DEPARTMENT OF THE PRIME MINISTER AND CABINET
TE TARI O TE PIRIMIA ME TE KOMITI MATUA

Proactive Release

The following documents have been proactively released by the Department of the Prime Minister and Cabinet (DPMC), on behalf of Hon Andrew Little, Minister of Health:

Health and Disability System Reform Briefings

The following documents have been included in this release:

Title of paper: Health Reform Strategy and Approach to Legislation

Title of paper: Health Reforms: Implementation and Transition Cabinet Paper

Title of paper: Health Reforms: Planning and Accountability Framework

Title of paper: Health Reforms: Implementation of a Consumer Voice Framework

Title of paper: Health Reforms: Legislation Cabinet Paper Summary and Talking Points

Title of paper: Health Reform: Legislation and Transition Update

Title of paper: Health Reforms: Legislating for Public Health Structures

Title of paper: Health Reforms: Legislating Intervention Powers and Obligations Relating to Health New Zealand

Title of paper: Health Reforms: Final Decisions for Legislation

Title of paper: Health Reforms: Implementation Cabinet Paper Summary and Talking Points

Title of paper: Confirming Hauora Māori System Settings

Title of paper: Health Reforms: Employment Relations Settings

Title of paper: Further Policy Decisions for the Health Reform Bill: Cabinet Paper Summary and Talking Points

Title of paper: Health Reforms: Development of the NZ Health Charter and Associated Legislative Provisions

Title of paper: Health Reforms: Independent Alcohol Advice and Research Function and Levy

Title of paper: Health Reforms: Remaining Transitional and Consequential Provisions for Decision

Title of paper: Joint Te Kawa Mataaho/ Health Transition Unit Report: Māori Health Authority – Proposed Application of Crown Entities Act 2004 and Public Service Act 2020

Title of paper: Health Reforms: Draft Cabinet Paper to Approve Bill for Introduction and Health System Principles

Title of paper: Pae Ora (Healthy Futures) Bill: Approval for Introduction at Cabinet

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Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act). Where this is the case, the relevant section of the Act that would apply has been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

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Briefing

HEALTH REFORMS: DRAFT CABINET PAPER TO APPROVE BILL FOR INTRODUCTION AND HEALTH SYSTEM PRINCIPLES

To: Hon Andrew Little, Minister of Health; Hon Peeni Henare, Associate Minister of Health			
Date	21/09/2021	**Priority**	Routine
Deadline	21/09/2021	**Briefing Number**	DPMC-2021/22-389

Purpose

This briefing attaches the draft Health System Bill and a draft Cabinet paper for Ministerial consultation ahead of Cabinet's consideration of the Bill for introduction. It also seeks your decision on options for the drafting of the 'health system principles' clause of the Bill, and advises on next steps and the timetable in light of recent Cabinet decisions.

Recommendations

1. **Note** the attached draft Cabinet paper seeks approval for introduction of the Health System Bill
2. **Note** the paper also seeks a specific policy decision on two elements of the Bill, following advice to Cabinet that further interagency discussion was to take place on those issues
3. **Note** that Cabinet's recent decisions regarding legislation for iwi-Māori partnership boards require some additional legal work to incorporate, and while this will be progressed at pace, we do not advise that Bill drafting be closed this week
4. **Indicate** your preferred timetable, route and process for approval of the Bill, in light of the above
5. **Agree** that the Bill at introduction should provide for entities to "have regard to" the health system principles, but that this weighting should be kept under review pending **YES/NO**
6. **Note** that the wording "decision-making authority" has been agreed by agencies and provides an important steer as to the need for genuine partnership with Māori.
7. **Agree** to provide guidance to health entities on the drafting of 'decision-making authority' by:' **YES/NO**

7.1. providing additional text in the health principles clause clarifying that the provision of opportunities for Māori to exercise decision-making should occur in a way proportionate to the strength and nature of the Māori interest, and the need for health entities to represent the interests of other health consumers or the Crown in the matter;

7.2. through the policy and operational guidelines that we will develop for Health New Zealand and the Maori Health Authority; and

7.3. by making clear in those parts of the Bill authorising delegations that:

7.3.1. delegations must be consistent with the New Zealand Health Plan; and

7.3.2. must not be contrary to any direction or instruction given by the Minister.

8. **Agree** to include recommendations in relation to the above in the draft Cabinet paper for approval of the Bill **YES/NO**

9. **Note** that an advisor representing the Hauora Māori Steering Group has provided initial advice on the draft Bill and the matters included in this advice, and will provide further advice to you

10. **Provide** any further comments on the draft Cabinet paper attached

11. **Agree** the draft Cabinet paper be distributed by your office for Ministerial consultation.

pp. Stephen McKernan Director **Health Transition Unit**	Hon Minister Andrew Little **Minister of Health**
21 / 09 / 2021	…../…../….

Contact for telephone discussion if required:

Name	Position	Telephone	1st contact
Stephen McKernan	Director, Health Transition Unit	s9(2)(a)	
Simon Medcalf	Health Team Lead	s9(2)(a)	X

Minister's office comments:

- ☐ Noted
- ☐ Seen
- ☐ Approved
- ☐ Needs change
- ☐ Withdrawn
- ☐ Not seen by Minister
- ☐ Overtaken by events
- ☐ Referred to

HEALTH REFORMS: DRAFT CABINET PAPER TO APPROVE BILL FOR INTRODUCTION AND HEALTH SYSTEM PRINCIPLES

Purpose

1. This briefing attaches a draft Cabinet paper for Ministerial consultation to seek Cabinet's approval of the Bill for introduction. It also seeks your decision on options for the drafting of the 'health system principles' clause of the Bill, and inclusion in the Cabinet paper of your final recommendations on this, for agreement alongside the rest of the Bill.

2. This briefing also provides advice on the timetable for the Bill approval, introduction and initial stages, following the recent Cabinet decisions on hauora Māori.

Next steps for Bill timetable

3. Following Cabinet's agreement to the policy decisions regarding the hauora Māori institutions and settings in the legislation, we are able to finalise drafting for these. However, the revision to the approach to legislating for iwi-Māori partnership boards will require some further time to work through implications. In summary, we anticipate that the Bill at introduction:

    a. will recognise iwi-Māori partnership boards in legislation – for the first time – and require the Minister to make a Schedule to identify the boards (subject to the advice of the Māori Health Authority and requirements regarding representation of hapori, etc.);

    b. will need to include a high-level intended function for the boards, as the purpose for which they are identified in the Schedule. This would not list the fuller set of statutory functions, which are to be subject to future advice from the Māori Health Authority, but would provide a broad basis for the recognition of the boards (perhaps along the lines of 'to represent the interests of iwi and hapu, and Māori in general within their area' although the precise wording will need to be refined with agencies and PCO);

    c. will not include further provision for boards' functions or powers, pending that work by the Māori Health Authority and subsequent Cabinet decisions;

    d. therefore, will provide that the agreement of locality plans will be a matter only for Health New Zealand and the Māori Health Authority, and will not require agreement by the boards; and

    e. will also make consequential revisions to other provisions such as references in the descriptive provision for te Tiriti o Waitangi to reflect the revised provisions for the boards.

4. Pending further policy work undertaken by the Māori Health Authority and decisions by Cabinet, the Bill will require government amendment during passage to provide for the fuller functions and powers of boards as agreed. Our view is that these must be included in the Bill and should not be provided for via secondary instruments (e.g. an Order in Council). Depending on when decisions are taken, these amendments could be brought forward during the latter stages of the Select Committee process; but may be better made at Committee of the Whole House to avoid a late extension to Select Committee. This will

need to be communicated to the Select Committee at the outset to manage expectations appropriately.

5. A consequence of the revised approach to the iwi-Māori partnership boards as above is that **we cannot advise that the Bill be confidently closed down this week as intended**. A small amount of further time – perhaps an additional week – is needed to provide for the necessary changes and test these with agencies. Any additional time will, of course, also support further improvement to other provisions and in particular the outstanding matters detailed later in this paper.

6. The impact of the above is to push back the intended timetable for receiving approval for the Bill, introduction and First Reading. We have previously advised on a number of options for these; and had been working towards seeking approval from Cabinet Business Committee (with Power to Act) during the first week of recess. As a result of the need for this rapid work, we see the options for timetable as:

    a. to seek approval from CBC (with Power to Act) in the second week of recess (i.e. 11 October), with publication of the Bill as soon as possible after (i.e. the same or following day). First Reading may still be possible on 19 October, but there would be less time from publication and it would be more challenging to argue this on urgency grounds. Moreover, this additional week will help resolve the issues above, but will not add significant time for consultation with agencies and Ministers;

    b. to seek approval from Cabinet after recess (on 18 October), for introduction immediately following. First Reading could follow later that same week (under urgency), but may take place under usual timescales on Tuesday 26 October. This would effectively provide for a further two weeks to settle the Bill;

    c. alternatively, you may seek approval from LEG Committee as usual in the week after recess (i.e. 20 October), for introduction either immediately (with Power to Act) or following Cabinet on 26 October.

7. None of the above options makes a substantive difference to the timetable for Select Committee or subsequent steps. **Our view is that option (b) would both meet the expectation for referral to Committee in October, and provide sufficient time to finalise and seek approval for the Bill**. Option (a) would be deliverable if desired, although it would come with greater risk to the Bill at introduction.

8. Under any of the options, we recommend that the draft approval paper attached be sent for Ministerial consultation as soon as possible. This will maximise the time available for consultation (which could be up to two weeks for option (b) or (c), but would be closer to one week in option (a)). Although the paper is partially technical in nature, it also includes (as below) recommendations on two remaining significant policy matters and legal drafting – for te Tiriti o Waitangi and statutory principles. These topics are likely to general Ministerial interest, and further time for consultation would be prudent if the timetable allows.

Draft Cabinet paper

9. We have attached a draft Cabinet paper to seek approval to introduce the Health System Bill to the House of Representatives. The paper will be amended to be directed to either Cabinet or the relevant committee, depending on the approach and timetable. Subject to your comments on the paper, as above we recommend commencing Ministerial consultation as soon as possible to maximise time for consideration.

10. The paper proposes that the Bill be referred to the Health Committee, pending your confirmation of the intended committee. It also notes your decisions on outstanding policy matters regarding the drafting of the 'health system principles' clause in the Bill, as proposed in the sections below for your agreement.

Health system principles

11. On Monday 20 September, Cabinet agreed that the Bill should contain:

    a. a descriptive Tiriti o Waitangi clause that sets out how particular provisions in the legislation give effect to the government's obligations under te Tiriti; and

    b. a general set of decision-making principles based on the concepts and principles identified by the Waitangi Tribunal in the Wai 2575 Hauora Inquiry to which health entities in the Bill must have regard when carrying out their functions.

12. The Cabinet paper for that meeting attached an indicative draft of the text for the principles clause, and noted that further analysis and discussion with agencies was required in relation to the legal weighting for the principles, and references to "opportunities for Māori to exercise decision-making authority on matters of importance to Māori".

13. In parallel with Cabinet consideration, further agency discussions and drafting have been undertaken, and a new draft of the provision is attached at **Appendix One** [revised version coming tomorrow]. However, both of the points raised in the Cabinet paper may still be the subject of agency briefings (including the Crown Law Office's briefing to the Attorney General) ahead of approval of the Bill, and are likely to attract specific comment and debate during the Parliamentary process. Therefore, we seek your explicit comfort with what is being proposed.

Legal weighting for the health system principles clause in the Bill

A balance must be struck between appropriate weighting and integrity in the system

14. The purpose of the health system principles in the Bill is to ensure that all actions and decisions in the system are aligned with the key objectives of the reforms, including the core concepts articulated by the Waitangi Tribunal in Wai 2575. They wrap around the specific provisions of the Bill, to inform the exercise of functions or decision-making processes that will not be prescribed or fully set out in the Bill. The legal weighting chosen defines the impact the principles will have on the actions of health entities under the legislation.

15. The possibility of future legal proceedings (including judicial review) that challenge decisions on the basis of these principles is an inherent part of their effectiveness, and it is common for a small number of judicial decisions to add body and meaning to a new legislative framework after it is enacted. Such decisions can lead to better processes and outcomes, and in general, legislation should not attempt to eliminate this possibility.

16. At the same time, there is a legitimate question as to which institutions in the system should make different decisions. At substantive weightings, successful legal challenges can change the action or decision that would otherwise have been taken by requiring the decision-maker to actively provide for the principle, often in a way informed by the perspective of the litigant.

17. However, because the courts operate a bipartite, adversarial process, they are often not well-suited to making decisions involving complex trade-offs (such as for resource allocation or service planning). As such, frequent substantive decisions can undermine the certainty and integrity of the legislative framework and the wider system. You have already made significant choices about how key trade-offs will be made in instruments like the New Zealand Health Plan.

18. In addition, although we can make general observations about the different weightings, the impact they have on statutory decision makers (and therefore the standard against which decision-makers can be challenged) is context-specific, depending on the nature and circumstances of the function or decision, whether the relevant principle is 'process' or outcome focused[1], and other public or administrative law considerations. Given this, and the range of health entities under the Bill,[2] it is not possible to anticipate or analyse all possible scenarios where the principles will impact.

19. The novel approach taken to incorporate the Wai 2575 concepts in this clause (in lieu of an operative te Tiriti clause) also means that Māori will be particularly interested in the weighting. At the same time, because the clause applies a single set of principles to the whole system, the weighting also needs to work for general objectives and interests.

Options considered

20. Taking into account the above factors, we have considered four specific options. These are that entities under the Act:

    a. 'must have regard to' the principles;

    b. 'must be guided by' the principles;

    c. 'must act consistently with' the principles; or

    d. 'recognise and provide for' the principles.

21. All options would apply "as far as reasonably practicable having regard to all the circumstances, including any resource constraints; and to the extent applicable to the health entity" – meaning relevant and proportionate to the functions that entities possess.

Meaning and impact of different weighting options

'Must have regard to'

22. Means the principles are 'mandatory relevant considerations'. In exercising their functions, health entities must turn their mind to the principles and give them due weight, but may reasonably decide that no weight is to be given in particular circumstances. Only weightings clearly unreasonable or based on an error of fact may be overturned by a court, and the court cannot substitute its own decision for that of the health entity. Rather, an erroneous decision is referred back to the entity for reconsideration.

23. This option provides the greatest control and discretion for health entities, whilst encouraging processes that highlight the relevance of the principles to functional decision-making. Citizens can hold entities to account against the principles, but 'gaming' litigation

[1] Several of the principles are focused on outcomes, such as equity, choice, and the protection of health and wellbeing.

[2] Entities covered will be: Health New Zealand, the Māori Health Authority, the New Zealand Blood Service, Pharmac, and the Health Quality and Safety Commission.

is generally not incentivised. However, the lower weighting means that the requirements of the principles can be legitimately outweighed by other factors.

'Must be guided by'

24. Is likely to require substantive weight be given to the principles. When considering the principles against other legitimate factors, the entity must act on them, unless the other factors legally carry a greater weight. Other factors might carry a greater weight if they are clear limitations or where the statute specifies it such as the requirement to "give effect to" the Government Policy Statement.

25. This weighting brings a corresponding increase in litigation risk, because the language reduces the discretion entities have to depart from the direction set by the principles. It gives the courts an ability to adjudicate on whether an entity has taken a decision that is sufficiently influenced by the principles. A court can still not substitute its own view, but its referral back to the entity is more likely to lead to a substantive change in the action/decision. This language is also relatively new and has not been substantially tested by the courts in a judicial review context.

'Must act consistently with'

26. Imposes a substantive, rather than procedural requirement. The effect is that the principles operate as a yardstick against which an entity's actions can be tested, effectively requiring positive action to provide for the matter in question. It further reduces the discretion of health entities, and allows the courts to adjudicate on whether actions or omissions by the entities are what is required by the principles, regardless of how careful the entities own decision-making process has been. This gives the courts jurisdiction to declare what action must be taken in order to achieve consistency, and creates a greater incentive to litigate.

'Recognise and provide for'

27. Is also a substantive obligation, with an additional procedural aspect. It is not generally used in the context of principles clauses, but more commonly applied to particular interests, relationships, plans/instruments or activities, where it is easier to identify whether the object has been "provided for" or not.

28. This option requires positive action by the health entities to pursue the principles and gives the courts jurisdiction to decide whether or not an entity has "provided for" the matters in the principles. Litigation risk is harder to manage because an applicant may argue that, although an entity has carefully considered the principles and come to some reasonable decision, that decision does not provide for the interest in the relevant principle. It may also limit a system approach to achieving consistency with the principles because it may place an obligation on each entity to provide for the things in the principles (although this may be mitigated by explicit language that entities are only intended to provide for the matters as relevant and proportionate to their functions).

We recommend the Bill include a 'must have regard to' weighting on introduction, while maintaining an open mind

29. When combined with the principles as currently drafted, we consider that 'have regard to' is likely to be the most appropriate legal weighting. Since it is more likely to leave decision-making power with the most appropriate entity, it is a more flexible fit for the variety of entities covered by the principles, and is less likely to undermine system integrity. A key factor in this judgment is that several of the principles as currently drafted

represent very broad and aspirational outcomes for the whole system, so that substantive weightings could place obligations on some entities that it is difficult for them to meet.

30. At the same time, previous Cabinet decisions have been clear that wholesale improvements in the way the system operates and a significant lift in outcomes is very much what the reforms are about, and a procedural weighting may prove a weak incentive for change.

31. Māori are also likely to see 'have regard to' as placing insufficient weight on the key concepts discussed in Wai 2575, especially in light of the reforms to the Resource Management Act 1991, which are proposing an operative te Tiriti clause with a 'give effect to' weighting.

32. In addition, specific feedback on the principles during the Parliamentary process may result in significant amendments, and any such re-framing may allow for a higher weighting without a significant increase in legal risk.

33. On balance, we recommend the Bill include a 'have regard to' weighting on introduction, but that the Government maintains an open mind on this point. We will provide you with further advice on this as stakeholder views become clear in submissions on the Bill.

References to opportunities for Māori to exercise 'decision-making authority'

Our rationale for using 'decision-making authority'

34. The draft principles require entities to have regard to the principle that "the health system should provide opportunities for Māori to exercise decision-making authority on matters of importance to Māori".

35. We have seen this reference as critical to demonstrating that the Crown has understood and incorporated key concepts underpinning te Tiriti principles of partnership and rangatiratanga (as referenced in Wai 2575). While these principles are strongly recognised in specific provisions of the Bill such as the establishment and functions of the Māori Health Authority (and may in time be supplemented by the powers of iwi-Māori partnership boards), a wider obligation is an important part of acknowledging these ideas at all levels of the system.

36. Other statutory references aimed at similar purposes have tended to require opportunities for Māori to 'contribute' to decision making, or decision-making 'processes'. Such provisions have come to be viewed by Māori as not reflecting the nature of the ongoing relationship between kāwanatanga and rangatiratanga. While they provide a good mandate for consultation and even collaboration in the making of decisions or exercise of functions, they do not provide a strong mandate in situations where the strength of the Māori interest may justify a level of co-design, joint decision making, or even delegation of statutory decision-making to Māori.[3]

37. We have deliberately used the phrase 'decision-making authority' to provide for the possibility that some decisions in the health system may require joint or delegated decision making.[4]

[3] This spectrum of engagement between the Crown and Māori is set out in Te Arawhiti's Framework for Crown engagement with Māori.

[4] A good example might be the choice of specific target outcomes for a particular service contract. Within the bounds of the New Zealand Health Plan and Locality Plan and commissioning frameworks, a commissioning agency might make joint decisions with an iwi- Māori Partnership Board or specific iwi/Māori health entity about those outcomes that relate particularly to Māori.

38. At the same time, joint or delegated decision-making will not always be required or may be catered for within specific legislative provisions, and it may be difficult for health entities to determine exactly where they need to be on the spectrum of engagement for particular decisions.

39. s9(2)(h) [redacted]

We recommend continuing to use 'decision-making authority' with additional guidance for health entities

40. We do not consider it possible or in good faith for Parliament or a Minister to make 'authority allocating' choices for every decision in the health system – such choices are possible for large, prescribed decision-making processes such as the development and approval of the New Zealand Health Plan, but are not possible for the hundreds of decisions made under discretionary functions.

41. Nor do we consider that some ambiguity for health entities in determining how they make or share decisions (and the associated litigation risk) is a fundamental problem. Achieving a te Tiriti-consistent health system may not be easy, comfortable or always certain for the Crown, but that should not be a reason to curtail the system principles.

42. Overall, we consider the phrase 'decision-making authority' provides an important steer as to the need for genuine partnership with Māori, and we think it should be retained in the Bill for introduction.

43. At the same time, we think it desirable to mitigate the risks above by providing as much guidance as we can to health entities. We propose to do this in three ways:

44. through additional text in the health principles clause clarifying that the provision of opportunities for Māori to exercise decision-making should occur, having regard to both—

    (i) the strength or nature of Māori interest in the matter; and

    (ii) the interests of other health consumers or the Crown in the matter: through the policy and operational guidelines that we will develop for Health New Zealand and the Maori Health Authority; and

    a. by making clear in those parts of the Bill authorising delegations that:

        i. delegations must be consistent with the New Zealand Health Plan, and

        ii. must not be contrary to any direction or instruction given by the Minister.

45. The additional text referred to in paragraph 44 above is highlighted in **Appendix One**, and we recommend that you include it in the Bill.

Further advice on behalf of Steering Group

46. As you will recall, the Department of Prime Minister and Cabinet has recently engaged an advisor to provide advice to the Transition Unit and Ministry of Health, nominated by the

Hauora Māori Steering Group to give technical advice on the Bill with regard to those elements impacting hauora Māori. Her advice is informed by the perspective of the Steering Group, but she is a contracted advisor to DPMC for this purpose.

47. The advice provided to date has provided useful in refining the drafting on matters to do with hauora Māori, and we have amended drafting based on the proposals, especially with respect to the specific text of the decision-making principles. There are likely further changes, particularly with respect to consultation provisions, some of which we may be unable to incorporate in the introduction version of the Bill, but can pursue via the departmental report during the Bill's passage.

48. There are some issues on which the advice is that the Steering Group may wish to advance a different position from that recommended above or previously agreed. This is particularly related to the proposed legal weighting of the principles, which the Steering Group would prefer to be stronger, and which as discussed, we consider the government should be open to strengthening in Select Committee consideration. Further issues include the coverage of the principles, Māori decision-making authority, the Treaty provision (including the nature of, and reference to, the Treaty), incorporating tino rangatiratanga into the descriptive text and the utility of a Preamble to capture the critical context to the reform. You will receive separate advice on these points shortly from the perspective of the Steering Group.

Next steps

49. We have drafted sections of the Cabinet paper to align with the recommendations in this advice, which can be amended prior to lodging subject to your decisions.

50. We expect to receive an updated version of the Bill tomorrow that will include the drafting excerpts provided for in this paper along with other amendments. We will supply your office with the new version once we have received it.

51. If you agree, the next step is for the draft Bill and Cabinet paper to be distributed by your office for Ministerial consultation.

52. We are available to assist with any amendments you would like to make to the Bill and paper as a result of consultation.

Appendix One – draft system principles

Attached as pdf