



Regulatory Impact Statement: Establishing a legislative framework for funded disability support services

Decision sought	This analysis has been produced to inform Cabinet decisions on establishing a foundational legislative framework for the Ministry of Social Development's funded disability support services, and that addresses issues arising from a 2025 December Supreme Court judgment in relation to paid family carers.
Agency responsible	Ministry of Social Development
Proposing Ministers	Hon Louise Upston, Minister for Disability Issues
Date finalised	24 March 2026

This document contains legally privileged advice.

The Ministry of Social Development (MSD) has been developing advice on establishing legislation for its funded disability support services (DSS) as part of its work to stabilise and strengthen the system.¹ Legislation is intended to provide clarity to disabled people, families, whānau, and the wider community on what disability support they could expect to access from MSD. Legislation will create an authorising framework that establishes consistent and transparent parameters for DSS, which is provided within available funding. It will provide for the responsible Minister to promulgate funding and policy settings in secondary legislation.

The absence of such a legislative framework has meant operational policy has developed without robust and clear authority, which has allowed for successful litigation with significant historic, current, and potential fiscal impact. In December 2025, a Supreme Court judgment on paying family carers of disabled people (the judgment) determined that two family carers are employees of MSD. There is an implication from the judgment that primary responsibility for the care and support of disabled people rests with the Crown. This is inconsistent with the longstanding government position that families and whānau are responsible in the first instance.

This judgment has reinforced the urgency for a legislative framework for DSS. Through a new Act, a DSS Bill is proposed to establish an authorisation framework for policy and funding decisions for DSS. It will also take a precautionary approach to mitigate fiscal risks arising from

¹ Since September 2024, MSD has administered funding from Vote Disability Support Services for DSS. Previously, administration was the responsibility of the Ministry of Disabled People (July 2022 to September 2024), and before that variously with the Ministry of Health.

the judgment by establishing that there is no employment relationship between MSD and carers, and clarifies that families provide support to disabled people in the first instance.

The judgment could be used as precedent for s (9)(2)(g)(i) other similar family carers who could take action for remedies in recognition of work undertaken, as well as ongoing costs as employees. This could come at a cost of disruption in access to DSS for disabled people as fiscal controls would need to be put in place.

Employment is not a suitable model for paying family carers. If no action is taken, then there is the potential for significant immediate and future fiscal impact to the Crown. This will need to be accommodated within Vote Disability Support Services, which may require reducing access to DSS. Increasing funding for DSS may not be feasible and may not meet the Government's priority of fiscal responsibility.

MSD is developing new support for DSS carers that will enable family carers to transition away from being paid within an employment relationship to more appropriate arrangements.

Summary: Problem definition and options

What's the policy problem?

MSD has been doing some work on setting the foundational parameters for DSS through legislation that provides for an authorisation framework for policy settings and funding decisions. It is informed by feedback from disabled people, their families and whānau from stakeholder consultation in late 2024 and 2025 that they find DSS complex to navigate, inconsistent, and not fair. In addition, the judgment has created an urgency to progress the DSS Bill to ensure continuation of services for disabled people and take a precautionary approach to reduce fiscal risks. The Bill will establish that MSD does not employ family carers and policy work will put in place more appropriate measures for disabled people without decision-making capacity.

Policy settings have been determined by the courts

Policy settings are normally set by the Government. However, in the absence of a legislative framework, policy settings for DSS have increasingly been made through court judgments. These have widened the scope of DSS, with consequential significant fiscal impact.

s (9)(2)(g)(i)

The judgment will further exacerbate fiscal pressures on DSS and create uncertainty for disabled people, their whānau, families and the wider community.

s (9)(2)(g)(i)

There is no legislative framework for DSS

Until June 2022, funding for DSS was administered by the Ministry of Health. Following the repeal of the New Zealand Public Health and Disability Act 2000 and transfer of administration to MSD in July 2022, there has not been any legislative framework that clearly sets out the Government's intentions for funding DSS or the parameters in which it is provided. In its absence, Cabinet decisions, ministerial decisions and budget appropriations have been used as the basis for operational policy.

Consequently, complexity and incoherence in operational policy and practice has allowed for court judgments to set policy settings and increase cost for DSS. The focus of court judgements are summarised below and detailed in **Appendix one**.

- **Discrimination:** Policy of excluding specified family members from payment under DSS is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990 ("NZBORA"). This judgment led to provision for family carers to be employed (and paid) by disabled people (known as Funded Family Care). This policy did not put appropriate measures in place in relation to disabled people who do not have decision-making capacity to be an employer.
- **Supervision and sleepovers:** Sleepovers were determined to be work, and relevant workers are entitled to be paid minimum hourly wages under the Minimum Wage Act 1983. This judgment led to increase in pay for the support workforce.
- **Employment status:** Employment status disputes where tests for home-based or care work have been clarified, which led to the judgment that two family carers are employees of MSD and can seek remedies including for unpaid wages.
- **Decision-making capacity:** The threshold was established that a person is presumed capable unless clear evidence shows otherwise, and an agency is only liable if they had actual or constructive knowledge of incapacity. It reinforced the need to align service delivery with safeguards in the Protection of Personal and Property Rights Act 1988.

There is a need to promote fairness in access to DSS

s (9)(2)(g)(i)

There is urgency for legislation to provide certainty and mitigate fiscal risk

The judgment has the potential to increase fiscal costs for DSS. This could create uncertainty for disabled people, families, and whānau on whether there will be disruption to their access to DSS and/or the level of funding they may be able to receive. For paid family carers, they may also be uncertain on whether they are employees of MSD.

s (9)(2)(g)(i)

s 9(2)(f)(iv)

and how to appropriately manage an employment relationship with family carers based in their own homes. This is in addition to the rollout of changes regarding how Flexible Funding² can be used, and the establishment of a consistent needs assessment around the country (including a new specific assessment for carers).

² Flexible Funding gives disabled people more choice and control on how they spend within their allocated budgets to achieve their personal plan. Flexible funding cannot be used to buy items such as alcohol, tobacco and gambling. Some items may require pre-approvals such as overseas travel.

s (9)(2)(g)(i)

Operational policy changes cannot remove immediate fiscal risk nor reduce the likelihood of future litigation

Changes to operational policy alone cannot address the fiscal risk or disruption arising from the judgment.

MSD has been working on building the foundational elements that authorise use of funding for DSS s 9(2)(f)(iv)

Establishing legislation for DSS is an opportunity to put in place an authorising framework and specific provision in relation to paid family carers. This precautionary approach will be more successful in reducing the fiscal impact of any future litigation, as well as providing greater certainty, consistency, fairness, and transparency for disabled people, families, and whānau.

What is the policy objective?

The DSS Bill will establish a clear authorising framework and ensure certainty in access to DSS for disabled people. It will also mitigate fiscal risk arising from further legal action using the precedent of the judgment. Additional measures will be put in place to ensure appropriate safeguarding for disabled people who do not have decision-making capacity to be an employer or appoint someone to act on their behalf.

What policy options have been considered, including any alternatives to regulation?

Three legislative options have been considered as set out in Table 1 below. These options are presented as an increasing scope of legislative responses to the Supreme Court judgment:

Table 1: Options to promote certainty in access to DSS and take a precautionary approach to mitigate fiscal risk

Option 1	Option 2	Option 3	Option 4
<i>Status quo: No new legislation</i>	<i>Legislation clarifies there is no employment relationship with family carers and other employment-related changes such as third-party agreements</i>	<i>Legislation clarifies there is no employment relationship with family carers and establishes a retrospective litigation bar</i>	<i>Legislation establishes a foundational authorisation framework, including clarifying there is no employment relationship with family carers and establishes a retrospective litigation bar</i>

MSD’s view is that there is an opportunity to use legislation establish an authorisation framework that will clarify policy setting and funding decisions, which can be the foundation for ongoing improvements. The legislation will also mitigate the fiscal risk from the judgment. The legislation will This approach reinforces the Government’s direction for stabilising and strengthening the administration of DSS. A phased approach for implementing transitional and related operational policy is proposed.

The Minister for Disability Issues supports progressing foundational legislation and addressing matters in relation to clarify the employment relationship with paid family carers (option 4). The

Please note: in the penultimate paragraph on this page, the words “The legislation will” are a typographical error.

Minister has referred to Cabinet consideration of extinguishing employment related claims that have been filed but not determined or resolved by the date when the DSS Bill is introduced to the House of Representatives.

s 9(2)(f)(iv)

MSD is also exploring how family carers can be more appropriately supported outside of an employment relationship with MSD.

Consequential changes to amending relevant sections 5 and 6 of the Employment Relations Act 2000 (which relates to homebased carers) had been considered. There was not any time to discuss these matters with the Ministry of Business, Innovation and Employment during the recent consideration of the Employment Relations Amendment Bill that passed its third reading in February 2026. Delaying passing the DSS Bill to develop further options for addressing the employment-related issues would leave the Government open to fiscal risk s 9(2)(h)

Therefore, options considered are specific to DSS, with the immediacy in progressing the DSS Bill to enable taking a precautionary approach to mitigate fiscal risks.

What consultation has been undertaken?

As approved by Cabinet [SOU-25-MIN-0154 refers], planning for high-level community consultation on future priorities for strengthening DSS is underway. Specific proposals clarifying the employment relationship and related litigation of paid family carers will not be within the scope of this community consultation. This is due to the urgency and the confidential nature of the proposals. s (9)(2)(g)(i)

There have been previous community consultations on issues for strengthening DSS. In late 2024 and in 2025, MSD undertook various consultations on operational policy changes following from the Independent Review of DSS. The potential for legislation was included in the range of measures that could be explored, and community feedback has informed option 4.

MSD will prepare a communications plan to ensure messages reach disabled people and family carers most affected, and the wider community, about the impact from the Bill. A public announcement will be made by the Minister for Disability Issues. There will also be publicity associated with the Bill being considered by the select committee.

Is the preferred option in the Cabinet paper the same as preferred option in the RIS?

Yes. The Minister for Disability Issues' preferred option is option 4. The Minister has referred to Cabinet consideration of extinguishing employment related claims filed but not determined or resolved by the date when the Bill is introduced to the House of Representatives.

Summary: Minister’s preferred option in the Cabinet paper

Costs (Core information)

There are immediate and potentially significant fiscal costs arising from the judgment, which has triggered the proposal for a precautionary approach through the DSS Bill.

If the DSS Bill is not introduced, then MSD will have to manage fiscal costs through operational policy changes, for example, restricting eligibility, access to Flexible Funding, and/or level of DSS provided for disabled people and family carers. The Government has a priority of fiscal responsibility, and any increases in appropriated funding would ordinarily be prioritised to address cost pressures. Increasing payment to family carers to meet historic claims and/or ongoing wage costs will not result in an increased level of care and support for disabled people compared with the status quo.

s (9)(2)(g)(i)
 [Redacted text block]

Proceeding with a legislative response (options 2, 3 and 4) will involve establishment costs which will be met within baseline by MSD.

Solely focussing on mitigating the employment relationship and preventing remedies (options 2 and 3) will reduce potential future costs for MSD from additional legal action. The Minister has referred to Cabinet consideration of extinguishing employment related claims filed but not determined or resolved by the date when the DSS Bill is introduced to the House of Representatives.

The legislative option that proposes a foundational framework, responding to the employment relationship and preventing additional claims (option 4) will incur minimum financial costs. Any costs from aligning operational policy will be met within baseline. Transitional measures will be phased. For example, arrangements for how disabled people without decision-making capacity can access Flexible Funding.

Options 2, 3 and 4 will remove the potential for family carers in addition to Ms Fleming and Mr Humphreys to be determined as MSD employees, receive any relevant remedies and increased payments, and generally enjoy the benefits of being an employee. This may be seen as taking away their rights under the New Zealand Bill of Rights Act 1990 s (9)(2)(g)(i) [Redacted]. MSD considers removing the employment relationship is a justifiable limitation.

Benefits (Core information)

All legislative options will provide some degree of certainty regarding the type and level of DSS that can be accessed by disabled people, ensure continuation of care and manage MSD expenditure within appropriated funding.

Setting the foundational elements for DSS in legislation will benefit disabled people and family carers so they have clarity on disability funded support services. It will remove the additional pressure on family carers to individually go through the Employment Relations Authority to seek clarification of their employment status. It will have an enduring impact.

Another potential benefit is preventing the development of inequities amongst family carers.

§ 9(2)(g)(i)

Alongside consistency and fairness, feedback from community consultation has identified certainty as important for disabled people and family carers.

Balance of benefits and costs (Core information)

All legislative options have greater benefits than the costs incurred from successful litigation.

Option 4 is advantageous, as it provides greater certainty to disabled people on the continuation of care, could better manage expenditure within appropriated funding and will progress Government's commitment on strengthening of DSS so that it is consistent, fair, transparent, and sustainable into the future.

Option 4 will offset the financial, operational and reputational costs arising from the judgment, because it sets the foundation for ongoing improvements which is expected to reduce the extent of litigation and additional costs on other matters.

Implementation

How will the proposal be implemented, who will implement it, and what are the risks?

The DSS Bill will come into force following Royal assent. It is difficult to advise on timeframes for implementation of the legislative hierarchy provisions, such as development of Ministerial funding programmes. This work will be phased over the next few years.

§ 9(2)(f)(iv) MSD will develop a new support package for family carers of disabled people under DSS. § 9(2)(f)(iv)

Transitional arrangements such as clarifying the role of agents for disabled people lacking decision-making capacity may take up to three years.

The operational changes will be monitored and reviewed through data collected by MSD from contracted agents. Data collection will be part of business-as-usual and no additional funding will be required.

The introduction of a specific carer assessment that begun in early 2026 as part of establishing a national, consistent needs assessment means that MSD will have better data collection about family carers. This data does not currently exist. This better data collection will support MSD to capture during the assessment process any issues with the sustainability of a family carer as part of ensuring a disabled person's needs are met.

As the roll out of family carer assessment has recently begun, it is difficult to understand if there are any risks in data collection or quality of data and how to mitigate those.

Limitations and Constraints on Analysis

Due to the urgency and the confidential nature of the proposed legislative options that take a precautionary approach in response to the judgment, there has not been any community or prior agency consultation on the specific legislative proposals.

As noted, the lack of data on family carers accessing Flexible Funding and who may be within the scope of the judgment, and the unknown extent of individual family carers who may use the

precedent, means that it is difficult to estimate the potential fiscal cost from maintaining the status quo.

MSD has been working on the legislative proposals to strengthen DSS, which have been based on feedback from key stakeholders and the community during late 2024 and in 2025. In November 2025, Cabinet agreed that MSD could test and refine with key sector stakeholder's an initial policy foundation for strengthening DSS. The strengthening work will be the subject of community consultation intended to run around mid-2026.

I have read the Regulatory Impact Statement, and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the preferred option.

Responsible Manager(s) signature:



**Justine Cornwall, General Manager Policy, DSS,
Ministry of Social Development**

Quality Assurance Statement

Reviewing Agency: MSD and MBIE

QA rating: partially meets,

Panel Comment:

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 decision. 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.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

1. MSD funds³ a wide range of essential DSS⁴ through Vote Disability Support Services for over 55,000 disabled people, families, whānau, and carers to help with their daily life, equipment and modification services for 100,000 people, and access for 20,000 children and families to Child Development Services and other related services.
2. There is no legislative framework to underpin delivery of DSS. In November 2025, Cabinet agreed that MSD test and refine the initial policy foundational elements that could support a legislative framework with a small number of representative community stakeholders [SOU-25-MIN-0154 refers].
3. In December 2025, the Supreme Court released its judgment (*Fleming v Attorney General and Humphreys v Ministry of Social Development*) in relation to paid family carers under DSS. **Appendix two** sets out a timeline for the various litigation leading to the Supreme Court judgment and summarises its key findings.
4. The Supreme Court determined that two paid family carers (Fleming and Humphreys) had been engaged in an employment relationship with MSD as a result of the particular way that the Ministry of Health (which was then responsible for administering DSS) had arranged for their support services to be provided. The family carer was employed by the disabled family member receiving care and support. However, the judgment found that because the disabled family member did not have decision-making capacity to be an employer and that there was no order in place under the Protection of Personal and Property Rights Act 1988 for another person to act for them, the employment agreement was voided.
5. From 2013 to 2020, Part 4A of the now repealed New Zealand Public Health and Disability Act 2000 provided a legislative basis that prohibited any further court action claiming discrimination on the basis of family status in relation to payment for family carers under DSS.
6. The judgment is the latest in several successful litigations that highlights the impact from the absence of a clear authorising framework. Each litigation has contributed to

³ The Minister for Disability Issues is responsible for the appropriations in Vote DSS for the 2025/26 financial year covering the following: a total of over \$2,769 million on delivering DSS to improve outcomes for disabled people. Most funding for disability support is delivered through contracts with around 500 service providers, the majority of which are non-government organisations.

⁴ MSD-DSS is available to people who have a physical, intellectual, or sensory disability (or a combination of these) which is likely to continue for at least six months and needs ongoing support to live independently, to the extent that ongoing support is required. These services are mainly for people under the age of 65 years. MSD will also fund DSS for people with:

- some neurological conditions that result in permanent disabilities
- some developmental disabilities in children and young people, such as Autism
- physical, intellectual or sensory disability that co-exists with a health condition and/or injury.

uncertainty for disabled people, their whānau and families on what DSS provides and what it does not do.

7. It was never the Government’s intention in authorising payment to family carers to enter into a direct employment relationship with them. The current Flexible Funding arrangement is about giving choice and control to disabled people including being able to employ family carers. However, the policy does not address the issue of disabled people who do not have decision-making capacity to be an employer.
8. In the absence of legislation, operational policy has been based on relevant Cabinet decisions, Ministerial decisions, budget appropriations, and contract law. As a result of changes over the last 30 years, there is incoherence across operational policy, and there has been high administration and transaction costs with DSS. Disabled people, whānau, and families during late 2024 and early 2025 community consultation told us that their experience with DSS was inconsistent, unfair, and lacking transparency.⁵

Table 2: Summary of estimated implications from Supreme Court decisions on *Humphreys and Fleming*

s 9(2)(h)



9. s 9(2)(h) [Redacted]
10. s (9)(2)(g)(i) [Redacted]

⁵ For example, as described in the report of the Independent Review of DSS, June 2025 at https://www.disabilitysupport.govt.nz/assets/Uploads/Independent-review/05_AUGUST-CABINET-Paper-Appendix-1-Independent-DSS-Review-redactions-applied-FINAL.pdf

⁶ As defined in the Employment Relations Act 2000, the test of whether MSD was/is a controlling third party is fact dependant and is yet to be tested in situations where a valid employment relationship exists between a family carer and an employer (which is not MSD).

s (9)(2)(g)(i)

11.

s (9)(2)(g)(i)

12. The challenge for MSD is to continue delivering within appropriated funding, manage employee relationships in home settings, rollout of changes to Flexible Funding and establish a nationally consistent needs assessment process.
13. Operational policy changes will not be sufficient to address the fiscal risks created by the judgment nor reduce the risk of further litigation. Immediate legislative changes are required to take a precautionary approach, rather than wait and react to cumulating legal action.

What is the policy problem or opportunity?

14. There is an opportunity to progress the DSS Bill that establishes a clear authorising framework for DSS for how appropriated funding is used and clarify settings for DSS. It will also mitigate fiscal risk from employment matters with paid family carers.
15. Work on the legislative framework will be phased:
- 15.1 phase 1: the Bill establishes the foundational framework, and consequential work follows in support of transitional and operational arrangements over the next few years
- 15.2 phase 2: enhancing the foundational framework, for example with amendments on: residential care; residential care subsidies; safeguarding; information sharing provisions including interaction with the welfare and other government systems, powers to require information; institutional arrangements (if required); and appeals and complaints processes.
16. Legislation would be a strong lever to respond to fiscal risks by enabling Government to control policy setting and ensure expenditure is managed within appropriated funding. It will provide mechanisms for how Government will set funding decisions, confirm that funding is provided only within policies and Ministerial programmes, and set out the structure of the funding system. This should reduce the scope for future litigation.
17. Specifically, the proposed legislative framework will:
- 17.1 establish what DSS does within available funding
- 17.2 enable a legislative hierarchy where decision-making by the responsible Minister is allowed through secondary legislation, for example through Ministerial programmes determining funding policy for specific disability support (which are modelled on a similar provision in the Social Security Act 2018)
- 17.3 expand on some of the parameters from Part 4A of the repealed New Zealand Public Health and Disability Act 2000 Act

- 17.4 prevent wider litigation claims (for example, on the basis of discrimination).
- 18. There is a related opportunity to reaffirm that families are responsible for providing care and support to disabled family members in the first instance, which is complemented by funded disability support.
- 19. Legislation is the strongest mechanism available to ensure certainty in the continuity of care for disabled people. Family carers will still be able to be paid for the care and support they provide because the legislation will validate arrangements for them as a transitional measure until more appropriate arrangements are put in place. This would be without entering into employment agreements with MSD.
- 20. The DSS Bill will also address the employment-related matters arising from the judgment by:
 - 20.1 extinguishing employment related claims filed but not determined or resolved by the date when the Bill is introduced to the House of Representatives
s 9(2)(h) [Redacted]
 - 20.2 preventing litigation for historical claims for remedies
 - 20.3 clarifying that there is no employment relationship between MSD and family carers arising from payment for care and support of disabled people, unless there is a written employment agreement to that effect
 - 20.4 clarifying that MSD is not a controlling third party for family carers
 - 20.5 providing a transition process for dealing with employment agreements made where the disabled person who had been considered the employer may not have had decision-making capacity and does not have relevant valid orders under the Protection of Personal and Property Rights Act 1988, which limits any disruption to continuity of disability support.
- 21. s 9(2)(h) [Redacted]
- 22. Legislation will not eliminate challenges to funded disability support through the courts. ACC has long standing legislation and has had to respond to court judgments widening its provision and fiscal cost. One difference, however, is the ability of ACC to recover increased costs through its levies.
- 23. s (9)(2)(g)(i) [Redacted]

What objectives are sought in relation to the policy problem?

- 24. The primary policy objective is to provide certainty to disabled people on the continuation of their access to DSS. Family members will still be able to be paid for the care and support they provide by validating arrangements as they were before the judgment for a fixed period of time while transitional arrangements are made. Taking a precautionary approach that mitigates potential future litigation and fiscal costs is a key aspect of providing certainty.
- 25. In addition, establishing a legislative framework for DSS will reaffirm that the Government has the primary role in setting policy and funding. This is expected to support DSS to continue to manage expenditure within appropriated funding. It will also remove additional operational pressures on MSD to manage implications, such as:
 - 25.1 ensuring the family carer takes breaks (as required under the Employment Relations Act) and that they receive leave consistent with the Holidays Act
 - 25.2 ensure a safe workplace under the Health and Safety at Work Act 2015 (which may be the family carer’s home)
 - 25.3 adhering to the Parental Leave and Employment Protection Act 1987, if the carer takes parental leave.
- 26. If the initial legislative framework is approved, then MSD could provide a supplementary Regulatory Impact Statement to address the contents for the legislation and the subsequent choices that may need to be made.

What consultation has been undertaken?

- 27. Planning for high-level community consultation on strengthening DSS is underway. Specific proposals clarifying the employment relationship and related litigation of paid family carers may not be within the scope of this community consultation. This is due to the urgency and the confidential nature of the proposals. To mitigate this, three to four weeks of Select Committee process is anticipated as part of the legislative process to include the voice of the community.
- 28. s (9)(2)(g)(i) [Redacted]
- 29. There have been community consultations on issues for strengthening DSS. In late 2024 and in 2025, MSD undertook various consultations disabled people, their whānau and families on operational policy changes following from the Independent Review of DSS (which include the potential for legislation).
- 30. Relevant feedback from the community consultations which has been considered as part of the proposed DSS Bill is as follows:
 - 30.1 providing greater certainty in what to expect from DSS
 - 30.2 enabling disabled people to be involved and have choices in determining what support they need to live their everyday life

- 30.3 increasing consistency and flexibility in support that could be accessed by family carers of disabled people
- 30.4 maintaining stability in policy settings (which is largely in response to the Ministry of Disabled People's sudden changes announced in March 2024 that limited how disabled people and family carers could use Flexible Funding and froze the level of funding for residential care services for the 2024/2025 financial year).
31. Alongside clarifying employment and related matters, MSD is exploring proposals to financially recognise the contribution of family carers without using an employment model. s 9(2)(h) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
32. Furthermore, and as appropriate, MSD will consult with stakeholders when making more detailed choices and when developing proposals to build on the initial legislative framework.
33. MSD will develop a communications plan to ensure disabled people, family carers, and the wider sector can access information on the impact of the DSS Bill. A key message will be that current settings and funding allocations will continue, and the employment-related matters clarify the Government's policy intentions in paying family carers, which was not to be an employer. The development of new support for DSS carers will also be announced.

Section 2: Assessing options to address the policy problem

What criteria will be used to compare options to the status quo?

34. The following criteria has been developed to assess the proposed options:
- 34.1 **Respond to fiscal risks for MSD:** MSD is able to manage expenditure for DSS within appropriated funding.
- 34.2 **Access to DSS:** Eligible disabled people access DSS at the same level of DSS as prior to the judgment.
- 34.3 **Disabled people have choice and control:** Disabled people have the flexibility to make some decisions on the DSS that they are allocated.
- 34.4 **Family carers wellbeing:** Family carers are supported by MSD to sustain their caring role.
- 34.5 **Clarity of the authorising environment:** There is consistency in how policy settings and funding decisions are made for DSS.

What scope will options be considered within?

- 35. The scope within which the options are considered include:
 - 35.1 implications from the judgment (financial, policy, operational, reputational)
 - 35.2 eligible disabled people who currently access DSS
 - 35.3 new eligible disabled people seeking DSS
 - 35.4 family carers of disabled people who currently access DSS or are new in accessing DSS
 - 35.5 current and forecasted appropriated funding for DSS that sets the level of service delivery.

What options are being considered?

- 36. Three legislative options have been considered in comparison with the status quo, which are set out in Table 3 below.

Table 3: Options considered that to provide certainty for disabled people in accessing DSS and that applies a precautionary approach to mitigate fiscal risk

Option 1	Option 2	Option 3	Option 4
<p>Status quo: No new legislation</p> <p>MSD manages fiscal risk and makes changes to operational policy.</p>	<p>Legislation clarifies there is no employment relationship with family carers and other employment-related changes</p> <p>Narrow legislation that removes any employment relationship between MSD and funded family carers that:</p> <ul style="list-style-type: none"> • clarifies that MSD is not an employer of family carers unless there is a written employment agreement to that effect; and • clarifies that MSD is not a controlling third party where a family carer has an employment agreement with a provider of flexible funding contracted by MSD, such as a host agency. 	<p>Legislation clarifies there is no employment relationship with family carers and establishes a litigation bar</p> <p>Limited legislation that addresses employment relationship and other matters that:</p> <ul style="list-style-type: none"> • removes any employment relationship between MSD and funded family carers (as in option 1); and • removes the ability for any further retrospective litigation s 9(2)(f)(iv) 	<p>Legislation establishes a foundational authorisation framework, including clarifying there is no employment relationship with family carers and establishes a litigation bar⁷</p> <p>Limited legislation that provides:</p> <ul style="list-style-type: none"> • a framework setting out the parameters for what is intended by government from appropriated funding for DSS and limitations; and • removes any employment relationship between MSD and funded family carers (as in option 1); and • removes the ability for any further retrospective litigation s 9(2)(h) <p>(as in option 2).</p>

⁷ The foundational framework proposed in option 4 does not include wider disability support such as income support for carers, disability allowance, or support funds.

How do the options compare to the status quo/counterfactual?

	Option 1 – Status Quo / Counterfactual No new legislation. MSD manages fiscal risk and makes changes to operational policy.	Option 2 – Narrow legislation: Legislation clarifies there is no employment relationship with family carers and other employment-related changes (such as third-party agreements)	Option 3 – Limited legislation: Legislation clarifies there is no employment relationship with family carers (as in option 2) and establishes a litigation bar	Option 4 – Limited foundational legislation: Legislation establishes a foundational authorisation framework for DSS, including clarifying there is no employment relationship with family carers (as in option 2) and establishes a litigation bar (as in option 3)
Respond to fiscal risks	0 MSD will not be able to respond to the fiscal risks arising from the two employees confirmed by the Supreme Court judgment and pending claims or future claims before the Employment Relations Authority and the Employment Court. MSD will likely continue to have to meet increased costs flowing from court judgments.	+	+	++
Access to DSS	0 MSD will have to consider restricting access to DSS to manage expenditure within appropriated funding.	+	+	++
Disabled people have more choice and control	0 Disabled people may not have choice and control over the type/level of DSS offered to them as MSD may have to consider restricting some services to respond to fiscal demands.	+	+	++
Family carers wellbeing	0 Family carers who are determined to be MSD employees may have greater remuneration and may receive significant financial gain from remedies claims, however, the distribution of these gains may be uneven across family carers leading to inequities. Family carers may have to take-up	-	+	+

	more responsibility if MSD is operating within restricted funding.	reduce the remuneration package for family carers. Affected family carers will lose the ability to become employees of MSD and may not get increased payments as they had anticipated. s (9)(2)(g)(i) It will also take away from family carers the protection they would get as employees of MSD, like paid leave, cover for care etc.	employees of MSD and may not get increased payments as they had anticipated. s (9)(2)(g)(i) . It will also take away from family carers the protection they would get as employees of MSD, like paid leave, cover for care etc.	s (9)(2)(g)(i)
Clarity of the authorising environment	0 Currently, there is no clarity of the authorising environment for policy settings and funding decisions, which means the financial risk from litigation will continue. Furthermore, this will continue to allow the courts to effectively determine funding policy. DSS could be further restricted.	+ Will provide some degree of clarity that MSD is not the employer of family carers or a third party to any other employment relationship. The disadvantage is that MSD could expect further litigation on areas that have not been clarified by the DSS Bill.	+ Will provide greater degree of clarity that MSD is not the employer of family carers or a third party to any other employment relationship. The disadvantage is that MSD could expect further litigation on areas that have not been clarified by the DSS Bill.	++ The option would provide the greatest degree of clarity on MSD's role in providing DSS through the authorising framework. It will provide a stable platform to ensure integration and coherence across DSS, and alignment of operational policy. Fewer disruptions due to court decisions will enable MSD to continue its work on stabilising and strengthening its capability in funding DSS. A phased approach to implementation will reduce the organisational impacts. s (9)(2)(g)(i)
Overall assessment	0	+	+	++

Key for qualitative judgments

- | | | | |
|----|---|----|---|
| ++ | much better than doing nothing/the status quo/counterfactual | - | worse than doing nothing/the status quo/counterfactual |
| + | better than doing nothing/the status quo/counterfactual | -- | much worse than doing nothing/the status quo/counterfactual |
| 0 | about the same as doing nothing/the status quo/counterfactual | | |

What option is likely to best address the problem, meet the policy objectives and deliver the highest net benefits?

- 37. Option 4 has been assessed as the best option to ensure continuity of care for disabled people, apply a precautionary approach to mitigate fiscal risk from litigation, continue giving choice and control to disabled people who have decision-making capacity, start setting clarity on the current settings that disabled people will have a voice in shaping and reaffirm that Government sets policy for DSS. The option will remove the additional pressure on family carers to individually go through the Employment Relations Authority to seek clarification of their employment status. This option would also give the opportunity for Government to strengthen the foundational settings for DSS by setting parameters for policy and funding.
- 38. s 9(2)(h) [Redacted] s (9)(2)(g)(i) [Redacted]
- 39. Family carers may see the benefits from being MSD’s employees taken away, which they may perceive as having the opportunity to access increased remuneration than they are currently receiving under Flexible Funding arrangements and enjoy employee wellbeing and benefits as any other MSD employee. However, family carers may not fully appreciate the challenges and compliance from being MSD employees, where they will have accountability to MSD as their employer in addition to other restrictions including compliance with the public service code of conduct.
- 40. However, the presumption against extinguishing past claims (section 12 of the Legislation Act 2019 refers) is justified 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. Extinguishing past claims will provide certainty and clarity of the policy intent that the Crown was never intended to be the employer of family carers.
- 41. 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 family carer being an MSD employee. Extinguishing claims would reflect the original intent of Flexible Funding.
- 42. To support family carers, MSD has started exploring policy options to pay family carers within reasonable parameters. s 9(2)(f)(iv) [Redacted]
- 43. The judgment noted that if a disabled person over 18 years old lacks decision-making capacity, they could not enter into an employment arrangement nor nominate an agent to act for them unless they have an order under the Protection of Personal

and Property Rights Act 1988 (PPPR Act). However, people cannot be compelled to gain an order under the PPPR Act, but lack of such an order may restrict how they may access DSS. Transitional arrangements will be put in place for these disabled people. For example, as a temporary measure, prior arrangements will be validated and continue until an alternative mechanism is put in place for up to three years.

44. Due to the sensitivity of proposals, there will be no community consultation prior to the DSS Bill being introduced to the House of Representatives. This may not be well received by disabled people, whānau, and carers. It may be seen as inconsistent with the obligation in the Convention on the Rights of Persons with Disabilities to actively involve and closely consult with representative organisations of disabled people on matters that directly affect them.
45. MSD is planning to do a broad community engagement that will set out the Minister for Disability Issues' intention to continue supporting family carers and other matters. Details for the community consultation is being worked through. The immediate post-introduction actions will include further communications to the sector, providers, users, and the wider public.
46. Options 2 and 3 have a narrower effect compared with option 4 because the focus is on the judgment. These options do not support stabilising or strengthening DSS into the future, except to the extent of addressing current known risks. A focus on the narrow benefit from mitigating current fiscal risk will not address potential future fiscal risk that may lead to restricting DSS as family carers continue to individually go through the Employment Relations Authority to seek clarification of their employment status.
47. Family carers may see the DSS Bill as taking away their rights to be employees of MSD [s \(9\)\(2\)\(g\)\(i\)](#)
 Options 2 and 3 do not give the clarity and certainty on the future of DSS that disabled people, their whānau, and families are seeking from the government.
48. Taking no action and retaining the status quo (option 1) will not manage fiscal risk or set a clear authorising framework. Family carers who are determined to be MSD employees will have greater remuneration compared with family carers who have not sought such a determination. MSD will need to take action to fulfil future claims which are still to emerge from the Employment Court and Employment Relations Authority. [s 9\(2\)\(f\)\(iv\)](#)

Is the Minister's preferred option in the Cabinet paper the same as the agency's preferred option in the RIS?

49. Yes. The Minister has referred to Cabinet consideration whether to save or extinguish employment related claims filed but not determined or resolved by the date when the Bill is introduced to the House of Representatives.

55. MSD will have to commit to resources and funding to develop and implement the legislation. However, the benefits of ensuring certainty and that the Government is committed to continuing care for disabled people by responding to fiscal risks will outweigh the costs of developing and implementation of a the DSS Bill.

Marginal costs and benefits for the users of DSS

56. s 9(2)(f)(iv) [REDACTED]. However, the judgment acknowledged that there is shared responsibility for the care of disabled people between the Crown and families. The DSS Bill will establish and clarify this shared responsibility, where families have responsibility in the first instance in providing care and support for their disabled family member.
57. The provision of current and new support to family carers (that is in development) will balance the Government's commitment to supporting family and whānau of disabled people and ensuring fiscal control as well as continuity of DSS for disabled people. s 9(2)(f)(iv) [REDACTED]

Section 3: Delivering an option

How will the proposal be implemented?

58. Existing policies will be saved to allow time for transition to new legislative-mandated arrangements. MSD will continue to review and monitor the foundational elements before setting broader provisions as part business-as-usual timeframes.
59. A work programme will be developed to implement transitional and related operational policy enabled by the DSS Bill. This includes options for providing new support for family carers and operational work to address situations where a disabled person does not have decision-making capacity and there is no order in place under the Protection of Personal and Property Rights Act 1988.
60. A phased approach for implementation will be taken which will be led by MSD and put into practice by contracted agents for example Needs Assessment and Service Coordination agencies (NASCs), once the DSS Bill commences. In parallel, there will be prioritised work to establish Ministerial programmes based on existing policies. The scope of the implementation work programme will need to be confirmed and may cover a range of subjects such s 9(2)(f)(iv) [REDACTED] and other matters. Therefore, we are unable to provide specific timelines for implementation.
61. MSD will communicate the changes to the sector with the emphasis on reaching those directly affected. MSD will provide advice to the Minister on implementation, and where necessary updates will be made to Cabinet.

How will the proposal be monitored, evaluated, and reviewed?

62. A work programme to monitor, evaluate and review the proposed legislation has not been worked through by MSD at this time.
63. Early monitoring and review will be done through real time data collected from NASCs and Enabling Good Lives (EGL) sites on how MSD contributes to the intended

outcomes for disabled people. Data is collected via an online portal that is available to NASCs, EGL sites and MSD.

64. The data collection will be part of business-as-usual and no additional funding will be required. Better data collection has been made possible through the roll-out of changes to assessment, allocation and flexible funding in early 2026.
65. The data will support stronger financial management for MSD including enabling NASCs and EGL sites to manage their budgets more effectively and give early indication to MSD on any potential financial risks. The monitoring and control are 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. Any early risks will be communicated to NASCs, EGL sites and MSD as part of the business-as-usual monitoring and evaluation timeframes. Any substantial risks or disruption to DSS will be communicated to the Minister for Disability Issues in the first instance and then to the public.
66. As the new system is being rolled out, it is too early for MSD to do any evaluation on its efficiency and effectiveness. To mitigate this risk, the Government's commitment is to continue engaging with disabled people, whānau, and families. Their feedback will inform the monitoring and evaluation of the proposed legislation.
67. MSD will support the Minister for Disability Issues to communicate with disabled people, family carers, and the wider disability sector on the proposed changes, the effect of the DSS Bill, and future work. A key message that will be emphasised is that current settings and funding allocations will continue, which will seek to mitigate any concerns at sudden changes or worries about reduction in access to funded disability support.

Appendix one: Summary of Court judgments and the impact on funded disability support

Issue and impact	Court judgment
<p>Discrimination: Policy of excluding specified family members from payment for the provision of DSS is inconsistent with S19 of the New Zealand Bill of Rights Act 1990 ("NZBORA").</p>	<p>2010 Atkinson v Ministry of Health NZHRRRT 2012 Ministry of Health v Atkinson NZCA 184 2015 Attorney-General v Spencer 2017 Spencer v Ministry of Health NZHRRRT 14</p>
<p>Supervision/ Sleepovers: Sleepovers are work and workers are entitled to be paid minimum hourly wages under the Minimum Wage Act 1983.</p>	<p>2011 Idea Services Ltd v Dickson 2014 Law v Board of Trustees of Woodford House [NZEmpC 25, ERNZ 576. 2017 In Sanderson v South Canterbury District Health Board [2017] NZERA 2018 Chamberlain v Ministry of Health [2018] NZCA 8</p>
<p>Employment status: Cited in employment status disputes where tests for home-based or care work is clarified.</p>	<p>1997 Cashman v Central Regional Health Authority 2015 Lowe v Director-General of Health 2017 Lowe v Director-General of Health (Supreme Court) 2021 Humphreys v Humphreys (and the CE of MOH). Employment Court Citation: [2021] NZEmpC 217 2021 Fleming v Attorney-General Employment Court Citation: [2021] NZEmpC 2022 Attorney-General v Fleming. Court of Appeal. Citation: [2022] NZCA 461 2024 Attorney-General v Fleming & Humphreys. Court of Appeal. Citation: [2024] NZCA 92 2025 Attorney-General v Fleming & Humphreys. Supreme Court. Citation [2025] NZSC 188</p>
<p>Decision-making capacity: Clarify threshold for decision-making capacity</p>	<p>2020 TUV v Chief of NZ Defence Force</p>

Appendix two: Background to litigation that led to the Supreme Court judgment establishing an employment relationship between MSD and funded family carers

Up until 2013	Funded disability support excluded payment to family carers of eligible disabled people. It was considered that any care provided by family members was informal and unpaid. This contrasted with the professional employed workforce of support workers.
2013	Human Rights Review Tribunal and Court of Appeal case found that exclusion amounted to discrimination on the basis of family status. The Ministry of Health introduced a new policy called Funded Family Care (FFC). ⁸ It allowed funding to be provided to family carers in recognition of the care they provided, who were employed by the disabled care recipient. Critically, FFC did not explicitly provide for situations where the disabled care recipient did not have decision making capacity ⁹ to enter into an employment agreement (and where there were no authorised substituted decision-making orders in place).
2020	In 2020, the Government repealed relevant legislation authorising the FFC policy. People who had accessed funding under FFC were transitioned to flexible funding. Under the new scheme, it was possible for disabled people to employ family members to care for them, however this was not part of the original intent of the flexible funding. There were no savings provisions or bar on litigation put in place.
2025	Supreme Court hearing that establishes a family carer employed by a disabled person who does not have decision-making capacity was in effect not accountable to that disabled person (that is their family member). After the judgment, any funded family carer who are determined to be MSD employees will now be accountable to MSD.

⁸ FFC was a disability support scheme introduced in October 2013 to enable the Ministry of Health to pay for a disabled person to employ a family carer. Key elements of FFC were its focus on personal care and household management services, provided at a maximum 40 hours per week at the minimum wage rate. The person being cared for had to be aged 18 or over and assessed as having high or very high disability support needs and not be able to remain at home if they did not have a family carer.

⁹ A person is determined that they do not have decision making capacity if they are assessed as not being able to understand relevant information, retain it, use or weigh it, and communicate their decision. A determination of a lack of decision-making capacity can only be made by the courts or via a valid Enduring Power of Attorney under the Protection of Personal and Property Rights Act 1988. A determination that a person lacks decision making capacity means that they are not legally able to be party to a contract or be responsible for other decisions relating to their welfare or property. Substituted decision making that is authorised by the courts or a valid Enduring Power of Attorney can transfer their decision-making rights to another person or people, who are legally entitled to make decisions on their behalf (within some limitations as set out in legislation).

	<p>The Supreme Court extended the definition of what engagement in an employment relationship means. MSD may be liable for remedies where it can be determined as the employer. A family carer may be found to have been engaged in employment by MSD if:</p> <ul style="list-style-type: none">• s 9(2)(h) [Redacted]• s 9(2)(h) [Redacted]• s 9(2)(h) [Redacted] <p>s 9(2)(h) [Redacted]</p>
--	--

s 9(2)(h) [Redacted]