



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.

Regulatory Impact Statement: Holidays Act reform - Further Policy Decisions

Purpose of Document	
Decision sought:	<i>Further improvements to the replacement of the Holidays Act 2003</i>
Advising agencies:	<i>Ministry of Business, Innovation and Employment</i>
Proposing Ministers:	<i>Minister for Workplace Relations and Safety</i>
Date finalised:	<i>10 May 2024</i>
Problem Definition	
<p>Work has been underway to draft new legislation to replace the Holidays Act 2003 (the Act). However, detailed policy design work based on the 2020 Cabinet decisions to accept the Holidays Act Taskforce’s 22 recommendations revealed workability issues and the extent of system changes for businesses and payroll providers that the implementation of those decisions would require. The Minister for Workplace Relations and Safety is planning to release an exposure draft in September 2024 to test the policy and technical details before a Bill is introduced.</p> <p>Before an exposure draft is released there is an opportunity to make changes and additions to some existing policy decisions, to address issues identified through stakeholder feedback to date and allow for more effective feedback on unknown issues. These changes focus on areas where policy and drafting work can be undertaken quickly and would simplify, address gaps, and reduce implementation requirements for payroll and businesses.</p>	
Executive Summary	
<p>Issues with the Holidays Act 2003 have been a longstanding concern for employers, employees and payroll providers. The lack of clarity around the processes and calculations required to determine leave entitlements and payments, and reliance on employer judgement, have caused widespread and often unintentional non-compliance with the Act, resulting in high remediation costs for both public and private sectors.</p> <p>In 2018 the Government established the Holidays Act Taskforce (the Taskforce) to explore issues with the Act and in 2020 endorsed its 22 recommendations for improving it. The 2020 Cabinet decisions were intended to provide certainty and clarity for employers by providing greater prescription. The prescriptive formulas, methodologies and detailed processes agreed by Cabinet in 2020 add an inevitable amount of complexity. The Regulatory Impact Statement (RIS) accompanying the 2020 Cabinet paper concluded that the 2020 proposals were superior to the Holidays Act 2003 on all criteria except simplicity. Greater simplicity would have required a trade-off with other objectives, including ensuring that no employee would be worse off than under the current Act.</p> <p>Subsequent policy design and drafting work revealed the extent of complexity, and the implementation and compliance costs some of the processes and calculations agreed in 2020 would result in. The feedback from stakeholders involved in MBIE’s 2021-2022 policy design process was that the size of these potential costs was so high that it cut back the net benefits of the changes. Some technical refinements were made through that policy design process that are consistent with the 2020 policy decisions, but there was not scope</p>	

to address any of the issues with the underlying policy decisions MBIE and stakeholders identified through the detailed policy design process.

Before the 2023 General Election, drafting of the **Confidential advice to Government** Bill) began but was not completed. The Minister for Workplace Relations and Safety (WRS) intends to release an exposure draft of the Bill in September 2024 for targeted consultation. The purpose of the exposure draft is to identify remaining technical and workability issues with the proposed policy decisions and to understand stakeholder concerns and views before a Bill is introduced.

There are two options related to the content of the exposure draft that is intended to be released in September 2024:

- **Option One:** Exposure draft reflects the 2020 policy decisions (with technical refinements) in their entirety.
- **Option Two:** Exposure draft incorporates changes and additions (that were previously out of scope) to some of the 2020 policy decisions in areas where officials can complete policy and drafting work within the time available before September.

The Minister for WRS is proposing Option Two. The proposed policy changes are intended to simplify the regime while maintaining broad alignment with the underlying framework of the Act and the objective of protecting the *overall* level of worker entitlements. Addressing some of the known issues will enable stakeholders to focus their feedback in other areas.

The changes proposed under Option Two address some, but not all, of the issues with the 2020 policy decisions that MBIE and stakeholders have identified.

Changes beyond this scope would involve substantial additional policy work and would not be achievable before September. **Confidential advice to Government**

This RIS acts as an addendum to the 2020 RIS¹ and includes an additional qualitative assessment of the expected costs and benefits of the proposed policy changes in Option Two. The proposed policy changes will not significantly impact on the cost estimates in the 2020 RIS, which focus on the costs employers will incur because of the new payment methodologies and earlier access to some leave entitlements which are not changing. These proposals aim to reduce the compliance costs to employers of implementing the changes, which the 2020 RIS did not include analysis of.

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¹ [Regulatory Impact Statement – Improving the Holidays Act 2003 \(mbie.govt.nz\)](https://www.mbie.govt.nz/regulatory-impact-statement-improving-the-holidays-act-2003)

Limitations and Constraints on Analysis

There were a number of limitations and constraints relating to the 2020 RIS, although most of these were focussed on the costs and benefits of increases to leave payments and earlier access to leave entitlements. The 2020 RIS also identified some limitations and constraints relevant to calculating implementation costs, which are the focus of the current proposals:

- There had not been wide consultation on the Taskforce's recommendations. The lack of comprehensive consultation constrained MBIE's ability to fully understand the impacts and costs of the Taskforce's recommendations.
- It was not clear what changes might be needed to implement recommendations in payroll systems and as a result, what potential costs might be for payroll providers and employers.
- Accurately quantifying the cost of implementing system changes is inherently difficult. Costs will vary depending on a range of factors, including:
 - the size of the business/organisation
 - the nature of the employer's workforce
 - the type and functionality of existing payroll systems used to manage pay and leave (including whether it is digital and, if so, whether it is cloud or non-cloud based, whether it is an 'off the shelf' or bespoke product that requires a customised implementation process and whether it is integrated with time and attendance systems)
 - the employer's access to payroll expertise.
- The Taskforce was given scope to change fundamental aspects of the Act so long as tripartite consensus between government, business, and union representatives could be maintained. This requirement constrained the Taskforce's recommendations.

Additional limitations and constraints in this RIS include:

- The refinements proposed in Option Two largely reflect MBIE's engagement with payroll providers during the 2021-2022 policy design process and their feedback on areas where significant system changes would be required. A lack of broader consultation remains a limitation on the analysis. It is, therefore, difficult to quantify the extent to which Option Two might reduce implementation and compliance costs, which is why we have focused on qualitative analysis.
- The proposals in Option Two were constrained by the time available for policy development and drafting ahead of an exposure draft in September 2024. Policy refinement has occurred at pace with a focus on addressing some known gaps with the assumption that further insights and evidence will be provided during the exposure draft process.
- The scope for making changes to the existing policy decisions is limited to options that maintain broad alignment with the current drafting of the Bill and the underlying framework, which at the time required tripartite consensus.
- Significant changes that would extend the timeframe for policy development and legislative drafting before an exposure draft could be released are out of scope and have therefore not been considered or analysed. **Confidential advice to Government**
- The narrative description of proposed changes set out in this addendum is largely based on anecdotal feedback from stakeholders engaged with the detailed design process undertaken to date. **Confidential advice to Government**

While the limitations and constraints impact the ability to quantify the costs and benefits of the options, MBIE considers that the qualitative assessment based on feedback from stakeholders on the impacts of the 2020 policy decisions is sufficient to give Ministers confidence to make an informed decision on options for changes to be included in the proposed exposure draft for consultation.

Responsible Manager(s) (completed by relevant manager)

Alison Marris

Manager, Employment Standards Policy

Ministry of Business, Innovation, and Employment



10 May 2024

Quality Assurance (completed by QA panel)

Reviewing Agency:	The Ministry of Business, Innovation and Employment.
Panel Assessment & Comment:	MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Statement prepared by MBIE. 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.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem?

Issues with the Holidays Act 2003 have been a longstanding concern for employers, employees and payroll providers. The lack of clarity around the processes and calculations required to determine leave entitlements and payments make the Act difficult to apply in practice, particularly when it comes to complex and evolving working arrangements that differ from a standard five-day, 40-hour salaried week.

The effect of the lack of certainty and clarity the Act provides to employers is that:

- many employees are not receiving their correct entitlements, or payment for their entitlements
- employers and employees do not have certainty regarding the provision of, and payment for, entitlements
- employers, particularly those with large numbers of employees on variable work and pay arrangements, can incur relatively high costs to comply with the Act
- the Act cannot be readily systematised in a payroll system
- many employers are carrying a liability that cannot be readily quantified (and may change significantly when employees change their work patterns).

Reliance on employer judgement and poor implementation in payroll systems has caused widespread and often unintentional non-compliance with the Act, resulting in significant remediation costs for public and private sector employers. Until a legislative solution is provided, risk of ongoing non-compliance will remain.

In 2018, Cabinet agreed to establish a tripartite Holidays Act Taskforce (the Taskforce), comprised of government, business and union representatives, to recommend improvements to the Act.

In 2020, Cabinet agreed to a legislative solution, endorsing the Taskforce's recommendations for improving the Act. The recommendations retain the underlying framework of the Act, which provides entitlement after specified periods of employment to weeks of annual leave and days of other types of leave, and include:

- prescriptive methodologies, calculations and definitions intended to provide more certainty about how to calculate entitlements and pay
- improved access to some leave entitlements
- some increases to minimum leave payments
- improved transparency and clarity around some processes.

The Taskforce focussed more on some of the objectives Cabinet set for it than others. It focussed particularly on providing greater certainty about how to calculate entitlements and ensuring that no employee would be worse off than under the current Act in any circumstances. This focus required a significant trade-off with the objective of simplifying the Act.

Between 2021 and 2022, MBIE brought together a small working group of payroll providers and practitioners to complete the detailed policy design process required to implement the 2020 policy decisions in legislation. This work and initial drafting of the Bill revealed ambiguities and gaps in the policy decisions, and the extent of complexity within the prescriptive methodologies and system changes they would require, particularly those used

by small businesses. For example, the recommended methodology for determining the hours an employee would have worked on a day of leave would require employers to have pay systems that are integrated with time and attendance, which many small businesses do not currently have.

The then Minister for WRS made decisions on some refinements in response to technical issues identified by MBIE's stakeholder working group, maintaining alignment with the 2020 policy decisions and tripartite consensus². Drafting of the Bill was not completed before the 2023 General Election and further work to draft provisions that accurately reflect policy will be required to complete the Bill, irrespective of whether there are any further policy changes.

What is the policy problem or opportunity?

The Minister for WRS intends to release an exposure draft of the Bill in September 2024 for targeted consultation. The Minister has decided to test the workability of changes in the Bill with stakeholders to ensure any legislative changes are robust and enduring. Stakeholders will be asked to comment on the technical details in the Bill and highlight any concerns around workability and implementation.

Before an exposure draft is released, there is an opportunity to make some changes and additions to the existing policy decisions. A number of issues identified during the policy design process could not be addressed within the scope MBIE was given prior to the 2023 General Election. The scope required continued tripartite consensus and alignment with the underlying policy decisions which meant only technical refinements were possible. There is now scope to make some further policy changes to address known issues.

These changes would simplify, address gaps and reduce implementation requirements for payroll and businesses and focus on areas where policy and drafting work can be undertaken quickly before September (they do not address all the known issues).

Changes proposed seek to resolve issues in the following areas:

- The annual leave framework including access to annual leave entitlements, methodologies for determining how leave is taken, and Pay-as-You-Go leave payments.
- Payment methodologies for family violence, bereavement and sick leave, and the accumulation period for sick leave entitlement.
- Treatment of leave entitlements in restructuring situations.

The proposed changes have been informed by consultation and drafting during the 2021-2022 policy design process, which revealed that in some cases, the methodologies and processes would result in an inevitable amount of complexity. The proposed changes are achievable within the time frame and will improve the quality of feedback from stakeholders during consultation and reduce unnecessary feedback on known issues with already identified solutions.

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Given the work that has happened to date and the risk of ongoing non-compliance, the most efficient way of seeking that feedback is to complete the legislative drafting, incorporating changes to some known issues with the 2020 decisions.

² 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.

Who will be affected by the proposed changes?

The primary stakeholders are:

- employers who struggle to comply with their obligations under the current Act
- employees who do not always receive their correct entitlements
- payroll providers who supply payroll systems to employers and payroll practitioners who work in employer organisations.

All stakeholders stand to benefit from improvements to the Act. Businesses and payroll in particular will benefit from further refinements to the 2020 Cabinet decisions which aim to improve implementation and workability, whilst also reducing administrative burdens and compliance costs.

Feedback provided by payroll providers and practitioners during MBIE's 2021-2022 policy design process has helped to inform the proposed policy changes in Option Two. 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. **Free and frank opinions**

Employee representatives are likely to continue to oppose a fundamentally different basis for providing leave entitlements. **Confidential advice to Government** Their opposition is driven by the potential impacts on the principles of the current Act³ and, therefore, the current level of worker entitlements the Act provides.

Compared to the 2020 Cabinet decisions, changes proposed in Option Two are not expected to have a material impact on specific population groups. The proposals will not substantially impact any of the proposed improvements in access to leave entitlements the 2020 policy decisions deliver. Improved access to entitlements will benefit all employees but particularly those employees in jobs with variable working patterns, lower levels of pay and less generous conditions of employment. Women, Māori, Pacific peoples, disabled people and young people are more likely than other groups to be employed in these jobs. A key objective of the proposed changes to the 2020 policy decisions is to improve the accessibility and understandability of the new legislation which will benefit these population groups by making it easier for them to understand their leave entitlements.

What objectives are sought in relation to the policy problem?

The 2020 RIS outlined the key objectives for improving the Act, which are still relevant:

- Provide clarity and certainty to employers and employees about the rules for providing minimum leave entitlements and payments.
- Make the provision of, and payment for, entitlements to holidays and leave simpler and more readily applicable to the range of complex working arrangements in the labour market.
- Make obligations easier to systematise and implement in payroll systems.
- Minimise compliance costs.
- Protect the *overall* level of entitlements the Act provides for employees.

³ The Act is based on two key principles relating to entitlements and pay.

- i. That entitlements are determined in relation to the work pattern at the time leave is taken.
- ii. 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.

The previous Government had a bottom line of maintaining tripartite consensus. Achieving this resulted in a focus on ensuring no employee would be any worse off than under the Act. Protecting worker entitlements while providing greater certainty and clarity required a direct trade-off with the objective of simplifying the Act.

The Minister for WRS has instructed MBIE to seek more balanced policy solutions (Option Two), considering all objectives, particularly simplicity and workability to improve implementation and compliance costs.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options?

In order to meet the above objectives, the options have been assessed against the following criteria:

Clear and simple

- Obligations in relation to the provision of, and payment for, leave entitlements are as simple as possible, while providing clarity and certainty for employers and employees so that employees receive their correct entitlements and employers can have confidence they have met their obligations.

Readily implementable to minimise compliance costs

- Workable and readily implementable in payroll systems (including those used by large and small businesses). This includes minimising the system changes required and the need for employers to apply judgement and discretion when determining entitlements and payments.
- Minimises administrative burden, implementation requirements and compliance costs.
- Aligned with common practice (where this is well intentioned and desirable).

Flexible and future proof

- Applicable to the full range of complex working and remuneration arrangements in the labour market both now and in the future.
- Supports flexibility where it is appropriate for employers and employees to adopt an approach that suits their circumstances.

Fair for employers and employees

- Results in a fair outcome for both employers and employees and achieves an appropriate balance of interests between parties. This includes maintaining overall levels of entitlement for employees but ensuring an appropriate balance between protection of entitlement and compliance costs.
- Minimises the risk of any perverse incentives on employers or employees to arrange work and leave to minimise obligations or maximise entitlements. Appropriately calibrates the balance of decision-making between employers and employees.

What scope will options be considered within?

The scope for making changes to the existing policy decisions is limited to options that maintain broad alignment with the current drafting of the Bill and the underlying framework of the Act. Policy development and drafting work for options considered must be able to be undertaken quickly, within the timeframe for release of an exposure draft in September 2024.

What options are out of scope?

Significant changes that would extend the timeframe for policy development and legislative drafting before an exposure draft could be released are out of scope.

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What options are being considered?

The following options are being considered regarding the content of the exposure draft that is intended to be released in September 2024:

- **Option One:** Exposure draft reflects the 2020 Cabinet decision to endorse the Taskforce's recommendations, along with the technical refinements agreed by the previous Minister for WRS.
- **Option Two:** Exposure draft largely reflects the 2020 decisions (e.g. Option One) but incorporates changes and additions in order to simplify and reduce costs in areas where officials can complete the necessary policy and drafting work before September.

Under Option Two, we propose changes to three areas of the draft Bill, where there are known opportunities to reduce costs, simplify and improve workability within the constraints of the September exposure draft.

1. **Earning, taking and paying annual leave:** The changes focus on simplifying the way that employees earn and take annual leave (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 system changes required by the new methodology for determining the use of AL entitlement and ensuring the framework for paying AL with regular pay does provide the certainty that is missing from the Act.
2. **Paying and accumulating other types of leave:** The changes focus on reducing the complexity of the payment methodologies by removing the requirement to make two calculations and avoiding the overinflation of payments this could have caused in some situations. They also update the profile for accumulating sick leave from the first day of employment.
3. **Treatment of leave entitlements in a restructuring situation:** This includes an adjustment to the policy regarding the treatment of leave entitlements in restructuring situations to provide flexibility and support common practice.

Description and analysis of Option Two

The following tables provide a description of the three areas for proposed change, accompanied by a qualitative analysis against the criteria listed above. For the purpose of this analysis, Option One, which is analysed in detail in the 2020 RIS, is considered the 'status quo' or 'do nothing' option. The tables also provide a brief description of the relevant provisions in the current Act, without the 2020 changes.

Key:

- + + Much better than doing nothing/the status quo
- + Better than doing nothing/the status quo
- 0 About the same as doing nothing/the status quo
- Worse than doing nothing/the status quo
- Much worse than doing nothing/the status quo

1. Earning, taking and paying annual leave

Description	Analysis of Option Two (compared to Option One)	
<p><u>Earning annual leave (AL)</u></p> <p>Current Act:</p> <ul style="list-style-type: none"> Employees are entitled to four-weeks AL, arising after '12 months continuous employment'. An employee is not entitled to access any AL until the date their AL entitlement arises. <p>Option One:</p> <ul style="list-style-type: none"> Four weeks AL entitlement would continue to arise after 12 months continuous employment, but an employer would not be able to unreasonably withhold consent to an employee's request to take 'AL in advance on a pro-rata basis'. <p>Option Two:</p> <ul style="list-style-type: none"> Employees would accrue four weeks AL from the start of employment at a rate of not less than 0.0768 weeks per week of employment. There would be a clear set of parameters to support the operation of the system and adjustments to other parts of the AL provisions to reconcile them with an accrual-based system. <p><u>Taking AL</u></p> <p>Current Act:</p> <ul style="list-style-type: none"> Employers are required to agree what portion of AL entitlement is used for a period of AL based on 'what genuinely constitutes a week for the employee' each time leave is taken. <p>Option One:</p> <ul style="list-style-type: none"> When determining the use of AL entitlement for an employee who has guaranteed hours of work, an employer would be required to carry out an audit to assess whether the employee's actual hours were 20 percent or more than their guaranteed hours. If they were, the employer must use actual hours to determine use of AL entitlement for a period of AL. To determine the number of hours an employee who does not have clear daily hours would have worked on a day of leave, an employer would have to calculate the average number of hours an employee had worked on the same calendar day in the previous 13 weeks ('the calendar methodology'). <p>Option Two:</p> <ul style="list-style-type: none"> There would be no 'audit requirement' and where an employee has guaranteed hours of work AL calculations would always be based on those. The 'calendar day methodology' would be replaced with a calculation based on an average of an employee's hours of work across all days of work in the previous 13 weeks. <p><u>Paying AL</u></p> <p>Current Act:</p> <ul style="list-style-type: none"> The rules for paying AL as a regular part of an employee's pay (Pay-as-You-Go or PAYG) lack clarity and require the application of discretion and judgement. <p>Option One:</p> <ul style="list-style-type: none"> There would be a four-part test to define an 'intermittent or irregular working pattern' for the purpose of assessing an employee's eligibility to be paid for AL using PAYG. Employers would have to review eligibility every 13 weeks. <p>Option Two:</p> <ul style="list-style-type: none"> The four-part test would be replaced with objective criteria for using PAYG and the 13-week review period would be extended. 	<p>Clear and simple</p> <p style="color: green;">++</p>	<p><u>Earning leave</u></p> <ul style="list-style-type: none"> Option Two would simplify the end-to-end system for providing and paying AL entitlement, and better support common practice with a clear set of parameters to provide clarity around the operation of a week-based accrual system for employers, payroll and employees. <p><u>Taking leave</u></p> <ul style="list-style-type: none"> A single methodology for employees with guaranteed hours will simplify the Bill and provide clarity and certainty for both employers and employees. Replacing the 'calendar day methodology' with an average across all days is simpler and easier to understand as it does not require a separate calculation for each individual day of leave in a pay period. <p><u>Paying leave</u></p> <ul style="list-style-type: none"> Objective criteria will remove the need for employers to apply judgement (which Option One would still require), thereby creating greater certainty and clarity.
	<p>Readily implementable</p> <p style="color: green;">++</p>	<p><u>Earning leave</u></p> <ul style="list-style-type: none"> An accrual-based AL system would align with the way many payroll and accounting systems already account for AL entitlements. Employers and payroll would not be required to differentiate between different 'pots' of AL an employee has earned. <p><u>Taking leave</u></p> <ul style="list-style-type: none"> Removing the audit requirement for employees with guaranteed hours reduces administrative burden and compliance costs associated with completing an audit. Removing the 'calendar-day methodology' removes the requirement for businesses to have integrated time and attendance and payroll systems to support the new rules. 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. <p><u>Paying leave</u></p> <ul style="list-style-type: none"> Removing the requirement to apply employer judgement to determine if criteria are met for PAYG means that the criteria could be systematised. Under Option One, the 13-week review period would impose high compliance costs on employers. A longer review period will reduce administrative burden and compliance costs.
	<p>Flexible and future proof</p> <p style="color: green;">+</p>	<p><u>Earning leave</u></p> <ul style="list-style-type: none"> The adjustments to the rules for rules for taking, allowing and requiring AL to be used to reconcile them with a weeks-based accrual system are designed to maintain the current degree of flexibility around employer and employee rights and obligations. <p><u>Paying leave</u></p> <ul style="list-style-type: none"> Greater certainty around eligibility for PAYG will make the criteria easier to apply to a range of employment situations. A longer review period would provide greater flexibility around using PAYG as it will avoid short seasonal fluctuations in work triggering a requirement to stop using PAYG.
	<p>Fair for employers and employees</p> <p style="color: green;">+</p>	<p><u>Earning leave</u></p> <ul style="list-style-type: none"> Adjustments to reconcile other AL provisions with weeks-based accrual are designed to maintain the underlying intent of the current provisions and maintain the current balance of interests. The parameters are designed to ensure an employee will have accrued four weeks AL after the same period as they would be entitled to it under Option One. <p><u>Taking leave</u></p> <ul style="list-style-type: none"> The benefit of removing the audit function and using actual rather than guaranteed hours (Option Two) 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 exposure draft will provide the opportunity to test the fairness, practicality and outcomes of this approach. MBIE does not consider that removing the 'calendar day methodology' will have a significant impact on leave entitlement and payment calculations. 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. The exposure draft will provide opportunity to test for any unintended consequences. <p><u>Paying leave</u></p> <ul style="list-style-type: none"> PAYG criteria will be designed to reflect the underlying intent of the Option One criteria - to ensure that an employee who receives PAYG does genuinely work on an intermittent basis and have periods away from work. The review period will be longer than 13 weeks but will still ensure that there is a framework to support the review of its use during employment, which is missing from the current Act.

2. Paying and accumulating other types of leave (family violence, bereavement and sick leave (FBS leave))

Description	Analysis of Option Two (compared to Option One)	
<p>Payments for other leave types</p> <p>Current Act:</p> <ul style="list-style-type: none"> Payments are based on an employee's relevant daily pay (RDP) or, if it is not possible to determine RDP or daily pay varies in the pay period, an employer may use ADP. <p>Option One:</p> <ul style="list-style-type: none"> All employees would be paid at the greater rate of Ordinary Leave Pay (OLP) and a new hours-based Average Daily Pay (ADP). <p>Option Two:</p> <ul style="list-style-type: none"> There would be a consolidated single calculation comprising 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. <p>Accumulating sick leave</p> <p>Current Act:</p> <ul style="list-style-type: none"> Eligible employees become entitled to the full sick leave allowance of 10 days after six months of continuous employment. <p>Option One:</p> <ul style="list-style-type: none"> Proposes that eligible employees receive a portion of their sick leave entitlement on their first day of employment, with the remaining entitlement accumulating over a four-month period. In 2020, statutory sick leave entitlement was only five days per year, the four-month accumulation period reflects this smaller allowance. <p>Option Two:</p> <ul style="list-style-type: none"> Proposes a longer accumulation period of six-months for sick leave entitlement to reflect the increase from five to 10 days sick leave per year. 	<p>Clear and simple</p> <p>++</p>	<p>Paying FBS leave</p> <ul style="list-style-type: none"> One payment methodology is simpler than two and avoids additional complexity and administrative burden in situations where the current calculation in the Act is straightforward. The intent is that, in situations where the current methodology is straightforward, there would be little change from how payments are currently calculated. <p>Accumulating sick leave</p> <ul style="list-style-type: none"> Fewer accumulation points for sick leave will be simpler and offer clarity around entitlement for employees and employers.
	<p>Readily implementable</p> <p>++</p>	<p>Paying FBS leave</p> <ul style="list-style-type: none"> Systems only need to be capable of performing one calculation with no requirement for a comparison. A clear formula will make it possible to calculate variable components of pay in all cases. <p>Accumulating sick leave</p> <ul style="list-style-type: none"> Fewer accumulation points will be easier to administer in leave management systems.
	<p>Flexible and future proof</p> <p>++</p>	<p>Paying FBS leave</p> <ul style="list-style-type: none"> The payment methodology is intended to be applicable to all work and pay patterns. <p>Accumulating sick leave</p> <ul style="list-style-type: none"> The revised sick leave accumulation period is fit for purpose with the increase to ten days sick leave entitlement.
	<p>Fair for employers and employees</p> <p>+</p>	<p>Paying FBS leave</p> <ul style="list-style-type: none"> 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 the consolidated calculation is designed so that it should, overall, provide a fair outcome for both employers and employees (reflecting what they would have expected to be paid had they worked). It avoids the payment overinflation that the new hours-based ADP calculation would result in under option one in some cases but still incorporates the variable components of leave pay that are part of leave payments under the Act. <p>Accumulating sick leave</p> <ul style="list-style-type: none"> The longer sick leave accumulation period reduces the impact on employers compared to the four-month period recommended but is aligned with the current entitlement timeframe of six months and still provides earlier access to sick leave equivalent to the 2020 decision (employees would still have access to five days after four months).

3. Treatment of leave entitlements in a restructuring situation

Description	Analysis of Option Two (compared to Option One)	
<p>Current Act:</p> <ul style="list-style-type: none"> There is lack of legislative clarity regarding the treatment of leave entitlements for some employees in restructuring situations which results in common practice in breach of the Act (which requires AL to be paid out and reset). <p>Option One:</p> <ul style="list-style-type: none"> If an employee (not covered by Schedule 1A of the Employment Relations Act), is offered the choice to transfer employment, they will also be given the right to choose whether to transfer their leave entitlements or have them paid out in accordance with the Holidays Act when employment with the outgoing employer ends. <p>Option Two:</p> <ul style="list-style-type: none"> Proposes no change to the treatment of employees specified in Schedule 1A of the Employment Relations Act. They must be offered choice to transfer employment and if they choose to do so must be given the choice to transfer leave entitlements. For employees not covered by Schedule 1A of the Employment Relations Act, the matters that Employment Protection Provisions (EPPs) (a compulsory part of an employment agreement) must state employers will negotiate (if transfer of employment is negotiated) would be expanded to include matters related to the treatment of leave entitlements. This would include whether or not the new employer will recognise leave entitlements and if so whether the employee will be provided a choice to transfer their entitlements. 	<p>Clear and simple</p> <p>+</p>	<ul style="list-style-type: none"> Option Two avoids the need to mimic the complex legislative provisions that currently apply in transfer situations for specified employees (Sub-part 1 of Part 6A of the ERA) and set out a multi-step choice set for employees and employers and information disclosure provisions. Option Two does increase the complexity of the requirements for EEPs in employment agreements but is intended to support common practice around the negotiation of the treatment of leave entitlements.
	<p>Readily implementable</p> <p>+</p>	<ul style="list-style-type: none"> Implementation detail would be negotiated between the two employers so they can negotiate an arrangement that is workable for their systems. Option Two will require a change to the employment agreement of all employees to amend the EPP.
	<p>Flexible and future proof</p> <p>++</p>	<ul style="list-style-type: none"> Option Two 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. It would also require but maintain flexibility around the commercial negotiation of apportionment of liability and transfer of employee information. In contrast, option one would require an incoming employer to offer transferring employees a choice to have their leave entitlements transferred or paid out by the outgoing employer as a downstream decision of voluntarily agreeing for employees to be offered the choice to transfer employment on the same terms and conditions.
	<p>Fair for employers and employees</p> <p>+</p>	<ul style="list-style-type: none"> Option Two would not impose a statutory constraint on the contractual arrangements employers negotiate in restructuring situations. Such a constraint could discourage the incoming employer from offering employees the opportunity to transfer their employment if large leave liabilities were involved. 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. Employees may or may not have entitlement transferred and may or may not have the option (unlike Option One where they would always have the option if they are offered and choose to transfer employment).

Which option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

There are multiple, sometimes conflicting, objectives when developing a legislative regime for employee leave and pay entitlements. Policy makers are trying to balance appropriate minimum standards for employees with compliance costs for employers. A balance is needed to develop a framework that can be applied to all types of employment and work situations in a fair and consistent manner, whilst being easy to understand and implement, minimising the need for employer judgement.

The current proposal (Option One), based on the 2020 Cabinet decisions, gives effect to the high-level recommendations from the Holidays Act Taskforce. Detailed design work to take those recommendations and turn them into an implementable framework, made clear the complexity needed to achieve some of the desired outcomes. 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 systems⁴.

The new proposals (Option Two) are the result of policy work intended to achieve the same high-level outcomes specified by the Taskforce, but with simpler payment methodologies and fewer calculation steps for employers and payroll providers to navigate. A simpler Act would be easier for employers and payroll to implement, minimise the need for extensive payroll changes and associated implementation costs and reduce on-going calculation costs. Employees would also benefit from a simpler Act with better clarity and transparency around their legal pay and leave entitlements.

Although we cannot quantify the implementation costs, we believe they will be lower for Option Two and the consultation will provide an opportunity to test with stakeholders. Option Two proposals are expected to reduce the compliance burden for employers and improve overall understanding and workability of entitlements and obligations relating to leave for employees.

The proposals under Option Two address feedback from stakeholders in some areas and are mainly focused on parts of the Bill considered to be critical to the overall operation of the legislation. The Option Two proposals prioritise areas where changes will improve the quality and usefulness of consultation feedback, while balancing progress towards delivery of a Bill for introduction. We anticipate these changes will improve the anticipated quality of submissions on the exposure draft of the Bill and go some way towards addressing the concerns that might have been raised by submitters otherwise.

⁴ 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].

Section 3: Delivering an option

What are the next steps?

To progress either Option One or Option Two, the next steps would include additional drafting to develop an improved draft Bill, followed by an exposure draft consultation process to test the workability and cost implications of the draft provisions with employers, employees and payroll providers. Option Two would require further drafting instructions to be issued to reflect the policy changes. The consultation will also provide the opportunity to consult with relevant population groups and ask targeted questions to understand their views. MBIE will ensure that representatives of Māori, Pacific peoples, ethnic communities, disabled people, women and rural communities are invited to make a submission.

Stakeholder feedback will inform next steps following the consultation. Confidential advice to Government

How will the new arrangements be implemented?

During the policy design process following the 2020 Cabinet decisions, stakeholders unanimously agreed that, given the scale and complexity of the changes, an 18-month implementation period between the date the Bill receives Royal assent and the date on which it comes into force would be required to support a smooth transition to the new rules.

We recognise that 18 months may not be enough time for all employers, with payroll providers and practitioners estimating the implementation process for a medium-large employer could take between 9-28 months. We intend to test the proposed 18-month implementation period during the exposure draft consultation process to better understand the practical implications of this timeframe Confidential advice to Government

Once implemented, MBIE would be the agency responsible for administering the legislation. Following the consultation process, we will develop a plan to support businesses and payroll providers. The plan will include recommendations for new tools, resources, guidance and engagement activities, Confidential advice to Government

How will the new arrangements be monitored, evaluated, and reviewed?

Monitoring, evaluation and review processes set out in the 2020 RIS remain relevant, Confidential advice to Government

The Labour Inspectorate, as the regulator for the employment relations and standards regulatory system, would be responsible for enforcing and monitoring the new arrangements, and ensuring that sufficient support is provided to employers, employees and payroll providers during the implementation period.

MBIE will track the number and types of queries to the MBIE contact centre, the Labour Inspectorate and our websites (business.govt.nz and employment.govt.nz) in relation to the Holidays Act. The number and types of breaches resulting from Labour Inspectorate activities, as well as Employment Relations Authority and Employment Court cases, will also be monitored. Confidential advice to Government