legislative response will be alongside a range of operational responses and policy work on carer support options to address issues raised by the judgment. Work on the operational responses is underway and will be the subject of separate advice to you.

5. This advice sets out your choices with regards to a Bill.

   a. <u>Foundational elements to stabilise and strengthen the DSS system</u>

   Your choices relate to:

   - confirming the structure, purpose and fundamental system settings, including constraints, you may want to include in the Bill
   - addressing the role of State and family and limits the State's responsibility to the extent that Cabinet (or you as Minister where applicable), decides that support should be provided, and funding is appropriated.

   b. <u>Responding to the employment related issues arising from the judgment</u>

   Your choices concern:

   - stating in the Bill that MSD and its contracted providers supporting assessment or service coordination are not the employer of PFCs or a controlling third party under the Employment Relations Act 2000 (ERA).
   - confirming that pre-existing employment arrangements and other related arrangements are valid. This includes a transition period if the person (i.e. the disabled person who received Flexible Funding) did not have the decision-making capacity to enter into an employment arrangement or appoint an agent.

   c. <u>Addressing fiscal, operational and litigation risks arising from the judgment</u>

   Your choices focus on whether:

   - you wish to apply the legislation retrospectively (and to what extent)
   - to extinguish any claims, and bar further litigation. We are recommending that any claims that have already succeeded (currently just the two appellants at this time) are saved but that any claims that are in-process are extinguished, and further litigation related to carer employment status and discrimination are barred with respect to past events
   - to include 'avoidance of doubt' provisions to further reduce the risk of future claims arising from courts re-interpreting the new legislation. For example, making it clear that DSS is a contribution to a disabled persons support arrangements.

6. This advice also sets out the next steps through to Budget night, if Cabinet agrees to introduce the Bill. It concludes with an overview of implementation steps that would be taken post-Budget night.

A package of work

7. A package of work is planned to address the issues raised by the judgement. This includes:
    a. development of a new support measures for carers
    b. legislation to establish a foundational framework that promotes certainty and equity in access to funded disability support
    c. measures to ensure appropriate arrangements for disabled people who do not have decision-making capacity by new measures in relation to agents.
8. These measures will leverage recently rolled out changes that have enabled greater choice and control in how Flexible Funding can be used, and a consistent approach to needs assessment around the country (including a specific family carer assessment).
9. Work on the legislative framework will be phased:
    a. phase 1: the Bill establishes the foundational framework, and consequential work follows in support of transitional and operational arrangements
    b. phase 2: further work to enhance the foundational framework, for example complaints and appeal provisions, enhancing safeguarding, and protecting information collection and sharing (and any other further operational matters).
10. In the medium term, the forward work on policy issues might result in a proposal for an amendment Bill to address matters not addressed in the Budget night Bill and to reflect the further work undertaken to strengthen the system.

Recommended actions

It is recommended that you:

1 **note** that you have previously instructed us to progress work on a DSS Bill to set the foundations for the DSS system and to address issues raised by the Court's judgment

2 **note** that you have a range of choices as set out below with respect to core elements of the proposed Bill to create an authorising legislative framework for DSS

Foundational elements

3 **agree** that the purpose statement of the Bill should reflect the intention to provide disability support services which contribute to enabling eligible people to live their everyday life by providing disability support fairly and consistently from within funding available, having regards to their needs and circumstances

yes | no | discuss

4 **agree** that the Bill should clarify that DSS is a funding programme administered by an agency which makes a contribution to the care of disabled people

yes | no | discuss

5 **agree** that responsibility for care of disabled people rests in the first instance with family and whānau

yes | no | discuss

6 **agree** that the Bill will allow you, through Ministerial Programmes, to target funding based on a disabled person's circumstances and needs

yes | no | discuss

7 **note** that current eligibility settings for funded disability support services are complex and will require further work to be properly integrated into the legislative framework

8 **note** that existing eligibility settings will continue

9 **agree** that the Bill provide that MSD and its providers can only allocate funding or support, including for care provided by family members, in accordance with what is provided for under the Act, including under any savings provisions (existing policies that are saved)

yes | no | discuss

10 **agree** that the Bill should provide a framework for subsequent decisions on matters by establishing:

11 system-wide eligibility settings in regulations

11.1 Minister-approved and Ministerial Programmes

11.2 Ministerial directions

yes | no | discuss

12 **note** that even after passage of the Bill, decisions in the DSS system made under the Act will remain subject to normal judicial review

13 **agree** that the Bill does not include appeal provisions but note that these could be considered for inclusion in a future DSS amendment Bill

yes | no | discuss

Employment related provisions

14 **agree** that the Bill include that MSD and its providers can only allocate funding or other support, including to family members, in accordance with what is provided for under the Bill, including under any savings provisions (existing policies that are saved)

yes | no | discuss

15 **agree** that the Bill should specify that any care provided by PFCs beyond that funded in accordance with the Bill does not constitute 'work' for the purposes of the Minimum Wage Act 1983

yes | no | discuss

16 **agree** that the Bill should establish that MSD and its contracted providers supporting assessment or service coordination are not an employer for the purposes of section 6 of the Employment Relations Act unless there is an intentional written employment agreement to that effect

yes | no | discuss

17 **agree** that that the Bill should establish that MSD and its contracted providers supporting assessment or service coordination will not be a controlling third party under the Employment Relations Act

yes | no | discuss

18 **agree** that the Bill should temporarily validate prior/existing employment agreements (excluding any MSD or supporting agency agreement that were never intended to form an employment relationship) and any other arrangements disabled people who lack decision making capacity may have put in place to employ carers for a period of up to

three years to ensure continuity of care while addressing the absence of orders under the Protection of Personal and Property Rights Act

yes | no | discuss

19 **agree** that the Bill include for transitional and savings arrangements that will:

19.1 ensure existing DSS funding policies are saved and can be amended or revoked. This allows time to transfer existing DSS policies into Ministerial Programmes over time.

19.2 Confirm that existing DSS allocations/funding decisions are saved. This makes it clear that individuals' funding allocations do not change because of the passage of the legislation.

yes | no | discuss

Fiscal operational and litigation risk mitigation

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

21 **agree** that the Bill will have retrospective effect to validate all current PFC arrangements as if they were authorised by the Bill

yes | no | discuss

22 **agree** that the Bill will save the Court proceedings seeking remedies flowing from the Supreme Court's decision (Fleming v Attorney-General and Humphreys v Ministry of Social Development)

yes | no | discuss

23 **note** that if you agree to the above, s 9(2)(h) [redacted]

24 **agree** that the Bill should extinguish claims against the Crown that have been filed but not yet been determined or resolved s 9(2)(f)(iv) [redacted]

yes | no | discuss

25 **agree** that the Bill will include a litigation bar, effective from the date of the Bill's introduction, against claims regarding discrimination or employment claims related to the employment status of PFCs where those claims relate to decisions or events prior to the Bill's introduction in the House

yes | no | discuss

26 **agree** that the Bill should include 'for the avoidance of doubt' provisions to address any risk of remaining ambiguity regarding Government's intentions for the disability support system and the Crown's role in providing funding and support

yes | no | discuss

Other matters

27 **consider** the attached draft cabinet paper, which as drafted, assumes you have agreed to all the choices recommended above

28 **note** that if you do not agree with any specific recommended choices in this report, the cabinet paper will be redrafted to reflect your preferences before you discuss the draft cabinet paper with the Ministerial Disability Leadership Group on 10 March 2026

29 **note** the next steps for progressing the Bill as set out in this report and the timeframe for consultation to meet lodgement date.

Hon Louise Upston
Minister for Disability Issues

Date

JCornwall

Justine Cornwall
General Manager, DSS Policy MSD

4 March 2026
Date

The context

11. 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]. While work to strengthen the system is ongoing, the 9 December 2025 judgment has raised matters that require an urgent legislative response and the appropriateness of arrangements where someone does not have decision-making capacity. The Court determined that two PFCs are employees of MSD using the definition of 'homeworker' under sections 5 and 6 of the ERA.

12. The judgment has resulted in new employment relationships that are entirely inappropriate to the relationship between DSS and disabled people. They are not workable in practice, and are inconsistent with the policy intent. Further, they imply the State has primary responsibility for care, and this will result in very high costs to the State.

13. Noting the implications, we are nonetheless proceeding as legally required with all necessary actions to give effect to the judgment with respect to our two new employees. Alongside that we have provided advice to you on the wider implications for the pre-existing work to stabilise and strengthen the DSS system [REP/25/12/972 and REP/26/2/058 refer].

14. You have indicated concern for the implications, in terms of loss of clarity, possible interruption to existing care arrangements and expectations that may not be able to be met as well as fiscal risks, which are material.

15. There is currently no authorising framework for DSS beyond Cabinet mandates, various policies and MSD's appropriations. This is primarily because, the DSS system:

    a. is not underpinned by specific legislation and,

    b. has historically lacked clarity, even under the previous legislation (New Zealand Public Health and Disability Act 2000).

16. The absence of a framework has resulted in ambiguity regarding the role of the State versus personal/family responsibility and driven ongoing litigation and findings against the Crown with no regard to budget constraints. Decision-making also lacks sufficient transparency. Eligibility settings arguably lack consistency in design and application and DSS 'rules' are not clear for system participants (this includes disabled people, carers, providers s (9)(2)(g)(i) [redacted]

17. As a result of those concerns, you have asked that we move at pace to develop a Bill that will provide a foundational legislative framework for DSS and which also addresses the issues arising from the judgment. We are also preparing advice on options to better

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

support the wellbeing of carers to provide a sustainable model which does not include the MSD as employer. This will assist in addressing the underlying issues that have led to the lack of clarity and litigation in this area.

Operating assumptions

18. We have prepared this tranche of advice on the basis of the preferences that you have already expressed, notably that:

    a. you wish to progress development of a DSS Bill that will be a standalone piece of legislation to strengthen and stabilise the DSS system

    b. subject to agreement from the Leader of the House the Bill will be introduced on Budget night and then go through a short Select Committee process

    c. The Bill once enacted, will provide the foundations for the future operation of the DSS system

    d. The Bill will also address the implications arising from the judgment in terms of employment status, fiscal and litigation risks

    e. That there could be subsequent amendments via an Amendment Act to implement further actions to stabilise and strengthen the system[2].

Structure of the Bill and policy choices

Foundational elements to stabilise and strengthen the DSS system

19. The Bill provides an opportunity to set the foundations for DSS and improve system transparency, clarity and consistency. However, the design of the Bill also needs to recognise that:

    a. further system changes are expected in the short-to-medium term

    b. the level of detail and complexity around assessing individual need and allocation does not suit regulations. For example, assessment processes may have many categories and rely on assessment tools or professional expertise to reflect the needs across a spectrum of persons. We propose Ministerial Programmes (discussed below) which would be a better fit for this type of detail.

    c. the system operates under constrained funding and mechanisms need to be flexible to manage fiscal risks, which Ministerial Programmes would enable.

20. We propose to address the legislative uncertainty in the immediate term via a structure that saves current policies and enables flexibility for the future system. This can be progressed through a legislative hierarchy that includes:

    a. setting out the authorising environment in primary legislation

    b. system-wide eligibility settings in regulations

[2] In this briefing we foreshadow work to come that cannot be included in Budget night Bill in the time available. An example is provision for a statutory DSS appeals and complaints process.

c. further details about funding programmes, including specific eligibility criteria for those programmes, assessment requirements and service provision set out in Ministerial Programmes

d. Including a power to provide for Ministerial Directions to guide how certain provisions of the primary legislation are to be administered.

21. This approach is based on the welfare programmes model under the Social Security Act 2018. While, in theory, primary legislation could define terms such as eligibility and its criteria, MSD-funded disability support services are not currently stable enough and defining terms could constrain future strengthening developments. Accordingly, we propose the following legislative hierarchy (refer to the A3 in Appendix 2 for more detail):

a. Primary legislation would set out:

i. DSS purpose and scope

ii. Secondary legislation provisions for the power to make and amend:

- regulations
- Ministerial Programmes
- Ministerial Directions

iii. Transitional provisions

b. Secondary legislation (regulations) would set out qualifying/first order eligibility requirements

c. Secondary legislation (Ministerial Programmes), including

i. Minister-approved and DSS funded programmes administered by an agency

ii. transferring existing DSS services and creating new ones.

d. Ministerial Direction which would allow for discretionary instructions to the administering agency, e.g., consider relevant matters when making a decision to grant, or not grant, funding.

22. In the case of DSS there would be no ‘main benefit’ entitlement provided under the Act- rather all funding programmes would be set out in Ministerial Programmes. Under a DSS Ministerial Programme, the Minister would be able to set the purpose, eligibility criteria, package value, components of support and conditions. However, Cabinet approval for substantial policy changes or funding increases would still be needed. Regulations are proposed where there may be common eligibility factors across all funding programmes like residency status. We note that currently, each DSS programme has its own eligibility criteria.

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

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

24. The secondary legislation is not expected to come into force until further work is completed to review and rationalise DSS funding policies (though not with the intention of changing any key policy settings). The benefits of a DSS Ministerial Programme lie in their flexibility, speed of implementation, and ability to trial or tailor support for specific groups, while still operating within an overarching legislative framework that provides appropriate legislative authority for the programme or funding.

25. The structure recommended above would also align with the maturity level of the DSS system and reflect its complexity while allowing for future decision-making. The proposed approach allows for further work to be completed that is needed on the policy and details to be included in secondary legislation.

<u>Purpose</u>

26. Consistent with the approach proposed above, we have considered a range of potential purpose statements having regard to the Enabling Good Lives vision and principles and drafted a proposal with the following intentions:

    a. The purpose statement should embody a level of pragmatism

    b. It should reflect the intention that the Bill establishes that the DSS 'system' needs to operate within appropriated funding

    c. It also should be able to accommodate potential future decisions that may be taken to further strengthen the DSS system

    d. The purpose for the Bill also needs to be explicit that DSS provision of disability support is a contribution towards what an eligible person needs in their day-to-day life in response to an assessed need for support arising from their experience of disability.

    e. Total funding allocations for disability support must be within appropriated funding. Any person's funding allocation is not a guarantee an eligible person will be able to fully exercise choices or achieve everything that they want to do in their life.

27. The purpose has to be of immediate relevance and not in itself drive further changes in the DSS system. s (9)(2)(g)(i) [redacted]

28. Feedback from disability sector stakeholders on previous purpose wording has informed our current approach [SOU-25-MIN-0154 refers]. We have drafted the following for your consideration:

"The purpose of Disability Support Services is to contribute to enabling eligible people to live their everyday life by providing disability support fairly and consistently from within funding available, having regard to their needs and circumstances."

29. The proposed statement sets out in sequence, that the system will contribute, enable and support everyday life to the extent that funding allows. This is shaped by the principles of fairness and consistency and with regards to individual (and family and whānau) needs and circumstances. We consider that this framing captures the intentions for the DSS system and if you agree, we recommend asking PCO to draft a statement consistent with the intent of the above indicative purpose statement. Note that revisions to this may need to be considered once PCO has prepared the draft Bill.

<u>State vs Family roles</u>

30. The Supreme Court has recognised that there is a need to maintain proportionality between State and family responsibility. However, its judgment may have the effect of undermining this aspect of funding policy. s 9(2)(h) [redacted] This effectively overrides the assessment and allocation process, reduces family responsibility and creates a large fiscal risk.

31. s 9(2)(h) [redacted]

32. MSD considers that the Bill should make clear that the Crown, and not the Courts, sets funding policy. It also needs to make explicit that supports are provided within the budget appropriated for the purpose. We also recommend that the Bill explicitly enable DSS to prioritise funding and ensure DSS does not take on the role of support that should be provided by a disabled person's family, whānau or broader social network.

33. Differential treatment is not always unlawful discrimination under the New Zealand Bill of Rights Act. Discrimination may be lawful provided it is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

34. We consider differential treatment of disabled people with greater or lesser family or whānau support, and differential treatment of people providing care and supervision based on whether they do so for a family member, to be justified by:

    a. the general expectation that family members will provide other family members with a level of care and support

b. the intention for the funding available for disability support to be provided on the basis of need, and the requirement to account for the level of support available from family, whānau and broader social networks in determining what a particular person's level of need is

c. the requirement for the allocation of funding to be determined through the outcome of a needs assessment, and not to be dictated by the way in which services are subsequently delivered (i.e. choices made by disabled people and families over how to deliver care within allocated funding should not be able to establish an employment relationship that would require funding in excess of that allocation).

35. It will also be important that the Bill enables further work on opportunities for funded disability support to be used to invest early in support for disabled people, for example that promotes or maintains their independence. To ensure that DSS can continue to allocate funding based on person's needs and circumstance, and that future assessment, allocation and service delivery policies can continue to take these factors into account, we recommend that the Bill (in addition to the proposed Purpose above):

a. enable DSS to decide whether to provide for early intervention as well as a higher level of assistance to people who have more limited or less sustainable access to support from their families, whānau and broader social networks

b. clarify that assistance for an individual is provided within the range allocated for them under funding policy and within any limits the Minister may determine

c. includes that MSD and its providers can only allocate funding or provide support, including that delivered by family members, in accordance with what is allowed under the Act, including under any savings provisions (existing policies that are saved) the Act.

36. It will remain important for DSS policy and the design of Ministerial Programmes to provide flexibility for exceptional situations to avoid placing impossible or unsafe expectations on families.

<u>Reviews and appeals</u>

37. We have considered whether the Bill should include review and appeal provisions for decisions regarding eligibility or resource allocation. There is insufficient time in the development of this Bill to design and implement a fit for purpose statutory appeals process alongside the usual judicial review process. We recommend considering developing a tailored DSS appeals system as part of the strengthening work programme to be included in a future DSS Amendment Bill. In the absence of an appeals process, existing internal administrative review and appeal mechanisms will continue to operate.

38. We recommend that judicial review remain available, consistent with most legislation, for past, current and future events.

Responding to the employment related issues arising from the judgment

39. Ms Fleming and Mr Humphreys successfully argued that when they provide funded care for their disabled children, they fall within the statutory category of 'homeworkers' under the ERA and are therefore employees of the Crown with all the attendant protections and benefits. In its judgment, the Court noted:

    a. 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)[3],

    b. 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'

    c. A disabled person over the age of 18 who lacks the decision-making capacity to be an employer and where an order hasn't been issued under the PPPR Act also lacks the capacity to nominate an agent or family member to act on their behalf.

40. We recommend that the proposed Bill makes it clear that MSD and its agencies providing assessment, allocation and service coordination on behalf of the Crown (supporting agencies) are not an employer, through a consequential amendment to section 6 of the ERA. We have discussed this proposal with MBIE which noted that this approach has been used in other situations, such as for film workers.

41. However, the Bill would need to save the employment arrangements between MSD and Flemings and Humphreys and provide for their intentional written employment. [redacted]
    s 9(2)(h)

<u>Controlling third party</u>

42. There is a risk that the Crown and supporting agencies could be considered 'controlling third parties' under the ERA. The controlling third party provision[4] is designed for situations involving three parties, such as labour hire arrangements. However, it can be used in situations where an agency is not a formal party to an employment contract but none the less, exercises come control over the party's relationship.

43. A key element of the test is the degree of control that is exercised over a worker. [redacted]
    s 9(2)(h)

[3] The PPPR Act provides for substituted decision-making for adults who lack decision-making capacity.
[4] A party that can be joined in a personal grievance because of it has some form of control over the employment relationship.

s 9(2)(h) [redacted] In the case of PFCs, via the needs assessment and allocation processes, we agree the support package, including that a PFC is employed as part of the package and how much of the package is directed to that aspect of care.

44. It may be possible to amend operational processes to reduce the level of control and direction to reduce the risk that the Crown is found to be a controlling party. However, a degree of monitoring and control is necessary to ensure that any funding is used in a way that is consistent with the principles of responsible fiscal management under the Public Finance Act 1989.

45. We recommend the DSS Bill makes it clear that the Crown and supporting agencies are not a controlling third-party for the purposes of section 5 of the ERA and consequentially amend section 5 to this effect.

<u>Validating existing employment agreements with persons who may lack capacity</u>

46. The Court noted that if a disabled person over 18 lacks decision making capacity, they could <u>not</u> enter into an employment arrangement nor nominate an agent to act for them unless there is PPPR Order in place. That Act allows for a Court to recognise the lack of decision-making capacity and appoint a person or entity to act on the disabled person's behalf and for example, employ a disabled person's family member to care for them.

47. We do not have good information on how many of our clients lack decision making capacity in a legal sense nor of those, how many have a PPPR Order in place. However, we need to put arrangements in place regarding these people. Until the system to support people gaining a PPPR Order or the work of putting in place alternative employment arrangements for family carers is completed, we recommend that the Bill deem employment agreements where the disabled person may not have capacity to enter into an agreement as generally valid. Consequential amendments to the ERA will be needed to give effect to this provision for a transition period.[5]

48. Under the Code of Health and Disability Services Consumers' Rights (the Code) DSS is able to continue to provide existing services to any user identified through the assessment as someone who may lack capacity. Under the Code, every consumer must be presumed to be competent unless there are reasonable grounds for believing otherwise. People cannot be required to gain a PPPR Order s 9(2)(f)(iv) [redacted]

49. We consider that affirming prior arrangements as proposed would only be a temporary measure while we work through with these clients and their family and whānau the process to obtain PPPR Orders or establish alternative employment arrangements. These provisions would also include affirming the appointment of agents by disabled people.

[5] The exception relates to where the disabled person is a child under the age of 18 years and has been allocated a funding package where they are the 'employer'. We will need to develop a policy response to those cases and are seeking legal advice on how to address these situations.

50. The provisions related to this issue in the Bill would give us time to address this issue but set a time limit to put new employment arrangements in place backed by PPPR Orders. s 9(2)(f)(iv) [redacted]

51. A fairly long transition period will be needed to size the scale of the issue, identify the people involved, work with them, their families and whānau and obtain PPPR Orders where required. We think a period of three years is adequate. We would not be confident of being able to complete this work in a shorter time due to current uncertainties and known complexities.

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

Fiscal, operational and litigation risk mitigation

53. We have previously advised of the material fiscal risk arising from the judgment. We advised that the fiscal risk was conceivably approaching $500 million if no action is taken to mitigate it s 9(2)(h) [redacted]

54. s 9(2)(h) [redacted]

55. s 9(2)(h) [redacted]

56. s 9(2)(h) [redacted]

s 9(2)(h) [redacted]

57. The scale of the remedies claim and the breadth of expectations underlines that there needs to be careful consideration of retrospective provisions to validate current arrangements, a litigation bar to prevent new claims regarding past events, and savings provisions for the current claims (i.e. concerning whether existing claims can continue). We also note the ongoing risk that further claims will be lodged.

58. s 9(2)(h) [redacted] Each case will test the boundaries of the Court's precedent. The ongoing exposure, and public attention to the litigation, will materially reduce the stabilising effect of the Bill unless retrospectively is included, as recommended in this paper.

<u>Retrospectivity</u>

59. Retrospective provisions will be sensitive because there is a presumption against retrospectivity when it comes to legislation. Retrospectivity can, however, be appropriate in some circumstances. One of those circumstances is to provide certainty where uncertainty has arisen as a result of litigation and courts have made judgment at odds with policy intent. In this case retrospectivity would be justified to clarify that the Crown was never intended to be the employer of family carers.

60. We recommend including retrospective provisions that validate employment arrangements as they were before the judgment (excepting for Fleming and Humphreys). This will bring all existing arrangements under the new law. Without retrospective provisions, the core problem regarding the employment status of family carers, and employment entitlements of those carers, remains unresolved and the system would remain vulnerable to judicially driven policy shifts. Retrospectivity would provide certainty and finality. It would do this while also providing for fair, consistent and transparent treatment.

<u>Claims about past events</u>

61. A litigation bar will be sensitive because it limits access to justice under Section 27 of BORA. The treatment of current claims likewise raises questions regarding access to justice, focussing on named people who have already committed resources and gone through the emotional process of filing claims which include evidence regarding family relationships.

62. However, extinguishing claims and barring claims may be justifiable in situations where continued litigation would undermine system stability, shift core policy decisions to the Courts, or expose the Crown to significant and ongoing liability. Specifically, we note that Flexible Funding responded to the need for flexibility in care arrangements to

support greater choice and control by disabled people. It was not intended to imply or result in, a PFC being an MSD employee. Extinguishing claims would reflect the original policy intent of Flexible Funding.

63. There are potentially a number of choices related to claims regarding past events. These range from not allowing any claims to proceed, to allowing all current and future claims regarding past events. At that further end, all claims proven, known and unknown related to events before the introduction of the Bill would be extinguished. That would cover claims related to discrimination and employment status including claims related to arrears of remuneration, interest, legal costs and any other costs. The following sets out the choices and the case for and against each choice.

Option 1 (not recommended): No limits on claims about past events – [redacted] s 9(2)(h), s (9)(2)(g)(i), s 9(2)(f)(iv)

Claims filed before the date you choose would continue under the old law. This covers s 9(2)(h) [redacted] claimants (at time of writing) and potentially up to another s 9(2)(h) [redacted] in factually similar circumstances, if they decide to make a claim and possibly more. New claims could be filed and would be decided under the new Bill. This option is not recommended because most known fiscal and litigation risks for the period before the Bill is introduced would remain. s (9)(2)(g)(i) [redacted] Accordingly, this option would not address your stated preference to legislate to mitigate fiscal and litigation risks.

Option 2 (recommended): A small number of claims will be saved, and the claimant's treatment, or case, will continue under the old law. Claims that have succeeded by the time the Bill is passed would be either paid or settled (i.e. Ms Fleming and Mr Humphreys)[6] and their employment by MSD would continue. However, any other claims in progress (i.e. so far s 9(2)(h) [redacted] and further detail on this included in Appendix 3) no matter the basis for the claim, would be extinguished, and the Bill would prevent any future claims related to the period prior to the introduction of the Bill (or such commencement date you may decide to include). Unless prior period claims are barred, the fiscal risks will expand the longer it will take for the provisions to take effect.

64. Option 2 is recommended as a measured approach to established claims. Not extinguishing the two successful claims is also consistent with the convention that Parliament does not (with rare exceptions) remove the victory from successful litigants. s 9(2)(h) [redacted]

s 9(2)(h) [redacted]

65. Extinguishing claims that are in process as well as barring new claims about past events is likely to result in negative reactions from those involved as well as the sector more generally. However, this is unavoidable if the goal is to reduce pending fiscal risks.

66. If you wanted to further limit negative reactions, a variation of Option 2 would be to allow the current claims in progress and only bar new claims from a set date (Option 2a). s 9(2)(h) [redacted] The true liability will depend on the number of claims, periods claimed and value of individual claims.

67. We are also seeing much broader claims emerging, s 9(2)(h) [redacted] In addition, if the in-progress claims are not extinguished but you decide the Bill should bar new claims for the period before enactment, this would exacerbate the 'winner/loser' effect. This is where those who lodge claims before enactment would be seen as winning material benefits while those who may have similar circumstances for the same period but who did not lodge claims in time would be 'losers'. We note that if you accept our advice above, this effect would be present but be restricted to the two successful appellants (Fleming and Humphrey's). For these reasons, we do not recommend you further consider this variation of Option 2a.

<u>Period to which the Bar would apply</u>

68. The retrospective litigation bar should be at least six years. This is the limitation on employment claims (other than personal grievance) under section 142 of the Employment Relations Act 2000. It also recognises that between 2013 and 2020 there was a litigation bar on discrimination claims under the now repealed Part 4A of the New Zealand Public Health and Disability Act 2000.

<u>Some claims would not be barred</u>

69. We are proposing that any litigation bar solely relates to claims of discrimination and employment status. This focus is intended to stabilise the system and mitigate risks arising from the judgment and other employment related risks we have identified such as the Crown being declared a controlling third party. It should be noted that claims on other grounds could still be made. An example could be on the grounds of negligence.

70. We also note that we plan to draft the Bill in such a way as to ensure there can be no claims related to employment or discrimination for the period forward from the introduction of the Bill. In substance, the Bill would remove the grounds for prospective claims rather than barring them.

Avoidance of doubt provisions

71. Several of the provisions proposed are 'avoidance of doubt' provisions. For example, making it clear that DSS is making a contribution to a disabled persons support arrangements. Normally, legislation is not needed to make it clear the Crown decides funding policy limits. However, the judgment considered that the Courts, through the settlement process, could determine the funding to be provided to Fleming and Humphreys. For this reason, we consider it is necessary to make clear, what is normally implicit. We anticipate that there may be some feedback during ministerial and departmental consultation on this point.
72. Avoidance of doubt provisions will be reinforced by the introduction of Ministerial Programmes and directions which will also make clear the process of decision-making.

Transitional and savings provisions

73. In line with the advice in this report, the Bill will need to provide for the following matters:
    a. existing DSS funding and eligibility policies are confirmed on commencement. This allows time to transfer existing DSS policies into Ministerial Programmes over time
    b. confirmation of existing DSS allocations/funding decisions and their transfer to the new system. This makes it clear that individuals' funding allocations do not change because of the passage of the legislation
    c. to allow for existing employment arrangements and deem them as validly made and to continue while providing time for PPPR Orders to be obtained where they are required
    d. deeming of agent arrangements to be valid, even if they it may be voidable because they were made by persons who may not have capacity.
74. As we work through the Bill drafting, additional matters may need to be added to the savings and transitional provisions. We will advise you of any additions when we provide the final Bill to you for your consideration on or before 16 April 2026.

Further policy work and decisions

75. Because of compressed timeframes to prepare advice and drafting of the Bill, we anticipate that you may need to make a range of minor policy decisions once the detailed drafting of the Bill starts. Therefore, we have suggested that the Cabinet paper provides delegated power to you to resolve any such minor policy decisions before the Bill is provided to the Legislative Committee for consideration.

Steps to Budget night and beyond

76. The following sets out the major milestones/actions from this point to Budget night. We will work with your office on the finer details such as delivery of speeches and your pack for the Committee of the Whole stage.

Date	Milestone
Fri 6 March 2026	Preliminary drafting instructions to PCO
Mon 9 March 2026	DSS provides your office with an updated draft Cabinet paper and your office circulates the draft Cabinet paper for Ministerial consultation
Tue 10 March 2026	Ministerial Disability Leadership Group meets
Fri 13 March 2026	Ministerial consultation ends
	Budget night leg bid to office of the LHO
Thu 19 March 2026	Cabinet Paper and Regulatory Impact Statement lodged for Cabinet
Mon 23 March 2026	Cabinet meets, formal drafting instructions issued to PCO
Fri 3 April – Mon 6 April 2026	Easter Weekend
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.
Fri 24 April 2026	Ministerial consultation ends
Thu 07 May 2026	Cabinet Paper lodged for Legislative Committee
Thu 14 May 2026	Legislative Committee meeting
Mon 18 May 2026	Cabinet meets
Thu 28 May 2026	Budget Day – Introduction and first reading
Mon 1 June 2026	Select Committee process begins
25/26 June 2026	Report back and second reading
End of July 2026	Final reading

77. We understand you may wish to undertake targeted engagement with stakeholders prior to the introduction of the Bill. When we met on 3 March 2026 you indicated this engagement would be to set out your intentions to support carers and other matters. A recommendation reflecting the intended engagement is included in the draft Cabinet paper. The immediate post-Budget night actions will include further communications to the sector, providers, our users and the wider public.

78. Somewhat further away are possible additional changes to appropriations either to expand the new appropriation for PFCs or to close it out, depending on your decisions arising from this report, Cabinet decisions and the final form of the Bill if it is enacted.

Subsequent work programme

79. There are related actions already underway on policy work to complement the Bill including options for providing support for family carers (such as a stipend and other supports) and operational work underway to address situations where a PPPR Order is required but not in place. As noted earlier, we will provide separate advice to you on that work programme.

80. There will be a programme of work to establish Ministerial Programmes. A key example relates to reviewing existing policies to transition them into Ministerial Programmes. The scope of that work will need to be confirmed but may also cover a range of subjects such as the power to require information and other matters. Over the years there have been many ad hoc programmes and instructions within the system that will need review. This work may need to be prioritised. We will provide you with further advice on this work by the end of May this year.

81. Broader policy work as part of the strengthening programme will continue. This includes for example work on complaints and appeal provisions, enhancing safeguarding, and protecting information collection and sharing (and any other further operational matters). This may result in a proposal for an amendment Bill.

Near-term work related to Fleming and Humphreys

82. We will continue to respond to the ERA claims by Fleming and Humphreys s 9(2)(h) [redacted]

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Appendix 1 – Draft cabinet paper

Please note: pages 24-26 have been withheld under S 9(2)(h)