



Report

Date: 3 February 2026

To: Hon Louise Upston, Minister for Disability Issues

MSD File Reference: REP/26/2/058

Security Level: In confidence

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Legislation to stabilise and strengthen the Disability Support Services system and to address Paid Family Carers litigation

Purpose of the report

- 1 Further to our report of 14 January 2026 [REP/25/12/972 refers], this advice sets out options for a Disability Support Services (DSS) Bill which would create a standalone Act for disability support services. The intentions for the Bill are to stabilise and strengthen the DSS system and respond to the Supreme Court (the Court) judgment on Paid Family Carers (PFCs) *Fleming v Attorney General* and *Humphreys v Attorney General* (the judgment).
- 2 This report advises of:
 - 2.1 progress to develop a standalone DSS Bill for Budget night introduction that provides the foundations for DSS, responds to the implications of the PFC judgment and which would make consequential amendments to employment and other legislation
 - 2.2 the next steps and decision points for your agreement.

Executive summary

- 3 Following our report to you of 14 January [REP/25/12/972 refers] we met with you on 26 January 2026. At that meeting you supported the development of a standalone DSS Bill that would be foundational for the DSS system and address the implications arising from the PFC judgment.
- 4 This report comments on the key actions and decisions required if you agree to proceeding with a stand-alone DSS Bill. The actions include discussing with the Minister of Finance and the Attorney-General whether they would support Budget night legislation, to enable early drafting and if the Bill would be considered under urgency. We are also engaging with Crown Law on the issue of retrospectivity, while we continue work on a potential Bill. It also comments on the need for consequential amendments to the Employment Relations Act.
- 5 An initial outline of a possible DSS Bill is included in the Appendix. Further detail will be provided in subsequent advice for your consideration.

Recommended actions

It is recommended that you:

- 1 **note** that as part of the work to strengthen the DSS system, you have indicated your preference to consider legislation that sets out the purpose of the DSS system, and addresses the issues arising from or highlighted within the Supreme Court's judgment on PFC
- 2 **discuss** with officials the preliminary outline of content for a potential Bill as per the Appendix and options for development of the Bill when you meet with officials on Wednesday 11 February
- 3 **agree** that officials continue work on a potential standalone DSS Bill as Budget night legislation

yes | no
- 4 **agree** to seek the views of the Minister of Finance regarding the possibility of Budget night legislation

yes | no
- 5 **agree** to seek approval from the Attorney-General to draft a Bill before Cabinet approval

yes | no
- 6 **agree** to forward this report to the Minister of Finance

yes | no
- 7 **agree** to forward this report to the Minister of Health

yes | no

Hon Louise Upston
Minister for Disability Issues

Date



Justine Cornwall
General Manager, DSS Policy MSD

3 February 2026

Date

The context

- 1 In November 2025, Cabinet agreed to a range of actions in response to the Independent Review of DSS [SOU-25-MIN-154] and [CAB-24-MIN-301 refers].
- 2 Officials have been exploring the potential benefits of legislation to support the Government's intentions for the DSS system, including defining in legislation the purpose of the disability support system. The legislation would provide more clarity and certainty to disabled people, their whānau and families, and the wider sector.
- 3 While work to strengthen the system is ongoing, the 9 December 2025 judgment by the Supreme Court (the judgment) has raised matters that might require a legislative response. The Court determined that two PFCs are employees of the Crown using the definition of 'homeworker' under sections 5 and 6 of the ERA.
- 4 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.

Preferences you have already expressed

- 5 When we met with you on 29 January 2026, you indicated that:
 - 5.1 you wished to consider developing a Bill as the next step to stabilise and strengthen the DSS system
 - 5.2 the Bill would be an opportunity to set the foundations for the DSS system and address the implications of the judgment. The Bill specifically could clarify that the Crown is not the employer of PFCs (with other related and supporting provisions)
 - 5.3 officials should provide advice on the possibility of introduction as a Budget night Bill, reflecting that if you decide to take legislative steps to address the PFC litigation issues, there may be a case for this to be under urgency. We note that the grounds for urgency are being explored with Crown Law though the decision would rest with Ministers.
 - 5.4 you instructed officials to continue to progress operational and policy responses to the judgment [REP/25/12/972 refers]. You also directed officials to explore policy options to provide additional support to carers of DSS users.

Legislative options and major choices

- 6 While you have indicated that the Bill could be presented to the House on Budget night, there are further choices to be made with respect to legislation and how it should be progressed.

Standalone legislation

- 7 We seek your confirmation that you wish to progress a standalone DSS Bill for Budget night that would:
- 7.1 allow you to progress Government's plans to strengthen the DSS system
 - 7.2 clearly signal to disabled people, their whānau and families and the wider community the purpose of the DSS system and how it would be positioned to support people with disabilities
 - 7.3 increase the clarity regarding the support the Crown will provide to people with disabilities
 - 7.4 provide for secondary legislation and other instruments, such as regulation by which you can further specify what the DSS system will deliver, to who and how
 - 7.5 address the uncertainty and risks arising from the judgment
 - 7.6 provide for consequential amendments to employment and other legislation as appropriate.

PFCs: retrospectivity and litigation bar

- 8 As work on the Bill progresses, you will have choices regarding:
- 8.1 retrospective provisions clarifying the legal consequences of employment agreements entered into before the commencement date of the Bill
 - 8.2 whether to extinguish current litigation¹
 - 8.3 the scope of any litigation bar.
- 9 If the Bill does not include retrospective provisions, the immediate exposure is expected to continue and DSS would be liable for events prior to the commencement date of the legislation. We are engaging with Crown Law on this matter as required by the Legislation Guidelines 2021. We have previously provided advice to you on fiscal risk [REP/25/12/972 refers].

The use of urgency

- 10 The judgment has set a precedent for the Employment Court and Employment Relations Authority to declare that DSS is the employer of PFCs. That precedent is fact-dependent on situations where DSS funded a PFC in circumstances where the employment agreement between our client/service user and their family member was void because the DSS user did not have decision-making capacity to employ their family member. s (9)(2)(g)(i)

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¹ Extinguishing current litigation would not need to treat all litigants uniformly. A Bill could include a saving provision allowing the claims of Mr Humphreys and Ms Fleming to continue to be settled or determined. This approach would be consistent with previous settlement legislation relating to carers.

declaration of employment is the gateway to seeking remedies for alleged breaches of their employment agreement going back six years.²

- 11 s 9(2)(h) [REDACTED] [REDACTED]
[REDACTED] The Employment Court will be asked to determine the agreed hours of work and entitlements for additional hours. This decision will set a precedent and set expectations both retrospectively and prospectively for other PFCs who provide care services for disabled family members who require 24/7 care and supervision.

- 12 s 9(2)(h) [REDACTED]

- 13 s 9(2)(h) [REDACTED]

- 14 Beyond the retrospective and prospective financial impact, further judicial decisions will effectively set policy parameters for DSS, including the Crown's responsibility for, and oversight of, family^[REDACTED] provided care in the home. The judiciary will consider DSS's appropriate responsibility for, and oversight of, care services provided by family members in the family home based on current legislative settings which is silent on key issues relating to the employment of PFCs.

- 15 s 9(2)(h) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- 16 You have indicated a preference for a Budget night Bill, recognising the urgency of the issue. We have consulted with Treasury officials who have provided initial advice that a Bill wider than one that just addresses fiscal risk would likely receive a lower priority for inclusion on Budget night. A narrower Bill focussed on the fiscal risk arising from the Supreme Court judgment is more likely to meet the criteria for a higher priority.

² The Employment Relations Act has a limitation period of six years for actions other than personal grievances

³ s 9(2)(h) [REDACTED]

Preliminary outline of content of a DSS Bill

- 17 The Appendix includes our initial thinking on what a DSS Bill could include. This reflects taking a foundational approach to the Bill which includes critical elements to support the functioning of the portfolio as well as address the implications arising from the PFC judgment. Any extensive work on additional foundational settings for consideration of inclusion could be challenging in view of the tight timeframes. However, the Bill as currently envisioned and if enacted, would provide a basis for subsequent amendments over time to address other opportunities to strengthen the DSS system.
- 18 The core foundational elements initially identified are:
 - 18.1 setting out the purpose of DSS services
 - 18.2 establishing a legislative hierarchy, for example, setting out what matters may be appropriate for secondary legislation (e.g. regulations) such as eligibility to services
 - 18.3 defining the role of the State and the family in care arrangements
 - 18.4 clarifying that DSS supports are provided within a budget
 - 18.5 providing for limits on funding for family members through PFC policies and a possible carve out of PFC arrangements from the Minimum Wage Act 1983).
- 19 The balance of the Bill would address the employment relations matters stemming from the judgment and any decisions on addressing litigation risks such as use of retrospective litigation bars.
- 20 We are continuing our work to develop a potential Bill. There are several fundamental choices that would shape the Bill. In subsequent advice you will be asked to formally confirm your preference on whether the Bill should have retrospective provisions or not, and how far the Bill should go in setting the foundations for a strengthened DSS.

Timeline of key dates

- 21 The table below outlines key actions and dates to develop and pass a Budget night Bill. Achieving this timeline is dependent on securing agreement from the Minister of Finance to support a Budget night Bill. We have consulted with Treasury officials on this who have emphasised the need to demonstrate fit for a Budget night Bill. We can provide further advice to support this engagement, and alternatives to the approach discussed in this paper.
- 22 The Bill would require provision for consequential amendments to the ERA. We recommend that you engage the responsible Minister on this matter. We can provide further advice on this.
- 23 In addition, if you agree to a Budget night Bill, we recommend you seek Attorney-General approval to allow the Parliamentary Council Office (PCO) to start drafting the Bill ahead of Cabinet Policy decisions. We can provide you with a letter to the Attorney-General to this effect

Date	Milestone
Tue 3 February 2026	Initial advice provided to your office on potential Bill
Fri 6 February 2026	Waitangi Day
s 9(2)(h)	
Fri 20 February 2026	Attorney -General approval to draft Bill ahead of Cabinet agreement
Wed 04 March 2026	Draft Cabinet Paper and Regulatory Impact Statement for Social Outcomes Committee provided to your office for feedback
Fri 6 March 2026	Preliminary drafting instructions to PCO
Mon 9 March 2026	DSS provides your office with an updated draft Cabinet paper
	Your office circulates the updated draft Cabinet paper for Ministerial consultation. MSD undertakes departmental consultation
Tue 10 March 2026	Ministerial Disability Leadership Group meets
Fri 20 March 2026	Ministerial consultation ends
	Your office provides any feedback to DSS
Thu 26 March 2026	Deadline for Cabinet Paper and Regulatory Impact Statement to be lodged for Social Outcomes Committee
Fri 3 April – Mon 6 April 2026	Easter Weekend
Wed 1 April 2026	Social Outcomes Committee
Tue 7 or Mon 13 April 2026	Cabinet confirmation of SOC
Thu 16 April 2026	DSS provides your office with a draft Cabinet Legislation Committee paper
	Your office circulates the draft Cabinet Legislation paper for Ministerial consultation. MSD undertakes departmental consultation.

Date	Milestone
Fri 24 April 2026	Ministerial consultation ends
	Your office provides any feedback to DSS
Thu 07 May 2026, 10am	Deadline for the Cabinet Paper to be lodged for Legislative Committee
Thu 14 May 2026	Legislative Committee meeting
Mon 18 May 2026	Cabinet meeting
Thu 28 May 2026	Budget Day

Further policy work

24 s 9(2)(f)(iv)

Summary of next steps

- 25 Alongside your engagement with the Minister of Finance, Minister for Workplace Relations and Safety, and the Attorney General, officials will continue to develop advice on a potential Bill. That includes engaging with Crown Law to clarify the grounds for retrospectivity and within that, how broad or narrow the application of that could or should be.
- 26 We are also continuing to refine our analysis of fiscal risk and the operational and policy work for DSS depending on whether legislation is enacted and if it is, how that would flow through to family care arrangements.
- 27 If you decide to proceed, we will also need to consider how and when to communicate the intention to legislate with the disability community, noting that Cabinet approval will be needed to do so ahead of Budget night.

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Appendix – Outline of a potential DSS Bill

Topic	Intent	High-level options
Strengthening the Disability Support Services (DSS) system by setting the Government's intention for DSS		
Purpose of DSS	To provide in legislation the intention of DSS to provide clarity on what DSS is.	Policy choices include 1. a functional definition (recommended) 2. aspirational approach. Feedback to date from sector engagement indicates the DSS system should prioritise supporting disabled people to have their everyday needs met as a priority.
Providing in legislation key decision-making mechanisms, such as eligibility	Provides clarity on decision-making processes and where users can find information such as eligibility criteria. Decision-making on eligibility has been ad hoc, with some determined by Cabinet and others by Ministers.	Setting key parameters e.g. eligibility, assessment processes 1. Status quo - operational policy and various mechanisms (e.g. Cabinet agreement, Ministerial decisions) 2. Ministerial decision-making and publishing in Gazette 3. Secondary legislation, where appropriate, for eligibility criteria, to allow for policy changes as needed. Primary legislation sets out key elements of eligibility. No recommendations at this stage. We will consider the Legislation Design Advisory Committee guidelines in providing this advice.
Role of state and family	To clarify that DSS is a contribution to care and families have a role to play. Since 2020 there has been no legislative basis for the paid family carer system, and current policies are not consolidated.	1. Make it clear that DSS is a contribution to care 2. Point 1 above and provide in legislation that family generally have a primary care role (recommended) Between 2013 – 2020, health legislation provided that the family generally have a primary care role in relation to DSS.
Providing clarity that DSS funds supports and services to disabled persons	Clarifies that DSS funding is limited by eligibility criteria and a finite budget. Clarifies MSD or their providers cannot pay for support services provided by family members other than in accordance with DSS policy.	1. Status quo – legislation is silent on the nature of the DSS funding system 2. Rely on purpose statement for DSS to set out nature of the system 3. Simple qualifier to objectives referring to “within the funding provided” 4. Provide more detail in legislation about how funding is provided e.g. in line with eligibility and allocation policies (recommended).

Topic	Intent	High-level options
Provide for limits on funding to family carers (eligibility criteria, conditions, hours)	To make it clear that there are limits to funding of family carers. Reinstate some of the parameters established by the previous legislation providing for the paid family carer system.	1. Make it clear that there are limits to funding for family carers 2. Point (1) above but clarify that any care activities outside of the limits does not constitute 'work' for the purposes of the Minimum Wage Act 1983. Further advice is being sought on the extent to which there may need to be clarification of the interaction between DSS funding limits and the Minimum Wage Act 1983. We also need to engage with MBIE on this.
Addressing the Employment Relations Act 2000 matters		
Clarifying that Ministry of Social Development (MSD) is not an employer for DSS unless there is a written employment agreement to that effect.	To make it clear that MSD is not an employer in relation to DSS unless there is a written agreement.	1. Legislation clarifies that MSD is not an employer for the purposes of section 6 Employment Relations Act 2. Point (1) above plus clarifies that MSD and hosts and agents are not a controlling third party (a party that can be joined in a personal grievance because of it has some form of control over the employment relationship). Further legal advice and engagement with Ministry of Business, Innovation and Employment (MBIE) is necessary on the controlling third party risks and mitigation options.
Providing a transition process for dealing with employment agreements made where the disabled person may not have had capacity to enter into the agreement.	To legally validate employment agreements for disabled people lacking capacity, ensuring continuity of care while addressing lack of Personal Property Protection Orders.	1. Legislation does not address transition and use a litigation bar to prevent further challenges 2. Legislation provides validation of existing employment agreements for a fixed time period such as two years to allow to transition to either provider as employer or a person who has a Personal Protection Property Order for the disabled person to allow them to employ a person Option one would not provide clarity around who the employer is which is a key underlying principle of the Employment Relations Act 2000. We propose to explore further options with MBIE. If a transition process is included, the timeframe will also have options.

Topic	Intent	High-level options
Mitigating the Crowns fiscal and litigation risks		
Extinguish successful appellants (Fleming/Humphries)	To reduce the Crowns fiscal risks and the difficulties of an employment relationship with Paid Family Carers	1. Do nothing – comply with the Supreme Court's judgment, [REDACTED] [REDACTED] [REDACTED] [REDACTED] 2. Extinguish successful claims We note that generally those successful in making a claim get to receive financial recognition of their successful litigation. Crown Law advice is required.
Extinguish employment related claims to be heard [REDACTED] s 9(2)(h) [REDACTED]	To reduce the Crowns fiscal risks and the difficulties of an employment relationship with Paid Family Carers	1. Do nothing –continue litigation and comply with any Court judgment or directions, s 9(2)(h) [REDACTED] [REDACTED] 2. Extinguish the claims 3. s 9(2)(h) [REDACTED] [REDACTED] 4. Address through a retrospective litigation bar. This would be a legal mechanism in the proposed DSS Bill to prevent or restrict a person from bringing a legal claim about things that happened before the Bill's commencement date. Crown Law advice is required.
Prevent historical employment related claims	To reduce the Crowns fiscal and litigation risks	1. Do nothing – defend claims, s 9(2)(h) [REDACTED] and associate actions as claims are made and dependent on the facts of the claim 2. Wait until significant risk has materialised and then consider retrospective action to prevent historical claims and extinguish any claims to be heard 3. Restrict the Court from awarding certain remedies, including unpaid wages and damages for personal grievances 4. DSS Bill option: Put in a retrospective litigation bar that prevents or restricts from bringing claims about things that happened before the Bill's commencement date e.g. the Court

Topic	Intent	High-level options
		cannot hear these cases s 9(2)(h) Crown Law advice is required.
Prevent future employment related claims	To reduce the Crowns fiscal and litigation risks arising from the Supreme Court judgment and wider risks.	1. Do nothing – defend claims, s 9(2)(h) and associate actions as claims are made and dependent on the facts of the claim 2. Wait until significant risk has materialised and then consider retrospective action to prevent historical claims and extinguish any claims to be heard 3. Restrict the Court from awarding certain remedies, including unpaid wages and damages for personal grievances 4. DSS Bill option: Put in a litigation bar that prevents or restricts from bringing new legal proceedings Crown Law advice is required.
Prevent wider litigation claims (e.g. discrimination)	To reduce the Crowns fiscal and litigation risks	1. Do nothing – defend claims, s 9(2)(h) and associate actions as claims are made and dependent on the facts of the claim 2. Wait until significant risk has materialised and then consider retrospective action to prevent historical claims and extinguish any claims to be heard 3. DSS Bill option: Provide limitation on discrimination and employment related matters cases 4. DSS Bill option: Provide a wider litigation bar for all litigation risks from Paid Family Carers. Wide prevention of litigation is rare. However, the historical Paid Family Carers retrospective litigation bar between 2013 and 2020 did not cover employment. This has allowed the current proceeding to be heard. Crown Law advice is required.