Disability Support Services

MINISTRY OF SOCIAL DEVELOPMENT
TE MANATŪ WHAKAHIATO ORA

Aide-mémoire

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For:	Hon Louise Upston, Minister for Disability Issues
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Strengthening Disability Support Services: Talking Points for Cabinet, 7 April 2026

Key points are below. Attached:

1. Appendix one: additional talking points
2. Appendix two: table summarising choices to save or extinguish pending claims
3. Appendix three: questions following Social Outcomes Committee meeting on 1 April 2026

Key Points

The following summarise the context and intentions for the Bill:

- The Bill builds on actions already taken to strengthen and stabilise DSS.
- A second phase Bill will further build on this
- It will provide Government with a much-needed clear legislative base for disability policies and funding decisions.
- It will address core issues that have let courts redefine what the Government's policies and funding intentions are.
- The Bill will restore paid family carer arrangements to settings consistent with the Government's intent.
- It recognises that the employment model is a poor fit for family carers.
- It will place the decision-making role back with Government.
- It will mitigate most forward legal and fiscal risk.
- If not mitigated, meeting costs from further litigation may require service trade-offs.
- A choice is needed on whether to extinguish pending claims to address the estimated up to s 9(2)(h) [redacted] from those and restore policy settings.
- Some of the proposals in the Bill are temporary to allow time to address underlying issues, protect existing care arrangements and put in place more enduring and appropriate arrangements, such as improved support for carers.
- s (9)(2)(g)(i) [redacted]
- MSD officials will work closely with these other agencies on progressing these proposals, including the development of regulations to ensure clarity on agency boundaries.

- If cabinet approves you will provide a confidential update to select representative organisations on the development of the carers support package and the legislation in advance of the Bill's introduction.

Select Committee timings and the impact on legal risk [details in Appendix Three]

- The Bill is proposed to be introduced during the week of 18 May and referred to Select Committee after first reading.
- The truncated Select Committee process is not usual, or ideal given the contentious nature of some of the proposals.
- You are seeking to balance time for the proposals to be properly scrutinised with allowing sufficient house time for the Bill to pass ahead of the General Election, while not increasing the Crown's risk by lengthening the process
- The Bill must be passed to mitigate the fiscal and legal risks to the Crown and enable critical follow-on actions such as establishing Ministerial programmes that will provide for safer and more appropriate arrangements for DSS users who lack decision-making capacity.
- A typical 6-month Select Committee, is not possible given the time available between introduction in the week of 18 May and the final sitting parliamentary sitting day on 24 September.
- An 8-week process is possible ahead of the period of restraint.
- Appendix three contains more information.

Further background on estimated costs of saving claims [details in Appendix Three]

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

- If claims are saved, this supports access to justice, but exposes the Crown to up to s 9(2)(h) [redacted] in liability and could require trade-offs within Vote DSS and additional funding (depending on Court decisions.

- The facts of the pending claims are different from the Supreme Court case. s 9(2)(h) [redacted]

- Court decisions on the pending claims could also reset the balance between State and family responsibility, undermining current DSS funding assumptions and increasing long-term fiscal and litigation risk.
- Extinguishing claims would reassert that the Crown was never intended to be the employer of family carers, limit fiscal exposure, and restore policy control, s 9(2)(h) [redacted]

Timelines for introduction of the Bill

- May 2026 – Bill introduced and pass through first reading and referred to Select Committee, with a four-week period of consideration by Select Committee.
- By 31 July 2026 – Select Committee reports back to the House, with the intention for the Bill to be passed before the General Election.

Timeline for further policy work

- Mid 2026 – Implementation plan for developing Ministerial programmes, and high-level direction for Phase 2 legislation.
- End of 2026 – report back to Cabinet by the end of 2026 with the proposed package of new support for carers and pathway for implementation.

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Please note: page 4 has been withheld under S 9(2)(g)(i)

Appendix Two: Choices to save or extinguish pending cases that are before the Courts

Option	Advantage	Disadvantage	Risk Mitigation
Saving claims	• Upholds the right to justice. • In line with the legislation guidelines that legislature should not generally interfere with pending cases before Courts. • Grounds for discrimination is dismissed as the measure is demonstrably justified and is taken in good faith for the purpose of assisting or advancing disabled people who could be disadvantaged if no action is taken.	• Increase fiscal and practical risks for the Crown by validating the direct employment relationship with family carers. • If DSS is to respond to the fiscal risk within appropriate funding, then DSS will have to be restricted which in turn will disadvantage disabled people and their family carers. • Create unfairness that family carers who filed the case before the DSS Bill was introduced would have the opportunity for financial renumeration and other family carers would miss out.	• Crown will have to increase funding for DSS significantly to ensure existing services to disabled people are not reduced as a result of meeting the cost of claims.
Extinguishing claims	• Will provide certainty to disabled people, their families, whānau and carers following the Supreme Court judgement on the continuation of DSS as it is now. • It will reaffirm the longstanding policy intent that the Crown was never intended to be the employer of family carers of disabled people. • Manage fiscal risk by restoring the intended policy setting. • Grounds for discrimination and taking away the right to justice from family carers is dismissed as the action is taken in good faith to ensure continuity and sustainability of DSS. • Reaffirm that that family has the responsibility to care for their disabled family member first and this does not constitute work under the Minimum Wage Act 1983.	• It is likely that there will be negative reaction to the approach, and the decision may be contested in courts. • Limits carers' rights to justice.	• LDAC guidance provide for extinguishing current claims if the government needs to restore or clarify that it is the role of the government to set policy settings and not the Courts. • s 9(2)(f)(iv) [redacted] • DSS users will have options to raise concerns s 9(2)(f)(iv) [redacted]

Appendix Three: questions following Social Outcomes Committee meeting 1 April 2026

Bill timing and impact on the communities ability to contribute

- The table below summarises best-case scenarios for either a 4 or 8 week Select Committee process.
- A longer process will likely make it more accessible to the disability community, however there will be limits to making information available in alternative formats
- A longer gap between the Bill's introduction and Royal Assent does not increase litigation risk, *provided* the Bill includes a retrospective litigation bar from the introduction date and that bar remains in place through to Royal Assent. If that bar (or its start date) is removed during the Bill's passage, longer timeframes would likely increase both legal and fiscal risk and should be weighed carefully.

4-week Select Committee process	**8-week committee process**
Committee 25 May – 19 June Report back and second reading by earliest 23 June Royal Assent earliest 30 June	Committee 25 May – 17 July Report back and second reading by earliest 21 July Royal Assent earliest 28 July
Key advantage: Balances time for consultation with allowing sufficient house time with contingency for the Bill to pass before the General Election	**Key advantages:** - Provides for more time for submissions (if the Select Committee chooses) - May make the process more accessible to some in the disability community (noting that there will be significant limits making information available in alternate formats) - Allows for more scrutiny if Cabinet decides to extinguish claims
Key disadvantage: A truncated process, may face criticism that there is insufficient time for scrutiny given the contentious nature of the proposals, especially if Cabinet choses to extinguish claims	**Key disadvantages:** - If Cabinet decided to extinguish pending claims there is a risk that a longer period before the legislation is passed provides more time for the Courts to progress claims that may set wider precedent (see Appendix One for further detail) - Risks insufficient House time to pass the Bill with less contingency for delays

The impact of saving cases

- s 9(2)(h) [redacted]
- The litigation bar, if included in the legislation, would put a cap on the Crown's liability for past events by preventing other carers from filing claims.

Saving claims

- Saving claims would offer family carers the right to justice, is in-line with LDAC guidelines that legislature should not interfere with pending cases before courts without justification.
- The option would increase fiscal risks to the crown by validating the direct employment relationship with family carers, and create practical risks for the Crown as employer of carers in their own home. s 9(2)(h) [redacted]
    - s 9(2)(h) [redacted]
    - [redacted]

Examples of precedent setting and impact

- Further litigation and fiscal risk could be realised, however, as these cases are determined. The facts of the cases contain a wider range of issues would broaden the scope of the precedent.
- While the Supreme Court case related to adult disabled people who lack decision-making capacity, the pending claims include cases with different circumstances, for example:
    - s 9(2)(h) [redacted]
    - [redacted]
    - [redacted]
- s 9(2)(h) [redacted]
    - s 9(2)(h) [redacted]
    - [redacted]

s 9(2)(h) [redacted]

    - This would have significant cost and policy implications well beyond the individual cases before the courts and could impact other sectors

- In deciding any of pending cases, the Employment Court and ERA will reassess the balance between State responsibility and family responsibility. That balance underpins current DSS allocation settings, particularly the assumption that family and natural supports are available for disabled people.
- If the Crown is found to be the employer and remedies are awarded based on unfunded hours across this wider class of cases, then this would lock in public expectations about funded care levels. This would significantly increase fiscal, legal and judicial-review risk for the DSS funding model.

Extinguishing claims

- Extinguishing claims reaffirms that the Crown was never intended to be the employer of family carers of disabled people.
- There is an argument that extinguishing claims may take away rights from the claimants under the New Zealand Bill of Rights and would be inconsistent with the Convention on the Rights of Persons with Disabilities.
- The rebuttal is that extinguishing the claims is necessary to allow Government to restore policy settings and mitigate costs that may need to be met through trade-offs in service provision.
- LDAC guidance provides for extinguishing current claims if the government needs to restore or clarify that it is the role of the government to set policy settings and not the Courts.

s 9(2)(h) [redacted]