

Aide-mémoire

Date: 15 January 2026

To: Hon Louise Upston, Minister for Disability Issues

File reference: REP/26/1/017

Security level: In confidence

Meeting with Minister Brooke van Velden on Paid Family Carers

Meeting details

REP/25/12/972 **Wednesday 21 January 2026**

Location: Virtual meeting (Link will be provided by your office.)

Purpose

- You are meeting with the Minister for Workplace Relations and Safety to discuss the potential for **legislative options** to remove the Crown as the employer of family carers following the Supreme Court decision.
- A briefing paper (REP/25/12/972 refers) has been provided to you and the Minister for Workplace Relations and Safety jointly prepared by MBIE and DSS officials.
- This aide-mémoire provides you with some key messages to support you at your meeting.

Background

Supreme Court decision

On 9 December 2025, the Supreme Court has determined that:

- Ms Fleming and Mr Humphrey are **employees** of the Crown.
- MSD is deemed to have **engaged** a family carer as a homeworker through an awareness of, and monitoring of, support provided to disabled people. This sits alongside their specific factual circumstances including decision-making capacity of the disabled person and the existence of court orders under the Protection of Personal and Property Rights Act 1988.
- The definition of 'work' is met where a family carer providing **supervision**, who is sufficiently constrained (e.g. unable to leave their home or sleep uninterrupted). The court noted that care should be shared between the family and the Crown, but did not specify to what extent.

- A **disabled person who lacks the capacity to be an employer** and does not have an order under the PPPR Act **lacks the capacity to nominate an agent or family member** to act on their behalf. In this situation, the carer is deemed to be an employee of the Crown.

Key Messages

- Thank MBIE officials for working together with DSS officials to provide joint advice.
- Paid Family Care (PFC) has been a long-term, complex and litigious matter where family carers of high needs disabled people have sought more funding and support from the Crown.
- The Supreme Court case has significant practical and fiscal implications for the Crown. These are:
 - MSD needs to immediately establish the two PFCs as employees of MSD by setting their hours of work in employment agreements. s 9(2)(h)
 - This work will start immediately. The wider policy work will follow.
 - Additional practical challenges in managing establishment of the two PFCs as employees of MSD include, how to effectively manage health and safety issues, who will provide oversight, setting-up payroll, access to data etc.
 - A further s 9(2)(h) factually similar cases before the Courts will likely now proceed.
 - An estimated s 9(2)(h) and could seek to be deemed employees of MSD.
 - s 9(2)(h)
 - s 9(2)(h)
 - s (9)(2)(g)(i)
 - The Supreme Court indicated that family members should be paid for 'supervision' and that a degree of proportionality should be found between what the Crown should cover and what is the responsibility of the family. However, it did not provide any clear guidance on the degree of proportionality. Further policy work will be progressed in this area.
- s 9(2)(h)
- Decisions on how to respond to the judgment will need to be made soon. Delaying these may increase the complexity and scale of the impact on the Crown.
- Officials have developed a set of potential responses, including legislative options. Where appropriate, these have been developed jointly with officials from MBIE. These are set out below.

- At the request of the Minister of Workplace Relations and Safety, officials have explored all non-legislative options to mitigate the risks ahead of considering any amendment to the Employment Relations Act.
- Operational options to mitigate the risks include:
 - For new users encourage a PPPR order to be in place to support disabled persons and their families where there may be decision-making capacity issues and restricting access to flexible funding in those cases until the order is in place.
 - For existing users further work is required to manage this issue as restricting access to flexible funding may unduly disrupt care arrangements.
- It is the joint view of DSS and MBIE officials that none of the non-legislative options would provide a 'good and easy fix' to respond to the risks, and therefore legislative options would need to be explored, including an amendment to the Employment Relations Act.
- The current Employment Relations Act is not a good fit for employing family carers. It does not cover expectations that the family will contribute to care where possible.
- While there is an Employment Relations Amendment Bill before Parliament, there is insufficient time to draft and get Cabinet approval to make these changes for its passing in February 2026.
- In the joint report on proposed responses to the judgment, officials recommend that MBIE and DSS officials develop further advice on options for legislation. This would include work such as retrospective legislation options to deal with the historical claim risks.
- s 9(2)(h)
- You seek to discuss legislative options with the Minister for Workplace Relations and Safety and agree how to proceed.

Summary of proposed responses

Summary of proposed responses to mitigate risks to the Crown include:

- **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. This would include setting work hours for PFCs, cognisant of the wider policy work required to establish the respective roles of family and government (see Response 4). 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. s 9(f)(i)(v)
 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:** 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. s (9)(2)(g)(i)

It would also inform a recommendation for wider DSS specific legislation to set Government's intention for the disability support system.

Next steps

Agree on next steps with the Minister for Workplace Relations and Safety.

End

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