

Strengthening DSS and Responding to the Supreme Court decision on Family Carers

1. Purpose To brief on the choices for legislative, policy and operational changes in DSS following the December 2025 Supreme Court decision on family carers.

2. Background

DSS has operated in a highly litigious environment for some time. Court judgments have significantly shaped settings, exacerbated by a lack of clear, foundational legislation.

Supreme Court decision

In December 2025, the **Supreme Court determined:**

- **Two family carers are employees of MSD**
- **The two family carers had been engaged in an employment relationship with MSD**
- **Time when care provided by a family member means that they are constrained is regarded as work.**
- **Supervision should be shared between the family and the Crown. It did not specify to what extent.**
- **A family carer for a disabled person who lacks the capacity to be an employer and does not have a relevant order (e.g. Welfare Guardian) is a MSD employee.**

Implications from the Supreme Court decision

Issues:

- The Court's findings regarding supervision will support arguments for higher working hours than currently funded
- Remedies will be quantified by the Employment Court s9(2)(h)
- Further individuals could be deemed MSDs employees and seek remedies.

s 9(2)(h)

Future risk:

- Further litigation that broadens the scope of the issue- s 9(2)(h)

s 9(2)(h)

To address these issues and mitigate future risk urgent action is underway.

**Disability
Support Services**

3. Proposed Responses

Urgent legislation to progress the Government's plan to strengthen DSS and address the impacts of the Supreme Court Decision

- The purpose of legislation will be to put in foundational elements to stabilise and strengthen the DSS system, and respond to the employment related issues arising from the judgment, and address the fiscal, operational and litigation risks.
- Clearly signal to disabled people, their whānau, families and the wider communities that the purpose of the DSS system is to contribute to enabling eligible people to live their everyday life by providing disability support within funding available.
- Increase clarity regarding the support Crown will provide to disabled people and what will be the responsibility of whānau and families.
- Provide for secondary legislation and other instruments such as regulation and Ministerial Programmes which will further clarify what DSS will deliver and limits on funding and eligibility, and specify the ability to target supports, and work within its appropriation.
- Address the employment-related issues by clarifying there is no employment relationship between MSD and paid family carers.
- Subject to decisions – potentially address fiscal risks and litigation risks arising from the SC decision through the use of retrospectivity and a litigation bar
- Restores policy setting to the Crown, rather than the Courts.
- A subsequent bill (likely 2027/2028) is proposed to build on this initial foundation

s 9(2)(f)(iv)

DSS could:

- Encourage (but not require, as we cannot compel under current frameworks) the family of new and existing users to seek a Protection of Personal and Property Order so that there's substituted decision-making arrangements in place.
- s 9(2)(h)
We will provision for a transitional period to enable alternative arrangements that are compliant with the judgment to be put in place.

Policy proposals

- DSS will explore funding models for care in the home that does not require an employment model, less litigation risk
- This work will include a carer support package that will financially recognise family providing caring work without constructing an employment relationship, and in a way that balances the respective contribution of the Crown and the family caring for disabled family members.



Te Kāwanatanga o Aotearoa
New Zealand Government

IN-CONFIDENCE

Possible alternative model for family carers

1) DSS has not got the balance and mechanisms for supporting family carers right

- Responsibility for care and support of disabled people is shared between individuals, families, their wider support networks, and government.
- Most DSS disabled users receive at least some support from family and friends. The intensity of that caring, its impact on families vary widely.
- The types and levels of support families receive have also varied widely, and people in similar circumstances can be treated very differently.
- DSS has historically relied heavily on family contributions and has not fully recognised the extent of their roles and the costs these have both for them and those they care for. These costs can include burnout, financial hardship, and relationship breakdown.
- To the extent DSS has allowed financial recognition for family care, the mechanisms for this have been ambiguous and have had limitations.
- DSS disabled users in family care can be vulnerable, and we have very limited wellbeing and safeguarding tools.

2) The new assessment and allocation model provides a foundation for a new approach

- The new approach to assessment and allocation being rolled out intends to allocate funding for work done by family and friends on the same basis as work performed by a provider.
- Where family and friends can meet a disabled family members support needs as 'accommodations', funding will be allocated towards the sustainability of this support.
- The allocation model also recognises that family naturally have a greater or lesser responsibility for care at different life stages (eg children vs adults).

3) A new offering for carers

s 9(2)(f)(iv)

4) Shifting from an employment model to an alternative approach

- It should be possible to financially recognise family providing caring work without constructing an employment relationship, and in a way that balances the respective contribution of the state and the family in care of disabled family members.

s 9(2)(f)(iv)

