Disability Support Services

MINISTRY OF SOCIAL DEVELOPMENT
TE MANATŪ WHAKAHIATO ORA

Report

Date:	5 July 2026
To:	Hon Louise Upston, Minister for Disability Issues
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Security Level:	In Confidence and Legally Privileged

Alternative options for the DSS Bill

Purpose

1. This paper sets out alternative options for progressing DSS legislation for your consideration.
2. An overview of the options is included in the accompanying table.

Recommendations

It is recommended that you:

(1) **agree** to provide direction to Officials on your preferred option by Monday 6 July 2026 — **agree | disagree**

(2) **note** the options provided to you in the accompanying table

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Minister for Disability Issues

5 July 2027

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5 July 2027

Introduction

3. You have been considering your response to public submissions to the Social Services and Community Select Committee (SSC) on the Disability Support Services Bill. (DSS Bill).

4. You have asked MSD officials to provide high-level advice on alternative options for progressing the DSS Bill that address concerns raised by submitters, while continuing to mitigate the legal and fiscal risks flowing from the Supreme Court judgment on paid family carers.

There are four high-level options to progress the Bill

5. Officials have identified four high-level options to progress the Bill. These are described in brief below and in the attached table and were discussed with you on Saturday 4 July.

6. The options in brief are:

   6.1. **Option 1: Improve the current DSS Bill through the SSC**. This option is reflected in the current draft of the departmental report which we provided to you on Friday 3 July. It includes improvements to address the key concerns about the substance of the Bill raised by submitters to the SSC, including proposing consultation provisions for support programmes in secondary legislation. The foundational elements in the Bill support the operational response that further mitigate the Supreme Court risks beyond the direct changes to the Employment Relations Act (ERA) and the Minimum Wage Act (MWA).

   6.2. **Option 2: Improve the current DSS Bill and add a requirement for an empowering provision to commence after an Order in Council.** This option includes the improvements referenced above but adds a provision that the Support Programmes (Clause 11) provisions in total only comes into force through an Order in Council following consultation with representatives of the disability community on the overall provision.

   6.3. **Option 3: Amend the scope of the DSS Bill to remove foundational elements and retain only what is required to address the Supreme Court risks**. This option would remove content from the Bill that gives DSS a coherent legislative foundation that sets key parameters for the system. It would reorientate the Bill to only address the risks arising from the Supreme Court decision. A second phase of legislation would be required to establish the foundational legislative framework for DSS provided for in Options 1 and 2.

   6.4. **Option 4: Withdraw the DSS Bill and pass a new Bill under urgency to address the Supreme Court risks**. A new Bill would, as with the other options, address the risks arising from the Supreme Court decision and make amendments to the Employment Relations Act and the Minimum Wage Act. In addition, it may need to go further in addressing fiscal risks arising from live litigation as a new Bill may not pass ahead of further court determinations. A second phase of legislation would be required to establish a foundational legislative framework for DSS as provided for in Options 1 and 2.

7. Option 1 and 2 provide the strongest mitigations to address both existing and future risk arising from litigation. They do this by pairing the provisions that directly address these risks, such as employment clarifications (the Minimum Wage Act carve-out), with a legislative framework that provides a legal foundation for key operational changes, such as more appropriate arrangements for people who lack decision-making capacity. This legislative framework will make the system less vulnerable to judicial review.

8. Note that Options 1, 2 and 3 could also provide increased mitigation against financial risk that Option 4 includes if desired. Any changes to address the litigation provisions would need to be done via an Amendment Paper to the existing Bill.

9. Options 3 and 4 have a narrower scope and leave the system more vulnerable to future judicial review than options 1 and 2. Without the foundational elements currently in the DSS Bill the effectiveness of the legislation will be limited. The foundational elements have been designed to both enable the operational responses to the Supreme Court decision, as well as providing for a system that is more transparent.

10. No foundational legislative provisions also means that if further litigation risk is realised, there is no ability to quickly amend DSS-legislation to respond because amendments would be unlikely to fit within the purpose of that Act

11. Options 3 and 4 will need to be progressed at pace. This will carry an increased risk of errors in how the Bill is drafted. These errors may in themselves create or perpetuate risk.

12. By proceeding without the foundational elements, Options 3 and 4 will significantly increase the time that DSS will continue to operate without a solid legislative framework, with the associated risks and ongoing lack of transparency, clarity and oversight of how decisions are made. A subsequent phase of legislation will likely not come into force for several years.

13. It should also be noted that option 4 (and other options if amended to do this) will likely attract a negative BORA vet if it goes further to mitigate the risk from active claims by overriding any court decisions. Option 4 even would not be ready to proceed in the House until mid-August and would likely occur while active litigation is underway in the Employment Court (first week of August s 9(2)(h) [redacted] and in the Employment Relations Authority (Commencing on the 13th of August with s 9(2)(h) [redacted]

14. The accompanying table considers the benefits, risks and deliverability of these options in more detail.

Timelines and next steps

15. Timelines depend on the direction you wish to take and further consultation with PCO. More detail on the different procedural routes is included in the attached table. Some options will require further Cabinet decisions.

16. All options have a level of overlap with ERA hearings on current claims which are scheduled for 13-21 August.

17. Progressing Options 3 and 4 will require further consultation with Ministry of Business, Innovation and Employment officials and the Minister for Workplace Relations and Safety.

Options 1 and 2

18. Options 1 and 2 can be progressed on the current timetable via the SSC. If you choose either of these options, then Officials will finalise the departmental report and submit it to SSC on Monday 6 July. The SSC will then consider the report on Wednesday 8 July and proceed to direct PCO on drafting amendments to the Bill with a report back date of 13 August 2026.

Option 3

19. Option 3 will continue with the Select Committee process but will also require Cabinet agreement on 6 July to give you the power to act, given the scale of the changes that would be required to the current Bill. An Amendment Paper, following cabinet decisions, will be required. The overall timeline for this option will depend on PCO, Cabinet and House Time.

20. Officials would likely require up to an additional week to redraft the departmental report to SSC. PCO would also require additional drafting time which would push out the timing for the Committee could report back. This would likely involve reporting back on the Bill up to a week later. This is provisioned for by Speakers Ruling 105/2 which notes that ‘a delay of about one week in reporting to the House is quite acceptable’.

21. It is likely that the earliest the Bill would be ready for its second reading is the week of 18 August 2026. This would overlap with hearings for the current litigation.

Option 4

22. To progress Option 4 on a similar timeframe to Options 1 or 2 you would need to secure a wide power to Act from Cabinet on Monday 6 July. This would need to be sufficiently wide to enable officials to issue drafting instructions to PCO for a new Bill. Without sufficient power to act you will likely need to secure formal authorisation from Cabinet, extending the timeline.

23. Even with power to act, advice from PCO notes that the earliest the Bill would be ready for introduction and passed for all stages would be the week of 18 August 2026. This would overlap with hearings for current litigation.

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Appendix 1 – Table of Options – see separate file

OPTIONS TO PROGRESS LEGISLATION ADDRESSING THE IMMEDIATE ISSUES: 1 & 2 of 4

	1: improve the current DSS Bill	**2: add a requirement for empowering provision to commence after an Order in Council**
Description	• Reflects the current departmental report, which includes recommending improvements to the DSS Bill to respond to submitters concerns • Commencement by September 2026	• Same as Option 1 but includes a new provision to consult on the ability to establish secondary legislation, which includes support programmes • Proposal is that the clause empowering Support Programmes only comes into force through an Order in Council following consultation with representatives of the disability community • Commencement by September 2026
Responsiveness to immediate issues	• <u>Employment clarifications</u>: reduces Crown and contracted provider litigation and fiscal risks around employment matters going forward • <u>Decision-making capacity</u>: can rely upon temporary representatives for 3 years, and can pull levers to better respond when DSS has reasonable grounds to believe someone lacks decision-making capacity • <u>Current litigation</u>: all wins before commencement are saved. New claims about past events are barred. Bill provides certainty for future care arrangements • Provides a stable legislative foundation to create a stronger system that delivers better outcomes for disabled people and their carers	• Same as option 1 • Note: DSS would need to wait to establish a paid family carers payment after the empowering provision comes into force • Until an empowering provision comes into force, there would be no mechanism for introducing a family carer payment mechanism in secondary legislation. There is a risk that post-consultation, this mechanism is removed, which would have the same effect as removing cl 11 in terms of the application of the MWA carve out. Ie the MWA provision requires a robust mechanism for the carer payment.

Addressing wider risks	• The foundational elements support wider response to the Supreme Court judgment and provides for paid family carers payment
	• Contains wider employment clarifications around controlling third party and Minimum Wage Act carve out to reduce Crown and contracted provider risk going forward
	• Empowering provision for Support Programmes provides for the making of secondary legislation for services or decisions that would otherwise be vulnerable to being challenged and invalidated
	• Current bill also protects pre-commencement policies and programmes from NZBORA challenges until secondary leg is established
		• Similar to option 1, however, until an empowering provision comes into force:
		  ○ there would be nothing in primary legislation to protect any new policies or programmes from being invalidated for NZBORA-inconsistency
		  ○ there would be no way to react quickly and create a new Support Programme to respond to new issues

Rule of law / separation of powers	s 9(2)(h) [redacted]	
Responding to public concerns	• Proposed amendments to Bill addresses key criticisms: role of family, choice and safety, future consultation on creation of support programmes, outcomes for disabled people have been updated • Remaining criticism: relates to process to date, not rights-based (no ref to UNCRPD, EGL or ToW), no minimum allocation settings, no Crown employment status for paid family carers, no independent review mechanism, retain secondary legislation, continues Bill's response to Supreme Court and concerns about treatment of current and future litigants	• Same as Option 1 + consultation on development of empowering provision for Support Programmes • Would demonstrate that public concerns have been heard, and further consultation on empowering provision may mitigate criticism of the use of Support Programmes, and provide an opportunity to further clarify how they will work

Deliverability	• High - would only involve moderate changes to existing Bill
	• Next major public pieces of work: would include consultation on first support programmes, and phase 2 legislation
	• Note: if option 3 or 4 is selected, a subsequent phase for foundational legislation is likely to result in similar foundational provisions as are in the current Bill.
	  ○ Further policy work is required before consultation on broader legislation (anticipated phase 2)
	  ○ s (9)(2)(g)(i) [redacted]
		• High in the short term – would only involve moderate changes to existing Bill
		• Next major public piece of work: consultation on empowering provision. Would be expected prior to any engagement on future support programme
		• s (9)(2)(g)(i) [redacted]

OPTIONS TO PROGRESS LEGISLATION ADDRESSING THE IMMEDIATE ISSUES: 3 & 4 of 4

	3: remove foundational elements of DSS Bill (dependent on PCO, Cabinet and House time)	**4: pass a new narrower Bill under urgency (dependent on PCO, Cabinet and House time)**
Description	• Remove the foundational content from the Bill. • Retain only what is required to directly address the Supreme Court decision: narrow to employment provisions and what is necessary to achieve those • Save all legal victories as at commencement, extinguish pending claims, bar new claims about past events • Sub-options: o pass the Bill through the remaining stages in the sitting block beginning 18 August (during active hearings) o retain ability to introduce payment to family carers that isn't employment o extend the Minimum Wage Act carve out beyond 3 years • The effect on the current litigation (e.g. what's saved) will depend on the timing of commencement	• Urgently draft a new Bill to remove the Crown as employer. This removes current bar against discrimination claims because foundational provisions regarding family role are gone • There is a risk that this option does not pass ahead of further court determinations. To address this, it may need to go further by extinguishing further claims, override court decisions, or make changes to the savings provisions for Fleming and Humphreys. • Withdraw the DSS Bill or let it sit on the order paper
Timing	• Requires Cabinet agreement to give the Minister power to Act on 6 July 2026 • Note: Select Committee is due to report back on 13 August 2026. PCO will be drafting the RT version of the Bill and the Amendment Paper to remove foundational elements at the same time. PCO's view is that the earliest date to bring the Bill back to the House will be the sitting block beginning 18 August 2026 • Employment hearings begin with s 9(2) in the Employment Court on 5-7 August 2026 and the urgent ERA cases are set down for 13-21 August 2026	• Requires Cabinet agreement to give the Minister power to Act on 6 July 2026. This option includes potential to override Court determinations and extinguish case during active hearings • Pass all stages through urgency as soon as possible. PCO's view is that the earliest date will be the sitting block beginning 18 Augus 2026. This will be during active hearings in the ERA and after s 9(2)(h) hearing in the Employment Court. It may not get passed ahead of further determinations.
Responsiveness to immediate issues	• Employment clarifications: reduce Crown and contracted provider risk going forward. • Moving away from employment relationships for paid family carer was part of the assumptions underpinning the Minimum Wage Act carve out and helps reduce Crown employment related litigation risk in longer term. Retaining the ability to introduce payment to family carers that isn't employment will be the only way to do this without immediate legal risk. • Speed of policy development and drafting leaves room for errors • Lacks the foundational legislation intended to provide a firmer basis for addressing the operational issues highlighted by the Supreme Court judgment (see below). • Capacity: remove the ability to rely upon temporary representatives. All assessments, service-coordination decisions (including residential care placements), and flexible funding agreements with people who DSS is aware may lack capacity are vulnerable and may not be able to be relied upon. Any policy or process changes to better identify and respond would be vulnerable to judicial review, HRC and HDC complaints • Current litigation: if passes before hearings in August, Fleming and Humphreys are saved and all other litigation is extinguished. If passed later, same as option 1	• Employment clarifications: same as option 3 • Capacity: same as option 3 • Current litigation: overridden and extinguished
Addressing wider risks	• Continues with wider employment clarifications around controlling third party and Minimum Wage Act carve out that reduce Crown and contracted provider risk going forward • DSS will continue without a legislative framework until Phase 2 legislation can be progressed.	• Same as option 3

	• No primary legislation statement that DSS funding is contributory and subject to individual needs and circumstances, and available funding. This helps to provide legislative support for current policies and allocations. DSS policies remain vulnerable to challenge under NZBORA, capacity law and other general legal frameworks • No foundational legislative provisions means that if another litigation risk is realised, there is no ability to quickly amend DSS-legislation to respond because it would not fit within the purpose of that Act • Public Finance Act constrains total spending but does not guide individual funding decisions, leaving MSD vulnerable to overspending appropriations after intervention by the Courts. • Increased judicial review risks because programmes will not be protected in legislation and existing policies will be more vulnerable to being determined to be unlawful or invalid. • The community will still expect consultation/co-design on operational changes necessary to respond to priority issues such as decision-making capacity and a paid family carer policy	
Rule of law / separation of powers	• Same as Option 1, however potentially more opportunity for public discourse about rule of law concerns with extinguishing provisions	• New BORA vet required regarding nullifying the legal effect of the Supreme Court's declaration. Likely to be found to be inconsistent • Extinguishing claims during active hearings is likely be viewed as breach of comity • There may be significant concern that Parliament would overrule decisions of the judiciary, and interfere with the judiciary's exercise of its powers, resulting in major concerns regarding the rule of law and separation of powers • Likely that such a policy would be compared to the Pay Equity Bill and viewed as Parliamentary overreach (phrasing already used by submitters on the DSS Bill)
Responding to public concerns	• Responds to concerns about the foundational DSS provisions. • Does not address concerns about litigation extinguishment and treatment of litigants. • Does not immediately respond to calls to withdraw the Bill and undertake co-design of a replacement.	• Repeats Part 4A but goes further by overriding the Supreme Court's declaration • Responds to all criticism of the foundational provisions by removing them • Likely to be significant public concerns about the rule of law.
Deliverability	• Risk that at pace the Bill will inadvertently not fully address legal and fiscal risk • Parliamentary Counsel Office indicative advice is that could not meet the first sitting block in August but could pass before the House rises on 24 September (could look at week of 18 August 2026 onwards). • Next major public piece of work: consultation on foundational legislation and operational policies to support response to the Supreme Court	• Same as option 3 • This may not be ahead of decisions pending in the ERA so the Bill would need to remove any savings provisions for any decisions and override any decisions made after the introduction (e.g. s 9(2)(h) [redacted] Employment Court hearing set down for 5-7 August 2026) • Next major public piece of work: same as option 3