

# Regulatory Impact Statement:

In-between travel – proposed negotiated outcome

## Agency Disclosure Statement

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

The Ministry is seeking approval from Cabinet to develop legislation to formalise the negotiated settlement between unions, home and community support service (HCSS) providers and district health boards and to eliminate the risk of future Court claims relating to in-between travel in the HCSS sector.

This RIS contains analysis of the likely implications of using legislation for the proposed purposes. The analysis is based on estimates, average time and distance data and anecdotal information supplied by the parties to the negotiations. The preferred outcome is assessed against alternatives of not using legislation to implement the negotiated settlement, using legislation outside of the negotiated settlement, and doing nothing.

The Ministry has used the best available data in determining the implications of the options. Although, because of the limitation of that data, we propose a second stage (Part B) where a Director-General's Reference Group is established to conduct an investigation into the health funded HCSS.

The Ministry entered negotiations with the relevant parties after the Public Service Association (PSA) lodged claims in the Employment Relations Authority that travel between clients is "work" under the Minimum Wage Act 1983 (the Act). If the negotiated settlement is not approved then the PSA will proceed with its claims to the Employment Court.

Whether "in-between travel" is "work" under the Act has not been tested in the Courts yet. However, independent legal advice indicates that a test case has a reasonable prospect of success based on the criteria in the *Sleepover* case which would also apply in this instance. If legislation is not enacted for the proposed purposes (as part of the negotiated settlement) then the Ministry estimates that the cost of a ruling that in-between travel is "work" is approximately up to \$38 million per annum (at the minimum wage rate) and \$261 million for six years of backpay.

It is possible that outcome would also impact on the wider labour market but it is difficult to quantify the magnitude, at this stage.

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## Executive summary

The Ministry of Health (the Ministry) is seeking approval from Cabinet on a solution to the issues associated with home care workers travelling between clients to deliver home and community support services (HCSS). The solution includes the use of legislation.

On 23 March 2014, Cabinet authorised the Ministry to enter negotiations with relevant unions, HCSS providers, and district health boards (DHBs) for an enduring, affordable and sustainable funding solution for HCSS that addresses their issues relating to in-between travel.

The negotiated settlement (preferred option) would be implemented in two parts. The first part requires legislation to formalise aspects of the negotiated settlement and eliminate the risk of future claims before the Courts. It is intended that legislation is enacted prior to 1 July 2015, in time for the first allocation of additional negotiated funding in the 2015/16 year.

It is proposed that legislation is used to:

- i. limit the financial liability of employers/providers to pay for in-between travel time (at the minimum wage rate and based on a national schedule of travel bands) from 1 July 2015, and mileage (at, at least, 50 cents per kilometre from 1 July 2016)
- ii. effect consequential amendments to existing employment agreements of qualifying employees
- iii. confirm that the arrangements set out in the settlement agreement between parties are lawful in all respects
- iv. eliminate the entitlement of any person to enter claims of a similar nature to those in the current claims, in respect of the period prior to or after the date the agreement takes effect
- v. confirm that the agreed funding will be transferred from the DHBs and the Ministry's Disability Support Services to employers contracted to provide HCSS and then onto home care workers.

In the second part of implementation of the negotiated settlement, a Director-General's Reference Group will be established to investigate the home and community health sector, and a Steering Group will be established to develop and oversee the transition of the workforce to a regularised employment model. At this stage, it is not expected that legislation is required for the second part.

It is proposed that the "In-between Travel Settlement Bill" is considered, as soon as practicable, after the election. It is proposed that the Bill is included in the 2014 Legislation Programme and reinstated in 2015 as category two (must be passed in 2015).

If the negotiated settlement is not approved, then the alternatives are to approve the negotiated settlement without legislation (Option Two), to not approve the settlement but enact legislation to eliminate the risk of future Court claims about in-between travel time (Option Three), and to do nothing (Option Four). These options do not prevent either the PSA from proceeding with its current claims or any other person entering similar claims in the Courts.

There is also a possibility that a successful Court outcome will trigger other claims in other government and non-government sectors on similar matters, and potentially impact on the wider labour market.

## Status quo and problem definition

### *Delivery of HCSS*

In the health sector, home care workers are employed by HCSS provider organisations who are funded by the Ministry of Health (for disability support services) and DHBs (for aged

care) to deliver personal care and household management services. Home care workers need to travel to clients' homes to deliver these services.

Every day, the health funded HCSS provides direct support to approximately 40,000 older people, people with chronic health conditions and disabled people. There are between 60 and 70 providers that provide HCSS for older people, disabled people, or both. They include two large private organisations (Healthcare New Zealand Holdings Limited and Access Homehealth Limited) that together provide for approximately 60 percent of the market, several medium sized private and charitable organisations (eg, The Salvation Army New Zealand Trust, Presbyterian Support), and the remainder smaller private, charitable, and iwi-based organisations.

#### *Fair travel policies*

All providers are expected to have a fair travel policy in place. These policies cover matters such as any payment towards in-between travel time, mileage costs, and any exceptional costs (eg, rural travel). Budget 2005 allocated a price increase for HCSS providers with an approved fair travel policy.

In late 2013, the Ministry enquired with 60 HCSS providers about their travel policies and received information about 28 providers (from providers directly and DHBs). The Ministry found that 93 percent (or 26 out of 28) of providers either do not pay for in-between travel time or do not explicitly pay for it at, at least, the minimum wage. The Ministry also found that the median mileage rate that providers pay their home care workers is 50 cents per kilometre.

The results of this survey provide a reasonable indication of the proportion of all HCSS providers that would be liable as a result of a successful Court ruling for the PSA, on the basis that they do not pay in-between travel time at, at least, the minimum wage rate.

#### *Problem definition*

The PSA has applied to the Employment Relations Authority claiming that in-between travel time is "work" under the Minimum Wage Act 1983 (the Act) and intends to seek removal of this claim to the Employment Court. Whether providers are legally obligated to pay for the time taken to travel between clients (in-between travel time) is currently uncertain as the Act does not include a definition of "work". Whether in-between travel is "work" would require a Court determination.

If Cabinet does not approve the negotiated settlement (which requires legislation), then it is expected that the PSA will proceed with its Court claims. Independent legal advice indicated that there is a good argument that in-between travel time constitutes "work" under the Act and a test case has a reasonable prospect of success. In the event of that outcome (ie, the Court rules that it is "work"), then providers would be liable to pay their home care workers at, at least, the minimum wage rate for their in-between travel time and potentially six years of backpay (as was the case in the *IDEA Services Limited v Dickson (Sleepovers)* case). However, providers have expressed concern that they cannot sustain such an outcome as it would be difficult to remain viable if they had to fund or part-fund in-between travel time. That could have a negative impact on the delivery of health-funded HCSS.

The Ministry has estimated the total cost of in-between travel time to be up to approximately \$38 million per annum for the health sector (at the estimated minimum wage rate of \$14.75 from 2015) and up to approximately \$261 million for six years of backpay. The Ministry had previously estimated that the cost would be approximately \$26.7 million per annum and \$131 million for six years backpay. However, subsequent costings developed after more in-depth analysis suggest the cost for in-between travel (time and mileage) is approximately \$38 million and six years of backpay is estimated up to \$261 million. The estimates for backpay factor in the different minimum wage rates over the last six years.

Although, the Crown has no direct employment responsibility for home care workers and is not a party to the proceedings, in the event that the Court rules that it is "work", the

Government will likely be expected to contribute towards the shortfall in funding. The size of the shortfall will depend on providers' ability to cover the total costs following a Court outcome favouring the PSA.

## Objectives

The overarching objective of the negotiations was to achieve an enduring, affordable and sustainable funding solution for HCSS that addresses issues associated with workers travelling between clients.

The Ministry has broken down the objective into the following evaluation criteria.

1. *Enduring, affordable, and sustainable* – addressing ongoing issues with travelling between clients and the outcome is sustainable.
2. *Cooperation and participation by all parties in developing the proposal* – a whole-of-industry approach is taken to address and manage travel-related issues associated with delivering HCSS.
3. *Eliminate the risk of future claims* – a proposal that ensures that future similar claims about in-between travel are not lodged in the Courts.
4. *Current issues are addressed outside the Court setting* – this would minimise the potential total cost to providers (and ultimately the Crown) if the claims proceeded and the Court found that in-between travel time is “work” under the Act.
5. *Future focused* – the approach will not include backpay.

The parties have reached a negotiated settlement that is implemented in two parts. The Agreement is conditional on the approval and implementation of both Part A and Part B. The progression of only Part A is not an option, as parties would not reach a settlement without both Parts.

It is also conditional on legislation (Option One). The alternatives to the negotiated settlement are to approve the negotiated settlement without legislation (Option Two), to not approve the negotiation but enact legislation to eliminate the risk of future Court claims about in-between travel time (Option Three), and to do nothing (Option Four).

If Cabinet does not approve the proposed negotiated settlement (Option One), then, any other options would not meet the overarching objective.

The Options and Impact Analysis section below contains an assessment of the preferred option and the three alternatives against the overarching objective of the negotiations. A table comparing each option against the criteria is attached in the Appendix.

## Options and impact analysis

### OPTION ONE: NEGOTIATED SETTLEMENT (*preferred*)

The parties have agreed to a negotiated settlement that requires legislation. This option was agreed to and developed in a cooperative and participatory manner by all parties to the negotiations (criterion 2). Parties agree that the negotiated additional funding is for future travel and not in relation to any backpay (criterion 5).

Parties agree to establish an independent third party to undertake detailed analysis on the impact of the travel time and cost model, a Director-General's Reference Group to conduct an investigation into the HCSS sector, and a Steering Group (Workforce Regularisation) to develop and oversee the transition of the workforce to a regularised model (criterion 1). This

approach allows all parties to address issues relating to travel outside of a Court setting (criterion 4).

All parties agree that they will publicly support the enactment of legislation. It is proposed that legislation is used to:

- i. limit the financial liability of employers/providers to pay for in-between travel time (at the minimum wage rate and based on a national schedule of travel bands) from 1 July 2015, and mileage (at, at least, 50 cents per kilometre from 1 July 2016)
- ii. effect consequential amendments to existing employment agreements of qualifying employees
- iii. confirm that the arrangements set out in the settlement agreement between parties are lawful in all respects
- iv. eliminate the entitlement of any person to enter claims of a similar nature to those in the current claims, in respect of the period prior to or after the date the agreement takes effect
- v. confirm that the agreed funding will be transferred from the DHBs and the Ministry's Disability Support Services to employers contracted to provide HCSS and then onto home care workers.

The enactment of legislation will ensure that the risk of future claims is eliminated (criterion 3). Once the parties are satisfied that the legislation and the Settlement Agreement meet all requirements, the PSA will withdraw its claims before the Courts.

#### *Implications – costs and benefits*

If legislation is not enacted there is still a risk that a claim by another party could be brought to the Employment Court on whether in-between travel in the HCSS health sector is “work” under the Minimum Wage Act. The enactment of legislation, for the proposed purposes, will therefore avoid a ruling by the Court that in-between travel (in the health sector) is “work” under the Minimum Wage Act and avoid the subsequent risk of providers being liable to pay approximately \$38 million per annum and any backpay at approximately \$261 million.

It is possible that a Court finding that in-between travel time is “work” could also set a precedent for the wider labour market (ie, for government funded and privately funded industries that require travel to deliver services). The magnitude on the wider labour market could be significant. However, unless the claims proceed to court, the size of the impact is unknown. The likely costs (and other implications) of a ruling that it is “work” and any subsequent rulings relating to other industries, to providers, funders, and the Crown, are significantly greater than the proposed cost of the negotiated settlement.

Parties agreed that workers are compensated for time spent travelling between client homes at, at least, the minimum wage rate, from 1 July 2015, and mileage at, at least, 50 cents per kilometre, from 1 March 2016 (ie, a travel package - Cab Min (14) 23/22 refers). It is proposed that payments for in-between travel and mileage are achieved within the following Government appropriation:

- i. 2014/15 - \$24 million in 2014/15 (\$2 million for implementation costs and \$22 million carried forward to 2015/16)
- ii. 2015/16 - \$36.2 million (introduction of in-between travel time and mileage payments)
- iii. 2016/17 - \$38.6 million (ongoing payments)
- iv. 2017/18 - \$38.6 million (ongoing payments).

The total cost of the proposed funding package (outlined above) is less than the estimated cost to providers of a successful outcome for the PSA (including the cost of backpay) and

any subsequent costs to other industries should the case create a precedent for the delivery of services that require travel (outside of the health sector).

## **OPTION TWO: VARIATION TO NEGOTIATED SETTLEMENT (AGREEMENT WITHOUT LEGISLATION)**

This option relates to the scenario where Cabinet agrees to the proposed negotiated settlement (ie, the additional funding as a “travel package” and passage of funding through to the home care worker) but does not agree that legislation is required to formalise aspects of the settlement or to eliminate the risk of future claims. This option would meet criteria 1, 2, 4 and 5 but not 3 (eliminating any future risk of claims). Cabinet may consider that agreement by parties to the negotiations to not lodge claims in the Courts about in-between travel time is sufficient to close off any risks of future claims.

### *Implications – costs and benefits*

The cost of the agreed negotiated settlement is outlined in Option One above.

Without legislation, any employee/s could enter similar claims in the Courts. The issue of whether in-between travel time is “work” under the Minimum Wage Act can still be determined in a Court setting. The estimated cost of a Court ruling that in-between travel time is “work” under the Minimum Wage Act is estimated to be up to approximately \$38 million per annum and \$261 million for up to six years of backpay.

Independent legal advice indicates that a test case on whether in-between travel time is “work” has a reasonable prospect of success. The Ministry considers that the risk of backpay being awarded is too significant and the negotiated settlement should not be implemented without legislation eliminating the risk of future claims.

## **OPTION THREE – NEGOTIATED SETTLEMENT IS NOT APPROVED, LEGISLATION IS USED TO ELIMINATE THE RISK OF FUTURE CLAIMS (OUTSIDE THE NEGOTIATION PROCESS)**

If Cabinet does not approve the negotiated settlement and instead authorises legislation to eliminate the risk of future claims about in-between travel time, only criterion 3 (eliminates the risk of future claims) would be met. Legislation would only close off the risk of future litigation and would not formalise other aspects of the negotiated settlement.

### *Implications – costs and benefits*

If Cabinet does not approve the negotiated settlement then that decision would be contrary to its March 2014 decision to enter negotiations for an enduring, sustainable solution to travel related issues. It would also mean that the Budget 2014 allocation of \$96 million over four years for home support services would not be distributed for its intended purpose.

Although future claims would be prevented, it does not prevent the PSA from continuing with its current claim through the courts (potential cost of \$38 million per annum and \$261 million over six years).

## **OPTION FOUR: STATUS QUO REMAINS, DO NOTHING**

If Cabinet does not approve the negotiated settlement (including the allocation of additional funding for home care workers for travel-related costs) and does not approve the enactment of legislation to eliminate the risk of future similar claims, then none of the criteria of the overarching objective (and Cabinet’s intention) would be met.

### *Implications – costs and benefits*

Without a negotiated settlement binding all parties then the PSA can continue with its claim through the Courts, with a potential cost of \$38 million per annum and \$261 million over six years for the health sector only (regardless of enactment of legislation to eliminate future



litigation). A successful settlement for the PSA could also trigger other claims in other government and non-government sectors on similar matters and potentially impact negatively on the wider labour market.

The potential impact on service delivery is too significant to ignore. Therefore, it is recommended that Cabinet approve the negotiated settlement with legislation formalising the settlement and eliminating the risk of any future claims before the Courts.

## Consultation

The negotiated settlement was agreed to by the parties to the negotiations. Agencies were consulted prior to the negotiations, in the context of the earlier Cabinet paper. The Ministry informed eight government departments and agencies of the approach to the negotiated settlement and sought advice on the implications of the negotiated settlement (including the proposed use of legislation) for their departments and agencies.

The departments and agencies informed were the Accident Compensation Corporation (ACC), Ministry of Business Innovation and Employment, Ministry of Education, Ministry of Social Development, the State Services Commission, the Treasury, and Veterans' Affairs New Zealand, and the Department of Prime Minister and Cabinet.

ACC has agreed to enter into a similar arrangement as that negotiated with the employers, employees, unions and the Crown under the proposed Settlement Agreement.

## Conclusions and recommendations

The Ministry was a party to negotiations and recommends that the negotiated settlement is approved using legislation to formalise it and to eliminate the risk of future claims (Option One – preferred option).

The settlement was developed in a participatory manner by all relevant parties and will cost up to \$138 million over the next four years. This funding has been allocated in Budgets 2014 and 2015.

If Cabinet approves the preferred option, and parties are satisfied that the legislation and the Settlement Agreement meet all requirements, then the PSA will withdraw its claims before the Courts. This option will eliminate the risk of future claims and will avoid the potential cost of up to approximately \$38 million per annum and up to \$261 million for six years of backpay. If Cabinet does not approve the negotiated settlement (preferred option), which includes the use of legislation, then the remaining options could result in up to these estimated costs to the provider sector (and ultimately the Crown).

Any Court finding that in-between travel is “work” could set a precedent and trigger other claims in other government and non-government sectors on similar matters, whereby impacting on the wider labour market. The potential negative impact on service delivery and the wider labour market could be significant.

## Implementation plan

It is proposed that legislation is enacted no later than 30 June 2015. If Cabinet agrees to the proposed negotiated settlement, then the proposed additional funding will be distributed following passage of the Bill in the 2015/16 financial year.

Funding will be allocated on a population-based funding basis to DHBs and on a qualifying trip basis to the Ministry. Contracts between all 20 DHBs and providers, and the Ministry and

providers, will be varied to incorporate the terms of the additional funding (ie, the amount that DHBs and the Ministry will pay providers as part of the travel package and the amount that providers will pass through to home care workers).

## **Monitoring, evaluation and review**

The negotiated settlement includes a second part where a Director-General's Reference Group is established to conduct an investigation into HCSS and a Steering Group (Workforce Regularisation) is established to develop and oversee the transition of the workforce to a regularised employment model. All negotiation parties will be involved in both groups. Other government agencies will be involved, as appropriate.

The Ministry will report back to Cabinet in July 2016 on the implementation of the legislation. This will be 12 months from the introduction of Part A.