

Regulatory Impact Statement

Negotiated Settlement for Care and Support Workers

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Health.

It has been written using the assumption that the decision by Cabinet in 2015 to seek a negotiated settlement to the TerraNova pay equity claim, rather than wait for a decision from the Employment Court makes this option the *Status Quo* position. If the negotiated settlement was not reached then the Court would still be required to deliver a decision so this option has been described as the 'Do Nothing' position.

Similar legislation, both with and without a negotiated settlement, has been used to resolve two previous employment issues within this sector – sleepovers (2011) and in-between travel (2014).

The financial modelling provided within the RIS has been undertaken using the best available information about the profile of the workers within the sector and has made a number of assumptions about the number of workers that are likely to obtain further qualifications during the five year term of the settlement.

While the modelling is considered robust and appropriate there remain uncertainties in a number of factors that could alter the total cost to the Crown and ACC over time. If the assumptions about the qualifications of the current workforce, the rate at which employees seek qualifications, and the projected increase in service demand are not accurate, the cost estimates will be similarly inaccurate.

The proposed approach to monitoring and evaluation is put forward on the assumption that the Ministry of Health and ACC will obtain sufficient funding information from providers (through contractual arrangements) and details of workers' qualification levels over time to measure the outcomes sought. Further work is being undertaken on these issues.

Jill Lane Director

Service Commissioning

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Executive Summary

1. There are around 55,000 care and support workers in New Zealand who provide a mixture of care and support within communities to enable people to remain in their own homes and work in aged care residential facilities. The vast majority of care and support work is funded by the Crown via contracts with service providers.
2. The care and support industry is mostly made up of female employees with a high proportion working part time. A 2015 workforce survey by the Ministry of Health indicated that the average wage rate was between \$15 and \$16 an hour.
3. A pay equity claim was filed in 2012 in the Employment Court [TerraNova vs Bartlett/Service and Food Workers Union]. The plaintiffs' claim was that, because the work is predominantly performed by women, care and support workers are paid less than would be paid to a man performing work involving similar skills, responsibility, conditions and degrees of effort.
4. The Employment Court, and subsequently the Court of Appeal, determined that the Equal Pay Act 1972 did allow for such pay equity claims to be pursued. In June 2015, after the Supreme Court refused leave for TerraNova to appeal, a Crown Negotiator was appointed, following approval by Cabinet, to facilitate a negotiated settlement.
5. The RIS has explored the following options:
 - Option 1 – Negotiated settlement with supporting legislation (described as the Status Quo option as Cabinet agreed that a negotiated settlement be sought to resolve the issue)
 - Option 2 – Negotiated settlement without legislation
 - Option 3 – Legislative solution without agreement to a negotiated settlement
 - Option 4 – Court imposed solution (described as the 'do nothing' option as a conclusion to the original claim is still required).
6. Option 1 is the recommended approach as it:
 - delivers the most certain and timely outcomes for workers as well as the Crown
 - is likely to drive greater skill development and a more stable workforce
 - will be feasible to implement and provides a mechanism to vary contractual arrangements, and
 - is consistent with the process for sleepovers and in-between travel.
7. A monitoring (through random audits) and evaluation framework will be centred on firstly, confirming that the initiative has achieved pay equity in the sector and secondly, whether it has resulted in the anticipated wider outcomes for the sector, including skill development and reduced turnover.

Status quo

Understanding the care and support industry

8. An estimated 55,000 employees work in the care and support industry, made up of:
 - 24,000 workers in the home and community support sector supporting people who need assistance with household management or personal care in order to remain in their own home
 - 22,000 workers in aged residential care services for people who are no longer able to live safely at home, and
 - 9,000 workers in community residential support services who support people with disabilities to live in a home like setting.

Home and Community Support Services

9. Home and Community Support Services (HCSS) are funded by the Ministry of Health, District Health Boards (DHBs), and ACC.
10. HCSS are services to help people live at home. These services are typically household management and/or personal care.
11. People who are eligible for Ministry-funded services are mostly under 65, meet the Disability Support Services eligibility criteria, and have had a needs based assessment confirming home-based support services are required.
12. DHBs fund services that enable older people to be supported to live in their own homes. People eligible for these services are mainly over 65 or have a chronic long-term illness and where it has confirmed that home-based support is required. ACC funds services required as the result of an injury covered by the Accident Compensation Act 2001 and to achieve and sustain the client's maximum level of participation in everyday life.

Aged Residential Care

13. DHBs are responsible for funding aged residential care services and the providers are generally either private companies or charities. Aged residential care services are for those who are assessed as not being able to live safely at home, even with support.

Community Residential Living

14. Community Residential Support Services allow people with disabilities to live in a home-like setting in their community, while receiving support for up to 24 hours a day. This might include help with things like shopping, preparing and cooking meals, household chores and personal care. People eligible for Ministry-funded services will generally be under 65, with a long-term affliction, physical or sensory disability not covered by ACC. An assessment by a Needs Assessment and Service Coordination service has determined that their needs are best met by community residential support services.

ACC-funded residential services

15. ACC funds residential services to support a client's rehabilitation from an injury covered by the Accident Compensation Act 2001 and to achieve and sustain the client's maximum level of

participation in everyday life. Clients range from young people with injuries to older people with co-morbidities. Some ACC clients are resident in aged care facilities, even though under 65.

Characteristics of the workforce

16. The care and support industry is mostly made up of female employees with a high proportion working part time. A 2015 workforce survey by the Ministry of Health found that the average wage rate was between \$15 and \$16 an hour. It has never been highly paid, however workers previously enjoyed more relativity to other employees operating within the same sector, such as healthcare assistants and nurse aides working in a public hospitals who do similar roles. There also tends to be a low level of formal qualifications within the sector.

Pay equity case

17. In 2012 a case was taken to the Employment Court regarding the interpretation of the Equal Pay Act 1972 [TerraNova vs Bartlett/Service and Food Workers Union]. The plaintiffs argued that a caregiver is paid less (because the work is performed predominantly by women) when compared to a man performing different work involving similar skills but where the employees are predominantly male.
18. The Employment Court was asked to consider whether the Equal Pay Act 1972, which provides for equal pay for the same work, also provided for pay equity. Pay equity means equal pay for work of equal or comparable value – meaning women should receive the same pay as men for jobs (preferably in the same sector) that require the same or substantially similar degrees of skill, effort and responsibility performed under the same or substantially conditions.
19. In October 2014, a Court of Appeal decision in TerraNova v Service and Food Workers Union (now E tū) endorsed the view that the Equal Pay Act establishes a pay equity regime.
20. This interpretation of the Equal Pay Act means any employee performing work where the workforce is predominately female, irrespective of whether they are a low or highly paid group, may potentially bring pay equity claims under the Equal Pay Act. The claims would allege that the workers would have been paid more (that is, that the work is undervalued) were it not mostly performed by women, with reference to what men would be paid to do the similar work abstracting from skills, responsibility, conditions and degrees of effort, as well as from any systemic undervaluation of the work derived from current or historical or structural gender discrimination.

Decision to explore negotiated settlement

21. In June 2015, Cabinet agreed to seek a negotiated settlement to the TerraNova case (Cab Min (15) 18/8 refers). A negotiated settlement was seen as being better able to meet the following objectives:
 - i. A stay in proceedings in the Employment Court and possible removal of further litigation on the matter of pay equity for care and support workers.
 - ii. A fair outcome which represents value for money, and supports a sustainable workforce in the future as demand for care services continues to increase.
 - iii. Keep costs to the minimum required, e.g. keeping pay increases to the minimum necessary to achieve objectives, avoiding back pay and introducing a phased approach to allow new pay rates to be transitioned into the sector at a fiscally responsible rate.

- iv. Avoidance of pay comparisons that would set a precedent for an as yet undecided pay equity regime.
 - v. Reduction in risk of workforce shortages.
22. The parties to the Court action agreed to pause proceedings while a negotiated settlement was sought. The unions indicated that they were prepared to reach a settlement which extinguished any claims to back-pay as they considered a forward-looking negotiated settlement would produce a better and a timelier outcome for workers.
23. The negotiations involved discussion with:
- The unions: E tū, PSA, and NZNO.
 - The employers: Agreed residential care representatives from the Aged Care Association, Home and Community Health Association (HCHA) and New Zealand Disability Support Network.
 - Business New Zealand and NZCTU.
 - District Health Board (DHB) representatives.
 - Ministry of Health and ACC.
24. These groups represented the parties that are mostly impacted by the issue and provided a good cross section of stakeholders to design a shared solution for all employers and all employees whether or not members of an association or union.

Joint Working Group on Pay Equity

25. Following the specific TerraNova claim by Kristine Bartlett, the Service and Food Workers Union filed a companion claim seeking advice on the principles that should be used to determine pay equity. In October 2015, the Government established a Joint Working Group on Pay Equity Principles (the JWG) to make recommendations for dealing with pay equity claims under the Equal Pay Act (SOC-15-MIN-0020 refers). The JWG was required because when the Equal Pay Act passed, wage setting in the private sector was highly centralised. The main bargaining system was compulsory conciliated bargaining for blanket-coverage awards that set minimum terms and conditions of employment. Where an agreement could not be reached, the Court of Arbitration had the power to resolve disputes and set wages and minimum working conditions. This is no longer the case. Under the existing employment relations framework:
- Wages are mostly agreed between individual employers and employees and are informed by market information and subject to minimum standards.
 - Most wages are set at the individual or workplace level.
26. The JWG reported back in early 2016 with recommendations for a set of principles to guide considerations of pay equity claims. Each member of the Working Group was encouraged to consult with their stakeholders and members and ensure that they had the opportunity to input.
27. The Government accepted these recommended principles and in addition announced it would supplement the Joint Working Group's recommendations to clarify how to choose an appropriate job for comparison when making a pay equity claim. A bill is expected to be introduced in 2017 to amend the Equal Pay Act and the Employment Standards Act to give effect to these decisions (CAB-16-SUB-0255 refers).

28. This work has been informed by the decisions taken recently by Cabinet on these matters, however this work will only provide a framework for future pay equity claims - it will not deal with a claim already partly determined by the Court such as the TerraNova issue.

Problem definition

29. The pay equity issues facing the care and support sector have yet to be resolved, affecting approximately 55,000 employees.

30. While the Employment Court's decision confirmed that workers have the right to bring claims for pay equity under the Equal Pay Act, it has not yet established a framework for determining how issues of pay equity should be dealt with in the care and support sector. The court proceedings were placed on hold in 2015 by the parties when Cabinet agreed to explore a negotiated settlement as a way of resolving the issue and removing any need for further litigation.

31. The Crown, ACC and DHBs have negotiated with unions to resolve this issue given:

- They are the purchaser of the services in this sector, so will ultimately have to meet increased costs.

- 9(2)(h) 9(2)(j)

32. The negotiations have now concluded and an agreement reached between the Crown, ACC and DHBs and relevant unions, which is being taken back to Cabinet for final approval. This RIS considers the option of a negotiated settlement against other options available to resolve the issue.

Options

<p>Option 1: Negotiated settlement with supporting legislation. (preferred option)</p>	<p>The Crown and unions have agreed to a settlement of the pay equity claims related to care and support workers. Under this settlement position there is an agreement to:</p> <ol style="list-style-type: none"> 1. Funding from the Crown, ACC and DHBs to support the providers in meeting the costs of the wage increases. 2. Pay rates for workers based on the level of qualifications they hold, with a one-off transition arrangement for existing employees. 3. The new pay rates taking effect from 1 July 2017. 4. Extinguish all current and future pay equity claims from care and support issues. 5. Legislation to support implementation. <p>The agreement is costed at \$2.048b over five years. The agreement phases in a matrix of higher wage rates which are scaled based on the level of qualifications an employee holds. A qualification based scale was determined the most appropriate to encourage skill development within the sector. The unions proposed an alternative approach of years of service, however analysis undertaken shows that this would result in a significant number of unqualified workers being on the highest pay rate and provides little incentive for them to become more qualified. Further detail of the wage rates and additional cost of this option</p>
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	<p>are provided later in the RIS. The Crown has agreed to a one-off transition arrangement for existing employees</p> <p>The rates have been established through the use of a comparator sector where the skills and role are similar to care and support workers.</p> <p>The settlement would be implemented through the passing of legislation to:</p> <ul style="list-style-type: none"> • fix the pay rate matrix as minimum rates for the sector • confirm the sectors which employees will be subject to this settlement • extinguish any right to back pay, and • prevent any further Court action being brought on pay equity claims covered by this agreement. <p>The Ministry of Health, DHBs and ACC will give effect to the provisions of the agreement by amending contracts with providers or DHBs to fund the costs of the higher pay rates to be received by workers. Consideration is being given to effect this by deemed variations to the funding agreements through the legislation (effectively by operation of law).</p>
Option 2: Negotiated agreement without legislation	<p>This option assumes that there would be a negotiated settlement reached as described in Option 1 but that there would not be any legislation put in place to enact the settlement. The parties to the settlement would still be subject to the settlement and the wage rates and qualifications framework but the different rates would need to be implemented through changes to the contracts that the Ministry of Health, ACC and DHBs enter into with providers. The same level of funding would be provided as in Option 1. This option would require all affected parties to formally sign the agreement.</p>
Option 3: Legislatively imposed solution	<p>Under this option a negotiated settlement is not supported but government decides against letting the Employment Court rule on the TerraNova case and instead passes legislation which settles pay equity issues for support and care workers. The key purpose of legislation would be to establish equitable pay rates for workers and to extinguish any claim to back pay.</p> <p>The structure and cost of this Option is assumed to be the same as in Option 1 as the option is limited to a situation where there is substantive agreement to a settlement approach and pay regime between parties but no formal agreement is signed.</p>
Option 4: Court determines pay rates for care and support workers (will occur if a settlement is not agreed).	<p>Currently the existing TerraNova case legal proceedings have been placed on hold by the parties while negotiations take place between the Crown, unions and provider representatives to see if a settlement could be reached that would:</p> <ul style="list-style-type: none"> • resolve the pay equity issues faced by care and support workers; and

	<ul style="list-style-type: none"> • negate the need for the Court to make any further determinations. <p>Had a negotiated settlement not been achieved then it would be left to the Employment Court to resolve the pay equity claim, most likely by determining the appropriate pay rates for care and support workers. The Court would also need to reach a position on the question of whether employees are entitled to backpay and, if so, from when.</p> <p>Once the Court reached a decision, and any subsequent appeals have been resolved then the providers and the Crown would be required to give effect to the decision. This would involve the amending of 4,000 contracts and likely providing funding to providers at a similar level to Option 1 to meet the additional wage costs and avoid a reduction in supply (through provider business failures). Without associated legislation (as in Option 1) this would need to be done contract by contract. This option would therefore expose the Crown, ACC, and DHBs to effectively double the negotiated settlement amount.</p>
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Objectives

33. The overarching objective of the negotiations process was to achieve a timely, fair and affordable resolution to the pay equity concerns related to care and support workers. Each of the options analysed achieve this overarching goal.

34. A secondary set of objectives have been used to further assess and compare the four options:

- i. *Improved outcomes for workforce* – the approach focuses on creating an equitable pay and will facilitate high qualifications and less turnover in the sector.
- ii. *Provides a timely and certain outcome* – reaches a solution which ensures that care and support workers receive a fair and timely outcome and minimises the need for further Court action.
- iii. *A solution supported by all parties* – unions, employers and the Crown have been involved in the settlement process and are supportive of the outcome.
- iv. *Cost effective outcome* – does not impose additional compliance or administrative costs, and ensures sustainability of supply and manages government costs.
- v. *Can be implemented in an efficient and timely way* – the implementation can occur swiftly following approval and ensures that workers start receiving the adjusted rates of pay from 1 July 2017.

Impact analysis

Review against each criteria

35. Each of the four feasible options have been assessed against each of the five criteria that have been identified in the table below. Option 4 has been used as the base case (do nothing option) which the three other options have been considered against using a scale of:

□□	Significantly superior to the do nothing option
□	Better than the do nothing option but with some issues
=	The same or equivalent to the do nothing option
×	Worse than the do nothing option

	Option 1 – Negotiated Settlement with legislation (“STATUS QUO” – APPROACH AGREED TO BY CABINET)	Option 2 – Negotiated Settlement without legislation	Option 3: Legislatively imposed settlement	Option 4 – Court determines pay rates for care and support workers (“DO NOTHING” OPTION)
Improved outcomes for the workforce	<p>☐☐</p> <p>The settlement would result in pay equity in the future, extinguish any claim to back-pay and extinguish current litigation on this issue. A pay regime based on qualification levels is likely to lead to a higher-skilled and more stable workforce.</p>	<p>☐</p> <p>The settlement would result in pay equity in the future but is unlikely to extinguish any claim to back-pay without supporting legislation. It is also feasible that further litigation could be brought on same issues. Would achieve similar outcomes in terms of qualifications and reduced turnover as Option 1 but may take longer to achieve, provide greater uncertainty about who is covered by the agreement and be implemented inconsistently.</p>	<p>☐</p> <p>The settlement would result in pay equity in the future, extinguish any claim to back-pay and extinguish current litigation on this issue. It would achieve similar outcomes for the sector as Option 1 but without the same level of sector support or buy in as Option 1.</p>	<p>This solution would ensure pay equity for care and support workers in the future 9(2)(g) 9(2)(j) It is unknown at this point whether the Court would structure rates around qualifications (as in Option 1) however high wages overall is likely to reduce turnover levels.</p>
Provides a timely and certain outcome	<p>☐☐</p> <p>Would remove the need for any further court action on this matter. The supporting legislation would confirm wage rates and specify the employees involved.</p>	<p>☐</p> <p>If settlement is not supported through legislation there could be a lack of clarity regarding which employees are covered by the settlement and no easy mechanism to amend contracts.</p>	<p>☐</p> <p>A move to impose a legislative rather than an agreed settlement may result in legal action to determine the validity of such an action. It would produce a more likely and certain outcome than Option 2 or 4.</p>	<p>The Employment Court would be required to resolve the question of what pay equity is for care and support workers. It may draw on the principles established through Joint Working Group. The timeframe for resolution is unknown but would be longer than Option 1.</p>
A solution supported by all parties	<p>☐☐</p> <p>All parties to the agreement would be supportive of it. While it would be being imposed on a group of employees not represented by a union they would be receiving a net benefit.</p>	<p>☐</p> <p>All parties to the agreement would be supportive of it however it is likely that parties would prefer to see it enshrined in legislation to avoid the need for interpretation. This would require all affected parties to formally agree to the settlement.</p>	<p>=</p> <p>It is unlikely this option would be supported by all parties, however if the Crown and unions are in agreement about the pay rates then it would mitigate some of the risk of pursuing this option.</p>	<p>While all parties would need to abide by a court imposed solution it is unlikely that all parties would support the outcome – particularly if there have been appeals.</p>
Cost effective outcome	<p>☐☐</p> <p>The additional cost to the Crown of this option is \$2.048 billion 9(2)(h) 9(2)(j) There would be no further litigation costs. Compliance and administrative costs would likely be the least of all the options.</p>	<p>☐</p> <p>Details of the settlement include an agreement about how it would be enacted however without supporting legislation there may be additional compliance and administrative costs because there will not be legislated means for giving effect to the settlement – such as the ability to amend employment agreements and add provisions to contracts.</p>	<p>☐☐</p> <p>The Crown cost would be same as Option 1.</p>	<p>9(2)(h) 9(2)(j) </p>
Can be implemented in an efficient and timely way	<p>☐☐</p> <p>Details of the settlement include an agreement about how it would be implemented. The passing of legislation would ensure a timely result – including changing contracts and amending funding levels.</p>	<p>×</p> <p>The settlement would include an agreement about how it would be implemented and when it must be implemented. Without the accompanying legislation there would not be the power to give effect to the decision through the varying of employment agreements and contracts.</p>	<p>☐</p> <p>The legislation would provide a framework for implementation and enable immediate changes to employment agreements and provider contracts. There remains a risk that the legislation could be challenged by a party e.g. to challenge which employees are subject to the legislation or which employers must comply with it. .</p>	<p>There are more variables that could come into play from a court imposed decision making the implementation process unpredictable. Likely to take longer to implement than Option 1.</p>

Costing of options

Option 1 – Negotiated settlement (STATUS QUO APPROACH AGREED BY CABINET)

36. [REDACTED] 9(2)(h) 9(2)(j)
[REDACTED]:
[REDACTED] 9(2)(h) 9(2)(j)
[REDACTED]
[REDACTED]
[REDACTED] 9(2)(h) 9(2)(j)
[REDACTED] 9(2)(h) 9(2)(j)
[REDACTED]

37. The table below describes the amended wage rates that have been agreed between the Crown and unions

Relevant NZQA Qualification	Year 1 1 July 2017	Year 2 1 July 2018	Year 3 1 July 2019	Year 4 1 July 2020	Year 5 1 July 2021
L0 (No qual)	19.00	19.80	20.50	20.50	21.50
L2	20.00	21.00	21.50	21.50	23.00
L3	21.00	22.50	23.00	23.00	25.00
L4a ¹	22.50	23.50	24.50	24.50	26.00
L4b	23.50	24.50	25.50	25.50	27.00

38. To achieve these wage rates the estimated costs would be funded over 5 years in the following way:

		2017/18	2018/19	2019/20	2020/21	2021/22	TOTAL
Crown costs	MOH and DHBs	\$303m	\$348m	\$377m	\$356m	\$472m	\$1.856b
	ACC	\$31m	\$37m	\$39m	\$37m	\$48m	\$192m
	Total Crown	\$334m	\$385m	\$416m	\$393m	\$520m	\$2.048b
Costs borne privately by aged-care residents		\$37m	\$47m	\$50m	\$48m	\$63m	\$245m
Costs borne by ACC levy payers		\$68m	\$83m	\$87m	\$81m	\$105m	\$424m
Crown cost plus private cost		\$439m	\$515m	\$553m	\$522m	\$688m	\$2.717b

39. The costs of this option have been modelled using best estimates of the make-up of the existing workforce, assumptions regarding how many employees may obtain higher qualifications and thus move up the pay scale, and projections of wage cost increases that are likely to occur in the sector over the next five years due to increased need for services (these costs would occur regardless of a TerraNova settlement). The number of hours of care being delivered by the workforce has been estimated using the analysis of the number of hours funded (where available) and the levels of need of the client accessing the services.

¹ This step is for employees without a level 4 qualification, but with 12 years continuous service with a particular employer.

40. The cost work applies a conservative approach where possible. However there are a number of variables across the multiple services and limited knowledge of the employees involved which mean there are still uncertainties associated with the modelling.
41. A further cost of Option 1 is the opportunity cost of Parliament's time in enacting the legislation and associated government agency work. It is assessed that even with the costs of legislating factored in it is still likely to be a lower cost option overall than a Court imposed solution.

Option 2 – Negotiated Settlement without legislation

42. The cost of Option 2 is likely to be equivalent to Option 1 however the implementation costs are likely to be higher – this is described further later in the RIS.

Option 3 – Legislatively imposed solution

43. The cost would be equivalent to Option 1.

Option 4 – Court determines pay rates for care and support workers (DO NOTHING OPTION)

44. 9(2)(h) 9(2)(j)

Detailed analysis by option

Issues common to all options

45. All of the options considered will address pay equity issues for care and support workers going forward.
46. With any of the options, the resulting change in pay rates to address pay equity for these workers will not be able to be absorbed by providers from their existing levels of funding. 9(2)(h) 9(2)(j)
47. A settlement of the TerraNova case – whether it be through a decision from the Employment Court or through some form of settlement facilitated by the Crown – will likely result in further pay equity claims from other historically female dominated sectors. Since the Employment Court's ruling that the Equal Pay Act 1972 provides for establishment of a pay equity regime, a number of cases have been filed with the Court.
48. In November the Government announced it would accept the recommendations of the Joint Working Group on Pay Equity Principles and has also confirmed it will legislate to establish a new pay equity regime (CAB-16-MIN-0620 refers). Once legislative changes have been made, then this will provide the framework for assessing any future pay equity claims. Unions and the Crown have agreed to apply the new framework to current claims (other than the TerraNova claim).
49. A shift in pay rates for care and support workers is also likely to result in pay relativity issues for employees who are not covered, but work for the same employer such as kitchen staff, gardeners or nurses in rest homes. Unions have agreed not to use a pay equity settlement for care and support workers as a precedent for other wage claims. The costs of a pay claim for these workers based on relativity would be subject to negotiation and has not been quantified, but would be minimal in comparison to a care and support workers settlement.

Option 1 (STATUS QUO): Negotiated settlement with supporting legislation (preferred option)

50. This option offers the greatest opportunity to manage costs, deliver a timely, agreed outcome and provide a strong legislative mandate to implement the decision. It is also consistent with the approach used to resolve other pay matters for the care and support workforce including pay rates for travel between clients and remuneration for situations where workers are required to sleep in a residential facility in case they are required during the night.
51. The negotiated settlement would establish stepped pay rates for workers based on the level of qualification they hold. While its primary purpose is to address pay equity, the structure and nature of this settlement approach could achieve:
- a more stable workforce and reduced turnover from existing high levels (estimated at approximately 30%), and
 - a stronger focus on development so that employees are incentivised to obtain higher qualifications.
52. If care and support workers play a greater role in the health sector and in turn deliver higher levels of service then this could reduce pressure on other services, such as GPs and hospitals.
53. A positive aspect of Option 1 ensures providers of services do not have an unsustainable financial burden from the new pay regime and that a sustainable supply of services is maintained, as the implementation timeframe is known and there is a mechanism for amending the contracts.
54. One of the key outcomes being sought is to achieve a sustainable equitable pay structure for this sector and Option 1 is likely to achieve this effectively by setting a fair level of pay [REDACTED]
[REDACTED] 9(2)(h) 9(2)(j)
55. [REDACTED] 9(2)(h) 9(2)(j)
[REDACTED]
[REDACTED]
56. Regarding precedent, the Government has moved to amend legislation so any future pay equity claims will be dealt with under the pay equity framework that emerged from the Joint Working Group. One of the conditions agreed to in the negotiated settlement is that all retrospective pay equity claims for this workforce are extinguished, and no prospective claims will be made for the 5-year duration of the settlement meaning they cannot use the new framework to alter the settlement position reached.
57. Passing primary legislation provides an opportunity to set an implementation framework and process. The significant number of services, providers and employees affected by this decision means that there is a high level of complexity in giving effect to the new pay rates. There is also a need to be specific about exactly who is covered by the decision, the obligations on employers and the Crown to ensure that employees receive the correct pay rate, provide a mechanism to alter existing contracts and employment agreement with immediate effect and facilitate the collection of detailed information about the workforce so that qualifications and years of service are known. Issues of implementation are achievable through the agreed settlement agreement supporting the legislation.

Option 2: Negotiated settlement without legislation

58. If this option were chosen then it would avoid the need to pass additional legislation. However, there would be a number of challenges with the implementation of the settlement. These would include:

- A lack of certainty about the portion of the workforce covered by the decision which could lead to further claims of entitlement.
- A requirement to amend all contracts and employment agreements on an individual basis which could lead to inconsistent timing and variable wording.
- The risk of non-compliance by some providers or employers that were not parties to the settlement negotiations.

59. It would also differ in the approach taken in two previous employment decisions for this sector – in-between travel and sleepovers – both of which had primary legislation enacted to support the settlement.

Option 3: Legislatively imposed solution

60. This option is likely only be applicable in a situation where a settlement position is reached but a formal agreement is not signed.

61. This option would have a similar base cost as Option 1 but provides a slightly less certain outcome as there is a greater risk of challenge regarding the legitimacy of imposing legislation on employers. Workers represented by the Unions may also question whether they must resolve their pay equity claims through this mechanism or whether they can ask the Employment Court to rule separately.

Option 4 (DO NOTHING OPTION): Court determines pay rates for care and support workers

62. This option represents the least interventionist approach and allows the Employment Court to continue to hear the case and reach a conclusion. It allows for the legislation to be interpreted and a position reached. Any precedent established could be used in other sectors facing similar issues. It also avoids the cost of legislation. 9(2)(h) 9(2)(j)

63. This option also represents the most uncertain timeframe given it could take 1 to 2 years for a decision to be reached and any subsequent appeals against the decision heard. Ultimately the nature of the case is to resolve a historical and long standing issue of low pay and pay equity concerns for a significantly sized workforce, if the matter is not resolved in a timely manner then these workers will continue to be paid at a lower rate than they are entitled to for a longer period.

64. 9(2)(h) 9(2)(j)
It would also likely have higher compliance costs as there would not be mechanism in place to give effect to the ruling and change current employment agreements and contracts.

Consultation

65. The settlement negotiations have involved:

- The unions: E tū, PSA, and NZNO.
- The employers: Agreed residential care representatives from the Aged Care Association, Home and Community Health Association (HCHA) and New Zealand Disability Support Network.
- Business New Zealand and NZCTU.
- District Health Board (DHB) representatives.
- Ministry of Health and ACC.

66. These groups represent the parties impacted by any settlement. Negotiations have taken place over a period of 18 months. The positions of each party have been taken account of as the discussion have proceeded and the framework and quantum of settlement has adjusted as a result.

67. Options 2 and 3 have not been discussed with the settlement parties.

68. The Treasury, State Services Commission, Ministry of Business Innovation and Employment, ACC and Crown Law have all been consulted and their feedback reflected in the RIS.

Conclusions and recommendations

69. All of the options considered could achieve pay equity for care and support workers. The options can be grouped into a court determined solution to pay equity (Option 4) or options which remove the need for a court determined solution (Options 1, 2 and 3).

70. Option 1 is likely to encourage care and support workers to seek high qualifications given pay rates are linked to skill levels. This, and a general increase in overall wage rates is also likely to lead to a reduction in the high turnover currently experienced by the sector and ultimately lead to more continuous care for clients and better outcomes.

71. Option 1 will also deliver the most certain and cost effective outcome with the parties most impacted by the initiative reaching joint decision. The settlement will be able to be implemented in a timely fashion meaning that employees will start receiving their increased pay rate sooner.

72. Options 2 and 3 are not preferred in comparison to Option 1 and should also be considered if all aspects of Option 1 cannot be achieved.

73. A court determined solution as in Option 4 9(2)(h) 9(2)(j)

The Court is also unlikely to provide a complete framework so the decision is likely to require some interpretation and be more complicated to implement than a negotiated settlement.

74. 9(2)(h) 9(2)(j)

Implementation

75. The key aspect for any of these options is to be able to effectively implement an altered wage regime. As government contracts directly, or funds DHBs to purchase these services, it must be

implemented through the various existing provider contracts that are in place. Implementation would be different depending on which option was chosen.

Option 1 – Negotiated Settlement (Option 4 would also have the same implementation considerations)

76. Once the legislation was implemented then new provisions would either automatically be inserted into provider contracts (by the legislation, effectively by operation of law) to provide for the new wage rates, or contracts would be altered when they next come up for renewal. Workers employment contracts would also be amended through the legislation to prescribe their new pay entitlement.
77. ACC will fund its contracted providers to meet the costs of the settlement. There are comparatively few providers in this sector that ACC contracts with, and the Corporation does not anticipate significant difficulty.
78. There are two options for how the Ministry would ensure that providers receive the required funding to meet their workers new entitlements –
- If enough information is available (though monitoring including random audits) about their employees to determine which level of pay they will receive then the Ministry can pay the provider based on actual costs. This approach has proved challenging in previous settlements such as in-between travel and sleepovers.
 - Provide each provider with increased funding based on the average worker profile and amend as required at year end. This approach may mean that providers do not have enough funding available in the short term to meet their new wage costs.
79. The Ministry of Health will need to undertake further work before 1 July to understand the most feasible approach to adopt.

Option 2 – Negotiated Settlement without Legislation

80. Likely to have similar implementation challenges to Option 2 due to the lack of a legislative mechanism.

Option 3 – Legislative imposed Solution

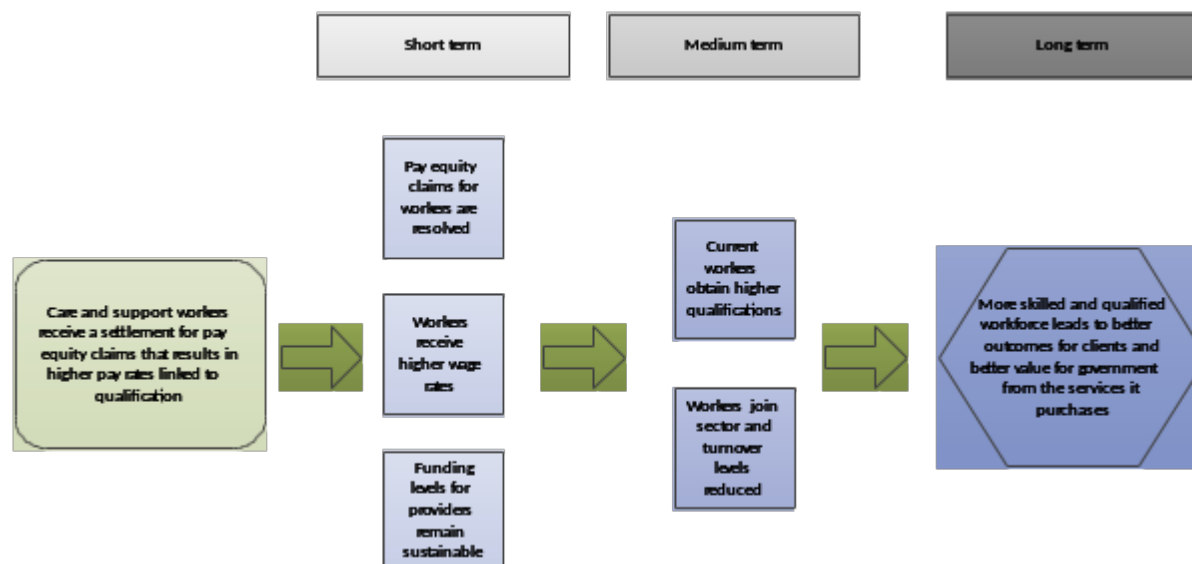
81. The approach outlined in Option 1 could be adopted.

Option 4 – Court Imposed Settlement

82. The implementation approach to this option would be uncertain until details of the Court approach were released however it is likely to be challenging to implement primarily because there would not be a legislative option available to amend contracts as with Option 1.

Monitoring, evaluation and review

83. The below intervention logic summarises at a high level the short, medium and long term outcomes that could be expected from adopting Option 1. This forms the basis of a monitoring and evaluation framework for the initiative.



84. In the short term, it will be important to confirm that the initiative has resulted in more equitable pay for care and support workers. This will involve monitoring and evaluating whether the agreement has been implemented in an appropriate way that ensures that:

- Workers receive the correct higher pay rate in a timely manner.
- The supply of services remains stable and providers do not experience unsustainable funding pressure. The initiative is implemented in an administratively efficient way.

85. It is important to monitor whether the introduction of higher and more equitable pay leads to the better outcomes identified for the sector earlier in the RIS:

- A more stable workforce with reduced turnover.
- A more highly qualified workforce.

86. This should result in greater levels of service and reduce pressure on other parts of the health sector, ultimately leading to better outcomes for clients.

87. The preferred option (Option 1), is structured around increased pay rates relating to a worker's level of qualification. Agencies must collect more information about the care and support workforce than it has previously. As the settlement is implemented over 5 years then this will provide a ready basis to monitor the effect of the initiative on skill development in the workforce and provide a picture of turnover within the sector. The mechanisms for receiving this information will be:

- Information required by agencies through provider contracts.
- Information on workers' qualifications held by New Zealand Qualifications Authority.

88. Agencies can also set targets through contracting processes for when workers will receive their new pay rates and track compliance and administrative costs associated with implementing the

initiative. The legislation will provide the mechanism to standardise reporting and information requirements for providers.