Disability Support Services

MINISTRY OF SOCIAL DEVELOPMENT
TE MANATŪ WHAKAHIATO ORA

vAide-mémoire

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Disability Support Services Bill – Approval for Introduction: Talking Points for Cabinet Legislative Committee, 14 May 2026

Key Points

The following summarises the context for the Disability Support Services Bill (Bill):

- You have taken actions to stabilise DSS.
  - The Independent Review in 2024 found that DSS had poor financial management of spending, and lacked fairness, consistency and transparency in the delivery of services.
  - Government has taken urgent action to respond to recommendations from the Independent Review in consultation with the community. As a result, financial management and delivery of services have improved with minimal disruption to disabled people.
- The Bill accelerates the strengthening and stabilisation work. It:
  - provides Government with a much-needed **foundational legislative base** for disability policies and funding decisions
  - sets out the **purpose** of DSS-funded disability support
  - establishes a consistent and transparent **mechanism for decision-making**, which includes powers for the responsible Minister to establish Ministerial programmes and provide ministerial directions
  - clarifies that **responsibility for the care** of disabled people rests in the first instance with their family and whānau as natural supports, where this is appropriate
  - clarifies that the Crown or its contracted providers are **not employers** unless there is an intentional written employment agreement, where a disabled person uses their funding allocation to pay a carer, including a paid family member
  - validates current employment relationships between disabled people and paid family carers, and temporary representative arrangements for people who lack decision-making capacity, for three years to **enable time to transition** to more suitable arrangements

    - **mitigates** the Crown's fiscal and litigation risks arising from the Supreme Court judgment

- **Appendix one** sets out the history of litigation on paid family carers that led to the Supreme Court judgment establishing an employment relationship between MSD and family carers.
- Subject to Cabinet agreement, your intended parliamentary timeline for the DSS Bill is:
    - introduce on 18 May 2026
    - first reading on 21 May 2026
    - refer to the Social Services and Community select committee, with a report back date of 19 August 2026
    - remaining stages completed before the House rises on 24 September 2026, so that Royal assent may follow.

Consistency with the Bill of Rights Act

- Ministry of Justice in their assessment found the Bill appears to be consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990.
- The Bill is assessed to not place any unjustified limitations on the right to be free from discrimination (s 19(1) and right to judicial review (s 27(2)).

Decisions you are seeking agreement from Cabinet

Approve the Bill for introduction

You are seeking approval of the Bill for introduction, subject to final approval by Government caucus and sufficient support in the House of Representatives.

You are also seeking agreement from Cabinet that the Parliamentary Counsel Office can continue to make minor changes to the Bill to settle technical matters up until the Bill is introduced.

Two additional policy areas following further work during drafting

1. **Provision for a decision-making principle regarding the use of own resources and other support**

Clauses 8(2) and 11(4)

- The Bill includes a provision that allocations of DSS-funded disability support should take into account, where appropriate, the resources and support available to an eligible person. This includes support available:
    - within their family, whānau and community; and
    - from other publicly funded sources
- This provision further clarifies that DSS is a contributory system taking into account people's needs and circumstances.
- This provision does not introduce new obligations to disabled people or their families and whānau.

2. Provision for the new carer payment

Clauses 11 and 12

- The Bill includes provisions that:
  - specifically empower the establishment of ministerial programmes that provide for payments by or on behalf of the Crown to people who provide care to an eligible person in the context of a familial or social relationship, and
  - ensure such payments do not constitute an employment relationship.
- The Bill does not "include" the new carer payment; but instead, it sets the foundation to provide for the establishment of one. Officials will continue to develop the carer payment while the Bill progresses through the House. Policy decisions are intended to be sought by early 2027.
- s (9)(2)(g)(i) [redacted]
- The primary intention with the new carer payment is to provide more appropriate measures for recognition the care and support provided by carers that is not within an employment relationship. s 9(2)(f)(iv) [redacted]

Decisions where you have used your delegated authority to make minor and technical changes to the Bill

- You have used your delegated authority to make minor and technical changes to the Bill: Clarification that Ministerial programmes can be used for issues relating to residential care.
- Making clear that that services provided under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 are excluded from the definition of DSS-funded disability support.
- Including spouses in the saving provision regarding the Supreme Court judgment.
- Clarification that claims that are filed and are pending decisions are extinguished in their entirety.

- **Appendix two** provides more details on these areas.

Contentious issues in the Cabinet paper

Issues raised by the Legislation Design and Advisory Committee (LDAC)

- LDAC raised concerns regarding three aspects of the proposals in the Bill. These relate to the following:
  - Legislative hierarchy.
  - Retrospective provisions.
  - Saving and amending existing DSS funding policies.

- **Appendix three** sets out the advice from LDAC in more detail.
- You have noted LDAC's concerns and will consider their feedback alongside submissions received by the Select Committee on these aspects of the Bill. You will come back to Cabinet if substantive changes are needed to the Bill.

Retrospective validation of employment and agent arrangements

- The Supreme Court highlighted that where a disabled person lacks decision-making capacity and has used their DSS funding to employ and pay their family member to provide care and support, then that employment relationship is voided. Similarly, any arrangement that named someone (usually a family member) as an 'agent' to act on behalf of the disabled person is not valid.[1]
- These employment agreements and reliance on representations from others have happened in good faith but without clear legal footing. It has allowed the system to continue, services to be delivered to the disabled person, and money to flow to the carer.
- The Bill validated these arrangements for three years, which is a novel approach in law. It retrospectively changes the legal impact of past actions.
- In some cases, paid family carers will be left with an employer who cannot reasonably be expected to fulfil their obligations. It is therefore necessary to also protect the ability for someone to act "as" the disabled person by validating people who have acted as Agents for that person for three years.
- This is necessary for the continuity of care while DSS supports the family and whānau to seek substituted decision-making orders from the Courts. Officials will begin identifying people who may lack decision-making capacity and triage those who require immediate support [REP26-2-100 refers].

Lack of consultation on the policy proposals

- Tight timeframes did not allow for consultation on the policy proposals regarding employment arrangements and new carer payment.
- The Select Committee process will provide an opportunity for individuals and sector groups to comment on the Bill and the policies which it reflects.

Residual litigation risk (including between disabled people and carers)

- The Bill will respond to the fiscal and litigation risks from the Supreme Court decision.
- s 9(2)(h) [redacted]

[1] The Supreme Court highlighted factual circumstances that can indicate to DSS and providers that a person may lack decision-making capacity; the legal consequences flow from general law.

Continuation of current DSS policies

- The Bill establishes a new legislative hierarchy, with detailed settings to be developed through ministerial programmes. In the interim, the system must be able to continue operating.
- Existing DSS policies are being continued on a transitional basis rather than exhaustively validated: policies will expire after 3 years if not replaced earlier.
- DSS will progressively replace legacy settings with clearer, more transparent ministerial programmes, without disrupting current support arrangements.

Minimum Wage Act 1983 carve out

- The Minimum Wage Act 1983 is a worker protection that assumes an ordinary employment relationship, where the employer controls hours of work and bears the cost of paying for them.
- Following the Supreme Court's decision, supervision and availability can constitute "work" once an employment relationship is characterised, even where care reflects what families would ordinarily provide and where hours are not actively directed or controlled.
- Within the DSS system, funding decisions deliberately cap the level of paid care as part of a contributory model that assumes a combination of State funding, family support, and other natural supports. Employment law has no mechanism to recognise or discount that distinction once hours are classified as "work".
- Under the Bill, employment relationships for paid family carers sit between the disabled person and the carer. Once routes for employment claims against the Crown or contracted providers are closed, minimum wage liability for unfunded hours may fall on disabled people as employers, even where they have no ability to fund or control those hours.
- The transitional Minimum Wage Act carve-out provides that, for a three-year period, care provided beyond the number of hours funded under DSS funding policy is not treated as "work" for minimum wage purposes. This aligns employment obligations with funded hours and prevents disabled people being exposed to wage liability for care that arises from system-level funding constraints rather than their own decisions.
- The carve-out is temporary, targeted, and limited to paid family carers, and operates only during the transition period while an alternative, non-employment payment model for family carers is developed through ministerial programmes.
- Officials will review the operation of the carve-out during the transition period and provide advice to the Minister for Disability Issues before the three-year period expires, ensuring the measure remains proportionate and time-limited.

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Appendix One: Decisions and litigations on PFCs since 2010

Up until 2013 **2010** Atkinson v Ministry of Health NZHRRRT **2011** Idea Services Ltd v Dickson **2012** Ministry of Health v Atkinson NZCA 184	Funded disability support excluded payment to family carers of eligible disabled people. It was considered that any care provided by family members was informal and unpaid. This contrasted with the professional employed workforce of support workers.
2013	Human Rights Review Tribunal and Court of Appeal case found that exclusion amounted to discrimination on the basis of family status. The Ministry of Health introduced a new policy called Funded Family Care (FFC). It allowed funding to be provided to family carers in recognition of the care they provided, who were employed by the disabled care recipient. Critically, FFC did not explicitly provide for situations where the disabled care recipient did not have decision-making capacity to enter into an employment agreement (and where there were no authorised substituted decision-making orders in place).
2020	In 2020, the Government repealed relevant legislation authorising the FFC policy. People who had accessed funding under FFC were transitioned to flexible funding. Under the new scheme, it was possible for disabled people to employ family members to care for them, however this was not part of the original intent of the flexible funding. There were no savings provisions or bar on litigation put in place.
2025 **2025** Attorney-General v Fleming & Humphreys. Supreme Court. Citation [2025] NZSC 188	Supreme Court hearing that establishes a family carer employed by a disabled person who does not have decision-making capacity was, in effect, not accountable to that disabled person (that is their family member). After the judgment, any funded family carers who are determined to be MSD employees will now be accountable to MSD. The Supreme Court extended the definition of what engagement in an employment relationship means. MSD may be liable for remedies where it can be determined as the employer. A family carer may be found to have been engaged in employment by MSD if: • The disabled person receiving care does not have decision-making capacity to be a party to an employment agreement or to nominate an agent to act for them, which voids the validity of the employment agreement (note that determination of a person as not

	having decision-making capacity is set by the courts or through a valid Enduring Power of Attorney); and • MSD had awareness of the care and support being provided by the family carer (through the assessment and funding allocation process; and for some, knowledge of the disabled person's likely lack of decision-making capacity to contract); and • MSD had made payment to the family member to provide care and support, and where the family member is constrained due to their care duties that goes beyond reasonable accommodations, then this constitutes work undertaken by the family member. MSD undertook monitoring of that care (including any reassessment of support needs). Therefore, any family carers who are engaged in this kind of work have to be paid at no less than the minimum wage and have corresponding employment conditions (for example, supervision, annual leave, sick leave, etc).

Appendix Two: Use of Delegated Authority

1. **Clarification that ministerial programmes can be used for issues relating to residential care.**

    Clause 11(2)

    - This would provide clarity that you in your capacity as the Minister for Disability Issues can make decisions on funding mechanisms for residential care services such as decisions on prioritisation of residential care packages.

2. **Clarification that services provided under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 are excluded from the definition of DSS-funded disability support.**

    Clause 4

    - The scope of DSS is defined in the Bill by the DSS Vote. Compulsory care and rehabilitation are also funded from the DSS Vote. It is important to provide clarity on the applicable purpose and principles for people with intellectual disabilities who are charged with, or convicted of, an offence. For example, the Bill provides that DSS makes a contribution to care. Court-ordered compulsory detainment is fully funded for the compulsory care and rehabilitation of the disabled person.

3. **Including spouses in the saving provision regarding the Supreme Court decision.**

    Schedule 1, clause 16

    - s 9(2)(h) [redacted]

4. **Clarification that pending employment-related claims against the Crown and/or its contracted providers are extinguished in their entirety.**

    Schedule 1, clause 10

    - The pending claims involve multiple parties, including contracted providers and individual disabled people. Extinguishing claims in their entirety, rather than just the claims against the Crown, best aligns with Cabinet's decisions as one of the measures to address future litigation risk.
    - The extinguishment clause also recognises that claimants include a broader group than paid family carers, but the claims follow the same arguments.

Appendix Three: Advice from the Legislative Design and Advisory Committee

Legislative hierarchy

- The proposed DSS Bill instead uses primary legislation plus secondary legislation (ministerial programmes and directions).
- LDAC recommended a three-tier model: primary legislation, regulations, and ministerial notices.
- As advised to Cabinet, DSS is not yet in a steady state to embed overarching settings in primary legislation or regulations.
- Officials looked at the LDAC advice and continue to recommend the use of ministerial programmes. These are a proven model under the Social Security Act 2018, offering flexibility, speed, and the ability to trial or tailor support.
- Ministerial programmes can set both funding and operational detail, avoiding the need for an extra layer of detail needed to support ministerial notices. This helps user access to information on funding policies.
- Ministerial notices require PCO drafting, whereas ministerial programmes are drafted by MSD. Transitioning existing DSS policies into PCO-drafted secondary legislation would be a significant resource burden for PCO (potentially 30+ programmes).

Responding to the litigation risk

- LDAC raised strong concerns about extinguishing existing and pending claims, viewing retrospectivity as exceptional and controversial.
  - Further cases may result in further judicial drift regarding system-settings for DSS.
  - Cabinet was provided with options on extinguishing claims and decided to extinguish pending claims.
  - There are s 9(2)(h) claims, with potential liability exceeding s 9(2)(h).
- LDAC also commented on the breadth of the litigation bar and questioned whether one was justified.
  - Approximately s 9(2)(h) people are in similar situations as the Supreme Court litigants. There is a potential liability exceeding s 9(2)(h) in one-off costs.
  - If the pending claims are heard, this could expand the scope of that precedent and therefore increase number of the possible claimants.

Saving existing policies

- LDAC question whether existing DSS policies should continue and assumed that the Bill validated these policies.
- The intent is not to validate these policies, and they will only be saved for 3 years
- Retaining links to existing DSS policies is critical to clarity of how the transition works.

- Retaining existing DSS policies under the Bill also mitigates future Crown litigation and fiscal risk arising from courts, via the Minimum Wage Act 1983, requiring payment for unfunded hours. This reinforces that decisions on Crown funding and funding policy rest with the Government, not the courts.