

# **Support Workers (Pay Equity) Settlements Amendment Bill**

Government Bill

As reported from the Health Committee

## **Commentary**

### **Recommendation**

The Health Committee has examined the Support Workers (Pay Equity) Settlements Amendment Bill and recommends that it be passed with the amendments shown.

### **Introduction**

This bill seeks to amend the Care and Support Workers (Pay Equity) Settlement Act 2017 (the principal Act), which formalised a pay equity settlement between the Government and many care and support workers. The amendments would incorporate the terms of two later settlements with other groups of support workers into the framework of the principal Act. These groups are:

- mental health and addiction support workers
- vocational disability workers engaged by Oranga Tamariki and the Ministry of Social Development.

The bill as introduced would also correct the formula used for calculating future minimum pay rates for support workers covered by the principal Act.

### **Proposed amendments**

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

### **Clarifying the duties of individually funded clients**

In some cases, support workers may be employed by clients who directly receive their own individualised funding from the Ministry of Health. We are advised that, at the

moment, this arrangement is relatively uncommon for mental health and addiction workers, but that it may be used more in future.

Although these workers and their employers are included in the settlement agreement, we understand that the definition of “employer” in the principal Act does not currently cover individually funded clients. This means that, under the bill as introduced, care workers employed directly by individually funded clients may not consistently receive the pay and conditions they are entitled to under the relevant settlement agreement.

We are recommending two amendments to the bill as introduced to clarify the duties of individually funded clients.

### **Minimum hourly wage rates**

We recommend the addition of clause 11A to insert new section 9A into the principal Act. This would apply to any client who receives individual funding for mental health or addiction services, and who directly employs a care worker to provide these services. It would require them to pay the worker at least the minimum rates mandated in the relevant settlement agreement and the principal Act.

### **Back pay**

The Schedule to the bill would insert a new Part 2 into Schedule 1 of the principal Act. We recommend adding new clause 2A in the proposed new Part. This would require individually funded clients to provide back pay to their directly employed workers if they had been paid less than the minimum rates between 1 July 2017 and the date on which this bill was enacted.

### **Coverage of these amendments**

We note that these amendments would only apply to individually funded clients who receive funding for mental health and addiction services. Clients funded for vocational or disability support are not currently considered employers, and so would not be affected by these amendments. This is because the relevant settlement agreement for vocational and disability support workers does not explicitly cover relationships between individually funded clients.

### **The definition of “employer”**

As it is currently written, the principal Act specifically excludes individually funded clients from being classified as employers. The Ministry of Health’s departmental report on the principal Act indicates that this is because classifying these people as employers would place additional burdens on them that are not proportionate to their status as clients hiring a personal support worker. We are advised that the Ministry of Health provides the settlement-mandated pay for workers working for these clients through operational means, without specific legislation requiring it to do so. We note that the Ministry assured the previous committee that mandated pay for care and support workers would be provided operationally in this way.

Our preference would be that the right to prescribed minimum pay, and similar rights in the more recent addiction and mental health workers settlement agreement, is enshrined in legislation. For this reason, we have recommended the above changes, which confirm the rights of addiction and mental health support workers, without reclassifying the individually funded clients that hired them as employers. However, we believe that any similar amendment to codify the status of care workers included in the original settlement agreement would be out of scope for this bill. We wish to draw the House's attention to this issue, in the hope that it may be addressed in future.

**Access to qualifications and education**

We are concerned at uncertainty that workers working for individually funded clients may not have the same opportunities for qualification and increases in remuneration accorded to other workers covered by this bill. We understand that the Ministry of Health's funding agreements do not have any specific requirements for individually funded clients to provide training and access to qualifications to their workers. Some support is provided to the individually funded clients by the "hosts" employed by the ministry to help them manage their funding.

**Reducing staffing hours**

We note that some submitters expressed concern that care workers were having their hours reduced as their pay rates were being increased in line with the settlement agreements, resulting in their receiving no additional remuneration from the settlement agreement. We believe this practice is against the spirit of the agreements, and risks poorer outcomes for clients receiving care from these workers and their employers.

## Appendix

### Committee process

The Support Workers (Pay Equity) Settlements Amendment Bill was referred to the committee on 29 May 2019. The closing date for submissions was 18 July 2019. We received and considered 13 submissions from interested groups and individuals. We heard oral evidence from 3 submitters at a hearing in Wellington.

We received advice from the Ministry of Health.

### Committee membership

Louisa Wall (Chairperson)

Hon Maggie Barry

Dr Liz Craig

Matt Doocey

Hon Ruth Dyson (from 24 July 2019)

Jenny Marcroft

Dr Shane Reti

Angie Warren-Clark (until 24 July 2019)

Hon Michael Woodhouse

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**Key to symbols used in reprinted bill**

**As reported from a select committee**

text inserted unanimously

~~text deleted unanimously~~



*Hon Dr David Clark*

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Government Bill

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#### **New Part 2 inserted into Schedule 1**

### **The Parliament of New Zealand enacts as follows:**

#### **1 Title**

This Act is the Support Workers (Pay Equity) Settlements Amendment Act **2019**.

#### **2 Commencement**

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This Act comes into force on the day after the date on which it receives the Royal assent.

#### **3 Principal Act**

This Act amends the Act that was previously called the Care and Support Workers (Pay Equity) Settlement Act 2017 (the **principal Act**).

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### **Part 1**

#### **Amendments to Care and Support Workers (Pay Equity) Settlement Act 2017**

#### **4 Title of principal Act changed**

In section 1, replace “Care and Support Workers (Pay Equity) Settlement Act 2017” with “Support Workers (Pay Equity) Settlements Act 2017”. 15

#### **5 Section 3 amended (Purpose)**

(1) In section 3(1)(a), replace “agreement” with “agreements”.



- (2) In section 3(1)(b),—
- (a) replace “that agreement” with “those agreements”; and
  - (b) delete “care and”; and
  - (c) replace “the agreement” with “the agreements”.
- (3) Replace section 3(2) with: 5
- (2) The settlement agreements are—
- (a) the agreement in respect of care and support workers signed on 2 May 2017 by or on behalf of the Crown, ACC, the 20 DHBs, E tū Incorporated, the New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi Incorporated, the New Zealand Nurses Organisation Incorporated, and the New Zealand Council of Trade Unions Te Kauae Kaimahi Incorporated; and 10
  - (b) the agreement in respect of vocational and disability support workers signed on 17 July 2017 by or on behalf of the Crown, E tū Incorporated, the New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi Incorporated, and the New Zealand Council of Trade Unions Te Kauae Kaimahi Incorporated; and 15
  - (c) the agreement in respect of mental health and addiction support workers signed on 25 July 2018 by or on behalf of the Crown, the 20 DHBs, Platform Charitable Trust, E tū Incorporated, the New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi Incorporated, and the New Zealand Council of Trade Unions Te Kauae Kaimahi Incorporated. 20

**6 Section 4 amended (Overview)**

- (1) In section 4, delete “care and” in each place.
- (2) In section 4(d), replace “Ministry of Health, DHBs, and ACC” with “funders”. 25

**7 Section 5 amended (Interpretation)**

- (1) In section 5, definition of **care and support services**,—
- (a) in paragraph (a)(i), replace “funded” with “that are funded by the Ministry of Health, a DHB, or ACC”:
  - (b) replace paragraph (a)(i)(C) with: 30
    - (C) in respect of a person with an injury covered by the Accident Compensation Act 2001, supporting the person’s rehabilitation from the injury or supporting them to achieve and sustain their maximum level of participation in everyday life; and 35
  - (c) replace paragraph (b) with:

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(b) does not include mental health and addiction support services, vocational and disability support services, or services provided by a health practitioner

(2) In section 5, definition of **continuous employment**, delete “care and”.

(3) In section 5, insert in their appropriate alphabetical order: 5

**Department of Corrections** means the department of the Public Service referred to by that name

**health practitioner** has the same meaning as in section 5(1) of the Health Practitioners Competence Assurance Act 2003

**mental health and addiction support services**— 10

(a) means services that are funded under a funding agreement and that are provided to—

(i) a person who has a mental health need or an addiction need for the purpose of assisting them to—

(A) continue to live in their home or in the community (such as personal care and household management services); or 15

(B) work or volunteer in the community; or

(C) participate in activities in, and contribute to, their community; or

(D) learn new skills to manage their lives and achieve overall well-being; or 20

(E) maintain and develop social and support networks; or

(ii) a person with a mental injury covered by the Accident Compensation Act 2001 for the purpose of—

(A) supporting their rehabilitation from the injury; or 25

(B) supporting them to achieve and sustain their maximum level of participation in everyday life; but

(b) does not include—

(i) care and support services; or

(ii) vocational and disability support services; or 30

(iii) services provided by a health practitioner; or

(iv) services provided at a location other than the following:

(A) the person’s home (including a residential care facility, a retirement village, and a rest home):

(B) the person’s workplace: 35

(C) an employer facility:

(D) a community facility

**mental health and addiction support worker—**

- (a) means a person—
  - (i) who is an employee of an employer; and
  - (ii) whose work for that employer primarily involves providing support services; and 5
  - (iii) who, of the support services that the person provides, primarily provides mental health and addiction support services; and
- (b) for the purposes of **Part 2 of Schedule 1**, includes a person—
  - (i) who was previously an employee of an employer; and
  - (ii) whose work for that employer primarily involved providing support services; and 10
  - (iii) who, of the support services that the person provided, primarily provided mental health and addiction support services

**Ministry of Social Development** means the department of the Public Service referred to by that name 15

**Oranga Tamariki—Ministry for Children** means the department of the Public Service referred to by that name

**relevant date,—**

- (a) in relation to a care and support worker, means 1 July 2017; and
- (b) in relation to all other support workers, means the date on which the Support Workers (Pay Equity) Settlements Amendment Act **2019** comes into force 20

**support services** means care and support services, mental health and addiction support services, or vocational and disability support services 25

**support worker—**

- (a) means an employee of an employer whose work for that employer primarily involves providing support services; and
- (b) for the purposes of section 8 and **Part 2 of Schedule 1**, includes a person who was previously an employee of an employer and whose work for that employer primarily involved providing support services 30

**vocational and disability support services—**

- (a) means services that are funded by the Ministry of Social Development or Oranga Tamariki—Ministry for Children under a funding agreement that are provided to a person with a disability for the purposes of assisting them to— 35
  - (i) continue to live in their home or in the community (such as personal care and household management services); or
  - (ii) work or volunteer in the community; or

- (iii) participate in activities in, and contribute to, their community; or
- (iv) learn new skills to manage their lives and achieve overall well-being; or
- (v) maintain and develop social and support networks; but
- (b) does not include care and support services, mental health and addiction support services, or services provided by a health practitioner 5
- vocational and disability support worker—**
- (a) means a person—
- (i) who is an employee of an employer; and
- (ii) whose work for that employer primarily involves providing support services; and 10
- (iii) who, of the support services that the person provides, primarily provides vocational and disability support services; and
- (b) for the purposes of **Part 2 of Schedule 1**, includes a person— 15
- (i) who was previously an employee of an employer; and
- (ii) whose work for that employer primarily involved providing support services; and
- (iii) who, of the support services that the person provided, primarily provided vocational and disability support services.
- (4) In section 5, definition of **employer**,— 20
- (a) replace paragraph (a)(i) with:
- (i) a person, trust, or partnership that receives funding from a funder to provide support services; and
- (b) in paragraph (a)(iii), delete “care and”.
- (5) In section 5, replace the definition of **funder** with: 25
- funder** means the Department of Corrections, the Ministry of Health, the Ministry of Social Development, Oranga Tamariki—Ministry for Children, a DHB, or ACC
- (6) In section 5, definition of **funding agreement**, paragraph (a),—
- (a) replace “the Ministry of Health or a DHB” with “a funder other than ACC”: 30
- (b) replace “between a funder” with “between the funder”:
- (c) delete “care and”.
- (7) In section 5, definition of **ordinary hourly wage**, delete “care and”.
- 8 Part 2 heading amended** 35
- In the Part 2 heading, replace “Care and support” with “Support”.

<b>9</b>	<b>Cross-heading above section 8 amended</b>	
	In the cross-heading above section 8, delete “ <i>care and</i> ”.	
<b>10</b>	<b>Section 8 amended (Existing claims extinguished and potential claims barred)</b>	
(1)	Replace section 8(1)(a) with:	5
	(a) any claim by or on behalf of a support worker under the Equal Pay Act 1972 relating to the provision of support services that was lodged but not determined before the relevant date; and	
(2)	In section 8(1)(b) and (3)(a) and (b), delete “care and” in each place.	
<b>11</b>	<b>Section 9 amended (Minimum hourly wage rates)</b>	10
(1)	In section 9(1), delete “care and”.	
(2)	In section 9(1)(b), replace “commencement of this Act” with “relevant date”.	
(3)	In section 9(3), definition of <b>excluded services</b> , repeal paragraphs (a) and (c).	
(4)	In section 9(3), repeal the definitions of <b>Ministry for Vulnerable Children, Oranga Tamariki</b> and <b>Ministry of Social Development</b> .	15
<b>11A</b>	<b><u>New section 9A inserted (Minimum hourly wage rates for mental health and addiction support services provided to individual clients)</u></b>	
	After section 9, insert:	
<b>9A</b>	<b><u>Minimum hourly wage rates for mental health and addiction support services provided to individual clients</u></b>	20
(1)	<u>This section applies to a person (an <b>individually funded client</b>) who—</u>	
	(a) <u>receives funding directly from a funder towards the cost of mental health and addiction support services for that person; and</u>	
	(b) <u>employs a person (a <b>worker</b>) to provide the services.</u>	
(2)	<u>The individually funded client must pay the worker, for the provision of the services, no less than the greater of—</u>	25
	(a) <u>the applicable hourly wage set out in Schedule 2; and</u>	
	(b) <u>the ordinary hourly wage that the client was required to pay the worker under the terms and conditions of employment in place between the client and the worker immediately before the commencement of the Support Workers (Pay Equity) Settlements Amendment Act 2019.</u>	30
(3)	<u>This section does not apply if the funding received by the individually funded client is paid under a family care policy within the meaning of that term in section 70B(1) of the New Zealand Public Health and Disability Act 2000.</u>	
(4)	<u>This section does not apply in respect of a period of time spent by a worker overnight during which the worker, under the terms of the worker’s employment agreement, is—</u>	35

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<p>(a) <u>required to be at the worker’s workplace; and</u></p> <p>(b) <u>allowed to sleep at the workplace while on duty; and</u></p> <p>(c) <u>required to be available to attend to the worker’s duties during the course of the night as necessary.</u></p>	
<p><b>12 Section 10 amended (Weekend and night penal rates)</b></p>	<p>5</p>
<p>(1) In section 10(1)(a) and (2), replace “commencement of this Act” with “relevant date” in each place.</p> <p>(2) In section 10(1)(b), delete “care and”.</p>	
<p><b>13 Section 11 amended (Previous agreements that require allowances for service or qualifications unenforceable)</b></p>	<p>10</p>
<p>(1) In section 11(1)(a), replace “commencement of this Act” with “relevant date”.</p> <p>(2) In section 11(1)(b), delete “care and”.</p>	
<p><b>14 Section 12 amended (Employers must ensure care and support workers are able to gain qualifications)</b></p>	<p>15</p>
<p>(1) In the heading to section 12, delete “care and”.</p> <p>(2) In section 12(1) and (2), delete “care and”.</p>	
<p><b>15 Section 14 amended (Care and support worker may recover unpaid or underpaid wages)</b></p>	<p>20</p>
<p>(1) In the heading to section 14, replace “Care and support” with “Support”.</p> <p>(2) In section 14, delete “care and”.</p>	
<p><b>16 Section 16 amended (This Act overrides terms and conditions of employment agreements)</b></p>	<p>25</p>
<p>(1) In section 16(1) and (2), delete “care and”.</p> <p>(2) In section 16(1)(a) and (2), replace “commencement of this Act” with “relevant date”.</p>	
<p><b>17 Section 17 amended (Employer and care and support worker may negotiate more favourable terms and conditions)</b></p>	<p>30</p>
<p>(1) In the heading to section 17, delete “care and”.</p> <p>(2) In section 17, delete “care and”.</p>	
<p><b>18 Section 18 amended (Funding amounts increased)</b></p> <p>Replace section 18(4) with:</p>	
<p>(4) This section applies only in respect of funding agreements entered into before,—</p>	

(a)	in relation to care and support services and vocational and disability support services, 1 July 2017; and	
(b)	in relation to mental health and addiction support services, 1 July 2018.	
<b>19</b>	<b>Section 19 amended (Records to support additional funding)</b>	
	In section 19(1) and (2)(b), delete “care and”.	5
<b>20</b>	<b>Schedule 1 amended</b>	
	In Schedule 1, after Part 1, insert the <b>Part 2</b> set out in the <b>Schedule</b> of this Act.	
<b>21</b>	<b>Schedule 2 amended</b>	
(1)	In Schedule 2, delete “care and” in each place.	10
(2)	In Schedule 2, clause 3(2), replace the formula with:	
	$a \times (((b \div c) - 1.017^4) + 1)$	

## Part 2

### Consequential amendments to Employment Relations Act 2000

<b>22</b>	<b>Amendments to Employment Relations Act 2000</b>	15
(1)	This section amends the Employment Relations Act 2000.	
(2)	In the following provisions, replace “Care and Support Workers (Pay Equity) Settlement Act 2017” with “Support Workers (Pay Equity) Settlements Act 2017”:	
(a)	section 148A(3); and	20
(b)	section 161(1)(m)(ia); and	
(c)	section 223(1)(ab); and	
(d)	section 236(4)(ba).	

**Schedule**  
**New Part 2 inserted into Schedule 1**

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<b>Part 2</b>		
<b>Provisions relating to Support Workers (Pay Equity) Settlements Amendment Act 2019</b>		5
<b>1</b>	<b>References to previous Title</b>	
	Every reference in any enactment and in any document to the Care and Support Workers (Pay Equity) Settlement Act 2017 must, unless the context provides otherwise, be read as a reference to the <b>Support Workers (Pay Equity) Settlements Act 2017</b> .	10
<b>2</b>	<b>Employers to pay back pay</b>	
(1)	This clause applies if—	
	(a) a support worker other than a care and support worker provided support services during the applicable period; and	15
	(b) the worker’s employer paid the worker for those services at a rate that is less than the rate that the employer would have been required to pay if the Support Workers (Pay Equity) Settlements Amendment Act <b>2019</b> had applied in respect of the worker during the applicable period.	
(2)	The employer must, on the commencement of the Support Workers (Pay Equity) Settlements Amendment Act <b>2019</b> , pay the worker an amount calculated as follows:	20
	(a – b)	
	where—	
	a is the amount that the employer would have been required to pay the worker for the provision of support services if the Support Workers (Pay Equity) Settlements Amendment Act <b>2019</b> had applied in respect of the worker during the applicable period	25
	b is the amount that the employer actually paid the worker for the provision of support services during the applicable period.	30
(3)	The calculation must take into account all applicable entitlements and deductions required by law, those specified in the worker’s employment agreement, and any other term or condition otherwise agreed to between the worker and their employer.	
(4)	In this clause, <b>applicable period</b> means the period starting on 1 July 2017 and ending on the day before the date on which the Support Workers (Pay Equity) Settlements Amendment Act <b>2019</b> comes into force.	35



- 2A Individually funded clients to pay back pay for mental health and addiction support services**
- (1) This clause applies if—
- (a) a person (an **individually funded client**) received funding directly from a funder towards the cost of mental health and addiction support services for that person during the applicable period; and
  - (a) the individually funded client employed a person (a **worker**) to provide the services; and
  - (b) the individually funded client paid the worker for those services at a rate that is less than the rate that the client would have been required to pay if the Support Workers (Pay Equity) Settlements Amendment Act **2019** had applied in respect of the worker during the applicable period.
- (2) The individually funded client must, on the commencement of the Support Workers (Pay Equity) Settlements Amendment Act **2019**, pay the worker an amount calculated as follows:
- $a - b$
- where—
- a is the amount that the individually funded client would have been required to pay the worker for the provision of the services if the Support Workers (Pay Equity) Settlements Amendment Act **2019** had applied in respect of the worker during the applicable period
  - b is the amount that the individually funded client actually paid the worker for the provision of the services during the applicable period.
- (3) The calculation must take into account all applicable entitlements and deductions required by law, those specified in the worker's employment agreement, and any other term or condition otherwise agreed to between the worker and the individually funded client.
- (4) In this clause, **applicable period** means the period starting on 1 July 2017 and ending on the day before the date on which the Support Workers (Pay Equity) Settlements Amendment Act **2019** comes into force.
- 3 Continuous employment for mental health and addiction support workers**
- (1) This clause applies to a mental health and addiction support worker who was employed by an employer—
- (a) immediately before and on 1 July 2017; and
  - (b) on 1 July 2018.
- (2) For the purpose of clause 1 of Schedule 2 of this Act, the worker's length of service includes the time, during the period beginning on 1 July 2017 and ending on 30 June 2018, that the worker was—
- (a) employed by any employer and was providing support services; or

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Schedule

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- (b) employed by any employer but was not providing support services; or
- (c) employed outside of the support services sector.

**Legislative history**

15 May 2019  
29 May 2019

Introduction (Bill 137–1)  
First reading and referral to Health Committee

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Wellington, New Zealand:

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