certainty, and transparency.**	• **Provisions provide greater clarity and transparency** around how employees are notified about closedown periods.
Entitlements to Family Violence, Bereavement and Sick (FBS) Leave, Public and Alternative Holidays (FBAPS leave)	*Earning FBS leave*	• **FBS leave entitlements arise after six months** 'continuous employment' meaning employee's may not be able to access leave for FBS purposes if they need it in their first six months.	• Eligible employees have **access to FBS leave entitlements from the first day of employment** and **eligibility criteria are clearer. 10 days sick leave accumulates over the first six months.**
	Using FBS leave	• **No explicit provision for taking part days of FBS leave.**	• **Ability to take part days of FBS leave** proportionate to time that would have been worked on the day.
	Bereavement leave entitlement	• **Eligibility to take three days bereavement leave not inclusive** of varied family arrangements or cultural practices.	• **Eligibility to take three days bereavement leave expanded** so that employees can access it for more family members.
	Otherwise Working Day (OWD)	• Determining whether a day is an OWD for the purpose of entitlement to paid FBAPS leave **requires the use of judgement.**	• **A new prescriptive OWD test** with a clear application for all leave types and working arrangements.
Payments for all types of leave	*Payment methodologies*	• **Inclusion of variable components of pay in calculations:** lack of clarity around what constitutes a 'regular' overtime and incentive payment and the value of such payments, discretion is also required to decide when criteria are met for using alternative averaging formulas.	• **A new 'greater of three' methodology for calculating annual leave payments:** Ordinary Weekly Leave Pay (which does not include variable components of pay) and quarterly and annual average weekly earnings. • **A new calculation for FBAPS leave payments:** a base rate for wages/salary and fixed allowances, plus an average of productivity or incentive payments.
	Gross earnings	• **Definition is not clear about payment types that must be included** and has been one of the most common litigation issues.	• **New definition of gross earnings provides clarity around which payment types to include.**
	End of employment	• The **different calculations** for paying employees for AL they have and have not become entitled to when employment ends **cause confusion and is difficult to apply.**	• **One payment calculation for AL when employment ends** (an accrual-based system makes the calculation for AL an employee has not yet become entitled to redundant).
	Overrides to the Act	• **AL payment method 'overrides'** for employers who take parental and volunteers leave result in employees receiving reduced pay for annual leave.	• **AL payment method 'overrides' removed** so employees returning from parental and volunteers leave will be paid according to the normal rules for annual leave, rather than their pay only being based on their average weekly earnings over the last 52 weeks.
Other provisions	*Leave in restructuring situations*	• **Lack of legislative clarity** about treatment of leave entitlements in restructuring situations which results **in common practice in breach of the Act (which requires AL to be paid out).**	• A flexible approach (for employees not specified in Part 6A of the Employment Relations Act 2000) **enabling the treatment of leave entitlements to be negotiated by the incoming and outgoing employers** rather than requiring AL to be paid out.
	Information about pay and leave	• Employees have the right to ask for information kept in records but there is **no requirement for employers to directly inform them about how pay and leave have been calculated.**	• **A legal requirement to provide a pay statement** in each pay period to provide greater transparency about leave and pay for employees.
	Leave records	• There are some gaps in requirements and changes to the Act will require some additional information to be held in records to support calculations.	• **Updated record-keeping requirements** including some new information and some clarifications to existing provisions.

Appendix two: Proposed adjustments to the 2020 Cabinet decisions related to the provisions for providing, taking and paying annual leave

Area	Context	Proposal
Framework for providing AL entitlement	In 2020, Cabinet agreed that: i. employees should continue to become entitled to four weeks' AL after '12 months' continuous employment' but, ii. rather than have to wait until AL entitlement arises to use it, an employer must not unreasonably withhold consent to an employee taking 'AL in advance on a pro-rata basis'. The 2020 Cabinet decision would add complexity to the framework for providing AL by creating three separate concepts related to AL, (AL entitlement that has arisen, pro rata AL in advance and AL in advance of pro-rata AL in advance) with different rules that apply to each. Many employers already use accrual-based systems to provide earlier access to AL. The agreed approach reinforces the need for the complex and confusing workarounds these employers have needed to build into their systems to ensure compliance.	• Replace the first part of the 2020 decision with a weeks-based AL accrual system that would treat all weeks of AL an employee has 'earned' as a single, continuously accruing, pot of entitlement. This proposal would simplify the provision of AL entitlement and better support common practice. It would also resolve issues with the rules for paying employees for outstanding AL when employment ends and simplify the provisions related to annual closedown periods and record-keeping. • Provide a clear set of parameters to support the operation of a weeks-based accrual system that: ○ specify AL entitlement accrues at a rate of not less than 0.0768 weeks per week of employment (regardless of the number of hours actually worked in a week); ○ provide clarity about the weeks of employment that AL accrues during. These would align with the weeks that are included in "12 months' continuous employment"[10] under the Act; ○ specify a rule for reducing the divisor for the average weekly earnings (AWE) calculation to account for periods of unpaid leave which aligns with the status quo;[11] ○ provide clear formulas for determining the amount of AL that would accrue during a part week of unpaid leave[12] and the AWE divisor reduction for a part week of unpaid leave.[13]

[10] AL 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. The Bill also provides clarity around the definition of 'unpaid leave' to mean a period during which an employee would be required to work under their employment agreement but are absent without pay with the agreement of both the employer and employee.
[11] When it is agreed that AL will accrue during weeks in a period of unpaid leave beyond the first week, the AWE divisor would be reduced by that number of weeks.
[12] The formula would be: *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.*
[13] The formula would be: *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.*

<table>
<tr><td rowspan="4">Adjustments to reconcile other AL provisions with an accrual-based system</td><td colspan="2">Provisions in the Act that set out employees' rights to take AL and when an employer may require an employee to take AL</td></tr>
<tr><td>The provisions are based on AL entitlement arising after a fixed period and require adjustments to reflect an accrual-based framework. In summary the current provisions are:

• An employer must not unreasonably withhold consent to an employee's request to take AL entitlement that has arisen.
• An employer may also agree to leave in advance of entitlement arising.
• An employer must allow an employee to take AL within 12 months after the date on which the employee's entitlement arises and must allow the employee to take at least two weeks of their 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.</td><td>I consider the current balance of interests between employers and employees is appropriate and I therefore propose adjustments that seek to maintain the underlying intent of the existing provisions while minimising complexity:
• An employer must not unreasonably withhold consent to an employee's request to take accrued AL entitlement (this reflects the 2020 Cabinet policy decision on pro-rata leave in advance).
• An employer may also agree to leave in advance of accrued entitlement (status quo).
• 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 two weeks of their accrued AL entitlement in a continuous period.
• If an employee's AL entitlement balance is greater than four weeks an employer can require employees to take AL entitlement 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 AL is to be taken but have 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.</td></tr>
<tr><td colspan="2">Provisions in the Act for exchanging AL entitlement for payment ('cashing-up')</td></tr>
<tr><td>A weeks-based accrual system will require a consequential amendment to the period of '12 months of continuous employment' (beginning on the date on which the employee most recently became entitled to AL) specified in the Act as the timeframe within which an employee can cash up one week of AL entitlement.</td><td>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), I propose an adjustment so that:
• after the completion of the first 12 months of employment an employee may request to exchange up to one week of accrued AL entitlement for payment in each subsequent 12-month period.</td></tr>
</table>

Ability to take AL in advance during a closedown period	In 2020 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. This creates a liability risk for an employer. 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. MBIE's stakeholder Working Group raised concern about the difficulties for employers to recover overpayments.	• Rescind the 2020 Cabinet decision. I consider that the new requirement to allow an employee to access the accruing amount of AL entitlement during a closedown period is a fair balance of interests.
Determining use of AL	***Methodology for determining hours an employee would have worked on a day of leave***	
	A core part of the new methodologies Cabinet agreed to in 2020 for determining the use of leave entitlements was a formula for determining the number of hours an employee who does not have clear daily hours would have worked on a day of leave. Cabinet agreed that, for all leave types, the calculation would be based on the average number of hours that an employee has worked on the same calendar day in the previous 13 weeks (the 'calendar day' methodology). This calculation would need to be carried out for each day of leave an employee takes. During the 2021-2022 policy design process MBIE's stakeholder working group raised concerns about the extent and cost of the payroll system changes that would be needed to implement the calendar methodology, as payroll systems would be required to access and store data about daily hours of work and leave. Payroll providers 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. For many businesses implementation would require integration of time and attendance and payroll systems.	• Remove the 'calendar day' aspect of the methodologies for determining the hours an employee would have worked on a day of AL and other leave types, and replace them with formulas that use an average of an employee's hours of work (including paid and unpaid leave) across all days worked in the pay periods that started in the 13 weeks before the one in which the leave is taken. I do not consider that the impact of this change on leave entitlement and payment calculations would be significant. An employee's average hours worked on a calendar day would only vary significantly from their average across all days 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. For events-based leave (for example sick leave) the averaging method would only apply where an employee notified their employee of the intent to take the leave in advance and no hours had been agreed for the day. In typical situations the notification would occur on or shortly before the day of leave however and rostered hours would be used. I consider that the significant benefits of removing the 'calendar day' aspect of the methodology outweigh the disadvantages of doing so may have for some employees in some scenarios.

	***Determining use of AL for employees who have guaranteed hours of work and work additional* hours**	
	Cabinet agreed that, where employees have guaranteed hours included in their employment agreement, those hours would be used for the purposes of determining the use of AL entitlement. It also agreed that there be an 'audit requirement' such that, if an employee's actual hours of work were found to be 20 percent or more above their guaranteed hours over a 13-week period, then the employer must determine their use of AL based on their actual, rather than guaranteed, hours of work using averaging calculations. The Cabinet decision did not include implementation details and there are several practical issues with an audit requirement including imposing a cost and compliance burden on employers. It could be confusing for employees to understand their leave entitlements and pay if methodologies switched as a result of an audit. The Taskforce intended the audit requirement to be an incentive for employers to ensure an employee's guaranteed hours set out in their employment agreement are an accurate reflection of their actual hours of work. I do not consider the Holidays Act or Bill is the appropriate mechanism through which to create such an incentive.	• Rescind the decision to introduce an audit requirement so that where an employee has guaranteed hours of work AL calculations will be based on their guaranteed hours of work. A single methodology based on guaranteed hours would simplify the Bill, reduce compliance costs and obligations, and provide certainty and clarity to both employers and employees. The benefit of using actual rather than guaranteed hours is a subjective assessment. If an employee's hours of work vary significantly from their guaranteed hours, using guaranteed hours would mean an employee uses more entitlement for a part week of AL compared to if actual hours were used, but that would translate to higher pay for the part week of AL. The employee would be under no legal obligation to work on days that are not agreed days of work. The exposure draft will provide the opportunity to test the fairness, practicality and outcomes of this approach.

Framework for paying AL as a regular part of an employees pay (pay-as-you-go (PAYG))	In 2020 Cabinet agreed to a new four-part test for determining when PAYG can be used because a work pattern is 'interment and irregular.' It also agreed to a recurring 13-week review period to determine if the definition continues to be met and PAYG can continue. This was intended to address the high degree of discretion employees are required to exercise about whether PAYG can be used and the lack of a framework for reviewing its use during employment. These have both contributed to non-compliance.	• Rescind the decision to introduce a four-part test for using PAYG and amend the decision to require the use of PAYG to be reviewed on a 13-week basis.
		• Authorise the Minister for Workplace Relations and Safety to make decisions on the detail of replacement provisions for using PAYG that align with the following approach:
		  ○ Provide simpler, objective criteria for using PAYG that provide certainty and remove the need for judgement.
		  ○ Create less administrative burden than a recurring 13-week review but still ensure that an employee who receives PAYG does genuinely work on an intermittent basis and have periods away from work.

	The recommended test and 13-week review process lacked clarity in several areas and still required a high degree of judgement. Employers would have to make an assessment at the start of employment about what they expected the employee's work pattern to be. During employment they would have to determine whether, within each 13-week review period, 'time at work had repeated in a manner possible to anticipate.' A 13-week review period would also impose high compliance costs on employers. PAYG can be a fair and simple way for employers to provide AL entitlement in employment situations where work is genuinely intermittent and employees have no obligation to perform work that is offered. It avoids the need for complex calculations to determine what a week of entitlement means for an eligible employee and what they should be paid for AL they have used. Further, where an employer opts to offer PAYG, employees must always be offered the choice of PAYG or receiving AL entitlement so that they can receive their AL pay during periods they do not work.	

Appendix Three: Proposed adjustments to the 2020 Cabinet decisions related to the provisions for providing, taking and paying other leave types (Family violence leave, bereavement leave, alternative holidays, public holidays, and sick leave (FBAPS leave))

Area	Context	Proposal
Payment methodology consolidation	In 2020, Cabinet accepted the Holidays Act Taskforce's recommendation to replace the FBAPS payment methodology with a requirement to compare two calculations for all employees (Ordinary Leave Pay (OLP) and a new hours-based Average Daily Pay (ADP)). Under the current Act, payments for other leave types 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 ADP. In some circumstances this requires the employer to make a judgement about which calculation to use. The intent of the Taskforce's recommendation was 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. Initial feedback suggests the new calculations would increase complexity in some cases (where the current methodology is very simple) and, in some situations, may inflate leave payments above what an employee would have expected to earn on the day in question and what would be considered fair.[14]	Rescind the decision to introduce a 'greater of' OLP and ADP payment methodology for other leave types and replace it with a single, consolidated, calculation. The proposed methodology would include the current components of the RDP calculation in the Act but would provide a formula that makes it clear and possible to calculate the variable components (e.g. 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 payments are currently calculated. The consolidated calculation is designed to be applicable to both waged and salaried workers. 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. 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, but I consider that the consolidated calculation will, overall, provide a fair outcome for both employers and employees. The exposure draft will provide an opportunity to test the proposal with stakeholders.

[14] 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

Timeframe for sick leave accumulation	In 2020 Cabinet agreed that, rather than the current six-month waiting period, eligible employees would begin to accumulate sick leave entitlement from the first day of employment. The intent of this change was to recognise that employees have little control over when they may need to take sick leave and may need to take it during their first six months of employment. In 2020 the minimum sick leave entitlement was five days per year. The agreed 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 minimum five-day sick leave entitlement was reached after four months. In July 2021, the previous Government increased the minimum sick leave entitlement from five to 10 days per year. The accumulation needs to be adjusted to reflect this.	Adjust the accumulation profile for sick leave to reflect the increase in sick leave entitlement from five to 10 days: • *For employees eligible for sick leave from the first day of employment*: 10 days' sick leave accumulates over a 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. • *For employees eligible for sick leave after three months of employment*: sick leave accumulates over a timeframe of three months, six days when they become eligible and then a further four days (i.e. the full entitlement) after six months. • *For employees eligible for sick leave after six months of employment:* full entitlement of 10 days is provided upon becoming eligible (aligned with the current six-month timeframe). A six-month timeframe is aligned with the current entitlement timeframe but is longer than the four-month period recommended, reducing the impact on employers. The proposal also responds to feedback from MBIE's working group that the multiple accumulation points for different employee groups would be complex to administer in practice by including fewer accumulation points.

Appendix Four: Proposed amendments to parental leave and employment relations legislation

Area	Context	Proposal
Methodology for determining parental leave payments (amending the *Parental Leave and Employment Protection Act 1987*)	The *Parental Leave and Employment Protection Act 1987* (PLEPA) relies on the definition of "ordinary weekly pay" (OWP) in the Act to calculate parental leave payments. Cabinet agreed that OWP be replaced and so a consequential amendment is needed in the PLEPA. The amendment also presents an opportunity to better support the objectives of Inland Revenue's (IR's) online application system to make applications faster and easier for applicants and employers. The system includes a calculated income estimate which was intended to remove the responsibility for making the complex payment calculations from applicants and employers. The calculated income estimate is limited however, as 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 Act and so instead estimates OWP based on a four-week average of taxable earnings. This requires affected employees or their employers to manually check the calculations. The OWP replacement agreed by Cabinet requires similar information about the components of an employee's pay.	Replace the current 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 in the online paid parental leave (PPL) application system. It would: • use a four-week average of an applicant's gross weekly earnings; and • specify the four-week reference period is the most recent four weeks up to the point that entitlement to parental leave payments commences. Analysis • *Practicality:* Reduces compliance costs and administrative burdens for applicants and their employers as most applicants or their employers would no longer need to run manual calculations to check the pre-populated figure. • *Payment outcomes:* The majority of applicants will be unaffected as their OWP and/or Average Weekly Income (AWI) are above the maximum parental leave payment rate (89 percent in the 2022/2023 financial year, 32,587 of 36,544 applicants). For those affected, the impact on payment will depend on their remuneration structure.[15] I consider that, overall, the proposal will provide a fair outcome for applicants and aligns with the original intent of including OWP in the methodology by providing a significantly different reference period to the 52-week period used for the AWI calculation. • *Costs to government:* It is not possible to calculate an exact fiscal cost due to the number of variables but as only a small percentage of applicants are affected, costs should be minimal. IR expects costs will

[15] 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. In other cases, because the proposed formula is based on gross taxable earnings which includes more payment types than OWP (e.g. 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. 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 PPL payments commence and their AWI.

		be manageable within the existing appropriation. IR implementation costs are also expected to be minor because the proposed formula is aligned with the one already being applied.[16]

Treatment of leave entitlements in a restructuring situation	In 2020, Cabinet agreed 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."[17] The Taskforce's recommendation aimed to address the lack of legislative clarity regarding the treatment of leave entitlements for some employees in these situations which results in (well intentioned) common practice in breach of the Act.
	
	Part 6A of the *Employment Relations Act 2000* (the ERA) already provides that, when employees specified in Schedule 1A of the ERA are affected by restructuring,[18] they must be offered choice to transfer employment to the incoming employer, and if they do, their leave entitlements must be automatically transferred. This explicitly overrides the Holidays Act requirement to pay out entitlements. 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 (Subpart Three) of the ERA requires employment agreements to contain an Employee Protection Provision (EPP) that sets out the process employers will follow in restructuring situations. 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.
		Rescind this decision and:
		• For employees specified in Schedule 1A of the ERA, retain the status quo provided for in the ERA.
		• For employees not specified in Schedule 1A of the ERA, expand the matters that EPPs must state employers will negotiate (if transfer of employment is negotiated) to the following:
		  ○ 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 Act and rights and benefits under 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 Act);
		  ○ whether or not the new employer will recognise all or part of an employee's family violence, bereavement and sick (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.
		• The ERA would also include the following requirements when any of the above is negotiated:

[16] This is a high-level assessment based on officials' preferred option.
[17] The Holidays Act requires that the outgoing employer must pay out untaken annual leave and alternative holiday entitlements when the employment with them ends.
[18] Restructuring situations include when a business is sold or transferred or work is contracted in or out.

	Operationalising the change agreed by Cabinet 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 and could discourage the incoming employer from offering employees the opportunity to transfer their employment if large leave liabilities were involved.	○ how liability will be apportioned between the employers must also be negotiated and agreed by the outgoing and incoming employers; ○ how and what employee information required by the incoming employer in relation to leave entitlements will be provided so that they can correctly determine the employee's entitlements and payments; ○ when an employee takes transferred leave entitlements, the payment rate must not be less than what it would have been had it been paid out at the time of transfer. This approach provides the flexibility for employers to adopt a range of approaches that best suit their specific business circumstances. It is intended to support common practice and would provide certainty about legal obligations in restructuring situations. It will minimise the risk of distorting the negotiation process between employers. It would also require but maintain flexibility around the commercial negotiation about the apportionment of liability and transfer of employee information. The proposal includes a safeguard for situations where an employee transfers employment on a lower rate of pay so the value of transferred leave entitlements is not affected. This is a complex area and including the option above in the exposure draft will provide the opportunity to test it with stakeholders for practicality and any unintended consequences or further complexities we may not have considered.

Appendix Five: Supplementary Impact Analysis (to the 2020 Regulatory Impact Statement)