

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

What are the marginal costs and benefits of the preferred option in the Cabinet paper?

50. The marginal costs and benefits for option 4 is discussed in two parts: Crown and the users (disabled people, their whānau and carers).

Marginal costs and benefits for the Crown

51. The fiscal risk from the judgment is difficult to quantify due to many variables involved, principally being that the Employment Relations Authority has not yet determined the number of hours that Fleming is to be paid by MSD (which is due to happen in or after May 2026). s 9(2)(h)

[Redacted text block]

52. s 9(2)(h)

[Redacted text block]

Table 4: Scenario of costs arising from retrospective claims

s 9(2)(h)

[Redacted table content]

53. s 9(2)(j)

[Redacted text block]

54. This estimate does not include s 9(2)(j) any organisational setup costs that would be incurred by MSD (for example, setting up a new class of employees) nor any ongoing management and any ongoing wage costs, where it is more than what the family carer has been funded, as this would depend upon the specifics of each individual case.

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>
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s 9(2)(h) [Redacted]