MINISTRY OF SOCIAL DEVELOPMENT
TE MANATŪ WHAKAHIATO ORA

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Disability Support Services

Report

Date: 14 January 2026

To: Hon Louise Upston, Minister for Disability Issues
Hon Brooke van Velden, Minister for Workplace Relations and Safety

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Supreme Court decision on the employment status of Disability Support Service Paid Family Carers

Purpose of the report

1 This report advises you of the implications arising from the recent Supreme Court judgment: *Fleming v Attorney General* and *Humphreys v Attorney General* (the judgment). The judgment determines the employment status of the Ministry of Social Development's Disability Support Service (DSS) Paid Family Carers (PFCs) particularly when a disabled person does not have decision-making capacity. PFCs are family or whānau who are employed by a disabled person, using DSS funding, to provide personal care, household support, and other assistance to them.

2 This report:

2.1 Sets out the legal, fiscal, operational, and system impacts of the judgment and the risks it creates for the Ministry for Social Development (MSD)[1] s (9)(2)(g)(i)

2.2 Provides options for responding to the judgment, including policy as well as legislation to clarify the employment status for DSS PFCs

2.3 Provides advice on the operational steps DSS must take immediately, and

2.4 Seeks your preferences on next steps.

Executive summary

3 On 9 December 2025 the Supreme Court delivered its judgment that two PFCs are employees of the Crown using the definition of 'homeworker'[2] under sections 5 and 6 of the Employment Relations Act 2000 (ERA). The judgment also broadened what constitutes engagement in an employment relationship and found that DSS clients who lack decision-making capacity cannot employ PFCs. The court indicated that where PFCs are constrained due to care duties then this constitutes work widening the scope of funded DSS services.

4 You are receiving this advice now because the risks created by the judgment are immediate with respect to the successful appellants and will increase over time if not addressed.

Impact of the judgment

5 Engaging PFCs as employees of the Crown is fraught as the institutional arrangements for employment are not designed for the situation of PFCs caring for family members in their own home[3]. The practical challenges include (but are not limited to):

5.1 How work in the home can be supervised by DSS and what 'satisfactory' performance would look like

5.2 What normal workplace policies should apply in a home setting[4]

5.3 How DSS safeguards new employees if they are regularly expected to work more than 40 hours per week.

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[1] MSD is the administering agency for DSS, which is a separate Business Unit. DSS was previously administered by the Ministry of Health (prior to July 2022) and Whaikaha – Ministry of Disabled People (July 2022 to August 2024). MSD is the employer of public servants who work within the DSS Business Unit and is now the employer of PFCs. For convenience we are generally referring to arrangements between DSS and PFCs.

[2] The definition of homeworker is a person who is engaged, employed, or contracted by any other person (in the course of that other person's trade or business) to do work for that other person in a dwelling/house and includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser.

[3] Including the Employment Relations Act 2000, the Health and Safety at Work Act 2015 and the Public Service Act 2020

[4] Examples include: gifts, drugs and alcohol policies, equipment, and who else has access to the 'workplace'

Scale of the issue

6 Although the judgment directly concerns the specific facts of Ms Fleming and Mr Humphreys, the fiscal implications of the judgment could be significant. There are:

6.1 s 9(2)(h) similar cases before the Employment Relations Authority (Authority) that were stayed awaiting the judgment and may now re-start

6.2 approximately up to another s 9(2) people who share similar factual circumstances

6.3 approximately up to another s 9(2) people who are providing care in circumstances which are similar enough that the judgment may be of relevance to them.

7 The judgement also has broader implications for how support services are funded and delivered in private homes, and for the nature of the relationship between the Crown, those who receive services and carers. s (9)(2)(g)(i)

Responses

8 There are immediate actions the Crown must take to comply with the judgement and employ the two new employees. There are also options to mitigate risks to the Crown, which include policy, operational, and legislative responses while also maintaining services to disabled people. These are:

Response 1 – Must do: Implement employment arrangements for the two PFCs covered by the judgment and any others that the Authority determines are employees of MSD. It does not include any actions to mitigate risks, including historic or future fiscal risks.

Response 2 – For consideration: Amend the ERA to clarify the Crown is not the employer of PFCs and consider whether this has retrospective effect. The employment relationship could shift to providers but further work on this is needed. Amending the ERA is recommended for consideration and to be actioned as soon as practicable. This response would materially reduce future fiscal risk but would not remove historic risk unless the legislation is retrospective.

Response 3 - Recommended: Revise DSS operational policy and practice to address the issue of clients who lack decision-making capacity to employ or appoint agents. s 9(2)(h)

Response 4 – For consideration: A DSS policy review focussed on providing certainty on the respective roles of government and families in providing care to disabled people, including how DSS funds and provides this support. This work would be done in conjunction with other agencies given the relevance to other sectors. It would also inform a recommendation for wider DSS specific legislation to set Government's intention for the disability support system.

9 We note that Response 4 could conceivably result in recommendations that have the effect of reducing the choices that disabled people have, particularly the choice to

employ family members as PFCs. s (9)(2)(g)(i) [redacted]

Recommended actions

It is recommended that you:

(1) **note** that a recent Supreme Court judgment found that two PFCs are employees of MSD

1 **note** that in addition to ongoing litigation risks and possibly significant fiscal implications, there are operational policy implications to implement and oversee these new employment relationships

2 **note** that a range of operational, policy, and legislative response options have been identified to respond to the judgment and that a combination of these would be required to address fiscal risks and the risk of ongoing litigation

(2) **discuss** this advice and next steps with DSS and MBIE officials following your meeting on 21 January 2026

Minister for Disability Issues: yes | no
Minister for Workplace Relations and Safety: yes | no

(3) **agree** to forward this report to the Minister of Finance

Minister for Disability Issues: yes | no
Minister for Workplace Relations and Safety: yes | no

(4) **agree** to forward this Report to the Minister of Health

Minister for Disability Issues: yes | no
Minister for Workplace Relations and Safety: yes | no

Hon Louise Upston
Minister for Disability Issues

Date

Hon Brooke Van Velden
Minister for Workplace Relations and Safety

Date

14 January 2026

Justine Cornwall
General Manager, DSS Policy,
DSS
MSD

Bridget Duley
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Relations Policy
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MBIE

Date

The context

1 Funding for family members to care for disabled family members has been a long-term complex and litigious issue (refer to Annex 2 on decision and litigation history). The ongoing litigation has been driven by shifts in settings that allowed disabled people to pay family members for their care using Flexible Funding (FF) arrangements. Note that most comparable jurisdictions place limits on the ability of recipients of DSS-like funding to use it to employ close family members.

2 FF allows eligible disabled people to use their allocated disability support funding in ways that best suit their lives, rather than being limited to defined, contracted services from providers. FF arrangements were not intended for the Crown to enter into employment relationships with family members for the care they provided disabled family members.

The decision

3 Ms Fleming and Mr Humphreys argued that, when they provide funded care to their disabled children, they fall within the statutory category of 'homeworkers' under the Employment Relations Act 2000 and are therefore employees of the Crown with all the attendant protections and benefits.

4 On 9 December 2025 the Supreme Court issued its judgment that:

- 4.1 Ms Fleming and Mr Humphreys are employees of the Crown using the definitions of homeworker under section 5 and section 6 of the ERA
- 4.2 An awareness of, and monitoring of, support provided to disabled people through assessment and allocation processes are relevant factors when deciding if DSS has engaged a family carer as a homeworker. This sits alongside their specific factual circumstances including the decision-making capacity of the disabled person and the existence of court orders under the Protection of Personal and Property Rights Act 1988 (PPPR Act)[5]
- 4.3 A family carer who is required to provide overnight support, or who must be at home to provide support, is 'constrained' and consequently is entitled to payment for 'supervision'
- 4.4 A disabled person who lacks the decision-making capacity to be an employer and where an order hasn't been issued under the PPPR Act lacks the ability to nominate an agent or family member to act on their behalf.

5 With this judgment the Crown is now the employer of two PFC employees (Mr Humphreys and Ms Fleming) and can expect to become the employer in similar situations where the current employer is a disabled person, or an agent of a disabled person who doesn't have decision-making capacity and where no welfare guardianship order (or another relevant order under the PPPR Act) is in place.

[5] The PPPR Act provides for substituted decision-making for adults who lack decision-making capacity.

6 In these circumstances the judgment creates a new employment role for the Crown. It puts DSS into a direct employment relationship with PFCs and involves DSS in the arrangements for the provision of care in private homes where the care is provided by family members and responsibility for workplace health and safety in private homes.

Implications

7 The issues raised in the judgment are complex, interrelated, and raise significant policy, operational, funding, and litigation risks for the Crown. At a practical level current employment legislation is not a good fit for the circumstances of family carers providing care in their own homes.

8 The practical challenges include (but are not limited to):

8.1 How work in the home can be supervised by DSS and what 'satisfactory' performance would look like

8.2 What normal workplace policies should apply in a home setting (eg gifts, drugs, alcohol and who else has access to the 'workplace')

8.3 How we safeguard our new employees if they are regularly expected to work more than 40 hours per week.

9 At a policy level the judgment changes the nature of the relationship between PFCs and the Crown in the provision of care for disabled people, particularly where decision-making capacity is an issue. s (9)(2)(g)(i)

10 The judgment also fundamentally changes the relationship between the PFC and the disabled person they care for. Whereas before, the carer worked for their disabled family member, DSS now has a system where some PFCs in their own home caring for their family member are primarily accountable to DSS for the services they provide and how they provide them.

11 Preparatory work was undertaken in anticipation of the judgment. However, the specific detail of the judgment raises two new risks for the Crown. These new risks relate to what constitutes engagement in an employment arrangement (the judgment broadens the test for engagement) [6]☐.

12 Specifically, the judgment has widened the scope of homeworker to allow consideration of the "real nature of the relationship[7]" between the parties. It found that awareness of the care being provided, the monitoring of that care, and a lack of decision-making capacity of the disabled person receiving care will be determinative when considering if

[6] The specific grounds on which appellants were found to have been engaged as homeworkers by MSD relate to factual circumstances associated with engagement during the FFC Period which ran from April 2014 to August 2020). The Court found the Ministry of Health set the terms of engagement with family carers through the FFC notice under the New Zealand Public Health and Disability Act 2000. MSD's ongoing monitoring and obligations towards care provided to people who lack decision-making capacity, by carers as determinative to its finding that it had engaged those carers as homeworkers.

[7] This is a consideration of a definition of employee under section 6 of the ERA.

DSS has engaged them as a homeworker. This makes it more likely that courts will expand the group of PFCs engaged by DSS as homeworkers.

13 There is considerable interest from PFCs in this judgment and confusion in the sector regarding what it means for PFCs and disabled people as well as other actors in the system such as Hosts and agents[8]. There are likely to be misunderstandings and mis-matched expectations about the breadth and applicability of this judgment for other carers in other contexts and sectors, such as care in the home for older people with dementia.

PFCs covered by the judgement

14 The immediate implications of the case directly involve two PFCs. In addition, there are:

14.1 s 9(2)(h) PFCs who already have cases before the Employment Relations Authority (the Authority) who have similar factual circumstances including having been through the [9]Family Funded Care scheme. We expect these cases to start to progress through the Authority with some likely to seek a settlement with the Crown based on the judgment.

14.2 up to an additional s 9(2)(h) PFCs[10] who may be able to make a similar case as the successful appellants and could seek to become MSD/DSS employees. In addition, s (9)(2)(g)(i) [redacted]

14.3 However, we note that there is also a further pool of PFCs (up to approximately s 9(2)(h) [redacted] The Court did not specifically consider whether a person in this circumstance would similarly be considered an employee of the Crown. However, there is a current matter before the Authority that concerns this specific scenario and will test whether the judgment can be applied to this wider group of s9(2)(h).

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

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

[8] A Host is an organisation contracted by DSS to support a person with disability who is using individualised funding. An agent is a person who makes decisions on behalf of a disabled person regarding their individualised funding. The agent is chosen by the disabled person to make decisions on their behalf about managing their IF.

[9] FFC was a disability support scheme introduced in October 2013 to enable the Ministry of Health to pay for a disabled person to employ a family carer. Key elements of FFC are that it focussed on personal care and household management services, was provided at a maximum 40 hours per week at the minimum wage rate. The person being cared for had to be aged 18 or over and assessed as having high or very high disability support needs and not be able to remain at home if they did not have a family carer.

[10] The s 9(2)(h) involved disabled persons who may lack decision-making capacity to employ a PFC. The difference between this group and the s 9(2)(h) is they did not have FFC. It is through FFC that the Court in part determined that the appellants had been 'engaged'.

s 9(2)(h)

16 The judgment also found the DSS's Individualised Funding (IF) Service Specification assumes an agent has the correct legal standing without invoking the PPPR[11]. The service specs need to be aligned with the judgement to make it clear when a PPPR is required. The absence of a PPPR where a person's decision-making capacity is uncertain creates ambiguity s 9(2)(h)

17 The emerging complexities and resources needed to employ and manage and respond to more PFCs who are found to be employees are significant. This pressure would be compounded if the Authority deems that people paid through IF (the s 9(2)(h)) are also Crown employees.

Fiscal risks

18 DSS officials have prepared a summary of estimated retrospective fiscal risks based on up to s 9(2)(h) people who may share the same material facts as the two successful appellants. We have also estimated the implications if the additional s 9(2)(h) receiving IF can successfully claim employment status.

19 Historical litigation by PFCs was prevented by Part 4A of the New Zealand Health and Disability Act 2020 legislation which was repealed in September 2020. s 9(2)(h)

20 The table below provides an estimate of the potential retrospective costs associated with settling claims for the most probable groups of claimants. However, there are significant uncertainties and likely a large amount of variation in personal circumstances. Further detail on how the cost estimates have been calculated are included in Annex 3.

s 9(2)(h)

[11] The PPPR provides for a range of orders where person may lack legal or decision-making capacity. It requires an application to the Family Court and costs between $3-4k to obtain with further costs for periodic reviews.

[12] The Supreme Court did not overturn the Employment Court's finding in the Fleming decision that Part 4A of the New Zealand Public Health and Disability Act 2000 prohibits the payment of claims by PFCs for lost wages and holiday pay prior to that section's repeal in 2020. Instead the Court has referred Ms Fleming's case back to the Employment Court for further factual inquiry. Accordingly, claims for lost wages and holiday pay prior to September 2020 will currently *not* be a liability to the Crown.

[13] s 9(2)(h)

s 9(2)(h)

21 The above estimates are based on the likely average amount of additional hours that could be claimed. As the factual circumstances for each family is unique some may have no or few hours and others many hours. The estimates also consider the potential implications of the judgment in relation to what constitutes 'work'. For example, it found that work is the PFC being available during the night.

22 This liability is retrospective and will not be changed by prospective legislation. There will be forward costs to DSS associated with managing the employment of PFCs and the legal costs of managing further litigation.

23 s 9(2)(h)

24 MSD will absorb the internal costs to implement and operate the arrangements for the two new employees, including the necessary ICT changes to our payroll system. However, we will need to monitor the cost and resourcing impact on DSS should the number of employees expand.

25 The following sets out the options identified to respond to the judgment.

Options for responding to the judgment

Response 1: DSS implementing new employment arrangements (must do)

26 DSS has commenced the processes required to implement the Court's decision with respect to the two appellants who are now deemed to be MSD employees.

27 In essence this involves developing an employment agreement, determining remuneration (and back pay) and establishing them as employees. This includes preparing a letter of offer, an Individual Employment Agreement (that will need to specify hours of work and associated conditions), and the necessary ICT changes required to our payroll system and appropriation structure to enable payments to be made[14].

28 There are a range of other decisions and actions needed such as Ministry of Justice Conviction checks, determining performance expectations, determining reporting lines and ongoing supervision. Issues such as backfill while on leave, training requirements, equipment needed (e.g. phones, computers etc) are to be worked through. We expect there will be other implications that have also not yet been identified.

29 Annex 1 has further information on the immediately identified implications in relation to employment issues and under the Health and Safety at Work Act (HSWA).

30 The employment related issues outlined above are not straightforward to implement and some intersect with policy work that needs to be done. For example, level of payment and hours of work would be set in an employment agreement. s (9)(2)(g)(i) [redacted]

31 Health and safety requirements need to be specifically considered as carer's homes will now be deemed DSS workplaces. The obligations on DSS as the employer under the HSWA are significant and bring associated risks. For example, the hours of work, the safety of care for the disabled person, and wellbeing of employees are factors that will need to be actively managed.

32 Paying an employee to provide care in excess of 40 hours per week is likely to be considered a health and safety issue for both the carer and the disabled person. [redacted] s (9)(2)(g)(i) [redacted]

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

[14] A new appropriation category in the DSS MCA (fiscally neutral initially) will need to be established to enable MSD to directly employ family members to provide care. A separate briefing will be provided to you to approve and progress this change.

s 9(2)(h)

34 s 9(2)(h)

35 The level of payment and hours to be paid raised by carers and now in the judgment will need to be worked through carefully. s 9(2)(f)(iv)

Response 2: Legislate to clarify the Crown is not the employer of PFCs

36 Operational or policy responses to address the issue of employment status will help to mitigate ongoing risks to Crown and the DSS system (discussed below). However, these will take time to implement and will not fully address all the risks raised by the judgment.

37 s (9)(2)(g)(i) DSS and MBIE officials consider confirming Government's preferences for how we respond to the Court's decision on employment status should be addressed as soon as practicable.

38 PFC arrangements are a poor fit for a Crown employment model. s (9)(2)(g)(i)

39 It is also important to note that once employment agreements are in place s 9(2)(f)(iv)

40 Delay in addressing the employment issue will further complicate the role of the Crown and family in the provision of care in the home. s 9(2)(h)

41 Passing legislation preventing MSD from being deemed the employer of PFCs would address many of the implementation issues associated with this judgment. This would stabilise the situation while wider policy and operational work is undertaken. s 9(2)(f)(iv)

42 Prospective legislation would also clearly signal the policy intent behind FF and stop the addition of new employees. s 9(2)(h) [redacted]

Clarifying that the Crown is not an employer for DSS PFCs

43 Government could clarify that the Crown is not an employer for DSS PFCs via an amendment to the ERA. An amendment would specify that paid DSS PFCs are not employees of the Crown unless there is a written employment agreement with each is in place to that effect. Options include:

43.1 Removing 'Homeworker' from section 5 of the ERA– this could be drafted quickly but does risk inadvertently changing the employment status of other people who work at home for other reasons.

43.2 A customised carveout from section 6 which allows for employment status even in the absence of an employment agreement– this is more targeted to the issue but would require policy work to describe with precision the types of homeworker who are to be carved out and could potentially take longer to draft.

44 There will also be an option to make the legislation retrospective to address historic risks in response to the judgment not aligning to policy intent. Guidance from the Legislation and Design Advisory Committee is that retrospective legislation can be justified if it is entirely for the benefit of those affected or is in the public interest. This includes providing certainty as a result of litigation. Retrospectivity in these cases must be justified as being in the public interest and impairing the rights of litigants no more than is reasonably necessary to serve that interest.

There are choices for how to progress legislation

45 Legislation could be progressed through:

45.1 a standalone amendment to the ERA, or

45.2 a DSS related Bill could clarify that the Crown is not an employer for DSS arrangements unless there is a written employment agreement in place. This would also resolve the engagement issue for DSS by making it clear the Crown has not engaged them as an employer. s 9(2)(f)(iv) [redacted]

46 Either approach would have a similar effect to that used previously for filmmakers. In that case the Screen Industry Workers Act 2022 made explicit that the employment status of screen production workers (e.g., people working on films, TV, commercials, and games) is determined by their written agreement with the engager.

47 The preferred approach could be progressed through the normal legislative process (but could be truncated) or could be progressed more rapidly as a Budget night Bill.

48 DSS and MBIE officials had considered amending the Employment Relations Amendment Bill, but this is currently scheduled to be before the Committee of the Whole on 10 February. This leaves insufficient time to obtain Cabinet approval and draft an amendment.

49 s (9)(2)(g)(i) [redacted]

Response 3: Addressing cases where decision-making capacity is an issue

50 There is a specific issue related to clients where decision-making capacity is an issue. The judgment found that the lack of decision-making capacity of the disabled person to enter an employment relationship was a key factor in determining that the Crown was an employer. The Court ruled that a person without decision-making capacity cannot enter into an employment relationship or nominate an agent to act for them unless there is a PPPR Order in place.

51 Where a parent or family member is providing paid care funded through FF arrangements to a person who lacks decision-making capacity, but no PPPR Order is in place, the carer is now deemed to be an employee of DSS. It is important for DSS to address this issue as soon as practicable.

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

53 The only way to address this aspect of the judgment and to improve DSS's overall processes for when a disabled person lacks decision-making capacity, is to adapt our operational approach and guidance. Essentially this means that where decision-making capacity of the disabled person is suspected to be an issue, DSS would encourage (but could not require) the family to seek a PPPR Order[16].

54 s 9(2)(h), s 9(2)(f)(iv) [redacted]

[15] The controlling third party test is fact dependant. s 9(2)(h) [redacted]

[16] The PPPR is the only current mechanism to determine legal capacity as it relates to decision-making. Both the PPPR and the Code of Health and Disability Services Consumers' Rights set out a presumption of decision-making capacity.

s 9(2)(f)(iv) [redacted]

55 s 9(2)(f)(iv) [redacted]

56 Any change would also have impacts for the rollout of FF changes announced on 3 September 2025 following Cabinet's decision on 28 July 2026 (CAB-25-MIN-0250 and SOU-25-MIN-0088 refers). s 9(2)(h) [redacted]

Response 4: A wider review of DSS funding and supports is needed

57 Even if amendments to the ERA are progressed quickly to clarify that the Crown is not the employer of PFCs and DSS amends operational practice, wider issues about the respective contributions of family and the Crown need to be addressed. This has to be done in a way that reduces ongoing litigation and provides consistency and certainty for disabled people and their family, whānau and PFCs. The 2024 Independent Review of DSS highlighted this as an area requiring further work.

58 A review should identify how to best define the respective role of Crown and Family in providing care for disabled people. The review would also establish funding approaches and arrangements for providing that care that are fit for purpose, reasonable and still support choice and control for disabled people. A key issue for a review would be how to balance costs of care alongside the choice of disabled people in their care arrangements. This would be complex and have interagency considerations for other social sector agencies where care is provided by families.

59 The work would also need to consider the role of flexible forms of funding in purchasing supports, the intersection with other supports such as the Supported Living Payment and the use of, and access to, respite care.

60 s (9)(2)(g)(i) [redacted]

[17] The Code of Health and Disability Services Consumers' Rights allows health and disability services to be provided to persons without decision-making capacity so we could continue to support the disabled person during this period.

s (9)(2)(g)(i) [redacted]

61 While Policy work on funding models and the operational changes around decision-making capacity would clarify settings, given ongoing litigation in this area, DSS is still likely to face further challenges unless the parameters for the system are also codified in DSS specific legislation.

DSS specific legislation

62 Currently DSS's disability services are largely provided for outside of legislation[18]. DSS officials have been considering whether wider DSS specific legislation would be helpful to frame the purpose and intentions for the system and how it should operate. Policy work on this is already underway to inform advice to you and would be further informed by the proposed review proposed as part of Response 4.

63 DSS legislation could be distinct from any legislative response to the PFC employment issue. It would function to further clarify Government intentions for the system including managing fiscal risks by clarifying the nature and purpose of the services, what can be provided, to whom and when. It could also clarify the respective contributions of the family and the role of the Crown.

Next steps

64 DSS officials will continue the work required to support and establish Mr Humphreys and Ms Fleming as new DSS employees and provide the Minister for Disability Issues with an update on progress by 30 January 2026.

65 If directed, officials will commence the operational work to address circumstances where decision-making capacity of the disabled person is an issue. We will provide the Minister for Disability Issues with a briefing on the proposed approach, implementation issues, costs, and timing for the work by 20 February 2026.

66 If you decide to progress legislation to amend the ERA, joint agencies will prepare advice on the best option and timing by early March 2026.

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

68 We will provide further advice to the Minister for Disability Issues on this in early March 2026.

[18] Most of the system is provided through contractual mechanisms and set out in operational policy. Cabinet has generally made decisions on eligibility.

69 If a wider policy review to address key settings related to PFCs is agreed, DSS officials will provide the Minister for Disability Issues with an outline of the scope and focus of the work and associated timelines by February 2026.

70 DSS officials will prepare communications material as required to support whatever response options are to be progressed to manage the risks and implications associated with the judgment.

71 There will be implications from responding to the judgment on the planned policy work programme to strengthen DSS. DSS officials will provide further advice on this in February 2026.

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Annex 1 – Employment law implications

Operationally engaging PFCs as employees of the Crown is challenging with respect to relevant employment legislation. The institutional and legal arrangements for employment under the ERA and Health and Safety at Work Act (HSWA) are not designed for, nor are they suitable for, the situation of PFCs caring for family members in their own home. We note also that employees are generally required to follow lawful instructions from their employer. Alongside the establishment of management structures and changes to payroll and appropriation structures, the MSD would also need to:

1. Establish the number of hours that the employees are working and within what timeframes, and how this is to be managed (e.g. completion of time sheets and use of Time off in Lieu and payment of overtime).
2. Clarify the provision of leave. Due to the challenges in accessing cover and because family holidays may include care responsibilities it may be impractical to take leave in a family care situation. This may lead to leave balances that will become a financial liability. If the carer takes the disabled person on a holiday the question arises does this still constitute work or is it considered leave? Our new policies will need to address this.
3. Note that Part 9 of the ERA would now allow PFCs to bring personal grievances against the Crown for discrimination, harassment, unjust dismissal etc.
4. Ensure compliance with the Minimum Wage Act 1983 to ensure that PFCs are being paid fairly, now that supervision is considered "work."
5. Establish performance criteria.
6. Manage the entitlements under the ERA such as paid and unpaid rest breaks which are likely to be difficult for a family carer to take advantage of.
7. Consider how the obligations on Crown Employees are applied. For example, adherence to the Public Service Code of Conduct, managing the principle of political neutrality, and associated requirements of public sector employees.
8. Consider the potential difficulties with getting PFCs to sign employment agreements with DSS if they are already deemed to be our employees with implicit but unclear terms and conditions, which might make existing employment arrangements difficult to enforce.
9. Obtain the agreement of carer to undergo police vetting.

Health and safety implications

MSD will need to address the application of the HSWA. The homes of disabled people and their PFCs will now become workplaces and all of the accountabilities under the HSWA will apply. As an Employer DSS will need to meet its responsibilities and will need to be able to access these homes to ensure that they are safe and meet appropriate workplace standards.

The table below highlights the range of issues that need to be considered.

Safety of, and in, the workplace	*Legal position* Under section 30 of the HSWA DSS will have a duty to eliminate risks to health and safety, so far as is reasonably practicable. If it is not reasonably practicable to eliminate risks, then risks need to be minimised so far as is reasonably practicable. Employees have the right to stop working if they believe the workplace is unhealthy or unsafe. They are entitled to: • work in environments where the risks to health and safety are properly controlled • access adequate facilities, such as toilets, washing facilities and first aid • have sufficient training, information and support on how to do the job safely • contribute to health and safety decisions at the workplace • have personal protective equipment (PPE). DSS has an obligation to maintain a physically safe workplace. The primary workplace would be the residential home but could in fact be multiple locations throughout a day or week. DSS will need to work through the level of responsibility we hold to ensure workplace safety in PFCs homes. We need to work through the ability as an employer to enter PFCs homes to assess safety risks. In terms of wider wellbeing of PFCs and disabled people we know that 1-2-1 supervision creates potential risk so how do we monitor adherence to hours in practice.
PCBU's	DSS would need to have a clear understanding of the nature of the operations and what the hazards and risks associated with those operations are (and manage them so far as is reasonably practicable). The level of influence and control a PCBU has over the operations impacts the duty of care, so as this is changing for PFCs and DSS, we would need to know and reassess all the H&S risks associated with the work (for our

	workers and the people being cared for) and the changed extent that we are controlling and influencing the work. We would also need to reassess what is in place to support the wellbeing of the PFCs who will now become our employees.
Risks	*Legal position* Serious injury or death is a serious risk that would need to be mitigated (choking or drowning in the home/workplace are known risks for disabled persons). All carry liability so would require individual risk assessments. As a reference, WorkSafe prosecuted a contracted provider after a bath drowning in residential care. Although operational policies and guidelines were in place, they weren't followed. MSD will need to determine how to understand, negate or mitigate any known risks and how we can have assurance that policies are being followed in this context.
ACC coverage	There is also a blurring of lines between when the home is a workplace and when it is a private residence which impacts whether an injury might be workplace related.

Annex 2 - Decisions and litigation on PFCs since 2010

Date	Event	Notes
2010 to 2013	Cabinet considers how to respond to the *Atkinson v Ministry of Health* litigation Cases: • *Atkinson v Ministry of Health* [2010] NZHRRRT 1 • *Ministry of Health v Atkinson* [2012] NZCA 184	• In 2010, the Human Rights Review Tribunal finds that the Ministry of Health's policy of excluding family members from being paid to care for disabled relatives is discriminatory • In 2012, the Court of Appeal upholds the Tribunal's decision
2012	The Ministry of Health consults with the public on proposed options for payments to family carers	• There are 632 submissions • People favour an allowance, but employment has greater status, recognition and equity with non-PFCs • People want individual arrangements • There's strong support for independent advocacy for the disabled person plus external auditing
2013	Parliament amends the New Zealand Public Health and Disability Act to introduce Part 4A: Family care policies	• This passes under urgency on Budget night • The Crown and DHBs can only pay family members for support services under a family care policy (or another enactment) • "Family member" includes spouses, partners, parents, step-parents, grandparents, children, stepchildren and grandchildren, siblings, aunts and uncles, nephew or nieces and cousins • Claims of unlawful discrimination are precluded
2013	The Minister of Health issues the Funded Family Care Notice 2013 Power to issue notice:	• Disabled people accept the terms of the Notice when they accept their first payment of funding

	New Zealand Public Health and Disability Act 2000 s 88	• Payment rates are the minimum adult wage plus allowance for "on costs" (ACC etc) • 40 hours a week is the maximum • The disabled person must have high or very high disability needs, and would not be able to remain at home if they could not employ a family carer
2013	The Ministry of Health's family care policy goes live	• It's only available for disabled people over 18 • It's only available to parents
2013	The Ministry of Health settles with the Atkinson claimants	• s 9(2)(h) • s 9(2)(h)
2017	The Ministry of Health is ordered to pay damages of $233,091 to Mrs Spencer for pecuniary loss resulting from unjustifiable discrimination Case: *Spencer v Ministry of Health* [2017] NZHRRT 14	• 1 claimant • Methodology is hours per week, minus Carer Support received, plus 5% opportunity cost
2018	The Ministry of Health is ordered to increase the maximum hours of funded family care for Mrs Moody Case: Chamberlain v Ministry of Health [2018] NZCA 8	• 1 claimant • This is a judicial review sets aside the NASC's decision regarding hours of funded family care • The Ministry of Health is directed to reassess the funding and make appropriate allowance for the family carer's provision of care services to meet immediate intermittent needs as they arise at any hour of the day
2018	The Ministry of Health runs targeted engagement with the public on funded family care and paid family care SWC-18-0129	• 911 survey responses are received • Family carers are dissatisfied with the 40 hour a week cap and speak of the reality of 24/7 care and supervision

		• People want solutions that apply across all policy and age settings • People want flexibility, choice and options • "natural supports" needs to be defined
2018	Cabinet agrees to announce that it intends to repeal Part 4A	• Flexible Funded Care is widely criticised • Part 4A is not required to support policies for PFCs • Funded Family Care will be considered alongside the health and disability system review and disability system transformation
2018	The Ministry of Health settles with family carers who had discrimination claims outside of the litigation bar	• s 9(2)(h) • s 9(2)(h) • s 9(2)(h)
2019	In response to a petition, Cabinet agrees to increase payments to funded family carers from the minimum wage to rates comparable with the Care and Support Workers (Pay Equity) Settlement Act 2017 LEG-19-MIN-0132	• The petition has 964 signatories
2019	Cabinet agrees to widen Funded Family Care: Cabinet also agrees to repeal Part 4A entirely without a litigation bar SWC-19-MIN-0054	• Family carers are treated the same as other employed support workers • There's no longer a requirement for the disabled person to be the employer • Includes spouses and partners • Includes disabled people under 18 with high or very high needs to receive Funded Family Care from parents or close family members

2019	Cabinet approves the introduction of the amendment bill repealing Part 4A LEG-19-MIN-0209	
2020	Parliament repeals Part 4A entirely	
2020	The Ministry of Health widens the family care policy to include disabled people of all need levels (not just high and very high). Existing flexible funding allocations can be used to pay family careers.	• This is a response to COVID-19
2022	The Ministry of Health undertakes targeted consultation	• People supported the proposal to enable people with low to moderate impairments to pay a family member to provide their supports • Disabled people would prefer to pay a family member to provide their supports for safety, convenience, privacy and dignity, greater independence, better quality support at the time that they need it, and they feel more comfortable providing feedback to a family member than a stranger • Māori and Pacific stakeholders said that payment of family is a valuable way to reflect the importance of family relationships
2022	Cabinet agrees to a new family care policy SWC-22-MIN-0110	• Family members providing care (including parents, spouses and resident family members) to disabled people of all need-levels and all ages can be paid • Services in scope: Home and Community Support Services, Individualised Funding, Enhanced Individualised Funding, EGL Personal Budgets, Carer Support, Choice In Community Living, Supported Living • s 9(2)(h) [redacted]

Please note: page 25 has been withheld under S 9(2)(h)