

Aide-mémoire

Date: 6 May 2026

To: Hon Louise Upston, Minister for Disability Issues

File reference: REP/26/5/332

Security level: In confidence

DSS Bill: meeting with the Attorney-General

Meeting details

Time and date: 7 May 2026, 12 pm

Location: Teams

Purpose

You are meeting with the Attorney-General to discuss how the DSS Bill engages rights in the New Zealand Bill of Rights Act 1990 (BORA).

Background

The DSS Bill will be lodged on 7 May 2026 for consideration by the Cabinet Legislation Committee meeting on 14 May 2026.

Subject to Cabinet agreement, your intended parliamentary timeline for the DSS Bill is:

- introduced on 19 May 2026
- first reading on 21 May 2026
- referred to the Social Services and Community select committee, with an anticipated report back in late August 2026
- remaining stages completed before the House rises on 24 September 2026, so that Royal assent may follow.

The Ministry of Justice will provide advice to the Attorney-General on whether it considers the DSS Bill contains inconsistencies with BORA. If this is the case, then the Attorney-General will decide whether to publish a statement of inconsistency, which would coincide with introduction of the DSS Bill.

The DSS Bill promotes certainty and consistency for disabled people and their families/whānau

The DSS Bill will reinforce measures taken to stabilise the financial management by DSS and establish a foundation that can be built upon to strengthen the sustainability of DSS into the future. It takes a precautionary approach to mitigate potential significant fiscal costs following from a Supreme Court judgment in relation to paid family carers.

The DSS Bill will provide for certainty and consistency in access to DSS for disabled people and their families and whānau, and carers, by:

- setting out the purpose of DSS-funded disability support
- establishing an authorising framework for policy settings and funding, which aim to strengthen the consistency, fairness, and transparency of decision-making, which includes powers for the responsible Minister to make ministerial programmes and provide ministerial directions
- clarifying that responsibility for the care of disabled people rests in the first instance with their family and whānau as natural supports, where this is available
- clarifying that the Crown or its contracted providers are not employers unless there is an intentional employment agreement, where a disabled person uses their funding allocation to pay a carer, including a paid family member
- validating existing employment and agent arrangements for three years to enable time to transition to more appropriate arrangements without disruption to care
- mitigating the Crown's fiscal and litigation risks arising from or related to the Supreme Court judgment.

Critically, the DSS Bill restores policy setting responsibility to the Crown, ensure decisions about publicly funded care and support by family members are made within the framework set by Parliament, and reduce litigation and financial risk. This makes it clear that funding decisions are made by the Crown, rather than being determined through individual court judgments.

The Bill when passed will reduce further litigation and fiscal risks

If the DSS Bill is not passed, then MSD estimates that there could be around § 9(2)(h) paid family carers who could use the precedent of the Supreme Court judgment to take employment claims, including becoming a Crown employee. If § 9(2)(h) of these family carers were successful, the one-off cost could be up to \$600 million and an unknown but likely high ongoing cost (such as from increased wages). In comparison, the total expenditure for DSS in 2025/26 is around \$2.7 billion.

There are § 9(2) pending cases in the employment jurisdiction where other people also seek employment status for services to DSS users. § 9(2)(h)

§ 9(2)(h)

It was never the intention in allowing Flexible Funding to be used to pay family carers for them to become Crown employees. Instead, the policy meant to give disabled people more choice and

control over their DSS funding allocation for disability support, including who they could employ to provide personal care and support.

Key issues and advice

The DSS Bill responds to complex matters in relation to some of the most vulnerable New Zealanders, who need support the most.

The provisions regarding family care seek to balance:

- maintaining continuity of support and recognition of family carers' contribution;
- family responsibility for wellbeing;
- recognising the consequences of a lack of decision-making capacity; and
- mitigating significant fiscal costs that could disrupt provision of funded disability support.

MSD has worked very closely with the Ministry of Business, Innovation and Employment and the Ministry of Justice. Officials have ensured that any limits on the right to access justice are as narrow as possible.

The DSS Bill engages two BORA rights where there are potential inconsistencies:

- **Freedom from discrimination** (section 19, on the grounds of disability, age, relationship status or family status), by allowing differential DSS funding allocations that treat family carers differently from other carers.
- **Right to justice** (section 27), by retrospectively treating current employment relationships as if they were made under the DSS Bill (if it had been in force), extinguishing unresolved pending claims before the courts s 9(2)(h), and barring further employment or discrimination claims based on past events.

MSD considers that these limits are justified because they:

- Support certainty and consistency for disabled people and families accessing DSS, by reducing disruption to disability support from court-mandated funding increases.
- Protect the sustainability of public funding, recognising the Crown must make prioritisation decisions.
- Use a rational, needs-based methodology to determine funding allocations arising from a disabled person's specific needs and circumstances.
- Prevent growing inequities between family carers who litigate and those who do not.
- Safeguard disabled people who lack decision-making capacity by moving away from use of employment as a mechanism to pay family carers.
- Temporarily validate existing employment agreements while alternative measures are developed.
- Ensure system-level decisions are made by democratically accountable institutions, not courts.
- Limit the litigation bar strictly to historical claims.

Talking points

- See the appendices for speaking notes.

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