

Holidays Act 2003 Review

Issues Paper

August 2018

Contents

Contents	2
How to have your say.....	3
Glossary of terms	4
Forward	6
1. Introduction	7
1.1 History of the Holidays Act.....	7
1.2 Overview of the current review	8
1.3 Scope of the review.....	8
2. Overview of the Holidays Act 2003	10
3. Who is affected by the issues with the current Act?	12
3.1 All employers and employees are affected by non-compliance with the Act	12
3.2 But it's harder for some employers for different reasons	12
3.3 And the effects can be worse for some employees.....	13
3.4 The Labour Inspectorate has a significant role to play as the regulator, and is also an important user of the Act	14
4. What are the key issues with the Holidays Act 2003?	15
4.1 Some issues relate to all aspects of the Act.....	15
4.2 Annual holidays – determining entitlements and payments.....	17
4.3 BAPS leave – determining entitlements and payments.....	18
4.4 Other issues.....	19
5. Ideas for change	20
6. Next steps.....	22
Recap of questions.....	23
Annex 1: Terms of Reference.....	28
Annex 2: More detailed list of issues.....	31

How to have your say

The Holidays Act Taskforce (the Taskforce) seeks written submissions on the issues raised in this document by **12 October**. Questions are posed throughout the document to guide your submission.

Your submission may respond to any or all of these questions. We also encourage your input on any other relevant issues. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

You can make your submission:

- By completing an online submission form at MBIE's website www.mbie.govt.nz
- By sending your submission as a Microsoft Word document to holidays.act.review@mbie.govt.nz
- By mailing your submission to:

Holidays Act Review
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand

Please direct any questions that you have in relation to the submissions process to holidays.act.review@mbie.govt.nz.

Use of information

The information provided in submissions will be used by the Taskforce to inform its recommendations on changes to holidays' legislation. It is not being requested for enforcement purposes.

We may contact submitters directly if we require clarification of any matters in submissions.

Release of information and submissions

Submissions will not be proactively published although a summary of submissions may be released which may include information you provide. Submissions may be the subject of requests for information under the Official Information Act 1982 ("OIA"). Please set out clearly in your submission if you object to the release of any information in the submission and, in particular, which part (or parts) you consider should be withheld together with your reasons for withholding the information. Examples could include that you have provided commercially sensitive material, or you have privacy concerns. We will take such objections into account when responding to requests under the OIA. Any decision to withhold information requested under the OIA can be reviewed by the Ombudsman.

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Glossary of terms

Annual holiday entitlement: Also known as annual leave, this is an employee's legal right to not less than four weeks of paid annual holidays each year after working for an employer for 12 months (Sections 15 to 20 of the Holidays Act 2003 (the Act)).

Average daily pay ('ADP'): The daily average of an employee's gross earnings over the past 52 weeks. This is worked out by adding up the employee's gross earnings for the period, and dividing this by the number of whole or part days the employee either worked or was on paid leave or holidays for, during that period. An employer may use an employee's ADP for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave if it is not possible or practicable to determine relevant daily pay or daily pay varies within the pay period when the leave falls (Sections 9A, 49, 50, 52, 53, 60 and 71 of the Act).

Average weekly earnings ('AWE'): AWE is one method for calculating annual holiday payment rates (the other being Ordinary Weekly Pay). It is 1/52 of the employee's gross earnings for the 12 months immediately before the end of the last pay period before the annual holiday (Sections 16, 21, 22, 24 and 71 of the Act).

BAPS leave: A collective term for Bereavement leave, Alternative holidays, Public holidays and Sick leave.

'Casual' employee: Employment legislation does not define what 'casual' employee means (it is set out in case law). It is generally taken to mean an employee who works only as and when required, can turn down work and has no expectation of ongoing employment (Section 28 of the Act).

Closedown period: Employers can have a customary closedown of all or part of their operations once a year and require employees to take annual holidays during the closedown, even if an employee has to take unpaid leave. Christmas is the most common time for a closedown, although it can occur at any time of year (Sections 29 to 35 of the Act).

Fixed-term agreement: Employment relationships with a set start and end day or event, along with a genuine reason based on reasonable grounds for such an arrangement. This arrangement, including the way in which the employment will end and the reasons for it ending that way, must be clearly specified in writing in the employment agreement (Section 28 of the Act).

Gross earnings ('GE'): For the purposes of calculating payments for holidays and leave, gross earnings means all payments that the employer is required to pay to the employee under the employee's employment agreement for the period during which the earnings are being assessed (Sections 8, 9A, 10A, 14, 23, 25, 26, 28 and 34 of the Act).

Leave without pay: When an employer allows an employee time off work when they would otherwise be working, but does not pay them for this time (Section 16 of the Act).

Ordinary Weekly Pay ('OWP'): The amount an employee receives under their employment agreement for an ordinary working week, including regular allowances, regular productivity or incentive-based payments (including commission and bonuses), the cash value of board or lodgings, and regular overtime. Intermittent or one-off payments as well as discretionary payments and employer contributions to superannuation schemes are not included in ordinary weekly pay (Sections 8, 10, 10A, 11, 21, 22, 24 and 71 of the Act).

Otherwise Working Day ('OWD'): An otherwise working day is a day that an employee would have worked, if it was not for them being sick, being on bereavement leave, being on annual holidays or it being a public holiday (Sections 12, 13, 43 and 68 of the Act).

Pay-as-you-go ('PAYG') annual holiday pay: Employees who meet either of two specific sets of criteria (i.e. are on a fixed-term arrangement for less than 12 months or work on an intermittent or irregular basis) can agree with their employer to be paid annual holiday pay on top of their gross earnings for each pay period, instead of receiving paid annual holidays (Section 28 of the Act).

Paying out some of the annual holiday entitlement: This is commonly referred to as 'cashing up' some annual holidays. Employees can ask their employer to pay out up to a maximum of one week of their minimum four-week annual holiday entitlement each entitlement year (instead of taking the time off as paid annual holidays). The employee must make the request for this pay out and the request must be in writing. Employers may have a policy against paying out (including in an applicable collective agreement), but even if they do not have such a policy they do not have to agree to a pay-out (Sections 28A to 28F of the Act).

Permanent employee: A person employed on an ongoing indefinite basis.

Relevant daily pay ('RDP'): What an employee would have received if they were at work on that day. Relevant daily pay includes: payments such as regular (taxable) allowances, productivity or incentive-based payments (including commission and bonuses) if the employee would have received them on the relevant day; overtime payments, if the employee would have received them on the relevant day; and the cash value of board or lodgings if this has been provided by the employer. It does not include employer contribution payments into an employee superannuation fund or reimbursements payable to the worker for the day (Sections 9, 9A, 10, 10A, 11, 49, 50, 52, 53, 60 and 71 of the Act).

Regular payments: Regular payments, such as payments for overtime and productivity or incentive-based payments, are included in calculations of ordinary weekly pay. Although the Act does not define what constitutes a regular payment, payments made in respect of work regularly undertaken should be included even if these payments are not made every pay period (Section 8 of the Act).

Foreword

The Holidays Act 2003 sets out the minimum entitlements to holidays and leave, and payment for them, that employers are obliged to provide to their employees. It is an Act that touches the lives of every employee in New Zealand. Its purpose is to promote balance between work and other aspects of employees' lives by providing minimum entitlements to annual holidays, public holidays, sick leave and bereavement leave.

However, it has become evident in recent years that widespread non-compliance with the current Act is affecting employers and employees right across the New Zealand economy and is costing employers and employees significant sums of money.

To address this, in May 2018, the Minister of Workplace Relations and Safety established a Taskforce to review the Holidays Act 2003 (the Act) and recommend changes. The tripartite Taskforce, which includes employer, employee and government representatives, gives us the opportunity to work together to find a better solution.

I am confident that this review will be more successful than previous reviews for two key reasons. First, there is strong agreement across government, employers and unions that a review is needed, and a genuine recognition that a collaborative approach is the best way to identify a preferred solution. Second, we now have a much better understanding of the issues the Act causes for employers and employees and so are better placed to ensure that any proposed solution will address these issues. Our recommendations will be thoroughly tested with payroll providers and professionals so we know they will work in practice, not just in theory.

To be successful the Taskforce first needs to gain a full understanding of the issues the current Act causes. While the members of the Taskforce bring together significant expertise in relation to the Holidays Act, we do not claim to have all the answers. This Issues Paper sets out our understanding of the key issues employers, employees and payroll providers face in trying to implement the Act.

We want to hear your views on some key questions:

- are the issues outlined in this paper described accurately?
- have you experienced any other issues working with the Act that are not captured in this paper? If so, what are these issues?
- do you have any suggestions or proposals for change?

Your views will be used to inform the work of the Taskforce in developing solutions. We are seeking feedback by **Friday 12 October** and I encourage you to have your say.

Gordon Anderson

Holidays Act Taskforce Chair

1. Introduction

1. In May 2018, the Minister of Workplace Relations and Safety established a tripartite Taskforce comprising government, New Zealand Council of Trade Unions and BusinessNZ to review the Holidays Act 2003. The purpose of the review is to make recommendations to Government for a clear and transparent set of rules for providing entitlements to, and payment for, holidays and leave. Any new system needs to be able to be implemented in a payroll system, and apply to an increasingly diverse range of working and pay arrangements while aiming to protect overall entitlements for employees.
2. In order to provide recommendations to Government, the Taskforce must have a comprehensive understanding of the issues with the current legislation. To assist with this task, the Taskforce has developed this paper which summarises the key issues with the Act as understood by the group. While this paper focuses on issues that arise from the legislation itself, it also includes discussion of the problems these issues create for employers, employees and payroll providers in trying to implement the Act.
3. The Issues Paper seeks the following feedback from key stakeholders:
 - from your perspective, are the issues outlined in this paper described accurately?
 - are there any other issues you have experienced in working with the Act? If so, what are these issues?
 - do you have any suggestions or proposals for change?
4. The paper begins with a brief overview of the history of holidays' legislation and some background information relating to the current review. This is followed by a brief overview of the Act itself (Section 2), a discussion on who is affected by issues with the Act (Section 3) and a summary of the key issues identified by the Taskforce (Section 4). The paper concludes with some ideas for change (Section 5) and intended next steps (Section 6).
5. The key questions we would like your feedback on will be posed throughout the Issues Paper. They are also collated following Section 6 on page 23.

1.1 History of the Holidays Act

6. The Bank Holidays Act 1873 was New Zealand's first holidays legislation, which stated that banks should shut on Christmas Day, Boxing Day, New Year's Day, Good Friday, Easter Monday and the sovereign's birthday. This was shortly followed by legislation extending paid statutory holidays to all employees.
7. For many years, provision of paid annual holidays in addition to statutory holidays to groups of workers was piecemeal, and depended largely on the collective bargaining power of individual unions. The first comprehensive piece of legislation regarding paid annual holidays was the Annual Holidays Act 1944, which granted the right to two weeks' paid holiday for all employees. This was increased to three weeks in 1974 and four weeks in 2007.
8. In more recent times, significant reviews of holidays' legislation were undertaken in 2001 and 2009. The 2001 review resulted in the 2003 Act, replacing the Holidays Act 1981, and the 2009 review resulted in a series of amendments in 2010.
9. These reviews had similar objectives, namely to make the legislation easier to understand and apply and to make it more applicable to a wider range of working

patterns beyond the standard five day, 40 hour working week. It has become evident that neither of these reviews was able to fully meet these objectives.

1.2 Overview of the current review

10. In recent years it has become apparent that there is a high level of non-compliance with the Act. While it often works for a standard, five day, 40 hour week, the Act can be difficult to apply to more diverse working arrangements and complex remuneration packages. Non-compliance has resulted in many employees not receiving the correct payments for their leave and employers spending significant resources on remediating historical underpayments and complying with the Act.
11. The Taskforce that has been established for the current review is required to develop, test and make recommendations to the Government on policy options for the provision of, and payment for, holiday and leave entitlements that:
 - continue to promote the existing purpose of the Holidays Act 2003, which is to promote balance between work and other aspects of employees' lives by providing minimum entitlements to annual holidays, public holidays, sick leave and bereavement leave
 - provide clarity and certainty for employers and employees so that employees receive their correct entitlements
 - are simpler than the current Act in relation to provisions of, and payment for, entitlements to holidays and leave
 - are readily implementable in a payroll system
 - minimise compliance costs for employers
 - minimise perverse incentives on employers and employees
 - ensure the balance of decision-making between employers and employees when it comes to requests for holidays and leave is appropriately calibrated
 - are readily applicable to the full range of working and remuneration arrangements in the labour market both now and in the future
 - aim to protect overall entitlements for employees.
12. The review is being carried out by a tripartite Taskforce, comprising representatives from government, the Council of Trade Unions and Business New Zealand. Professor Gordon Anderson, an employment law specialist from Victoria University, is chairing the Taskforce and MBIE is providing Secretariat support. The Taskforce's Terms of Reference can be found in **Annex One** and the Cabinet paper establishing the Taskforce can be found at: <http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/holidays-act-review>
13. The Taskforce will report back to the Minister of Workplace Relations and Safety with its recommendations by mid-2019. This timeframe will give the group sufficient time to commission work and undertake robust testing of options.
14. Any changes the Government decides to make as a result of the review will need to go through the legislative process, so it will likely be some time before a new Act is implemented.

1.3 Scope of the review

15. The scope of the review is sufficiently broad so as to generate fundamentally new ways of providing for entitlements and pay, while retaining the purpose of the current Act and (at least) the current levels of entitlement.
16. Full consideration will be given to designing an Act that works equally well for the ever increasing range of different working and pay arrangements that can be seen in the labour market. This may include consideration of whether the reference to the working

week should be retained in the holidays' legislation and if so, what form this should take.

17. The review also has scope to consider any other matters relating to the Act that it sees fit. This may include holidays and leave entitlements modified by other Acts (such as the Parental Leave and Employment Protection Act 1987). The Taskforce will consult to get a comprehensive understanding of the issues with the current legislation, and draw on examples from overseas jurisdictions.
18. The review will not include the issue of remediation of historical underpayments of holiday and leave pay. Employers still have an obligation to remediate employees for current and historic underpayments and must be compliant with the current Act until new legislation comes into effect. MBIE will continue to provide support and engagement on these issues to assist employers in the meantime.

2. Overview of the Holidays Act 2003

19. The Holidays Act 2003 sets out the minimum entitlements to holidays and leave, and payment for them, that employers are obliged to provide to their employees. Its purpose is to promote balance between work and other aspects of employees' lives by providing minimum entitlements to annual holidays, public holidays, sick leave and bereavement leave. MBIE is responsible for administering and enforcing the Act.
20. Two key aims of the Act can be summarised in the following principles:
 - **Entitlements are to be determined in relation to the work pattern at the time the leave is taken.** This principle is intended to ensure that the entitlements (both in terms of the leave period to be taken, and the level of payment for the leave period) reflect the employees work pattern at the precise time they take their leave rather than being based on what they have hypothetically accrued or 'earnt' over time.
 - **Employees should not be financially disadvantaged by taking leave.** That is, they should be paid (at least) what they would have earned had they worked for the period they are taking leave for.
21. The key provisions of the Act include:
 - at least four weeks of annual holidays each year for employees
 - a paid day off when a public holiday falls on a day that an employee would usually work
 - at least five days each year of paid sick leave
 - three days paid leave if an employee's immediate family member dies, or one days paid leave for the death of a person outside their immediate family
 - from 1 April 2019, the Act will also provide for up to ten days of leave for people affected by domestic violence (on a similar basis to the provisions for sick leave and bereavement leave)
22. The Act provides a number of calculations for determining pay when holidays or leave are taken. For annual holidays, employees must be paid whichever is the greater of their ordinary weekly pay or their average weekly earnings over the previous 12 months. For all other types of leave, employees must be paid their relevant daily pay, or if impractical or the employee's daily pay within the relevant pay period is variable, their average daily pay.
23. The Act also covers a number of issues such as annual closedowns for businesses, transferring of public holidays, the ability to 'cash up' one week's annual holiday entitlement and the employer's obligation to keep records. The enforcement provisions follow those in the Employment Relations Act 2000 and, as with other minimum entitlements, permit both employees and labour inspectors to take cases.
24. While the Act provides for certain levels of minimum entitlements, it does not provide full guidance on how these are to be provided in different working situations. For a standard five day, 40 hour working week, this is generally straightforward, but in other situations it is not obvious, such as when employees work unpredictable hours or receive variable pay (such as commissions). In these situations the Act relies on employers and employees reaching agreement as to how entitlements will be met or taken.

25. Employers have a range of obligations that are set out in the Act. These are outlined below:

Key employer obligations

Employers are required to fully comply with the provisions set out in the Act. Some of the key obligations include:

- Providing eligible employees with at least four weeks of annual leave a year, a paid day off when a public holiday falls on a day that an employee would usually work, at least five days' sick leave each year, and three days' paid bereavement leave if an immediate family members dies (or one day's paid leave for the death of a person outside their immediate family)
- Using the calculation method for annual holidays (either OWP or AWE) that results in the greater rate
- Using the employee's RDP for calculating payment for public holidays, sick leave and bereavement leave, unless it is not possible or practical or the employee's daily pay varies within the relevant pay period, in which case ADP may be used
- Keeping accurate and up to date holiday and leave records

26. Table 1 below provides an overview of each key part of the Act.

Table 1: Key parts of the Holidays Act 2003

Part	Key sections
Part 1 Preliminary provisions	<ul style="list-style-type: none"> • The commencement, purpose and overview of the Act, as well as how it is to be interpreted and applied • Key definitions, including ordinary weekly pay, relevant daily pay and average daily pay • Guidance about how to determine what would otherwise be a working day
Part 2 Holiday and leave entitlements	<ul style="list-style-type: none"> • Entitlement to, and payment for, annual holidays • Calculations and obligations regarding holiday pay • Provisions relating to closedown periods • Relationship between annual holidays and other entitlements (e.g. sick leave, bereavement leave) • Entitlement to, and payment for, public holidays • Transferring public holidays and alternative holidays • Relationship between public holidays and other entitlements (e.g. sick leave, bereavement leave) • Entitlement to, and payment for, sick leave and bereavement leave
Part 3 Enforcement and other matters	<ul style="list-style-type: none"> • Employer and employee obligations under the Act • Who can enforce the Act and penalties for non-

	<p>compliance</p> <ul style="list-style-type: none"> • Powers of, and determinations by, a Labour Inspector • Obligations relating to holiday and leave records
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27. Further information relating to the Act can be found at the following:

- The Act itself can be found at:
<http://www.legislation.govt.nz/act/public/2003/0129/latest/DLM236387.html>
- The Employment New Zealand website: <https://www.employment.govt.nz/leave-and-holidays/>
- Holidays Act guidance: <https://www.employment.govt.nz/assets/Uploads/Holidays-Act-2003-Guidance-on-annual-holidays-Sep-2017v1.pdf>
- The Employment Law Database, which contains Holidays Act-related determinations from the Employment Relations Authority:
<http://apps.employment.govt.nz/determinations/>
- Holidays Act-related judgments made by the Employment Court of New Zealand:
<https://www.employmentcourt.govt.nz/judgments/>

3. Who is affected by the issues with the current Act?

3.1 All employers and employees are affected by non-compliance with the Act...

28. We understand that the issues with the Act traverse the range of employment arrangements in New Zealand, and it is unlikely that any employer or employee experiences none of the problems identified in this paper. Even employers with a workforce working standard hours may face challenges such as not including all payments in 'gross earnings.'
29. This means that finding solutions to the challenges posed by the Act will support all employers and employees to better understand their obligations and entitlements.
30. It is clear to the Taskforce that issues with the Holidays Act are widespread across the New Zealand economy. Therefore, any potential solutions need to be applicable to the full range of current and expected future working arrangements. We will need to guard against the risk of solving problems for one group only to create problems for a different group.

3.2 ...but it's harder for some employers for different reasons...

31. Some employers find it more difficult to comply with the Act, or are more likely to face implementation issues than others, particularly where there are flexible or variable work practices in place. The review of the Holidays Act will consider the circumstances and arrangements that make compliance more difficult, in order to ensure that solutions are effective and make a difference where it matters most.
32. For instance, some small and medium-sized employers have difficulty interpreting the Act (particularly if they do not have a dedicated payroll professional as part of their staff). This can lead to poor understanding of the Act, especially its more complex provisions, and may see employers taking 'shortcuts' or incorrectly applying parts of the Act.
33. At the other end of the labour market, large employers look to systematise as much of their payroll as possible, particularly when dealing with a workforce that does not have regular and identical work patterns. This drive to systematise the Act can lead large employers to miss parts of the Act that require manual decision-making and intervention (such as the determination of what a 'week' is for an employee).
34. Some employers are unable to comply with the Act because their payroll system is not compliant, or because they misunderstand the capabilities and limitations of their system. Not all payroll systems have been adapted to the requirements of New Zealand law. For example, many payroll systems use accrual methods for calculating leave entitlements. This can cause issues as accrual systems are based on accumulating an entitlement over time. This approach may not be compatible with the requirements of the Act, in particular the need for entitlements to be determined in relation to the work pattern at the time the leave is taken. Furthermore, the 'set-and-forget' mentality that some employers have regarding systemisation often means that payroll systems may not be updated when circumstances change.
35. Some sectors and industries are particularly prone to complex working arrangements that do not fit the standard working week that the Act was originally based on. For example, sectors that have a high proportion of employees working irregular hours, such

as hospitality, retail or health may be more likely to have problems with interpreting and implementing the Act.

36. Any solution recommended by the Taskforce must be simple enough to be understood easily by all employers and employees, able to be systematised in a way that is implementable for most employers who use payroll systems, and cover the wide variety of working arrangements while ensuring employees receive their minimum entitlements.

1 Have we accurately captured the broad range of business arrangements that can contribute to difficulties with the Act?

2 Are there other specific types of business arrangements for which compliance with the Act is more difficult?

3.3 ...and the effects can be worse for some employees.

37. As mentioned above, a common problem for many employees is the uncertainty about entitlements and payments that is associated with working irregular hours, shift work, or changing hours. The two examples below show some of the difficulties that arise from some employees' working patterns:

Roberta works 10 hours on Monday, 5 hours on Tuesday and 5 hours on Wednesday each week. When agreeing what a 'week' is with her employer, there are two obvious options, but they have different consequences: 1 week = 3 days or 1 week = 20 hours. If Roberta takes 1 day of annual holidays on a Monday, she has either taken a third of a week off (1 week = 3 days) or she has taken half a week off (1 week = 20 hours). This decision has implications for how much of her entitlement she has used and how much she gets paid for the day she takes off.

Joseph's employment agreement guarantees him a minimum 10 hours a week, but he is regularly offered additional work when it is available. The work can take place on any days of the week. He is paid \$20 an hour. The data below provides 12 weeks of his work pattern.

Week	Days and hours worked							No of days worked	Total hours	Gross pay	Variation
	Mon	Tue	Wed	Thu	Fri	Sat	Sun				
1	4	8	10	4	6	6	0	6	38	760	280
2	0	0	6	4	10	0	0	3	20	400	100
3	6	6	0	0	8	10	10	5	40	800	300
4	0	0	0	0	0	8	8	2	16	320	60
5	0	0	0	10	0	0	0	1	10	200	0
6	4	4	0	10	0	8	8	5	34	680	240
7	8	8	8	8	8	10	0	6	50	1000	400
8	8	0	0	10	8	0	0	3	26	520	160
9	0	0	0	10	0	0	0	1	10	200	0
10	8	8	0	0	8	4	0	4	28	560	180
11	4	4	4	0	0	0	0	3	12	240	20
12	8	8	0	10	8	10	0	5	44	880	340

38. Issues also arise in relation to payments as well as the actual entitlements, especially when employees' pay is variable or the payroll system is not updated when changes occur. This can occur when employees' payments include commission, incentive-based payments, overtime, or board and lodgings. Complications can arise in determining whether these additional payments are 'regular' or not, and therefore should be included in the calculation of payments for leave.
39. It would seem that the more a working arrangement differs from a 'standard' 5-day working week paid as a regular salary, the more likely employers and employees are to be caught out by the various issues that arise in implementing the Holidays Act. This highlights to the Taskforce that any solution needs to be flexible enough to cover all possible arrangements, especially given the expected shifts towards more flexible work patterns in the future.

3

Have we accurately captured the broad range of working arrangements that can contribute to difficulties with the Act?

4

Are there other specific types of working arrangements which raise particular difficulties in terms of compliance with the Act?

3.4 The Labour Inspectorate has a significant role to play as the regulator, and is also an important user of the Act

40. The Labour Inspectorate, as an operational unit within the Ministry of Business, Innovation and Employment, is responsible for ensuring compliance with the Holidays Act. It also plays an important role in assisting employers to understand their obligations, and enabling employees to ensure they receive their correct entitlements by enforcing the Act.
41. The Inspectorate initiated a Payroll Strategy in 2015 that included a programme of proactive audits and investigations (and, subsequently, a number of 'watching briefs' in which employers undertake their own audit, remediation and rectification programmes agreeing to some review by the Inspectorate) to identify issues with payroll systems and remediate employees. In addition to the programme of audits and investigations, the Strategy involved:
 - an extensive stakeholder engagement/co-design programme to better equip businesses to comply
 - a proactive information and education programme.
42. The Payroll Strategy work is now complete, though a small team focusing on audits and investigations remains within the Inspectorate. One of the outputs of the Payroll Strategy was the publication of revised guidance on compliance with the Act which was produced in collaboration with professional services providers including payroll providers, employment law experts, and employer and employee representatives. Stakeholders have reported that this guidance is proving useful but that it also highlights ongoing difficulties with the Act. The Labour Inspectorate has also issued position statements relating to compliance with the Act, to provide employers with further clarity about the Inspectorate's approach.
43. As noted above, the Labour Inspectorate is responsible for ensuring compliance with the Holidays Act 2003. As part of its review, the Taskforce may consider, and make

recommendations about, the role the Inspectorate should play in relation to any new legislation arising from this review. The review can also consider alternative institutional arrangements in relation to the regulation and administration of any new holidays legislation (for example, whether other agencies or institutions should have any particular roles in relation to any new legislation).

5

Do you have anything further to add about the role of the Labour Inspectorate as a regulator of the Holidays Act?

6

What role do you think the Labour Inspectorate, or any other agency or institution, should have in relation to any future holidays legislation?

4. What are the key issues with the Holidays Act 2003?

44. In recent years a number of issues have been identified with the Holidays Act 2003 that have made it difficult to implement in practice. In addition to a range of specific issues relating to specific parts of the Act (for example, determining entitlements and payments for annual holidays), there are also some more fundamental, cross-cutting issues related to the design of the Act.
45. This section outlines these fundamental, cross-cutting issues as well as highlighting some of the more significant issues that relate to specific parts of the Act. A more detailed list of the specific issues the Taskforce is aware of in relation to particular parts of the Act is included in Annex 2.
46. The Taskforce would appreciate feedback on:
 - whether the issues outlined in this section and in Annex 2 are captured correctly from your perspective
 - whether you have encountered any other issues related to implementing the Act that are not included in this paper and if so, what these are.

4.1 Some issues relate to all aspects of the Act

47. There are a number of issues that apply across the whole Act rather than to one specific section or other. These relate to the design of the Act itself and are the cause of many of the problems employers, employees and professional service providers (including payroll providers) face in working with the Act. These issues, which are discussed below, are:
 - the lack of specific prescription in the Act
 - the complexity of the Act
 - the lack of clarity in relation to specific terms included in the Act.

4.1.1 The lack of prescription in the Act can make it hard to implement, particularly if agreement between employer and employee is not reached

48. The Act is intentionally not prescriptive in its design, to allow different ways for employers and employees to comply based on the particular circumstances of their workforce and individual situations.
49. In situations in which it is not clear how the entitlement is to be provided, the Act does not provide any prescription. Instead a number of judgements are required based on the specific facts of an employee's working and remuneration arrangements. Often the agreement of the employee about how leave entitlements should be provided for their particular circumstance is required. In practice, this agreement of the employee may not always be sought.
50. Instead, either the employer makes a determination, or the payroll system relies on available information which may never have been, or is no longer, accurate. The requirements for employers to use judgement or reach agreements with their employees are difficult to systematise and can involve significant resources, especially for large employers with many staff. Payroll systems are often configured around assumptions or agreements which later shift.

51. An example of this difficulty is in defining a ‘week’ for the purpose of the annual holidays entitlement when it is not obvious (for example, if employees work on a roster pattern that does not fit a weekly cycle, or they work variable hours and days from week to week). The Act is not explicit about how to achieve this, relying instead on employers and employees reaching agreement about ‘*what genuinely constitutes a working week*’ (Section 17 (1)) for the employee at the time the leave is taken.
52. The experience of recent years has shown that this approach is not working in practice. The lack of prescription and clear guidance has led to problems, especially in situations where the constructive engagement between employers and employees in relation to leave provisions may not be taking place or where employment agreements (whether individual or collective) are not kept updated or agree to things that are not in line with the Act.

4.1.2 The Holidays Act is a complex piece of legislation which can prove confusing to those using it...

53. Attempting to provide a range of ways for employers and employees to meet their obligations under the Act means that the Act is complex. There are several different pay calculations in the Act including:
 - Two calculations for Ordinary Weekly Pay ((Section 8 (1) and Section 8 (2) if Section 8 (1) cannot be used)
 - Calculation of Average Weekly Earnings (Section 5 (1))
 - Calculation of Relevant Daily Pay (Section 9 (1))
 - Calculation of Average Daily Pay (Section 9A (2))
 - Calculation of annual holiday pay after an entitlement to a holiday has arisen (i.e. where an employee has worked for more than 12 months) (Section 21)
 - Calculation of annual holiday pay if holiday taken in advance (i.e. before an employee has worked for more than 12 months) (Section 22)
 - Calculation of annual holiday pay if employment ends within 12 months (Section 23)
 - Calculation of payment for public holidays (Section 50)
 - Calculation of payment for alternative holidays (Section 60)
54. Often employers are unclear which calculations should be used and many employers are not using the correct calculations at the correct times.
55. For example, in relation to payment for BAPS leave it can be difficult to determine when to use Relevant Daily Pay (RDP) as opposed to Average Daily Pay (ADP). Section 9A(1) sets out the circumstances in which an employer “may” use ADP, but there may be circumstances in which an employer may be able to determine both RDP and ADP. In these circumstances the Act is not explicit about what is required (i.e. in situations where the employee’s daily pay varies within the pay period when the holiday or leave falls then the employer may use RDP or ADP).
56. One of the key principles underpinning the Act is that entitlements are determined in relation to the work pattern at the time the leave is taken (so an employee taking leave for a day is paid what they would expect to have earned if they had been at work). In practice, however, determining entitlements in relation to the work pattern at the time the leave is taken can pose implementation difficulties (for example, the work pattern can be open to interpretation or hard to prove if good records are not kept).
57. Achieving compliance with this requirement imposes a significant operational and administrative burden, particularly in large seasonal workforces and/or where work patterns vary across different groups of employees. It requires ongoing interaction

between payroll teams, employees, and managers, in relation to all employees. Furthermore, in the modern economy, flexible working is increasingly common. The Act provides limited guidance as to how an employee's entitlements should be determined where the employee's hours of work are flexible (for example, an arrangement whereby the employee is paid for 30 hours per week, which can be performed on any day and at any time of the employee's choosing).

4.1.3 ...especially given the lack of clarity over certain terms used in the Act

58. There are two aspects to this issue:

- firstly, some terms or phrases are used in the Act with insufficient guidance provided to ensure a common understanding of the term between all parties (e.g. 'regular' in relation to determining what income should be included in calculations for the payment of leave). This can lead to issues and misunderstandings if different parties have differing interpretations of particular terms or phrases.
- secondly, the Act sets out holidays and leave entitlements in weeks and days while payroll systems more commonly use hours. Issues can arise with the translation between the hours generally used by payroll systems into the days and weeks set out in the Act, especially when an individual's working arrangements change. Although this is not a problem with the Act itself, it causes practical issues for employers and employees when trying to implement the Act.

7

Do you agree with the description of the cross-cutting issues set out above? If not, why not?

8

Are you aware of other cross-cutting issues with the design of the current Act? If so, what are they?

9

In your opinion, what are the main reasons that make the Holidays Act difficult to comply with for employers?

4.2 Annual holidays – determining entitlements and payments

59. There are a range of specific issues related to those sections of the Act that deal with the entitlements to, and payments for, annual holidays. A more detailed list of these issues is set out in Annex 2 but some of the more significant issues are outlined below.

4.2.1 Determining what a week is

60. Section 16 of the Act states that '*after the end of each completed 12 months of continuous employment, an employee is entitled to not less than 4 weeks' paid annual holidays*'. A fundamental issue in terms of compliance with the Act is therefore determining what a week is in relation to an employee's working arrangements.

61. This can be very simple for some but difficult for other forms of working arrangements as illustrated in the scenarios below.

- Tina works 9.30-4.30 from Monday to Friday. It is not difficult to determine a working week for Tina.
- Simon works a regular four-day on/four-day off, 12 hour shift pattern. This means

that he works four days a (calendar) week for a block of four weeks and then three days a week for a block of four weeks before the eight-week pattern repeats. It is harder to determine what a working week is for Simon.

- Marama works 20 hours a week but has flexibility about when these hours are worked so the number of days worked each week varies between 2 and 5 days. A working week for Marama may best be accounted for in hours rather than days. This approach can however cause other issues (e.g. in terms of determining whether a day that has been requested as holiday falls on an otherwise working day).

62. If agreement is not reached early on between an employer and an employee about what constitutes a working week for that employee, then this can have significant consequences when the employee takes leave. The basis of this agreement may also change over time, meaning that the agreement may need to be revisited. In practice this does not always occur when working arrangements change.

4.2.2 Incorrect accrual over time

63. Problems can arise when payroll systems are used that have not been adapted to the requirements of New Zealand law. For example, many payroll systems use accrual methods based on accumulating an entitlement over time. This approach may not be compatible with the requirements of the Act, in particular the need for entitlements to be determined in relation to the work pattern at the time the leave is taken. Particular problems arise when employee's hours change as, under a straightforward accrual system where the accrual pattern is set at the start of the year, an employee will not accrue sufficient time for four weeks' leave if their hours increase during the year. This problem occurs even if the accrual pattern is updated when the employee's hours increase. The result of this is that employees can be left without their correct entitlements while employers may be liable for remediation.
64. This issue can be exacerbated by the 'set-and-forget' mentality that some employers have regarding systemisation, as this often means that payroll systems may not be updated when employees' circumstances change.

4.2.3 Knowing which method to use to determine payments for annual holidays, and how to use it correctly

65. Section 21 requires employees to be paid for their annual holidays at a rate that is the greater of either their ordinary weekly pay (OWP) at the point the leave is taken, or average weekly earnings (AWE) for the 12 months previous. Correctly applying section 21 requires employers to calculate both OWP and AWE and use the larger number.
66. OWP can be determined in two ways. Section 8 (1) defines it as the amount that the employee receives under their employment agreement for an ordinary working week (including regular additional payments such as overtime and commission). However, section 8 (2) allows OWP to be calculated using an averaging formula over the previous 4 weeks – if it is "not possible" to determine OWP using section 8 (1).
67. Ensuring compliance with section 21, therefore, requires employers to have detailed wage and time records for employees that include details about earnings for the purposes of OWP and "gross earnings" over a longer time period for the purposes of AWE. The employer is also required to calculate the payment for both OWP and AWE (which can involve a subjective decision about what payments are deemed to be 'regular') and then use the larger number.
68. There are many stages in this process that introduce the risk of non-compliance, if reliable quality assurance is not used.

4.2.4 Using the ‘pay-as-you-go’ provision inappropriately

69. Section 28 allows an employer to regularly pay annual holiday pay of 8 per cent of the employee’s gross earnings in lieu of providing 4 weeks of annual holidays (commonly referred to as ‘pay-as-you-go’(PAYG)).
70. However, an employer is only able to do so if the employee is on a fixed-term agreement for less than 12 months, or works on a basis that is “so intermittent or irregular that it is impracticable for the employer to provide the employee with 4 weeks’ annual holidays.”
71. It is not always clear to employers when this clause applies, and what “impracticable” means – especially if an employee requests or agrees to have holiday pay included in their regular pay. There is no statutory definition of a ‘casual’ working arrangement, even though this term might be used in employment agreements.
72. Some employees may start off as a casual worker and be eligible for PAYG but over time a pattern of work might emerge. If this happens then the employer should switch to providing annual holidays. Correctly using the PAYG provision requires the employers to be in regular contact with their payroll, and to make adjustments should circumstances change.
73. An additional liability can arise in situations where an employee may incorrectly be paid PAYG for 12 months or more as, after 12 months the employee becomes entitled to annual holidays in line with Section 16. In this instance, an employer has not met their obligation by providing four weeks of annual holidays. Providing an additional 8 per cent (even if identified and agreed as holiday pay), does not absolve the employer from the requirement to provide the four weeks entitlement if the employee has worked for the employer for longer than 12 months.

10

Do you agree with the description of the issues relating to annual holidays here and in Annex Two? If not, why not?

11

Are you aware of other issues relating to annual holidays? If so, what are they?

4.3 BAPS leave (bereavement leave, alternative holidays, public holidays and sick leave) – determining entitlements and payments

74. There are also a range of specific issues related to those sections of the Holidays Act that deal with the entitlement to, and payments for, BAPS leave. A full list of these issues is set out in Annex 2 but some of the more significant issues are outlined below.

4.3.1 Determining an ‘otherwise working day’

75. The concept of an ‘otherwise working day’ (OWD) is a fundamental test for all leave (an employee can only take leave on a day that they would have otherwise been working), but it is particularly relevant for determining an employee’s entitlement to BAPS leave.
76. Section 12(3) provides a list of factors that can be taken into account by the employer and employee when they agree on whether a day is an OWD. The factors to be considered are not ranked and taking these into account is, by definition, a subjective and hypothetical decision requiring communication and agreement between the

employer and employee. This makes it difficult to systematise the OWD concept, and for parties to have confidence that the Act is being complied with. Employers sometimes attempt to systematise this by using a particular formula which may focus on one particular factor over others but such an approach may not be compliant with the Act.

77. The implications of this decision can be significant. For example, if an employee works on a public holiday that is an OWD for them, then they become entitled to an alternative holiday. If the day is not an OWD, then they do not become entitled to the alternative holiday.

4.3.2 Determining what payments are included in an employee's 'relevant daily pay' and when 'average daily pay' can be used instead.

78. The payment for a public holiday, alternative holiday, sick leave and bereavement leave is determined using RDP. This is defined by section 9 as the amount of pay that the employee would have received had they worked on the day concerned.
79. RDP is a subjective and hypothetical decision, based on the historic earnings of the employee as well as the employer's estimation of what the employee '*would have received had the employee worked on the day concerned*' (for instance, by looking at what other employees who did work earned). This is more difficult to calculate if employees' earnings vary considerably (especially if commissions or other additional payments are part of their earnings), if the business is not open on the OWD that is being considered (e.g. it is shut for a public holiday) or where there aren't sufficient records being kept.
80. Employers and employees can agree on a rate that is to be used as RDP in an employment agreement, but this must be equal to or greater than the rate that would be calculated using the above definition. Employers therefore need to carry out the calculation to be confident that they are compliant.
81. Section 9A allows an employer to use ADP if it is not "possible or practicable" to determine RDP, or if the employee's daily pay varies within the pay period when the holiday or leave falls. This allows employers to use a simpler 52-week calculation. It is not clear that this 'trigger' is appropriate, and the choice between RDP and ADP may benefit from being made simpler.
82. There is also an issue relating to the calculation of ADP, as the formula in section 9A (2) requires the employee's gross earnings to be divided by the number of whole or part days they worked. This could potentially disadvantage employees who work varied hours, as using ADP to calculate their pay treats all days equally regardless of how much is earned on each specific day.

12

Do you agree with the description of the issues relating to BAPS leave here and in Annex Two? If not, why not?

13

Are you aware of other issues relating to BAPS leave? If so, what are they?

4.4 Other issues

83. We are aware of a number of other issues that are not specifically related to entitlements and payments for annual holidays and BAPS leave, which are detailed in Annex Two.

84. For example, people who work a Monday-Friday five day week observe all public holidays regardless of the day that they fall on. This does not apply to other working arrangements (i.e. if somebody regularly works weekends but not Mondays).

14 Do you agree with the description of the other issues in Annex Two? If not, why not?

15 Are you aware of any further issues you believe should be considered? If so, what are they?

5. Ideas for change

85. The Taskforce would like to hear from anyone who has proposals for changes to the Holidays Act. Please bear in mind that any proposals for change will need to reflect the criteria set out in the Terms of Reference for the review. The Terms of Reference states that:
86. *'The Group is required to develop, test and make recommendations to the Government on policy options for the provision of, and payment for, holiday and leave entitlements that:*
- *continue to promote the existing purpose of the Holidays Act 2003*
 - *provide clarity and certainty for employers and employees so that employees receive their correct entitlements*
 - *are simpler than the current Act in relation to provisions of, and payment for, entitlements to holidays and leave*
 - *are readily implementable in a payroll system*
 - *minimise compliance costs for employers*
 - *minimise perverse incentives on employers and employees*
 - *ensure the balance of decision-making between employers and employees when it comes to requests for holidays and leave is appropriately calibrated*
 - *are readily applicable to the full range of working and remuneration arrangements in the labour market both now and in the future*
 - *aim to protect overall entitlements for employees'.*
87. Please consider these requirements when developing your suggestions for change.
88. You may wish to consider the following questions in developing your proposal.

16

Are the broad principles that underpin the Holidays Act (that entitlements are to be determined in relation to the work pattern at the time the leave is taken and that employees should not be financially disadvantaged by taking leave) still appropriate?

17

How could holiday entitlements be provided for in a way that reflects the flexible working arrangements we have in New Zealand, including any arrangements we expect to see in the future?

18

How could the different calculations for holidays and leave payments be simplified?

19

What changes would make the Act easier to apply to workers with variable hours/days of work?

20

What changes would make the Act easier to apply to workers who receive variable pay (e.g. workers paid by commission)?

6. Next steps

89. Submissions received during this consultation period will be used to inform the work of the Taskforce as it develops its recommendations.
90. Once it has a full understanding of the issues posed by the Act, the Taskforce will develop options for change which will then be robustly tested using anonymised payroll data to assess how well these options could work in practice.
91. Following a robust testing phase the Taskforce expects to report back to the Minister of Workplace Relations and Safety with its recommendations by mid-2019. The final report of the Taskforce will be publicly released.

Recap of questions

Section 3: Who is affected by the issues with the current Act?

- 1 Have we accurately captured the broad range of business arrangements that can contribute to difficulties with the Act?
- 2 Are there other specific types of business arrangements for which compliance with the Act is more difficult?
- 3 Have we accurately captured the broad range of working arrangements that can contribute to difficulties with the Act?
- 4 Are there other specific types of working arrangements which raise particular difficulties in terms of compliance with the Act?
- 5 Do you have anything further to add about the role of the Labour Inspectorate as a regulator of the Holidays Act?
- 6 What role do you think the Labour Inspectorate, or any other agency or institution, should have in relation to any future holidays legislation?

Section 4: What are the key issues with the Holidays Act 2003?

- 7 Do you agree with the description of the cross-cutting issues set out on pages 15-16? If not, why not?
- 8 Are you aware of other cross-cutting issues with the design of the current Act? If so, what are they?
- 9 In your opinion, what are the main reasons that make the Holidays Act difficult to comply with for employers?
- 10 Do you agree with the description of the issues relating to annual holidays set out on pages 17-18 and in Annex Two? If not, why not?
- 11 Are you aware of other issues relating to annual holidays? If so, what are they?

12 Do you agree with the description of the issues relating to BAPS leave set out on pages 18-19 and in Annex Two? If not, why not?

13 Are you aware of other issues relating to BAPS leave? If so, what are they?

14 Do you agree with the description of the other issues in Annex Two? If not, why not?

15 Are you aware of any further issues you believe should be considered? If so, what are they?

Section 5: Ideas for change

16 Are the broad principles that underpin the Holidays Act (that entitlements are to be determined in relation to the work pattern at the time the leave is taken and that employees should not be financially disadvantaged by taking leave) still appropriate?

17 How could holiday entitlements be provided for in a way that reflects the flexible working arrangements we have in New Zealand, including any arrangements we expect to see in the future?

18 How could the different calculations for holidays and leave payments be simplified?

19 What changes would make the Act easier to apply to workers with variable hours/days of work?

20 What changes would make the Act easier to apply to workers who receive variable pay (e.g. workers paid by commission)?

Annex 1: Terms of Reference

Holidays Act 2003 Review – Terms of Reference

Purpose

1. The purpose of the Holidays Act Working Group (the Group) is to make recommendations to Government for a clear and transparent set of rules for providing entitlements to, and payment for, holidays and leave that can be readily implemented in a payroll system and is applicable to an increasingly diverse range of working and pay arrangements.
2. It is important that a customer-focused approach is taken to this review to ensure that recommendations are readily implementable by employers and their payroll providers.

Background

3. There is widespread non-compliance with the Holidays Act 2003 (the Act) and it is generally accepted that this is due both to issues with the implementation of the legislation in payroll systems and the business processes that support these, and issues with the legislation itself.
4. The Act works well for a standard, five day, 40 hour week, but can be difficult to apply to more diverse working arrangements and complex remuneration packages. This is primarily because the Act is based on two key principles relating to entitlements and pay:
 - a. that entitlements are determined in relation to the work pattern at the time the leave is taken
 - b. that employees should not be financially disadvantaged by taking leave, that is, they should be paid (at least) what they would have earned had they worked.
5. In these situations, the Act relies heavily on employers making judgements as to how the provisions of the Act apply to the specific circumstances of the individual employees, and in some cases agreement with the employee is required. In some cases, these may need to happen each time leave is requested.
6. The result is an Act that does not provide certainty to employers and employees, is difficult for employees and employers to understand and interpret, is hard to systematise in a payroll system, and can incur relatively high compliance costs for employers.

Objectives

7. The Group is required to develop, test and make recommendations to the Government on policy options for the provision of, and payment for, holiday and leave entitlements that:
 - a. continue to promote the existing purpose of the Holidays Act 2003
 - b. provide clarity and certainty for employers and employees so that employees receive their correct entitlements
 - c. are simpler than the current Act in relation to provisions of, and payment for, entitlements to holidays and leave
 - d. are readily implementable in a payroll system
 - e. minimise compliance costs for employers

- f. minimise perverse incentives on employers and employees
- g. ensure the balance of decision-making between employers and employees when it comes to requests for holidays and leave is appropriately calibrated
- h. are readily applicable to the full range of working and remuneration arrangements in the labour market both now and in the future
- i. aim to protect overall entitlements for employees.

Scope and parameters

8. The Review will retain the purpose of the current Act (in section 3) and (at least) the current levels of entitlements (such as four weeks' annual holidays, five days' sick leave).
9. The Group will consider:
 - a. options to improve both the provision of, and payment for, entitlements that meet the objectives set out in paragraph 7, and:
 - i. where trade-offs between competing objectives are required, will be explicit about how these are made
 - ii. may include consideration of the place of the standard five day, 40 hour, working week in the Act
 - b. any other matters relating to the Act that it sees fit. This may include holidays and leave entitlements modified by other Acts (such as the Parental Leave and Employment Protection Act 1987).
10. The principles set out in paragraph 4 may also be reconsidered, but options must aim to preserve the intent of these as far as possible.
11. The Group will not, however, consider the complex issue of remediation of historical underpayments of holiday and leave pay.

Membership and Process

12. The Group will consist representatives from MBIE, the State Services Commission and Inland Revenue, along with three to four members each representing workers, employers, led by an independent Chair with the power to commission work.
13. The Group will be chaired by Gordon Anderson, a law professor at Victoria University. The Chair is an independent/neutral party in the Group discussions, whose purpose is to facilitate the parties to reach jointly agreed recommendations to Government.
14. The Group is expected to consult widely to get a comprehensive understanding of the issues with the Act, and draw on international examples of holidays and leave legislation where appropriate.
15. The Group is also expected to work closely with technical experts such as payroll providers, business rules specialists, and service design and delivery specialists to assist with the design and testing of policy options.

16. The Group is required to support their recommendations with quantitative analysis of different options, tested with bona fide payroll data, to ensure that those options are readily implementable and adverse consequences have been identified.
17. The parties agree that consistency of attendees will be important for the Group to achieve its objectives, and will ensure that representatives will not be changed unless this is unavoidable. If any change in representatives is required, the party concerned will ensure the new attendee/s have been well briefed on previous discussions and progress.
18. The parties will each ensure that their constituents/stakeholders have appropriate opportunity to have input into development of options, through the parties' internal governance arrangements. MBIE will ensure that appropriate cross-agency structures in place for senior government officials to be kept informed of, and have input into, the work of the Group.
19. MBIE will provide secretariat support to the Group and information and research that the Group identifies is required to facilitate its discussions.

Rules of engagement

20. The parties agree that they will:
 - a. work together in good faith, balancing the interests of all parties
 - b. hold discussions in confidence and on a without prejudice basis
 - c. agree any external communications at each meeting.
21. If the parties are unable to reach agreement on recommendations, the Group's final report will outline:
 - a. the areas where the parties have reached agreed recommendations
 - b. the areas of difference.

Timing and reporting

22. The Group will report back to the Minister of Workplace Relations and Safety with their recommendations within 12 months. This timeframe will give the Group sufficient time to commission work and undertake robust testing of options.
23. The Group will also provide an interim report after six months, so that Cabinet – and the New Zealand public – can be informed about the Group's progress.
24. Each party will be responsible for reporting to their constituents/stakeholders, in accordance with any messaging agreed during the Group's discussions and as required by their internal governance mechanisms. In doing so, the parties agree to honour the confidentiality of the Group's discussions.

Annex 2: More detailed list of issues

The table below provides a more detailed list of the issues that the Taskforce is aware of that employers, employees and payroll providers face in implementing the Holidays Act. Some of these issues relate to the systems that employers tend to use in their attempts to comply with the Act rather than being issues with the legislation itself. These issues are included here because they still represent a practical barrier that can prevent employees from getting the entitlements that they are due, and will be relevant to any ideas for change to the current framework.

The Labour Inspectorate's guidance document on the Holidays Act is a useful resource for employers, and provides useful additional material in relation to compliance with the Act. This Guidance is available here: <https://www.employment.govt.nz/assets/Uploads/Holidays-Act-2003-Guidance-on-annual-holidays-Sep-2017v1.pdf>.

Description of issue	Section of Act
Cross-cutting issues	
<p>Meaning of 'regular' in relation to payments The Act refers to payments that are a 'regular' part of the employee's pay but no definition of how 'regular' is to be interpreted is provided.</p>	
<p>What payments are included in 'gross earnings' Employers not always clear what payments should be included as gross earnings, such as discretionary payments, cashed up holidays and redundancy payments.</p>	14
<p>Transferring an employee from 'intermittent or irregular' to permanent work pattern Complexity associated with providing correct entitlements when an employee's work pattern changes.</p>	28
<p>Definition of 'otherwise working day' The Act provides a range of criteria to assist in the determination of what is an 'otherwise working day', but these criteria are not always used/well-understood, and sometimes non-compliant 'rules' can be agreed to.</p>	12
<p>Definition of 'ordinary working week' Although the term 'ordinary working week' is used in the Act (Section 8 (1) (a)), this term is not defined. While it may be easy to determine a working week for some employees this is not true for all.</p>	8
<p>Determining which averaging formula should be used, and when The Act provides a number of different formulae for use in different situations (e.g. for Relevant Daily Pay, Average Daily Pay, Average Weekly Earnings or Ordinary Weekly Pay). Knowing exactly what formula should be used requires correctly configured software, or a high level of knowledge and confidence with the Act. Employees are often not aware of possible issues with their entitlements being met.</p>	
<p>Sickness/bereavement leave arising while employee is taking annual holidays/public holiday</p>	36-39 and 61A

<p>If an employee suffers a bereavement while taking annual holidays, the Act requires the employer to allow them to take the day as bereavement leave instead. If an employee is sick while taking annual holidays, an employer may allow the employee to take the day as sick leave rather than annual holidays.</p> <p>Some employers do not understand their obligations in relation to this, and find exchanging holidays and leave confusing (particularly given that employers are required to apply different approaches to the pay for these different types of leave).</p>	
<p>Employment ending with entitlement to annual holidays overlapping a public holiday</p> <p>Employees are entitled to payment for a public holiday if it falls within the period that would have been covered by an existing entitlement to annual holidays. This is not always well-understood, and employers may be using an accrual system that doesn't differentiate between entitlement and accrued leave.</p>	40
<p>Employers having insufficient record-keeping and operating a 'set-and-forget' mentality</p> <p>There may be an assumption (by employers and employees) that an electronic system is correct and reliable. Issues can arise if systems are not updated when working arrangements and/or pay change.</p>	
<p>Employers/payroll systems calculating entitlements in hours rather than weeks or days</p> <p>This can cause complexity and difficulty in understanding entitlements, and can present challenges with translating different units of entitlement.</p>	
<p>Sale and transfer of business</p> <p>Although the issue of the transfer of holidays and leave entitlements following the sale, contracting out or transfer of a business is dealt with for some employees by Part 6A of the Employment Relations Act 2000 (which provides protection to the terms and conditions of specified categories of employees on the sale or transfer of a business), the Holidays Act is silent on this issue.</p> <p>We understand that in reality the practice varies across the economy and additional clarity would be provided if this issue was explicitly addressed in the Holidays Act.</p>	
<p>Annual Holidays – Determining entitlements and payments</p>	
<p>Determining what payments are included in the OWP calculation</p> <p>Can be difficult for employers to determine what payments are included, and employees may not be aware. Also requires contact with payroll to ensure it is always correct for the employee's working arrangements.</p>	8
<p>Defining what a 'week' is</p> <p>Employer and employee can agree what a week looks like, but this requires good communication and agreement about working arrangements. Issues also arise when working out what portion of a week has been used when an employee takes leave, and this might be</p>	Part 2

calculated differently (and incorrectly).	
Inconsistency in the calculation of AWE Section 5 refers to 1/52 of gross earnings; section 21 refers to average weekly earnings for 12 months previous.	5 and 21(2)(b)(ii)
Not clear what 'not possible' means for using the OWP formula rather than Section 8 (1) Section 8 (2) allows for a simple formula to be used if it is 'not possible' to determine OWP. This is not very clear for employers, and hard to systematise.	8
OWP calculation divisor The calculation for OWP can be confusing for employers and payroll providers because it can sometimes refer to more than 4 weeks, but needs to be divided by 4.	8(2)
Pay-as-you-go provision for workers being paid 8% holiday pay Can be difficult for employers to know when it is appropriate to use the PAYG provision. When working arrangements change, it can be difficult for employers to know when to start providing 4 weeks, rather than 8% pay.	28
Annual holiday pay across multiple pay periods (difference between OWP and AWE) Section 21 (2) has two different calculations, which may provide different results. The Act requires the greater figure to be used, but some employers find it difficult to understand and use this section.	21(2)(b)
Incorrect accrual over time The use of accrual systems can cause problems as the amount of leave accrued may not provide a full entitlement, particularly if the employees working arrangements change during the year. This can also cause issues when an employee leaves employment as the outstanding leave balance may be incorrect if calculated using an accrual approach.	16, 23-25
'Cashing up' annual holidays entitlements Issues associated with the process for employees to request a portion of their entitlement to be converted into money. This is related to employers and employees referring to annual holidays entitlements as money owed, rather than time owed.	28A
B.A.P.S – Determining entitlements and payments	
Determining an 'otherwise working day' Defining an otherwise working day is fundamental for all parts of the Act, but it can be difficult for employers and employees to understand exactly what it means where flexible or variable work patterns are in use.	12 and 56
Calculating hypothetical wages for RDP RDP is based on what the employee would have otherwise earned, had they worked. This is a subjective decision that the Act provides guidance on, but not firm answers. This is hard to systematise for employers, and	9

hard for employees to determine whether they have been paid correctly.	
<p>Determining what additional payments need to be included in RDP calculations</p> <p>Similar to above, the payments are not always easy to determine, and the required information may not be captured in payroll data (e.g. payroll system captures base wage but not additional payments).</p>	9
<p>Payments for working on a public holiday</p> <p>If an employee works on a public holiday, Section 50 requires them to be paid according to RDP/ADP + half. ADP is only used if the RDP can't be determined. In some cases although the employee actually worked it may not be possible to determine their RDP (e.g. if their shift only included part of a public holiday) in which case ADP needs to be used. Greater clarity could be provided for employers about how to deal with these situations.</p>	9
<p>Transferring public holidays</p> <p>Transferring holidays can be a confusing process, especially given that an employee can work on a public holiday and receive an alternative holiday instead. Requires ongoing agreement between employer and employee.</p>	44A and 44B
<p>ADP calculation counting part days as whole days</p> <p>Some employees find themselves disadvantaged when picking up small shifts if their employer is using ADP, because this lowers the average they would be paid.</p>	9A(2)
<p>Trigger to use ADP instead of RDP</p> <p>One trigger to use ADP instead of RDP is if the employee's daily pay varies within the relevant pay period, which some argue is too broad.</p>	9A(1)(b)
<p>Applying sick/bereavement leave entitlements to those who work part-time/casual</p> <p>Some employers suggest that these entitlements should be provided pro rata. Should the Act explicitly provide for this?</p>	Subpart 4
<p>Taking sick leave for part days</p> <p>Some employees are only off work for part of a day (e.g. they go home early). The Act does not provide guidance for part days to be paid as sick leave, but some employers do this anyway. Greater clarity around this would be helpful.</p>	
Other issues	
<p>Coverage of bereavement leave list</p> <p>Are there other categories of person that should be included in this list?</p>	69(2)(a)
<p>Mondayisation of public holidays</p> <p>Some employees claim that this gives preference to employees who work a standard 5 day week including Monday. These employees get the benefit of a paid day off where public holidays either fall on a Monday or fall on a Saturday or Sunday and are then taken on the following Monday. Employees who do not work a standard 5 day week may be considered to be missing out on public holidays because when a public</p>	45 and 45A

<p>holiday falls on a weekday that they do not usually work they do not receive a paid day off.</p>	
<p>Holidays Act override in Parental Leave and Employment Protection Act</p> <p>This section overrides the Holidays Act so that a person who returns to work after a period of parental leave is entitled to only average weekly earnings for 12 months on the leave that they became entitled to during their absence. This effectively means that annual holidays taken the moment they return are paid \$0, which gradually increases over the next 12 months. It could be argued that this approach is discriminatory, and contrary to the objectives of the Parental Leave and Employment Protection Act (to protect the rights of employees during pregnancy and parental leave).</p> <p>There is a further problem that most payroll systems cannot distinguish between different values of leave.</p>	<p>PLEPA s42</p>
<p>Closedowns</p> <p>There are a number of areas where the Act could provide greater clarity in relation to closedown periods. These include:</p> <ul style="list-style-type: none"> • The relationship between the ‘must’ in Section 34 (2) and the ‘may’ in Section 34 (4) (i.e. whether Section 34 (2) takes precedence because it says the employer ‘must pay the employee 8%’ or whether this is an either/or situation where the employee is either paid the 8% (as per Section 34 (2)) or agrees to use annual holidays in advance (as per Section 34 (4))) • The definition of ‘reasonably proximate’ in Section 35 (2) in relation to the date nominated as the anniversary date for an employee not entitled to annual holidays – there have been cases of employers nominating dates several weeks away from the actual closedown period. 	<p>29-35</p>
<p>Entitlement to an alternative holiday</p> <p>The entitlement arises regardless of how much of a public holiday is worked, but some employers credit hours worked.</p>	<p>56</p>
<p>Payment of alternative holidays</p> <p>Alternative holidays can only be paid out after 12 months, but this sometimes happens incorrectly.</p>	<p>61</p>