IN-CONFIDENCE [Legally Privileged]

Office of the Minister for Disability Issues

Cabinet Social Outcomes Committee

Strengthening Disability Support Services: Policy decisions to establish a legislative framework

Proposal

1 This paper seeks agreement to accelerate action to further stabilise and strengthen the Ministry of Social Development's (MSD) Disability Support Services (DSS) by establishing a foundational legislative framework that clarifies its role and purpose. This Bill will also mitigate risks arising from a Supreme Court judgment regarding paid family care.

Relation to government priorities

2 Relevant priorities are better public services, fiscal responsibility, and ensuring fairer, consistent, transparent, and sustainable support for disabled people with the greatest need.

Executive Summary

3 It is essential that we have a fair and sustainable DSS so that disabled people and their families can live their everyday life. I have stabilised DSS so that expenditure is managed within appropriated funding and necessary fiscal controls are in place.

4 Further work to strengthen DSS over the next five years is underway [SOU-25-MIN-0154 refers]. This is focused on being clear about what DSS does and the difference it makes in the lives of disabled people, their family, whānau, and carers. This work includes developing legislation that establishes an authorising framework to set DSS's purpose, role, scope, and functions that can be built upon in the future.

5 The system also needs clarity about the role of natural supports, such as the care that may be provided by family, and the contribution of the State to the care of disabled people. Lack of clarity has led to inconsistent support being provided to families, while creating legal risk and driving ongoing litigation.

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

7 The judgment highlights that work underway to strengthen DSS should be accelerated. I seek agreement to policy decisions to develop a DSS Bill (the Bill) that will establish a foundational framework to address existing vulnerabilities in the system, provide an enduring platform that sets the parameters for how appropriated funding is used, and mitigate the risk of ongoing litigation.

8 The Bill will take a precautionary approach to address employment and related issues raised by the judgment. It will include retrospective provisions but will preserve the Supreme Court success of the two family carers' legal action. However, I ask Cabinet whether to save or extinguish other pending claims that have been filed, but not yet resolved or determined, as at the date of the Bill's introduction.

9 I do not consider that employment is an appropriate model for paying family carers. I have directed MSD to develop a new support model for carers to address the underlying drivers of ongoing litigation. It will enable an alternative mechanism for paying DSS family carers, so that they can transition from an employment relationship to more suitable arrangements. A transitional period of three years is proposed for development and implementation while minimising disruption to care arrangements. Operational measures will be progressed to ensure appropriate arrangements are in place to support disabled people who lack decision-making capacity.

10 I seek agreement to engage with a small number of representative organisations in advance of the Bill's introduction to provide a confidential update on the package and the Bill. I will emphasise that current settings and funding allocations will not be changed.

Background

11 MSD administers funding of over $2.7 billion through Vote Disability Support Services. External reviews[1] in 2023 and 2024 described of longstanding issues affecting DSS's efficiency and effectiveness. Cabinet agreed[2] to progress actions to stabilise financial controls and ensure sustainability, implement a new pricing model and improvements for residential care, implement a nationally consistent needs assessment (including a new carer assessment), and allow users more choice in the use of their Flexible Funding. These actions have laid the groundwork for long-term positive change for disabled people, their family, whānau, and carers.

12 The focus of my future work on strengthening DSS is to clarify what DSS does, the difference it should make in disabled people's lives, and the range of support that it provides. Legislation will set the direction previously considered by Cabinet that DSS makes a reasonable contribution towards disabled people having an opportunity to live an everyday life. It will create a clear authorising framework for policy settings and funding.

13 The legislation will also provide clarity on the respective roles of family and the State in providing care to disabled people. The existing ambiguity has led to families receiving inconsistent levels of support and has created legal risk.

14 Recently, the lack of clarity resulted in a December 2025 Supreme Court judgment: *Fleming v Attorney-General [2025] NZSC 188*. The judgment determined that two paid family carers are employees of the Crown using the definition of 'homeworker' under sections 5 and 6 of the Employment Relations Act 2000 (ERA). s 9(2)(h) [redacted]

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[1] Department of Prime Minister and Cabinet stocktake of risks report (2023); LINK review of commercial management report (2024); and the Independent Review of Disability Support Services (2024).

[2] Cabinet decisions: CAB-24-MIN-0301, SOU-24-MIN-0157, SOU-25-MIN-0088, and SOU-25-MIN-0154 refer.

s 9(2)(h) [redacted] **Appendix 1** has the history of this legal action.

Strengthening action will focus on establishing a foundational legislative framework, fix longstanding issues, and mitigate risks of litigation

15 I propose to accelerate work already underway to strengthen DSS that will have an enduring effect in enabling consistency, fairness, transparency, and sustainability. This work will maintain gains made since 2024 and consolidate improvements in fiscal management and controls.

16 A new Act will set out a foundational platform that can be built upon and extended. I seek your agreement to policy decisions for a Bill that will establish an authorisation framework and direction for DSS. It will set the parameters for how appropriated funding is used, its purpose, and mechanisms for setting funding policy.

17 The Bill will clarify that there is shared responsibility in the care of disabled people between the State and natural supports where those are available. This includes support ordinarily expected to be provided by family, whānau or broader social networks, or other funders of disability support.

18 I seek agreement to the Bill's structure and provisions as set out in **Appendix 2.** The Bill is proposed to enable flexibility by using a legislative hierarchy that includes:

- 18.1 setting out the authorising environment in primary legislation, with a purpose
- 18.2 details about funding programmes, including programme or service specific eligibility criteria, assessment requirements and service provision in Ministerial programmes[3]
- 18.3 power to provide for Ministerial directions to guide how certain provisions of primary legislation are administered (to provide direction, clarification, and oversight of funded disability support services and Ministerial programmes).

19 Work on the legislative framework will be phased:

- 19.1 phase 1: the Bill establishes the foundational framework, and consequential work to follows in support of transitional and operational arrangements over the next few years
- 19.2 s 9(2)(f)(iv) [redacted]

20 My intention is that core eligibility for DSS is developed and included in primary legislation with further specification in Ministerial programmes. However, more work, in consultation with stakeholders will be required to standardise eligibility settings so that a coherent and principled structure can be integrated into the new legislative framework. Currently there is no general or overarching eligibility setting that sits across all services. What does exist is complicated and inconsistent with settings tied to specific service

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[3] This approach is based on the welfare programmes model under the Social Security Act 2018 (which are Minister-approved, Cabinet-confirmed where appropriate, and Gazetted).

lines. While this work takes place, no changes to eligibility will be made and existing settings will stay in place.

The judgment sets a precedent that could be used in further legal action

21 The Bill will also address the specific issues arising from the judgment that established an employment relationship between two paid family carers and the Crown. The Bill will clarify that families have responsibility in the first instance for the wellbeing of family members (where available and if it is appropriate to do so).

22 It was never the policy intent for the Crown to be the employer of family carers. This employment relationship is inappropriate, impracticable to administer, and raises operational challenges and fiscal risks. There are no operational policy measures that can be taken to adequately address the judgment.

23 s (9)(2)(g)(i) [redacted] Therefore, as a precautionary approach, I am proposing a bar on further claims and litigation from the date of introduction of the Bill.

There is a choice in whether to save or extinguish pending cases

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

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

26 I propose that the successful claims of Ms Fleming and Mr Humphreys are saved. This means they will continue as MSD employees s 9(2)(h) [redacted]

27 However, I seek Cabinet consideration of the approach to be taken to the s 9(2)(h) [redacted] pending claims filed with the Employment Court and Employment Relations Authority by the date of when the Bill is introduced, but which are not determined or resolved. The fiscal impact from these pending claims' remedies awards and legal expenses is estimated to be between s 9(2)(h) [redacted]. This will increase if further claims are made before the Bill is introduced.

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

29 While the legislature should not interfere with cases before the courts without justification, there is a case for clarifying policy setting to the Crown.

30 If the pending claims are saved, there will likely be fiscal impacts and there will be ongoing uncertainty regarding the claimants' employment status. This would extend a

Crown employment model for carers that is inconsistent with policy intent and MSD's role. It would also secure the claimants' right to justice, but it creates an imbalance between people who file claims before the Bill's introduction and those who do not. s (9)(2)(g)(i) [redacted]

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

32 My preference is that all claims are addressed appropriately and there is no need for further litigation. s 9(2)(f)(iv) [redacted]

Fiscal costs arising from the judgment are highly probable

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

34 MSD has estimated the costs of family carers as employees, including wages, and one-off costs for remedies, such as unpaid wages. There will also be costs involved in accommodating family carers as employees. Initially, MSD could absorb costs within baseline at low numbers, but this would be difficult to maintain at a higher number and/or in a shorter timeframe. s 9(2)(f)(iv) [redacted]

35 **Table 1** s 9(2)(h) [redacted]

Table 1: Scenario of estimated costs based on possible fiscal impact from retrospective claims

s 9(2)(h) [redacted]

36 There are further uncertain risks following from the judgment:

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

[4] This table does not include all aspects of possible remedies claims, or claims for interest on unpaid wages, compensation or legal costs. s 9(2)(h) [redacted]

s 9(2)(h) [redacted]

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

New support for DSS carers will be developed with other operational changes

37 I consider that it is reasonable to expect families to be responsible for providing care and support for disabled family members in the first instance (where that is possible and appropriate). However, I also recognise that people in caring roles experience real costs and miss opportunities that others may have.

38 As noted earlier, I do not believe there is any benefit from carers being MSD employees. The employment model is not a suitable or effective way of recognising the contribution of carers. It does not reflect the true nature of the relationship and creates risks with the alignment of employment law and the need for DSS to target the allocation of resources.

39 There are considerable challenges for MSD if it is the employer of family carers, for example, ensuring health and safety in the workplace which is the carer's home. Carers will have additional accountabilities to MSD as their employer and as a public servant.

40 I have directed MSD to develop a new support package for carers of disabled people accessing DSS, which will be consistent with the Carers' Strategy and support the priorities identified in its forthcoming Action Plan. The focus will be ensuring the wellbeing of carers of disabled people so they can sustain their caring role.

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

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

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

44 Clarifying that MSD and supporting agencies are not the employer of carers makes it clear that where funding under a DSS policy or ministerial programme may be used by a

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

disabled person to employ a carer, including a paid family carer, the employment relationship is solely between the disabled person as employer and the carer as employee.

45 Development of the s 9(2)(f)(iv) [redacted] can leverage the recent changes to Flexible Funding and the shift to a national, consistent needs assessment process, including the introduction of a specific carer assessment. This will provide MSD with information on the wellbeing of carers and assist in planning ahead for key transition points for the disabled person (for example, becoming an adult, or expected decrease in functioning) and the carer (for example, older age requiring a stepping back from caring activities).

46 I intend to report back to Cabinet by the end of 2026 for policy decisions s 9(2)(f)(iv) [redacted] and confirm the timeframes for implementation (which is estimated to commence in mid-2027). s 9(2)(f)(iv) [redacted]

47 MSD will work with carer representative organisations in developing the package so that it reflects what is most useful for carers of disabled people, while continuing to manage expenditure. There will also be consideration of whether specific enabling provisions are required in the Bill. I will seek agreement to make any necessary amendments at select committee or during the Committee of the Whole House.

New measures for disabled people without decision-making capacity will be developed

48 Work will begin immediately on transitional operational policy changes, particularly to ensure appropriate arrangements are in place for disabled people who do not have decision-making capacity to be an employer or appoint an agent. MSD will work with disabled people and their family and whānau to support them to obtain relevant orders under the PPPR Act or establish more appropriate alternative arrangements.

Implementation

49 Implementation of the Bill will be led by MSD and put into practice by contracted service providers, as required. The Act will come into force following Royal assent. A phased approach will be taken to implementation, with a transition period for MSD to develop the new Ministerial programmes s 9(2)(f)(iv) [redacted] MSD will communicate the changes to the sector. Existing policies and funding allocations will be saved until new arrangements are in place.

50 There may be opportunities to align implementation activities with other related work, such as safeguarding work arising from the recommendations of the Royal Commission of Inquiry into Historical Abuse in State Care and in Faith-based institutions.

Cost-of-living Implications

51 There are no direct cost-of-living implications from this paper.

Financial Implications

52 There are no direct financial implications arising from the proposed policy decisions. By taking a precautionary approach, passing the Bill will mitigate actual and potential significant fiscal impact. s 9(2)(f)(iv) [redacted]

Legislative Implications

53 The intention of the Bill is to strengthen and clarify current settings. However, the Bill will also accommodate future decisions that may be taken to further strengthen the system. The Bill will bind the Crown.

54 The DSS Bill currently on the 2026 Legislative Programme can be repurposed as:

54.1 The Bill is estimated to be medium size and medium complexity.

54.2 Proposed priority: Category 2 - must be passed before the 2026 General Election. This action will promote certainty for disabled people, families, and whānau, as well as mitigate fiscal risk for the Crown.

55 To meet the tight timeline, I have obtained the Attorney-General's permission to draft ahead of policy approval. This approach runs the risk that the Bill may be less than fully settled when introduced and changes may be needed during the House process.

Retrospective provisions

56 I acknowledge the presumption against retrospectivity and the importance of the rule of law and access to justice [6] These are fundamental constitutional principles. However, I consider that limited and targeted retrospectivity to bring current employment arrangements within the new Bill is justified in the public interest in providing certainty for disabled people, family carers, and the administration of DSS.

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

Litigation bar on new claims from the date of introduction of the Bill

58 Section 27 of the New Zealand Bill of Rights Act 1990 (BORA) affirms a person's right to justice. The proposed litigation bar appears to limit that right. I also acknowledge LDAC guidance that legislation should not generally interfere with judicial proceedings, and I am mindful of the principle of comity.

59 The Bill proposes to save the position of Ms Fleming and Mr Humphreys. Consistent with LDAC guidelines, I do not propose to deprive them of the benefits of their case. Their cases will be resolved according to the law as it was at the time of the relevant events.

60 I consider that barring new claims regarding past events is justified. The approach will restore 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. It is appropriate that funding decisions remain with the Crown, rather than being determined through individual court judgments. The Crown does not have unlimited funding and must make choices.

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[6] Refer section 12 of the Legislation Act 2019 (presumption against retrospectivity) and section 27 of the New Zealand Bill of Rights Act 1990 (right to access justice)

Impact Analysis

Regulatory Impact Statement

61 A Regulatory Impact Statement (RIS) has been prepared and is attached as **Appendix 3**.

62 A quality assurance panel comprising members from MSD and the Ministry of Business, Innovation and Employment reviewed the RIS. The panel considers that the RIS partially meets the Quality Assurance criteria. The RIS is well written and concise, and it clearly outlines the limitations of the analysis. It notes that while some consultation has been undertaken to inform the legislative framework, there has been no consultation to inform the response to the Supreme Court judgment. The RIS is as complete as possible given the uncertainties relating to some implementation timeframes and details of the legislative framework. It presents a strong case for the recommended option; however, it provides limited detail on how the risks associated with this approach will be managed.

Climate Implications of Policy Assessment

63 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this policy proposal, as the thresholds for significance are not met.

Population Implications

64 Retrospective legislation will remove the ability for some disabled people and families to benefit from additional support they could seek. The remaining proposals in this paper seek to codify in a legislative legislation framework the existing policy intent underpinning DSS, so there are no other new population implications arising from this paper. MSD does not have reliable data on family carers to quantify whether there is a disproportionate impact on Māori. There is a higher rate of disabled Māori and Pacific people accessing DSS, who undertake caring for family members, which may see them overrepresented in family carers of disabled people. Care is also gendered with higher numbers of women providing care support. The development of new support for carers may help with addressing inequities in access to DSS.

Human Rights

65 I have considered the BORA and the Human Rights Act 1993. The proposals may engage the rights to freedom from discrimination and to access justice. I consider that any limits on these rights are prescribed by law, serve important public interests, and impair rights no more than is reasonably necessary. The relevant public interests are achieving certainty, restoring system level policy control to the Crown (within parameters set by Parliament), and ensuring fiscal sustainability. In particular:

65.1 Eligibility: DSS is a targeted system for those with the greatest disability-related need. This is necessary to ensure services are delivered fairly, consistently, and within available funding. This approach supports a disadvantaged group and reflects Parliament’s role in setting sustainable limits on public services.

65.2 Paid family care: these distinctions recognise their role and manage the boundary between DSS and family responsibility. They aim to enable care in family settings where appropriate and are limited to what is necessary to achieve that purpose sustainably.

65.3 Earlier legislation was inconsistent with human rights[7]: The DSS Bill takes a narrower approach, which distinguishes it from the earlier provisions.

66 Any resulting limits on the right to freedom from discrimination are reasonable and proportionate under section 5, given the importance of targeted assistance, consistent service delivery, and operating within funding set by Parliament. The use of Ministerial programmes will provide Cabinet with the opportunity to consider human rights impacts of funding programmes specific to the relevant support or service.

67 The proposals have been assessed under the Convention on the Rights of Persons with Disabilities (CRPD), particularly Articles 5 and 19 on equality and non-discrimination and on living independently and being included in the community. It is possible that the litigation bar may result in more individual complaints under the CRPD.[8]

Use of external resources

68 MSD sought specific legal advice from a law firm, Simpson Grierson, on the judgment.

Consultation

69 The Leader of the House and the Parliamentary Counsel Office are being consulted on the timing on the introduction of the Bill.

70 Agencies consulted: Oranga Tamariki, Public Service Commission, Treasury, Te Puni Kōkiri, and the Ministries of Business, Innovation and Employment (and Accident Compensation policy), Disabled People, Justice, Health (and Health NZ), Education, Ethnic Communities, Foreign Affairs and Trade, Pacific Peoples, Social Development, and Women. Parliamentary Counsel Office and the Department of Prime Minister and Cabinet were informed.

71 In late 2025 select stakeholders, including representative organisations, provided feedback on the purpose of DSS. The immediate pressure and sensitivity of employment-related matters arising from the judgment mean that proposals have not been subject to community consultation. This engages Article 4(3) of the CRPD which speaks to consultation and active involvement with disabled people. However, previous consultation has informed policy advice. Disabled people, families, and whānau will be involved in any significant reform of DSS.

Communications

72 I seek agreement to engage in advance of the Bill's introduction with a small number of representative organisations of carers and disabled people. I intend to provide a confidential update on the development of a carers support package and the Bill. I will clarify that current settings and funding allocations will continue. MSD will prepare a communications plan to support Government and Ministerial communications.

[7] In 2013, the Attorney General concluded that Part 4A of the New Zealand Public Health and Disability Act 2000 was inconsistent with BORA, and in 2014 the UN Committee on the Rights of Persons with Disabilities raised concerns about that legislation. The concerns centred on the prospective litigation bar.

[8] New Zealand is party to the Optional Protocol to the CRPD which provides for an independent complaints mechanism to the UN. To use this mechanism, individuals must exhaust all domestic remedies. The litigation bar may extinguish the availability of domestic remedies.

Proactive Release

73 I propose that this paper and related minutes are proactively released once the Bill is passed by the House of Representatives, subject to redaction as appropriate under the Official Information Act 1982.

Recommendations

74 The Minister for Disability Issues recommends that the Committee:

1. **note** that in November 2025, Cabinet invited me to report back to the Cabinet Social Outcomes Committee by mid-2026 with further policy advice for strengthening Ministry of Social Development (MSD) funded disability support services (DSS). [SOU-25-MIN-0154 refers]
2. **agree** to accelerate the strengthening of DSS through a package of policy and operational changes, which will be enhanced by a new Act (the DSS Bill (the Bill)) that establishes a foundational legislative framework and clarifies the policy intent in relation to DSS and carers, and takes a precautionary approach to mitigate potential financial and operational impacts
3. **note** that the Bill will give effect to the policy decisions below, and has a proposed category 2 priority on the 2026 Legislation Programme

Policy decisions for inclusion in the Bill: foundational elements

4. **agree** that the purpose 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 from within funding available, having regards to their needs and circumstances
5. **agree** that the Bill should provide a framework to allow for subsequent decisions to be implemented through secondary legislation by establishing:
   - 5.1. the power to make Minister-approved (and Cabinet approved where appropriate) Ministerial programmes (to be used primarily for funding policy)
   - 5.2. the power to make Ministerial directions (to be used primarily to provide direction, clarification, and oversight of DSS and Ministerial programmes)
6. **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
7. **agree** that responsibility for care of disabled people rests in the first instance with their family and whānau, or other natural supports
8. **note** that existing eligibility settings will continue
9. **agree** that the Bill should establish that MSD can use DSS to invest early in support for eligible disabled people, for example but not limited to maintaining or promoting their independence
10. **agree** that the Bill makes it clear that the responsible Minister, through Ministerial programmes and directions, can target funding and services based on a disabled person’s needs and circumstances
11. **agree** that the Bill include that MSD and its contracted providers can only allocate funding or other support, including to family members, in accordance with what is

provided for under the Act, including under any savings provisions (existing policies that are saved)

Policy decisions for inclusion in the Bill: employment-related provisions

12. **note** that the Supreme Court released its judgment *Fleming v Attorney-General [2025] NZSC 188* in December 2025 (the judgment), which established two paid family carers, Ms Fleming and Mr Humphreys, as employees of the Crown, widened the scope and payment for work to include where the family carers are constrained and that they are entitled to claim remedies for unpaid wages and relevant costs

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

14. **agree** that the Bill will ensure that care provided by a family carer beyond that funded under a DSS policy or ministerial programme by the agent that administers DSS (currently MSD) will not constitute 'work' for the purpose of the Minimum Wage Act 1983 for a period of three years

15. **agree** that the Bill should ensure the agency that administers DSS (currently MSD) and its contracted providers supporting assessment or service coordination are not (and will not be) in relation to a carer:

    15.1. an employer for the purposes of the Employment Relations Act 2000 unless there is an intentional written employment agreement to that effect

    15.2. a controlling third party under the Employment Relations Act 2000

    15.3. 'persons involved in a breach' for liability for penalties and arrears under the Employment Relations Act 2000

16. **agree** that the Bill should temporarily validate prior/existing employment agreements (excluding any MSD or supporting agency agreements that were never intended to form an employment relationship) and any other arrangements with disabled people funded by DSS who lack decision-making capacity put in place to employ carers, for a period of up to three years to ensure continuity of care while addressing the absence of valid orders under the Protection of Personal and Property Rights Act 1988

17. **agree** that the Bill include transitional and savings arrangements that will:

    17.1. ensure existing funding policies are saved and can be amended or revoked

    17.2. confirm that existing allocations and funding decisions are saved

Policy decisions for inclusion in the Bill: fiscal operational and litigation risk mitigation

18. **agree** that the Bill will have retrospective effect to validate all current paid family care arrangements as if they were authorised by the Bill

19. **agree** that the Bill will save the court proceedings seeking remedies flowing from the judgment

20. **agree** that:

    EITHER

    20.1. the Bill should extinguish claims against the Crown that have been filed before the date that the Bill is introduced to the House of Representatives but not yet determined or resolved

    OR

    20.2. the Bill should save claims against the Crown that have been filed before the date that the Bill is introduced to the House of Representatives but not yet determined or resolved, noting that these claims s 9(2)(h) could result in an additional one-off cost estimated to be in the range of s 9(2)(h)

21. **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 paid family carers where those claims relate to decisions or events prior to the Bill's introduction in the House of Representatives

Progressing the Bill

22. **invite** the Minister for Disability Issues to issue drafting instructions to the Parliamentary Counsel Office to enable development of new legislation to give effect to the policy decisions in recommendations 4 to 21 above and in Appendix 2

23. **authorise** the Minister for Disability Issues to act on any matters requiring further policy decisions in relation to policy detail and technical aspects, in line with the decisions in this paper, and to resolve any minor or non-controversial amendments that arise during drafting, without further reference to Cabinet

24. **invite** the Minister for Disability Issues to report back to the Cabinet Social Outcomes Committee by the end of 2026 for policy decisions on a new support model for carers of disabled people and timeframes for design and implementation

25. **authorise** the Minister for Disability Issues to engage, in advance of the Bill's introduction, with a small number of representative organisations of carers and disabled people most affected by decisions in this paper and provide them with a confidential briefing on the development of the new support for carers, the proposed Bill, and other operational matters

26. **agree** that this paper will be proactively released once the new legislation is passed by the House of Representatives.

Authorised for lodgement

Hon Louise Upston
Minister for Disability Issues

Appendix 1: Timeline of family carers legal action

Date	*Events*	*Notes*
2010 to 2013	Cabinet considers how to respond to the Atkinson v Ministry of Health litigations and conducts public consultation on payments to family carers Cases: Atkinson v Ministry of Health [2010] NZHRRRT 1 Ministry of Health v Atkinson [2012] NZCA 184	• In 2010, the Human Rights Review Tribunal finds that the Ministry of Health's policy of excluding family members from being paid to care for disabled relatives is discriminatory. • In 2012, the Court of Appeal upholds the Tribunal's decision. • Consultation finds that people favour an allowance, but notes that employment offers equity with paid carers.
	Parliament amends the New Zealand Public Health and Disability Act to introduce Part 4A: Family care policies	• The Crown and District Health Boards can only pay family members for support services under a family care policy. • "Family member" includes spouses, partners, parents, stepparents, grandparents, children, stepchildren and grandchildren, siblings, aunts, uncles, nephew, nieces, cousins. Unlawful discrimination claims are precluded.
2013	The Minister of Health issues the Funded Family Care Notice 2013 Power to issue notice: New Zealand Public Health and Disability Act 2000 s 88	• Disabled people accept the terms of the Notice when they accept their first payment of funding. • Payment terms are the minimum adult wage plus allowance for "on costs" and maximum of 40 hours per week. • Criteria includes the disabled person must have high or very high needs and would not be able to remain at home if they could not employ a family carer.
2019 to 2020	Cabinet agrees to widen Funded Family Care and agrees to repeal Part 4A entirely without a litigation bar. SWC-22-MIN-0054 Part 4A is repealed entirely	• Family carers are treated the same as other employed support workers and there is no longer a requirement for the disabled person to be the employer. • This includes spouses and partners, and disabled people under 18 with high or very high needs who receive care from parents or close family members.
2020	The Ministry of Health widens the family care policy to include disabled people of all need levels. Existing flexible funding allocations can be used to pay family careers.	• This is a response to COVID-19. • The Independent Review of DSS identified this change was a driver of increased flexible funding costs. By 2022/23 flexible funding costs were $424m (42 percent of the non-residential supports costs). At the end of April 2024, these costs were on track to be 30 percent higher than 2022/23.
2022	The Ministry of Health undertakes targeted consultation. Cabinet agrees to a new family care policy SWC-22-MIN-0110	• People supported the proposal to enable people with low to moderate impairments to pay a family carer. • Family members providing care to disabled people of all need-levels and all ages can be paid. • s 9(2)(h) [redacted]
2024-2025	Court of Appeal and Supreme court Judgments (Fleming v AG and Humphreys v AG)	• Supreme Court overturns Court of Appeal and finds Ms Fleming and Mr Humphreys are employed by MSD as homeworkers.

Appendix 2: Proposed approach and provisions for the Bill

Proposal	*Rationale*
Strengthening Disability Support Services	
Provide for the purpose of Disability Support Services (DSS).	The purpose will outline the Government's high-level intentions for the DSS system. It highlights key features, such as operating within limited funding and DSS providing a contribution to care. It also guides the interpretation of the law and sets parameters for the Bill. It reflects the intention to provide disability support services which contribute to enabling people live their everyday life, having regards to their needs and circumstances. It aligns with feedback from a small number of disability sector representatives on a draft foundational policy direction [SOU-25-MIN-0154 refers] that the focus should be on living an everyday life. This approach aligns with the Enabling Good Lives principles.
Strengthening the Bill – improving decision-making processes	
Provide that MSD can use DSS to invest in early support for disabled people.	This makes it clear that DSS decisions can include focusing on early intervention supports.
Provide ministerial programmes like section 101 of the Social Security Act 2018. These provide flexibility to change policy as needed. These programmes would set out the funding policy. This may include: • setting out programme-specific eligibility criteria which may include types of impairment • setting out criteria to be taken into account in allocating funding, which may include factors such as the needs and age of a person, the familial and social supports available to them and impairment specific factors • targeted funding for only certain persons or need or functional impairment or where paid family carers are used or medical condition or other form of differentiation • setting conditions on use of funding can be used including conditions on payment of family carers • means testing – testing if eligible for a funding programme based on assets/income thresholds • setting administrative rules • providing for processes for dealing with exceptional circumstances.	This approach is based on the welfare programmes model under the Social Security Act 2018 (which are Minister-approved, Cabinet-confirmed where appropriate, and Gazetted), s 9(2)(f)(iv) [redacted] of disabled people depending on need and their circumstances. Overall, Ministerial programmes allow greater flexibility, quicker implementation, and the ability to test or tailor support for specific groups within an overarching legislative framework, which represents a significant improvement on the current system where decision-makers, transparency, and oversight are unclear. The programmes would be secondary legislation for Part 3 of the Legislation Act 2019. This sets out mandatory publication requirements, including presenting a copy to the House of Representatives and may be disallowed by Parliament. While most of the current DSS is not means tested, there are some service lines that have specific income and/or asset testing, which will be carried over in the transition.
Provide for the making of Ministerial directions, like section 7 of the Social Security Act 2018. This allows the Minister to give MSD general or special written directions about how certain powers, functions and discretions are to be exercised. Directions would be published in the New Zealand Gazette and presented to the House of	Provides a mechanism to allow the Minister to provide direction and oversight of the DSS system and Ministerial programmes. s 9(2)(f)(iv) [redacted]

Representatives as soon as practicable after being given. Ministerial directions do not replace a decision which the Act contemplated would be made by another person, e.g. MSD exercising discretion under a Ministerial programme or pay less than required under a Ministerial programme.	
Make it clear that the Minister can set policies for differential treatment of disabled people depending on need and their circumstances.	This makes clear that Ministerial programmes and directions may differentiate between groups in ways that might appear discriminatory but are necessary to target funding to specific classes of people. For example, a disabled person who lives with or has access to family support may be treated differently from someone who lacks this support. s 9(2)(f) [redacted]
Strengthening funding settings	
Provide that MSD and its providers can only allocate funding or support, including that by family members, in accordance with what is provided for under the Act, including under any savings provisions (existing policies that are saved).	The Supreme Court judgment undermines the core principle that the Crown sets the level of DSS funding and support. This clarifies that funding is provided only through saved policies, Ministerial programmes, and directions. This makes the basis for funding decisions explicit and establishes what must be complied with.
Employment and capacity matters	
Establish that MSD and its contracted providers supporting assessment or service coordination agencies are not an employer for the purposes of section 6 of the Employment Relations Act 2000 unless there is an intentional written agreement to that affect.	This makes it clear the Crown, or its supporting agencies, were never intended to be the employer for paid family carers or other carers unless there was an intentional employment relationship.
Establish that MSD, and its contracted providers supporting assessment or service coordination are not a controlling third party under the Employment Relations Act 2000.	s 9(2)(h) [redacted]
Establish that MSD and its contracted providers supporting assessment or service coordination are not 'persons involved in a breach' for liability for penalties and arrears under the Employment Relations Act 2000.	s 9(2)(h) [redacted]
Specify that any care, beyond that funded by MSD, provided to a disabled person by someone within the context of a familial or social relationship does not constitute 'work' for the purposes of the Minimum Wage Act 1983 because it is a personal contribution to meeting the needs of that disabled person. This provision will be limited to three years from the Bill's commencement.	Clarifies that the Minimum Wage Act 1983 cannot be used by a court to require payment to paid family carers that is not consistent with the funding policies, Ministerial programmes or directions. This reinforces that the Government, not the courts, makes decisions on use of Crown funding and funding policies. It also recognizes the expectation that families contribute to care that is not paid for

	and the indirect risks to the Crown and system if the Courts determine additional hours are 'work' outside of what the DSS funding policies set. This clarification is temporary for three years to allow for an alternative payment model for family carers to be developed, tested, implemented, and for family carers to steadily transition out of employment relationships.
Capacity matters	
Validate prior/existing employment agreements (excluding any Crown 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 a PPPR Act order. s 9(2)(f)(iv) [redacted]	Deeming existing employment and agent agreements as temporarily valid is important to ensure disabled people continue to receive stable care while issues about decision-making capacity are addressed. The Supreme Court has made it clear that an order under the PPPR Act is required where a person cannot legally enter such agreements, but immediate compliance would risk sudden disruption to essential support. A three-year validation period provides the necessary time to develop targeted operational processes for identifying and supporting people who may need a PPPR Act order, while allowing current arrangements and the agents administering flexible funding to remain in place. This balances legal certainty with continuity of care and avoids avoidable upheaval for disabled people and their families.
Transitional provisions and savings	
Ensure existing DSS funding policies are confirmed/saved and can be amended or revoked. This allows time to transfer existing DSS policies into Ministerial programmes over time.	Existing policies and individual allocations will transfer into the new system. A transition process will progressively move current policies into Ministerial programmes.
Confirm that existing DSS allocations/fundings are saved. This makes it clear that individuals' funding allocations do not change because of the passage of the Bill.	This makes clear that people's individual funding allocations will not change because of the Bill. All existing allocations transfer on day one, so there will be no immediate impact on anyone's current funding.
Mitigation of Crown fiscal risks	
Save the Court proceedings seeking remedies flowing from the Supreme Court's decision (Fleming v Attorney-General and Humphreys v Ministry of Social Development).	Aligns with established principle generally not to quash a win for an individual in a court unless good reason.
Subject to Cabinet decisions, either to save pending claims filed but not yet determined by the date of the Bill's introduction or to extinguish all pending claims.	
Include a litigation bar, effective from the date of the Bill's introduction, regarding discrimination or employment claims against the Crown for historic matters related to the employment status of paid family carers.	s 9(2)(h) [redacted]

Appendix 3: Regulatory Impact Statement