

Report

Date: 30 April 2026
To: Hon Louise Upston, Minister for Disability Issues
File Reference: REP/26/4/306
Security Level: In Confidence

Disability Support Services Bill: Further decisions sought and updated draft Cabinet paper

Purpose

This paper recommends that you seek Cabinet approval for additional policy decisions related to the Disability Support Services Bill (the Bill); and, that you use your delegated authority to make minor policy and technical revisions to the draft Bill.

Recommended actions

It is recommended that you:

- (1) **note** we have received and considered feedback from agencies on the draft Cabinet paper: Disability Support Services Bill – Approval for Introduction. **noted**
- (2) **note** that as a result of feedback we propose some changes to the draft Cabinet paper before it is finalised for lodgement to the Cabinet Legislative Committee by 10 am on 7 May 2026. **noted**
- (3) **agree** to use your authorisation to make minor or technical changes to the draft Disability Support Services Bill to:
 - (a) clarify that ministerial programmes can be used for funding decisions and policies relating to residential care. **agree | disagree**
 - (b) clarify that services provided under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 are excluded from the definition of DSS-funded disability support. **agree | disagree**

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|---|-------------------------|
| (c) clarify that pending claims against the Crown and/or contracted providers (e.g. NASCs and Hosts) are extinguished in their entirety. | agree disagree |
| (d) include spouses in the savings provision regarding the Supreme Court decision. | agree disagree |
| <p>(4) agree to seek agreement from Cabinet that decisions regarding allocations should take into account, where appropriate, the resources and support available to an eligible person, which includes the support available:</p> <ul style="list-style-type: none"> • within their family, whānau and community, and • from other publicly funded sources. | agree disagree |
| (5) agree to seek agreement from Cabinet that decisions regarding allocations should take into account, where appropriate, the resources and support available to an eligible person. | agree disagree |
| (6) agree that the attached draft Cabinet paper can be lodged, subject to minor edits (such as typographical errors and readability improvements) by 10am Thursday 7 May 2026 | agree disagree |
| (7) note that, should substantive changes (such as additional policy decisions or the use of your delegated authority) be required, MSD will work with your Office to provide an updated Cabinet paper for your review and approval | noted |
| (8) note the Legislation Design and Advisory Committee (LDAC) has reviewed the Bill and raised their concerns related to legislative hierarchy, retrospectivity and saving existing policies. | noted |
| (9) note we do not recommend any immediate changes to the Bill in response to LDAC's feedback, and we do not support changes related to extinguishing claims. | noted |
| (10) note that during the Select Committee process we will consider whether changes should be considered to address LDAC's comments on secondary legislation. | noted |
| (11) note that additional decisions may be required prior to finalisation of the Cabinet paper as the Bill continues to be drafted. | noted |

(12) s (9)(2)(g)(i) [REDACTED] noted
[REDACTED]
[REDACTED]

Hon Louise Upston
Minister for Disability Issues

Date

J Cornwall

30/04/2026

Justine Cornwall
General Manager Policy
Disability Support Services

Date

Executive Summary

1. This report:
 - 1.1 seeks agreement to additional policy decisions to be sought from Cabinet as well as the use of your delegated authority to make decisions in relation to policy detail and technical aspects
 - 1.2 updates you on initial advice we have received from the Legislation Design and Advisory Committee (LDAC) and
 - 1.3 updates you on feedback received from agency consultation, including how this has been actioned.
2. The additional decisions outlined below support the policy proposal that Cabinet has already agreed to for the Bill. While feedback from agency consultation and LDAC has been valuable, we do not recommend any immediate changes to the policy proposals or the Bill as currently drafted but will consider whether further adjustments are required through the Select Committee process.
3. An updated draft version of the Cabinet paper has been provided to your office. We will action your feedback and advise you of any additional decisions required as drafting for the Bill continues, before providing a final version for your approval.

We seek agreement that you use your delegated authority to make some minor and technical changes to the draft Bill

4. You previously agreed to use your delegated authority to make further minor and technical decisions to include in the Bill. This covered:
 - 4.1 provisions for the Minister for Disability Issues to amend saved DSS policies
 - 4.2 that the savings provisions for DSS policies are in place for three years from the commencement of the Bill.
5. We now seek agreement that you use your delegated authority regarding four additional matters:
 - 5.1 **Clarification that ministerial programmes can be used for issues relating to residential care.** 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.
 - 5.2 **Clarification that services provided under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 are excluded from the definition of DSS-funded disability support.** 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 detention is fully-funded for the compulsory care and rehabilitation of the disabled person.

5.3 **Including spouses in the saving provision regarding the Supreme Court decision.** s 9(2)(a) s 9(2)(h)

- 5.4 **Clarification that claims that are filed and are pending decisions are extinguished in their entirety.** The pending claims involve multiple parties, including contracted providers and individual disabled people. Extinguishing claims in their entirety rather than just limiting extinguishing the claim against the Crown best aligns with Cabinet's decisions as one of the measures to address future litigation risk.

Clarity on the relationship between DSS and the other resources and supports available to disabled people

6. The Bill already:
- 6.1 incorporates the principle that family and whānau have responsibility in the first instance for the wellbeing of their members.
 - 6.2 states that DSS is a contribution, and that it has regard to the needs and circumstances of eligible people.
7. We want to make sure the Bill is clear that family and whānau support, and other resources and support available to people can affect how much DSS contributes. There are a number of aspects of DSS policy that need to be reflected:
- 7.1 Where appropriate, DSS uses income and asset testing to determine eligibility and levels of support.
 - 7.2 DSS expects disabled people to make use of the supports that are available to them from other parts of government.
 - 7.3 DSS accounts for the presence and sustainability of support available from family, whānau and others in a disabled person's life in allocating support.
8. We propose that the Bill provide that decisions regarding allocations should take into account, where appropriate, the resources and support available to an eligible person, which includes the support available:
- 8.1 within their family, whānau and community and
 - 8.2 from other publicly funded sources.
9. We consider this to be consistent with Cabinet's policy direction to date, but for the avoidance of doubt we recommend you seek agreement to include this change.

Our response to the advice from LDAC

10. We met with LDAC on 22 April 2022. LDAC had not had the opportunity to review the draft Bill, but they have raised concerns on all aspects of the Bill we discussed with them that require consideration. The three substantive matters are: legislative hierarchy, retrospectivity risk, and saving and amending existing DSS funding policies. **Appendix one** provides a more detailed consideration of and response to LDAC's advice.

Legislative Hierarchy

11. LDAC questioned the use of ministerial programmes and suggested an alternative legislative hierarchy featuring regulation-making powers and ministerial notices. We have considered their alternative approach. We generally recommend regulation-making powers, however the DSS system is not in a steady state for matters such as making regulations to set out core parameters of DSS funded policies or ministerial programmes.
12. We therefore continue to recommend the use of ministerial programmes. Ministerial programmes allow greater flexibility, quicker implementation, and the ability to test or tailor support for specific groups within an overarching legislative framework. This represents a significant improvement on the current system.
13. LDAC made suggestions to strengthen the delegated power to the Minister to create ministerial programmes, such as a requirement to consult with representatives of the sector. We will consider this during the select committee process and provide you with further advice.

Retrospectivity risk

14. LDAC raised significant concerns regarding the proposal to extinguish claims that are filed but not resolved or determined before the Bill is introduced, and to bar claims regarding discrimination or employment status relating to historical events. LDAC noted the strong convention, arising out of separation of powers and principle of comity, that parliamentary legislation should not generally interfere with the judicial process. Cabinet was presented with options regarding lodged claims and chose to extinguish them.

Saving existing policies

15. LDAC noted that saving existing provisions is normally undertaken for the purpose of validating those policies and including those which would otherwise cease to have effect as a result of the legislative changes. They noted that they had not seen evidence that demonstrates why such a provision is necessary or helpful.
16. We are clear that our intention is that the existing policies continue under the new regime. Several provisions of the Bill rely on links to existing DSS policies, such as the inability to pay for excess hours outside of the DSS funding policy under the Minimum Wage Act 1983.

17. LDAC also made suggestions regarding transition processes, in effect transitioning to Ministerial Programmes in one go, rather than staged. We consider a phased approach would allow better prioritisation and management of the work required to transfer existing policies into ministerial programmes. This will also ensure the transition does not negatively impact on disabled people and their current care arrangements.

Feedback received from agencies

18. The draft Cabinet paper Disability Support Services Bill: Approval for Introduction was circulated for agency consultation from 22 April 2026 to 24 April 2026.
19. We received feedback from the following agencies: Te Puni Kōkiri (TPK), Inland Revenue and the Ministries of Business, Innovation and Employment (MBIE), Disabled People, Justice and Health. The Department of Prime Minister and Cabinet was informed.
20. We have considered the feedback and have made some changes to the draft Cabinet paper that require decisions from you. We are working with Parliamentary Counsel Office (PCO) to incorporate the feedback into the draft Bill).
21. The substantive feedback on the Bill from agency consultation included:
- 21.1 whether the Bill should leave open the possibility that the new carer payment could constitute employment in some cases
 - 21.2 possible inconsistency with the New Zealand Bill of Rights (NZBORA),
 - 21.3 concern over the lack of consultation on the Bill.
22. Other feedback included population impacts especially on Māori carers and concern that the Bill could overlap with other agency boundaries such as Health New Zealand funded disability support services, and the inclusion of eligibility criteria.

Payment for carers could constitute employment

23. MBIE supports the intent of the new carer payment to ensure that it does not constitute an employment relationship. They have suggested considering aligning the provisions in the Bill related to the new carer payment to the Real Estate Agents Act 2008 (REAA), which enables agents to be either an employee or independent contractor, but the written agreement is conclusive on the status of the agent. This provision is currently supported by section 6(4) of the Employment Relations Act.
24. We consider there are merits in the very specific suggestion from MBIE but at this stage we are of the view that we may have a narrower scope than the REAA. Our intent is to ensure that DSS is allocated through a consistent assessment and allocation process, rather than application of employment legislation.

Inconsistency with the New Zealand Bill of Rights

25. s (9)(2)(g)(i)
- [REDACTED]
- [REDACTED]
- [REDACTED]

s (9)(2)(g)(i) We have worked with MOJ officials to update the human rights content of the draft Cabinet paper to make the implications of the inconsistencies clearer.

26. s (9)(2)(g)(i)

Ministry of Health provided advice on managing litigation risk

27. The Ministry of Health provided advice on strengthening the management of litigation risks in the draft provisions of the Bill by aligning it with the text in the repealed New Zealand Public Health and Disability Act 2000, based on their experience with the paid family carer litigation in 2012-2013. We are considering the advice as part of the drafting process.

Consultation on the Bill during policy development

28. MBIE, Te Puni Kōkiri and Whaikaha have raised concerns on the lack of consultation due to the sensitivity of these proposals and the tight timeframes. There was particular concern on the impact on Māori family carers which are more likely to be affected and that no engagement was taken with them, tangata whaikaha iwi and hapu. We have not included these specific comments/issues into the Cabinet paper as it speaks to the policy proposals (already decided) rather than approval of the Bill itself.
29. The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) requires disabled people sufficient time to engage in policy proposals impacting them. We envisage that the eight week Select Committee process will enable disabled people, carers and whānau to provide feedback on the policy proposals underpinning the Bill.

Eligibility

30. Whaikaha is concerned that in its current form, the Bill is a missed opportunity to make eligibility for DSS much clearer so that DSS users would find it easier to understand and navigate.

31. s 9(2)(f)(iv)

Tax Status

32. s 9(2)(f)(iv)

Next steps

33. We will provide the final version of the Cabinet paper and cover report with a full summary of how we have addressed the feedback from ministerial and departmental consultation on 5 May 2026. The deadline to lodge the Cabinet paper is by 10am 7 May 2026 for the Cabinet Legislative Committee meeting on 14 May 2026.
34. We will provide an aide-mémoire by 13 May 2026 to support you at the Cabinet Legislative Committee. This will include talking points and a summary of feedback from Ministerial and departmental consultation.

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Appendix one: Our response to advice from the Legislation Design and Advisory Committee

LDAC concerns	Advice
Legislative hierarchy: LDAC supported the objective of flexibility through ministerial programmes but consider the primary legislation should provide more of the scope and purpose of the secondary legislation. LDAC also recommended considering a 3 tier legislative hierarchy with primary legislation, regulation-making and ministerial notices.	We agree with LDAC that primary legislation should clearly define the scope of secondary legislation. In our view, the DSS Bill achieves this through the purpose of DSS-funded disability support and the purposes of the Act. During the Select Committee process, we propose we continue to consider whether decision-making could be strengthened in the Bill. This could include provisions regarding decision-making criteria for the Minister when establishing ministerial programmes, such as fiscal implications, relative need, and prioritisation. We support a three-tier hierarchy as a longer term approach, comprising primary legislation, regulations, and ministerial programmes. However, as noted in previous advice, the DSS system is not in a steady state for such an arrangement. For example, there is only one common eligibility requirement. We continue to recommend the use of ministerial programmes. These are well tested under the Social Security Act and provide for funding policies and their detail in a one place. Historically, policies have not been easy to access for those that use the system. LDAC suggested a legislative hierarchy that would separate policy into regulations and detail into ministerial notices. This could make it harder for users to find funding policies and could require the Parliamentary Counsel Office to draft material. We continue to consider the use of ministerial programmes is the most appropriate way to achieve our intent and suggest that we consider the use of regulations in future amendments to the Act. Using ministerial notices the detail can be hard to determine because they prescribe the requirements and would rely on another layer to provide the technical detail. In order to implement the operational response to the Supreme Court's decision (including tighter controls around decision-making capacity), flexible funding will be an urgent priority for ministerial programmes. If a layer of regulation is required between

LDAC concerns	Advice
	primary legislation and the ministerial programmes, this will become extremely challenging.
LDAC raises significant concerns about proposals to extinguish claims that are filed but not resolved or determined. LDAC noted that legislation should be prospective, there is a strong convention not to interfere with the judicial process or deprive individuals of their rights. LDAC asked is <i>the level of fiscal risk of the s 9(2)(h) significant enough to justify the extraordinary (and highly controversial) step of extinguishing those claims?</i> LDAC does not believe on the evidence it has been provided that retrospectivity is justified and that the wording of provisions to extinguish claims is worded very broadly.	We note that Cabinet was provided options relating to the extinguishment of claims and agreed to extinguish claims.
LDAC noted that saving provisions are used to save something that would <i>'otherwise cease to have legal effect as a result of legislative changes being made'</i>. LDAC noted the principles that should be applied for validation, which include clarity on what is being validated, why it may be suspect, and not unintentionally validate anything beyond what is intended. LDAC did not consider that the savings or validation of existing DSS policies in statute was necessary or helpful.	LDAC appears to have assumed that the purpose of being explicit that the existing DSS policies continue to apply as to validate these policies. The purpose is to make it clear that existing DSS policies and individual allocations will continue to apply once it is enacted. LDAC noted that existing policies would not be abolished by the Bill, therefore, do not need to be saved. Cabinet has agreed to make it clear that existing policies and individual allocations continue under the new regime. We intend to undertake work to list the saved policies during the Select Committee process.

LDAC concerns	Advice
LDAC noted it is <i>'contrary to the overall direction of travel to preserve pre-commencement policies as part of the future legislative schema and will be contrary to your transparency objectives. It also creates ambiguity about whether or how pre-commencement policies can be amended'</i>. LDAC noted a clearer approach would be to avoid including pre-commencement policies within the legislative definition of "DSS funding policy" and instead making transitional arrangements for when new settings come in through ministerial programmes (or other secondary legislation as we discuss above).	The limitation of the Minimum Wage Act and being clear that the Ministry and its providers rely on the Bill relay on the Bill being clear that the existing DSS policies apply to these provisions. We do not support LDAC's advice to defer the use of ministerial programmes until DSS policies are transferred into them. Significant programmes, may take several years to change, and there may be opportunities in the interim to transfer other programmes within a shorter timeframe. MSD intends to develop a list of policies to be transferred. While this will not be completed in time for the Bill, we anticipate that the select committee may seek greater transparency about which policies are proposed for transfer.