

# Departmental Disclosure Statement

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Pae Ora (Healthy Futures) Bill
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Department of Prime Minister and Cabinet.

The Department of Prime Minister and Cabinet certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

14 October 2021

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## Part One: General Policy Statement

Successive reviews of the publicly-funded health system in New Zealand, most recently the independent Health and Disability System Review that was released in June 2020, have found consistently poor outcomes for some groups, in particular Māori, Pacific peoples and people with disabilities, and significant unwarranted variation in service availability, access, and quality between population groups and areas of New Zealand. For Māori in particular, the health system does not operate in partnership and does not meet the Crown's obligations under te Tiriti o Waitangi/the Treaty of Waitangi.

The Health and Disability System Review identified that one of the root causes of this inequity and variation was the structure of the health system. It described a system that had become fragmented and complex, leading to unclear roles, duplication, misalignment and a lack of a common whole-system ethos.

Tackling these issues requires reform that fundamentally changes the structure and accountability of the publicly-funded health system, making it necessary to repeal and replace the New Zealand Public Health and Disability Act 2000 in its entirety.

This Bill addresses these issues and provides for a new structure and new accountability arrangements. The purpose of the reforms is to:

- (a) protect, promote, and improve the health of all New Zealanders; and
- (b) achieve equity by reducing health disparities among New Zealand's population groups, in particular for Māori; and
- (c) build towards pae ora (healthy futures) for all New Zealanders.

### *Giving effect to the principles of te Tiriti o Waitangi/the Treaty of Waitangi*

The Bill is intended to give effect to the principles of te Tiriti o Waitangi/the Treaty of Waitangi. A descriptive clause sets out the provisions that give effect to the Crown's obligations. The Bill also sets out principles that will guide decision-makers, incorporating the concepts of the principles for the health system discussed by the Waitangi Tribunal in the WAI 2575 Inquiry. This places Tiriti/Treaty-informed decision-making at the heart of the system by ensuring that decisions made by health entities will be genuinely informed by the health principles identified by the Tribunal, and that the legislation will support system-wide accountability for Māori health outcomes.

### **Health system structures**

The Bill disestablishes district health boards and the Health Promotion Agency. Their assets, liabilities, contracts and employees will transfer to new entities. All transferring employees will retain their existing terms and conditions of employment on transfer, including arrangements that had been specific to particular district health boards.

### *Health New Zealand*

The Bill establishes Health New Zealand, a new Crown agent to lead system operations, planning, commissioning and delivery of health services, working with the Māori Health Authority. Health New Zealand will establish localities to plan and

commission primary and community health services effectively and engage with communities at the appropriate level. This will reduce system complexity and enable consistency, a population health focus and meaningful community and consumer participation in the planning, delivery and monitoring of health services.

#### *Māori Health Authority*

The Bill establishes the Māori Health Authority to drive improvement in hauora Māori. The Authority will be an independent statutory entity with clear accountabilities to both Māori and the Crown. It will co-commission and plan services with Health New Zealand, commission kaupapa Māori services and monitor the performance of the system for Māori. The Authority will work with the Ministry of Health to prepare national strategies and provide advice to the Minister. The Bill also requires the Minister to establish a Hauora Māori Advisory Committee to advise on the exercise of Ministerial powers in relation to the Authority.

#### *Iwi-Māori partnership boards*

The Bill provides a statutory purpose and framework for recognising iwi-Māori partnership boards as a vehicle to exercise tino rangatiratanga and mana motuhake at the local level. The interim Māori Health Authority is leading a process of engagement to advise on the specific functions and powers the partnership boards should have and changes are anticipated during the passage of the legislation.

#### *Public health*

The Ministry of Health will continue to act as chief steward of the health system with a focus on strategy, policy, regulation and monitoring. A new Public Health Agency will be established as a business unit within the Ministry of Health to provide system leadership for public health and advise the Director-General on public health matters. The role of the Director of Public Health as a system leader will be strengthened. The Bill also requires the Minister to establish an expert advisory committee to provide independent advice on issues relating to public health.

#### *Strategic, accountability, and monitoring documents*

The Bill establishes a more cohesive system focused on long-term strategic direction and population health needs, providing for a number of key health system strategic, accountability and monitoring documents:

- The Government Policy Statement on Health, which will set out the government's overall direction, priorities, and objectives for the health system. It must be issued by the Minister at intervals no longer than 3 years;
- National health strategies – the New Zealand Health Strategy will provide a framework for the overall 5–10 year direction of the health sector and must be prepared and determined by the Minister. The Minister must also prepare and determine Hauora Māori, Pacific Health and Disabled Health strategies that include specific consideration of outcomes and performance for Māori, Pacific and disabled peoples;

- The New Zealand Health Plan, which will set the operational direction for the system and is to be jointly prepared by Health New Zealand and the Māori Health Authority;
- Locality plans, which will assess health needs at the local level and are to be jointly agreed by Health New Zealand and the Māori Health Authority;
- The New Zealand Health Charter, which will provide common values, principles, and behaviours for organisations and workers in the health system; and
- A Code of Consumer Participation, which will support consumer participation and enable the consumer voice to be heard.

*Continuation of some existing statutory provisions*

Part three of the Bill continues Pharmac, the New Zealand Blood and Organ Service, and the Health Quality and Safety Commission. They will continue to exercise their current functions, subject to the accountability and monitoring requirements in the Bill, and minor amendments to reflect a stronger role for HQSC in supporting consumer engagement.

Part four of the Bill continues provisions relating to ministerial committees, commissioning powers, and general administrative requirements that apply to health entities.

The Schedules set out transitional, savings and related provisions. This includes the transfer of district health board assets and liabilities, amending the Health Act 1956 to establish the Public Health Agency, and replicating relevant schedules of the New Zealand Public Health and Disability Act 2000.

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	<b>YES</b>
<p><i>Health and Disability System Review – Final Report – Pūrongo Whakamutunga</i>, Health and Disability System Review, March 2020 (accessible at <a href="http://www.systemreview.health.govt.nz/final-report">www.systemreview.health.govt.nz/final-report</a>).</p> <p><i>Health and Disability System Review – Interim Report</i>, Health and Disability System Review, August 2019 (accessible at <a href="http://www.systemreview.health.govt.nz/interim-report">www.systemreview.health.govt.nz/interim-report</a>).</p> <p><i>Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry (Wai 2575)</i>, Waitangi Tribunal, July 2019 (accessible at <a href="http://www.waitangitribunal.govt.nz">www.waitangitribunal.govt.nz</a>).</p>	

### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	<b>NO</b>
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### Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>YES</b>
<p>Supplementary Analysis Report: Health System Structural Change to Support Reform Programme, Department of Prime Minister and Cabinet, 2 June 2021.</p> <p>Regulatory Impact Statement: Decision on the organisational form of a Māori Health Authority, Department of Prime Minister and Cabinet, 2 September 2021.</p> <p>Both are accessible at <a href="https://www.dpmc.govt.nz/publications">https://www.dpmc.govt.nz/publications</a> and can also be found and downloaded at <a href="http://www.treasury.govt.nz/publications/informationreleases/ris">http://www.treasury.govt.nz/publications/informationreleases/ris</a>.</p> <p>Some content is withheld to protect the confidentiality of advice tendered by Ministers of the Crown and officials.</p>	
<b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>	<b>YES</b>

The Supplementary Analysis Report: Health System Structural Change to Support Reform Programme dated 2 June 2021 met the threshold for receiving an independent opinion on the quality of the RIS from the RIA Team based in the Treasury. Their opinion for Cabinet on that RIS is below:

“The review panel considers that it meets the Quality Assurance criteria. The SAR provides a clear problem definition and intervention logic. It acknowledges that not all costs and benefits of the proposed change have been estimated, and provides informed estimates where these are possible. The analysis within this SAR is on the first regulatory proposal decided as part of the wider health reform process. Subsequent regulatory decisions will be accompanied by separate regulatory impact analyses.”

The Regulatory Impact Statement: Decision on the organisational form of a Māori Health Authority was quality assured by a panel with representatives from the Department of Prime Minister and Cabinet and the Ministry of Health. Their opinion for Cabinet on that RIS is set out in full in Appendix One of this disclosure statement.

<b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b>	<b>NO</b>
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### Extent of impact analysis available

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	<b>NO</b>
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<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
<b>(a) the size of the potential costs and benefits?</b>	<b>YES</b>
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	<b>NO</b>
For analysis on the size of the potential costs and benefits, see pages 28 - 32 of Health System Structural Change to Support Reform Programme and pages 20 – 29 of Decision on the organisational form of a Māori Health Authority.	

<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
<b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>	<b>NO</b>
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	<b>NO</b>

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

<b>3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?</b>
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The policy in the Bill is consistent with New Zealand's international obligations.
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### Consistency with the government's Treaty of Waitangi obligations

<b>3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?</b>
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A series of regional hui and forums were held to engage with Māori on the reforms, including the Iwi Leaders Forum, WAI 2575 claimants and Māori health and disability providers. A steering group chaired by Tā Mason Durie considered and provided advice on the hauora Māori components of the reform, and officials from Te Puni Kōkiri, Te Arawhiti and the Crown Law Office have been consulted and engaged in discussions throughout the development of the Bill.

The Bill contains a number of specific provisions which provide for the Crown's intention to give effect to the Treaty principles, such as the Health system principles (clause 7), the establishment and functions of the Māori Health Authority (Part Two), and the purpose of Iwi-Māori Partnership Boards (Part Three). These provisions are summarised and referenced as being for this purpose in clause 6. The Health system principles aim to incorporate key concepts discussed by the Waitangi Tribunal in its Hauora Inquiry.

### Consistency with the New Zealand Bill of Rights Act 1990

<b>3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?</b>	<b>YES</b>
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The draft Bill has been sent to the Ministry of Justice in order for them to prepare advice on consistency with the New Zealand Bill of Rights Act 1990.

Advice provided to the Attorney-General by the Ministry of Justice is generally expected to be made available on the Ministry of Justice's website upon introduction of a Bill. Such advice will be accessible on the Ministry's website at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/>. If the Attorney-General determines the Bill to be inconsistent with the New Zealand Bill of Rights Act, a section 7 report will be published on the Ministry's website and tabled in the House.

### Offences, penalties and court jurisdictions

<b>3.4. Does this Bill create, amend, or remove:</b>	
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<b>(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?</b>	<b>YES</b>
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<b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b>	<b>NO</b>
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<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	<b>YES</b>
<p>The Offence and Penalty Vetting team at the Ministry of Justice was consulted on the two strict liability offences carried over from the New Zealand Public Health and Disability Act 2000, relating to proceedings during mortality review committees, specifically:</p> <ol style="list-style-type: none"> <li>1. strict liability offence for non-compliance with a requirement made by the chairperson of a committee (clause 75(5) and Schedule 4); and</li> <li>2. strict liability offence for the disclosure of information (clause 75(6) and Schedule 4).</li> </ol> <p>The Ministry of Justice was satisfied that the absence of a defence of reasonable excuse for the disclosure of information revealed during mortality review committee proceedings was appropriate for the reasons outlined in paragraph 4.4.</p>	

### Privacy issues

<b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>	<b>NO</b>
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### External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	<b>YES</b>
<p>For a description of the external consultation and feedback received, see pages 13 - 17 of Health System Structural Change to Support Reform Programme and Appendix Two of Decision on the organisational form of a Māori Health Authority.</p>	

### Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	<b>NO</b>
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## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

<b>4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?</b>	<b>NO</b>
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### Charges in the nature of a tax

<b>4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?</b>	<b>YES</b>
<p>The Bill replicates provisions in the New Zealand Public Health and Disability Act 2000 relating to the establishment of an alcohol levy. An alcohol levy was first introduced through the Alcoholic Liquor Advisory Council Act 1976, and since 2012 has been received by the Health Promotion Agency. The Bill disestablishes the Health Promotion Agency, and provides for the levy to be received by the Public Health Agency within the Ministry of Health.</p> <p>The levy is necessary in order to collect funds that cover the cost of addressing alcohol related harm and other related alcohol activities. The safeguards on the power are:</p> <ul style="list-style-type: none"><li>• the levy is limited to classes of alcohol as identified by New Zealand Customs categories;</li><li>• the full amount recovered is determined by the Minister of Health and the Minister of Finance as an amount that they regard as reasonable to spend on alcohol related matters;</li><li>• once the amount is determined, there is a set formula to work out the rate for different categories of alcohol, which means there is no discretion in the rates that apply to the particular classes of alcohol; and</li><li>• this must be approved through Order in Council, which is a disallowable instrument.</li></ul>	

### Retrospective effect

<b>4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?</b>	<b>NO</b>
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## Strict liability or reversal of the usual burden of proof for offences

<b>4.4. Does this Bill:</b>	
<b>(a) create or amend a strict or absolute liability offence?</b>	<b>YES</b>
<b>(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?</b>	<b>NO</b>
<p>Clause 75 and Schedule 4 relate to mortality review committees, which are appointed when a death or serious injury has resulted during medical care. The Bill includes two strict liability offences:</p> <ol style="list-style-type: none"> <li>1. for non-compliance with a requirement made by the chairperson of a committee (clause 75(5) and Schedule 4); and</li> <li>2. for the disclosure of information (clause 75(6) and Schedule 4).</li> </ol> <p><b>Offence 1</b></p> <p>Clause 75(5) provides that, where a person fails, without reasonable excuse, to comply with a requirement imposed under Schedule 4 by the chairperson of a mortality review, they have committed an offence and are liable on conviction to a fine not exceeding \$10,000.</p> <p>Schedule 4 details that the chairperson can require a person before the committee to produce information, for example patient records, clinical advice, and information known including that which is subject to very strong non-disclosure requirements such as the protections in the Privacy Act 2020, or through patient confidentiality.</p> <p>Compliance with such a requirement means the committee can fully perform its functions in order to learn from and prevent any further harm to human life. The actus reus is of the nature appropriate for a strict liability offence (a person either does or does not perform the actus reus). There is a defence of reasonable excuse available for situations where a person could not reasonably comply with a requirement.</p> <p><b>Offence 2</b></p> <p>Clause 75(6) provides that every person who discloses information contrary to Schedule 4 commits an offence and is liable on conviction to a fine not exceeding \$10,000.</p> <p>This offence protects information revealed during committee proceedings from being shared outside of those proceedings.</p> <p>The offence exists because a person such as a clinician needs to feel freely able to disclose information that may relate to how a patient died during medical care. If shared outside of the proceedings, information disclosure could leave that person potentially open to a civil case. Also, as described above, the information revealed during proceedings is also likely to be subject to very strong non-disclosure requirements in order to protect a patient's privacy and the confidentiality relationship between clinician and patient.</p> <p>The high value of the information provided during an open discussion to prevent further harms (including death) means any confidential information provided during the discussions should be protected.</p> <p>This offence does not include a defence as the conduct captured by this offence (disclosing information) is a positive act, for which we see no reason to undertake and no situation where a person should disclose information revealed during proceedings. Though there remains the common law defence of total absence of fault, which means this offence remains a strict liability offence, and is not absolute (see: <i>Millar v Ministry of Transport</i> [1986] 1 NZLR 660).</p>	

### Civil or criminal immunity

<b>4.5. Does this Bill create or amend a civil or criminal immunity for any person?</b>	<b>NO</b>
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### Significant decision-making powers

<b>4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?</b>	<b>NO</b>
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### Powers to make delegated legislation

<b>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</b>	<b>NO</b>
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<b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b>	<b>YES</b>
Clause 97 provides for regulations to be made by the Governor-General by Order in Council. These will provide for the matters of detail necessary to support the implementation and operation of the Act. These include regulations relating to regional arrangements for the provision of services, information that health entities must provide to the Director-General, entitlement cards and dispute resolution processes.	

### Any other unusual provisions or features

<b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b>	<b>NO</b>
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## Appendix One: Further Information Relating to Part Two

### Independent opinion on the quality of the regulatory impact statement – question 2.3.1

The Panel considers that the RIA Meets the Quality Assurance Criteria.

The Panel noted that it was difficult to develop a full regulatory impact assessment for a machinery of government issue, in this case for choosing between different organisational forms for the Māori Health Authority. This is because it is not possible or practical to distinguish between the overall costs and benefits of creating a Māori Health Authority (which has already been decided by Cabinet), and those associated with the question of organisational form. This is a similar situation faced in producing other RIAs of a comparable nature, such as for Taumata Arowai, the Criminal Case Review Commission, the role of the Reserve Bank Governor on its Board, and the Independent Mental Health and Wellbeing Commission.

In this case, the decision to form the Māori Health Authority has already been made, and the remaining decision (and the focus of the RIA) is its organisational form.

The RIA clearly outlines the benefits that could be gained in Māori health status and equity through the effective functioning of the Māori Health Authority. The approach taken is robust, and based on available evidence.

The Multi-Criteria Analysis teases out the trade-offs and nuances between the different choices of organisational form, and allows a clear choice to be made. There has been considerable general consultation and engagement on these issues, and the advice of an expert panel, on these matters. The Select Committee process will provide the opportunity for further detailed stakeholder input.