New Zealand Law Society
Te Kāhui Ture o Aotearoa

Disability Support Services Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

12 June 2026

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) is grateful for the opportunity to submit on the Disability Support Services Bill (**Bill**),which, among other things:

(a) identifies the purpose of funded disability support services (**DSS**), and creates a framework for funding such services; and

(b) responds to the Supreme Court's decision in *Fleming v Attorney-General*,[1] and proposes to clarify that the Crown and its contracted providers are not 'employers' of family members who receive payments for caring for a disabled person.

1.2 This submission, prepared with input from several of the Law Society's law reform committees,[2] identifies some significant concerns arising from the Bill, including that:

(a) There are deficiencies in the policy and legislative processes used to develop and progress the reforms.

(b) The reforms appear to be premised on an interpretation of the *Fleming* decision as giving rise to broader implications than may be the case.

(c) The reforms appear to limit the right to freedom from discrimination and the right to justice affirmed in the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**).

(d) The proposal to extinguish existing proceedings can weaken the rule of law by undermining the principle of comity and blurring the separation of powers between Parliament and the judiciary.

(e) The proposal to use secondary legislation and Government policies to suspend or exclude the application of primary legislation creates uncertainty and raises rule of law concerns.

(f) There is uncertainty as to how the framework in the Bill would operate alongside other employment legislation and the Health and Safety at Work Act 2015 (**HSWA**).

1.3 For these reasons (which we discuss in more detail below), the Law Society recommends the Bill not proceed until further policy work is completed.

1.4 The Law Society **wishes to be heard** in relation to this submission.

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1 *Fleming v Attorney-General* [2025] NZSC 188, [2025] 1 NZLR 973.

2 Employment Law Committee, Health & Disability Law Committee, Human Rights & Privacy Committee, and Public Law Committee. More information about these committees is available on the Law Society's website: www.lawsociety.org.nz/professional-practice/law-reform-and-advocacy/law-reform-committees/.

2 Deficient policy and legislative process

2.1 The materials relating to the Bill note there has not been consultation on the proposals in the Bill "due to the urgency and the confidential nature of the proposals".[3] The proposals therefore appear to have been developed in haste, with no opportunity for disabled people, their whānau, and family carers (who are the individuals who are most likely to be adversely impacted by these reforms), to provide feedback on the design and development of these proposals.

2.2 While the select committee process will allow these individuals to submit on the Bill, submissions received during this consultation process are less likely to influence the underlying policy decisions to restrict funding for family members and whānau of disabled persons. Select Committee is therefore not a sufficient replacement for proper policy processes and public consultation prior to legislative design.

2.3 We also note the submitters have only been given 15 working days to submit on the Bill. This truncated timeframe is unlikely to give submitters adequate time to carefully consider the impacts of the proposed reforms, or to identify alternative options to mitigate the fiscal risks that have prompted these amendments. This is particularly likely to be the case for disabled people who might require assistance with understanding how the Bill will impact them, and with preparing submissions to the Select Committee.

2.4 Any amendments to the legislative framework governing DSS should be designed, drafted and enacted following a process that enables meaningful engagement with disabled persons, their whānau, family carers and any representative organisations, and gives them the opportunity to provide feedback on potential policy options before any further decisions are made on whether to proceed with any legislative amendments. We draw the Select Committee's attention to Article 4(3) of the United Nations Convention on the Rights of Persons with Disabilities (**CRPD**), which – as noted by Whaikaha – New Zealand was a "leader in negotiating."[4]

2.5 In the Law Society's submission, adequate time must be given to carefully consider and respond to the issues identified below (and in particular, issues relating to the rule of law, workability, and consistency with the Bill of Rights Act and other existing legislation), alongside those of other submitters, in particular disabled people and their representative organisations.

2.6 The process should also ensure that information and data that is central to the proposed reforms (including on fiscal risks which have prompted these reforms, and funding arrangements that are intended to replace current arrangements) are made publicly available to ensure submitters (and particularly those who will be directly affected by these reforms and have their rights limited or extinguished by the Bill) can provide informed feedback about any proposed changes.

2.7 The Law Society recommends that the Bill does not proceed any further until this work is completed, and any necessary amendments are then made. In addition to addressing

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3 Ministry of Social Development *Departmental Disclosure Statement: Disability Support Services Bill* (14 May 2026) (**DDS**) at [3.1]; RIS at pages 5 and 7.

4 See https://www.whaikaha.govt.nz/about-us/the-uncrpd/about-the-uncrpd.

concerns about consistency and workability, such an approach is likely to be better aligned with New Zealand's international obligations under the CRPD.

3 Premise of the Bill

3.1 The Bill is presented as a legislative response to the Supreme Court's decision in *Fleming v Attorney-General*,[5] with the Regulatory Impact Statement (**RIS**) for the Bill noting "there is an implication from [that] judgment that primary responsibility for the care and support of disabled people rests with the Crown".[6]

3.2 This statement appears to be premised on an interpretation of the Supreme Court judgment as giving rise to broader implications than may be the case. The Supreme Court recorded in its decision that it did not reach any conclusions about the scope of the State's obligations to care for adult disabled persons,[7] and acknowledged that the State's responsibilities are not open-ended, and reflect notions of proportionality between state and family responsibility.[8]

3.3 The judgment also makes clear that the appellants' cases in that proceeding turned on their particular facts, and that the two family carers involved in the *Fleming* proceeding were left with no possible employer other than the State because of errors by officials in the way that individualised funding reforms were implemented, which treated the appellants as 'homeworkers' and therefore, 'employees' of the State:

(a) The Court concluded Ms Fleming was a 'homeworker' because she had been made an incorrectly calculated offer of funding which did not include funding for supervision, and the Court did not make any suggestion that a family carer could expect State funding for full-time care.[9]

(b) The Court's decision on Mr Humphreys' case was based on an error in the implementation of government policy, which wrongly assumed that all disabled people would have the capacity to take on employment responsibilities, and failed to provide support to his disabled daughter (who lacked decision-making capacity) in her decision making.[10]

3.4 This raises questions as to whether *all* family carers would come within the definition of 'employee', and therefore, whether legislative reform of this scale is necessary. In the ordinary course, the implications of the judgment would be worked out by the courts in subsequent cases, following which Parliament would retain the right to intervene if it considered necessary. The Law Society does not take a view on the broader implications of the judgment, but notes these matters are not discussed in unredacted parts of the RIS and it is therefore unclear what analysis has been conducted of this issue or whether the

5 *Fleming v Attorney-General* [2025] NZSC 188, [2025] 1 NZLR 973 (***Fleming***).
6 Ministry of Social Development *Regulatory Impact Statement: Establishing a legislative framework for funded disability support services* (24 March 2026) (**RIS**) at page 1.
7 *Fleming* at [108].
8 *Fleming* at [152].
9 *Fleming* at [103] – [104].
10 *Fleming* at [114].

reform has proceeded on the basis of an assumption as to the effect of the Supreme Court's decision.[11]

3.5 If the Bill is to proceed, the Select Committee should seek further, more detailed advice about the legal and practical implications of the *Fleming* decision, and whether all of the amendments in the Bill seek to respond to that decision. It may be that some of the amendments in the Bill are not needed if the *Fleming* decision has narrower implications than what is suggested in the RIS.

4 Rule of law concerns arising from proposal to extinguish live proceedings

4.1 While the Bill preserves the positions of the appellants in the *Fleming* proceeding,[12] it will have retrospective effect and extinguish other proceedings that are currently before the courts and the Employment Relations Authority (**Authority**) that are yet to be determined:

(a) Clause 10 of Schedule 1 of the Bill provides that certain proceedings in the Authority and the Employment Court, which are specified in subsection (1), will be extinguished when the Bill is enacted – these include, for example, proceedings seeking:

(i) declarations that family carers and representatives of disabled people are employees of the Crown or a contracted provider,[13]

(ii) compensation and recovery of wages under the Employment Relations Act 2000 (**ERA**),[14] and

(iii) the resolution of personal grievances.[15]

(b) Clause 14 of Schedule 1 seeks to extinguish all unlawful discrimination proceedings in the courts that relate to DSS policies, programmes and funding.

4.2 The RIS explains that these amendments seek to "provide certainty and mitigate fiscal risk" because the *Fleming* decision has "widened the scope of DSS, with consequential significant fiscal impact".[16] The Departmental Disclosure Statement (**DDS**) also notes the amendments in clause 14 (to extinguish unlawful discrimination claims) respond to "significant public interests" to maintain the continuity of care of disabled people by avoiding unmanageable fiscal costs, preserve a coherent and sustainable disability support system, and ensure policy decisions are made by democratically accountable institutions rather than "fragmented litigation".[17]

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11 It is also worth noting that the Supreme Court's decision may not amount to substantive new law, as the Court's decision appears to simply builds on existing and recognised principles: the statutory definition of homeworker originally appeared in s 2 of the Labour Relations Act 1987, and the concept of a 'homeworker' has since been incorporated into various statutes including the Employment Relations Act 2000, Crimes Act 1961, Minimum Wage Act 1983, and the HSWA.

12 Clause 16 of Schedule 1 of the Bill.

13 Clause 10(1)(a)(i).

14 Clause 10(1)(a)(iv).

15 Clause 10(1)(b)(i).

16 RIS at pages 2-3.

17 DDS at [4.3].

4.3 The proposal to achieve those goals by extinguishing live proceedings raises significant rule of law considerations which are not discussed in the materials relating to the Bill. If enacted, these amendments could reduce the certainty and predictability of the law (in terms of its application at the time these proceedings commenced), and blur the separation of powers between Parliament and the judiciary by legislating over matters before the courts.

4.4 There is a strong convention arising out of the constitutional principles of comity and the separation of powers that, except in very limited circumstances, Parliament should not legislate in a way that:

(a) interferes with the judicial process and cases before the courts, or

(b) deprives individuals of their right to continue proceedings and assert rights and duties under the law as it stood at the time the proceedings commenced.[18]

4.5 For this reason, the Regulatory Standards Act 2025 and the *Legislation Guidelines* caution against retrospective legislation which interfere with existing proceedings, and suggest that such legislation may be appropriate only where it is necessary to achieve the underlying policy goals of the legislation.[19]

4.6 While the need to mitigate fiscal risks and ensure the sustainability of the DSS funding regime are legitimate policy objectives, any legislation which seeks to achieve those objectives should be developed following robust policy processes which, among other things, include meaningful public consultation (in particular, with affected parties to existing proceedings), and detailed analyses of whether those objectives could be achieved in other ways that do not infringe upon the rule of law and comity.

4.7 It is unclear if that is the case here: there does not appear to be any publicly available information about the number of proceedings which will be extinguished once this Bill is enacted, or what fiscal risks those proceedings present to the Crown. While the RIS appears to include a table titled 'Scenario of costs arising from retrospective claims' (which we acknowledge might include some of this information), the table and related paragraphs have been redacted. It is also unclear (again noting this may be within redacted material), whether there has been engagement with those whose live proceedings may be extinguished.

4.8 Also absent are assessments of whether it is necessary to:

(a) extinguish all proceedings before the Employment Court and the Authority (that come within the scope of clause 10) *as well as* extinguishing all unlawful discrimination proceedings (as proposed in clause 14); and

(b) extinguish live proceedings *in addition to* barring future proceedings (as proposed in clauses 11, 12, 13 and 15 of Schedule 1),

in order to achieve the stated policy goals of reducing fiscal risks and avoiding unmanageable costs, and whether the policy objectives of this Bill could be achieved in

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18 *Legislation Guidelines* at pages 58-59, [12.1]-[12.2]; Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th edition, LexisNexis, Wellington, 2021), ch 18.

19 Regulatory Standards Act 2025, ss 9(a)(ii) and 9(g); *Legislation Guidelines* at page 59.

an alternative way that upholds the rule of law and preserves live proceedings (for example, via some alternative arrangement or settlement with affected parties). We consider such assessments to be crucial to determining whether these provisions in the Bill are necessary and justified.

4.9 The RIS notes the fiscal risk from the *Fleming* 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)".[20] This suggests that there have been no – or only limited – assessments of whether the retrospective provisions in the Bill are necessary and appropriate.

4.10 The Supreme Court has remitted the *Fleming* matter to the Employment Court to determine the quantum of lost wages and holiday pay.[21] The Law Society understands the Court recently adjourned this hearing to the first available dates (four days) after 30 July 2026, and it is unclear whether this matter will be decided before the Select Committee's reporting deadline of 13 August 2026. In any case, we urge the Select Committee to make enquiries about the status of this proceeding, and seek advice from officials on:

(a) what fiscal risks arise (or are likely to arise) in relation to both existing and future proceedings which will either be extinguished or barred under the Bill;

(b) the extent and nature of these fiscal risks (including, for example, whether they arise in relation to matters that are specific to the facts of a limited number of cases, and what impacts they will have on DSS funding and the Crown's ability to continue to support disabled people); and

(c) whether it is necessary for *all* proceedings that come within the scope of clauses 10 and 14 of Schedule 1 to be extinguished in order to avoid unmanageable costs to the Crown, or whether this could be achieved by adopting a narrower approach, and extinguishing only some existing proceedings, or only barring future proceedings.

4.11 If it is not possible for officials to advise on these matters before the Select Committee's reporting deadline, we recommend halting these reforms until officials are able to do so.

4.12 It may be that clauses 10 and 14 are unnecessary if it is possible to sufficiently reduce fiscal risks, for example, by only barring potential future proceedings. If that appears to be the case, we recommend deleting clauses 10 and 14 from the Bill (and we note this approach is likely to strike a better balance between achieving the policy objectives of the Bill, and upholding the rule of law and maintaining the separation of powers).[22]

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20 RIS at [51]. While the RIS refers to this matter being remitted to the Authority, we understand it has in fact been remitted to the Employment Court, as we discuss in [4.10].

21 *Fleming v Chief Executive of Ministry of Social Development* [2026] NZEmpC 66 at [2].

22 We also note the Finance and Expenditure Select Committee took a similar approach when reviewing the Credit Contracts and Consumer Finance Amendment Bill, and recommended amending the Bill to exclude its application to a live proceeding that was yet to be determined (see Credit Contracts and Consumer Finance Amendment Bill (137-1) (select committee report, October 2025)).

5 Limits on the right to freedom from discrimination

5.1 Two clauses in the Bill have the potential to result in differential treatment between family carers and non-family carers (i.e., those who provide disability support services to a disabled person who is *not* a family member):

(a) Clause 12, which excludes family members and anyone who is in a close social relationship with a disabled person from being employed by the disabled person. In preventing family carers from being recognised as 'employees', this clause excludes those carers from receiving statutory entitlements and protections that would otherwise be available to them under employment legislation (in particular, the ERA, Minimum Wage Act 1983 and Holidays Act 2003). The Bill does not extend this exclusion to non-family carers who, despite providing the same or similar services, will remain able to be employed by disabled people who require their services.

(b) Clause 5 of Schedule 1 applies to family carers who are employed by a disabled person under an employment agreement that has been validated by clause 2 of Schedule 1 for the duration of the transition period. This clause provides that, for the purposes of the Minimum Wage Act, family carers are not treated as performing work during excess hours. Like clause 12, this provision would exclude the application of the Minimum Wage Act to excess hours during which the family carer provides (or remains available to provide) disability support to their disabled family member. Again, this restriction does not extend to non-family carers employed by disabled people who work excess hours.

5.2 In its advice regarding the Bill's consistency with the Bill of Rights Act, the Ministry of Justice correctly identifies that the provisions which enable differential treatment of family carers engage section 19 of the Bill of Rights Act, which affirms the right to freedom from discrimination on prohibited grounds including marital and family status.[23]

5.3 We note the Court of Appeal has considered the extent to which this right is engaged where Government policies distinguish family carers from non-family carers: in *Ministry of Health v Atkinson & Ors*,[24] the Court found it is necessary to apply a two-pronged test to determine whether those Government policies breached section 19:[25]

(a) First, it requires assessment of whether there is differential treatment or effects between family carers and non-family carers who are able and willing to provide disability support services.[26]

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23 Section 19 of the Bill of Rights Act operates with reference to the prohibited grounds of discrimination identified in s 21(1) of the Human Rights Act 1993 (**HRA**), which include family status (subsection (l)). 'Family status' is defined in s 21(1)(l) of the HRA as including having the responsibility for part-time care or full-time care of children or other dependants, and being a relative of a particular person.

24 *Ministry of Health v Atkinson & Ors* [2012] NZCA 184 (***Atkinson***).

25 *Atkinson* at [55].

26 *Atkinson* at [74].

(b) This should be followed by consideration of whether that differential treatment is discriminatory, subject to the ability to demonstrate that the discrimination is justified under section 5 of the Bill of Rights Act. This assessment operates on the presumption that differential treatment will be discriminatory if, when viewed in context, it imposes a material disadvantage on the person or group differentiated against.[27]

5.4 We consider a similar approach would assist in determining whether or not this Bill breaches section 19 of the Bill of Rights Act (and we note the *Atkinson* test is also identified as one of the applicable tests in the Ministry of Justice's advice).[28] However, we note with concern that the Ministry of Justice's advice includes only a cursory assessment of limits on the section 19 right, and does not apply the *Atkinson* test, or undertake detailed analysis of whether the limits on section 19 are reasonable and justified (as required under section 5 of the Bill of Rights Act).

5.5 Here, the application of the *Atkinson* test suggests the Bill prima facie limits the right recognised in 19 of the Bill of Rights Act:

(a) As we explain at [5.1] above, clause 12 and clause 5 of Schedule 1 both enable differential treatment of family carers.

(b) The Ministry of Justice's advice on the Bill also confirms that this differential treatment of family carers could impose a material disadvantage on family carers – it states:[29]

> The transitional work limitation discriminates on the basis of marital/family status as it draws a clear distinction between an employee who is not a family member and one who is, with a material disadvantage arising for the family carer. The non-family employee would be entitled to be paid for hours worked in excess of their employment agreement, whereas a carer who is a family member would not. In situations where a disabled person requires 24/7 care, for example, the potential difference in earnings between these two groups could be substantial.

5.6 Where the Bill appears prima facie to limit the right to freedom from discrimination, we consider it is necessary to undertake a more robust assessment to determine whether those limitations are in fact justified (as required under section 5 of the Bill of Rights Act). However, it appears there is no specific consideration of clause 12, and section 5 is given only limited consideration in respect of Schedule 1, clause 5.[30]

5.7 The Law Society also raises concerns with certain aspects of the Ministry of Justice's advice:

(a) In its advice, the Ministry of Justice notes the eligibility framework for disability support services is inherently discriminatory as it is based on drawing

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27 *Atkinson* at [109].

28 Ministry of Justice *Consistency with the New Zealand Bill of Rights Act 1990: Disability Support Services Bill* (8 May 2026) (**BORA vet**) at [15].

29 BORA vet at [32].

30 We note the analysis titled 'litigation bar' in the BORA vet, appears to conflate the relevant provisions (and applicable rights, and whether infringement is justified) into non-specific, general commentary.

distinctions based on prohibited grounds of discrimination, and this is "clearly necessary and justified".[31] The Ministry then suggests that, because the discriminatory nature of overarching eligibility framework is justified, further discrimination based on marital or family status is also justified because "the State's responsibility to provide DSS is not open-ended and some proportionality between State and family responsibility is necessary, with a pooling of resources to ensure appropriate standards of care".[32]

In our view, it is not sufficient to suggest that any limitations on rights affirmed in the Bill of Rights Act are justified simply on the basis that they are needed to reduce fiscal costs and risks (if that is what is intended). It is necessary to undertake a more robust assessment of the extent to which the section 19 right is engaged, and whether any limits placed on that right are reasonable and proportionate to their objectives when determining whether those limits are justified.

(b) The Ministry's advice also suggests it is possible to make Ministerial programmes and directions that are consistent with section 19 of the Bill of Rights Act, and in enabling this, the Bill itself can also be deemed consistent with section 19.[33] It is unclear how the Ministry has reached this conclusion: if the framework proposed in the Bill prevents the application of certain employment protections and entitlements to family carers, it would not possible for programmes and directions made under that framework to then avoid differential treatment of those excluded family carers. Irrespective of the programmes and directions made by the Minister, family carers cannot have the status of employees, where non-family carers do.

(c) The Ministry has also suggested, in relation to the transition arrangements in the Bill (including those in clause 5 of Schedule 1), that because the Ministry considers the new framework in the Bill to be consistent with the Bill of Rights Act, "it follows" that the transitional provisions are also consistent because the funding arrangements in the transitional provisions are intended to align with those proposed in the Bill. This approach fails to take into account and apply well-established principles for determining whether rights limitations are justified (for example, the principles of reasonableness and proportionality established in *R v Hansen*).[34]

5.8 If these reforms are to proceed, the Law Society urges the select committee to seek further and more detailed advice from officials regarding the Bill's consistency with the Bill of Rights Act (including through the application of the *Atkinson* and *Hansen* tests where relevant), and to carefully consider whether any limitations on the right to freedom from discrimination are justified under section 5 of the Bill of Rights Act.

31 BORA vet at [17] and [26].
32 BORA vet at [28].
33 BORA vet at [29].
34 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

6 Limits on the right to justice

6.1 In addition to the right to freedom from discrimination, a number of provisions in Schedule 1 of the Bill also engage the right in section 27 of the Bill of Rights Act to seek judicial review (subsection (2)) and bring civil proceedings against the Crown, and to have those proceedings heard according to law in the same way as civil proceedings between individuals (subsection (3)):

(a) Clause 10 seeks to extinguish existing employment proceedings against the Crown in the Authority and the Employment Court.

(b) Clause 11 seeks to bar future employment proceedings against the Crown in the Authority and the Employment Court.

(c) Clauses 12 and 13 seek to bar the making of unlawful discrimination complaints against the Crown to the Human Rights Commission or the Health and Disability Commissioner, and prevent them from taking action against the Crown.

(d) Clause 14 extinguishes existing unlawful discrimination proceedings against the Crown.

(e) Clause 15 bars future unlawful discrimination proceedings against the Crown.

6.2 Together, these clauses will confer significant advantages on the Crown by shielding the Crown from complaints and litigation while non-Crown parties in similar proceedings will remain exposed to such risks.

6.3 These provisions appear to limit the right in section 27(3) of the Bill of Rights Act to bring civil proceedings against the Crown by extinguishing existing civil proceedings and barring future proceedings. Because some unlawful discrimination claims can be raised in the context of judicial review proceedings relating to actions taken and decisions made under this legislation,[35] some of these provisions also appear to limit the right to judicially review those actions and decisions. It is also possible that these clauses are, to some extent, inconsistent with section 12(1) of the Crown Proceedings Act 1950, which provides that civil proceedings which must be brought against the Crown may be commenced, heard, and determined in the same court and in like manner in all respects as in suits between subject and subject.

6.4 However, we note with concern that the materials relating to the Bill (including the Ministry of Justice's advice regarding the Bill's consistency with the Bill of Rights) do not:

(a) offer substantive reasons as to why the limits on section 27(2) are reasonable and justified under section 5 of the Bill of Rights Act; or

(b) identify or otherwise engage with the limits on the right to justice affirmed in section 27(3) of the Bill of Rights Act.

6.5 We also note the Ministry's advice notes that "the litigation bar does not affect the ability to bring discrimination proceedings relating to the proposed legislation, Ministerial directions or programmes made under it, or new or continuing alleged breaches of s 19(1) that occur or persist after the Bill is introduced". This appears to be an incorrect

35 BORA vet at [36].

assertion, given clause 15 seeks to bar future unlawful discrimination proceedings against the Crown in any court or tribunal (and the Ministry's advice acknowledges elsewhere that discrimination proceedings could include judicial review proceedings relating to a policy, programme, action or omission).[36]

6.6 Finally, we note the Ministry of Justice's advice disregards alternative reform proposals that would impose narrower limits on section 27 rights on the basis that "nothing short of a complete bar on discrimination claims relating to historic arrangements" would sufficiently achieve the underlying policy objectives of finality and financial sustainability.

6.7 However, the Ministry's advice offers no evidence or analyses to support this claim, such as:

(a) whether these litigation costs outweigh the long-term social policy costs of enacting these proposals; and

(b) the fact that most Government policy decisions can be challenged through judicial review and civil proceedings, and to that extent, present some degree of fiscal risks to the Crown.

6.8 Our view is that it is not appropriate, for the purposes of section 5 of the Bill of Rights Act, to simply assert that limitations on rights are justified because the Crown will otherwise incur fiscal costs.

6.9 A more robust assessment of these limitations, which applies relevant principles including reasonableness and proportionality, would need to be completed to determine whether those limitations are justified. Failure to do so, particularly where the Bill proposes to confer significant advantages on the Crown, creates uncertainty about the Bill's consistency with the Bill of Rights Act, and raises rule of law concerns (in terms of equality before the law) about whether the Crown is being inappropriately shielded from its obligations under the law.

7 Uncertainties regarding the application of other employment legislation

7.1 The RIS suggests there has been only limited consideration of how the provisions in the Bill will interact with other existing employment legislation – it states:[37]

> 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. … 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.

36 BORA vet at [36].
37 RIS at page 5.

7.2 Unsurprisingly, the proposals which have been developed following this truncated process raise concerns about how the new DSS funding framework is intended to operate alongside other existing employment legislation in a clear and predictable way. We discuss these concerns below.

Uncertainty and concerns arising from transitional arrangements for disabled people who lack decision-making capacity

7.3 The Supreme Court has recognised, in *Fleming v Attorney-General*, that some disabled individuals lack decision-making capacity to enter into employment agreements and employ family carers. The Bill proposes to respond to this finding by enabling the creation of alternative funding models to support family members who care for disabled people who lack decision-making capacity.[38] However, it anticipates the development of these alternative funding models will require some time – Schedule 1 of the Bill therefore provides for transitional arrangements for a 3-year period (**transition period**),[39] and proposes to validate for the duration of that period any employment agreements between disabled individuals who do not have decision-making capacity, and their family carers.[40]

7.4 The Law Society notes that the Bill and related policy documents do not discuss or directly address various issues arising from this proposal – they include:

(a) The fact that this proposal contradicts the Supreme Court's findings that disabled people who lack decision-making capacity do not have capacity to employ their family carers.[41]

(b) Whether it is appropriate to validate, even temporarily, employment agreements which have been deemed invalid by the Supreme Court.

(c) Whether it is appropriate to legislate, even as a transitional measure, that disabled people who lack decision-making capacity are to be considered 'employers' for legal purposes, and to expect those individuals to discharge the statutory obligations that would apply to them in their capacity as an employer.

(d) How a disabled person who lacks decision-making capacity would be expected to discharge their obligations as an employer under other existing employment legislation, including the ERA, Holidays Act, and Minimum Wages Act (which would require, among other things, negotiating and setting work hours and pay, and identifying which services would need to be provided under the validated agreement).

(e) Identify or consider how to address the practical challenges which would inevitably arise in circumstances where the disabled person cannot understand

38 Also see RIS at [59].

39 '3-year transition period' is defined in cl 1 of Sch 1 of the Bill as "the period that tarts on the commencement date, and ends immediately before the date that is the third anniversary of the commencement date".

40 Cl 2 of Sch 1.

41 See *Fleming v Attorney-General*.

or discharge their statutory obligations because they lack decision-making capacity and/or the resources and funding needed to discharge those obligations.

(f) Who would monitor and enforce compliance with relevant employment legislation, and whether this would involve taking enforcement action against disabled people who lack decision-making capacity, and fail to meet their statutory obligations as an employer.

(g) What standards and protections apply when an agent or representative makes a decision on behalf of a disabled person absent a valid order under the Protection of Personal and Property Rights Act 1988.

7.5 These gaps create uncertainty regarding how these proposals are expected to work in practice, and raise questions as to whether family carers will be able to receive statutory entitlements and protections that should be available to them as employees.

Issues arising from the reliance on secondary legislation and Executive policy

7.6 The new funding framework in the Bill relies heavily on the establishment of 'DSS funding policies'. DSS funding policies are defined in clause 4 of the Bill as policies that are established through secondary legislation and Executive policy which relate to the allocation and use of 'DSS-funded disability support services' – this effectively means DSS funding policies can be created by:

(a) directions (which are secondary legislation) issued by the Minister under clause 10;

(b) programmes made by the Minister under clause 11 (which are also secondary legislation); and

(c) policies and programmes that have been established by the Crown before the commencement of the provisions in the Bill, and can be amended by the Minister at any time.[42]

7.7 Once established, these DSS funding policies will play a crucial role in identifying what services constitute 'DSS-funded disability support services', which in turn determine whether or not a carer is an 'employee' for the purposes of employment legislation (including the ERA, Minimum Wage Act and Holidays Act).

7.8 While these provisions are not identified as Henry VIII clauses in the DDS, they appear to operate as such:

(a) Clauses 10 and 11 are broadly drafted, and enable the Minister to set and adjust the policy settings of the new framework for DSS-funded disability support services. In doing so, they could have the effect of potentially suspending or excluding the application of primary legislation that has been passed by Parliament.

(b) Despite their broad application, these clauses do not require the Minister to consult disabled people, their whānau and carers, or relevant representative

[42] Cl 8 of Sch 1.

organisations (as required under Article 4(3) of the CRPD) about proposed Ministerial programmes or directions.

(c) As a result, they have the potential to reduce the predictability and accessibility of the law (particularly where the Minister exercises their powers frequently to establish and/or change DSS funding policies and DSS-funded disability support services). This gives rise to rule of law concerns.

7.9 Clause 10 also gives the Minister a broad power to issue binding directions relating to the exercise of the Ministry's functions, duties and powers under this legislation. However, this clause does not impose any further constraints on the scope of these powers and Ministerial directions – therefore, as currently drafted, this clause could enable the Minister to issue directions that are contrary to, or undermine, the purposes and provisions of this Bill, as well as other applicable legal frameworks (including the Bill of Rights Act and the CRPD).

7.10 We also note that, while clause 10 has been drafted with reference to the "Ministry's performance or exercise of any functions, duties, or powers",[43] the Bill does not identify the responsible Ministry (although we presume this refers to the Ministry of Social Development (**MSD**)), or contain any clauses which prescribe its functions, duties or powers. It may that these are intended to be references to the principles in clause 8, and the functions, duties and powers that may be specified and/or discharged under Ministerial programmes established in accordance with clause 11; however, as currently drafted, this remains unclear.

7.11 Finally, we note the Bill does not *require* the Minister to issue directions or establish programmes,[44] or otherwise require the development, revision or completion of an existing policy or programme – it simply puts in place transitional arrangements for a 3-year period to enable more enduring arrangements to be put in place within that time. This means any failures or delays in establishing enduring DSS funding policies could contribute to gaps in the overall DSS funding framework – this can then create further uncertainty about:

(a) whether those who are deemed 'employees' under validated employment agreements will continue to receive payments after their validated agreements expire at the end of the transition period;[45]

(b) what services constitute 'DSS-funded disability support services' and enable carers to be recognised as employees.

Next steps

7.12 If these reforms are to proceed despite the concerns we have identified in this submission, the Law Society urges the Select Committee to seek detailed advice from officials about how the new framework in the Bill will operate alongside existing employment legislation, and whether amendments could be made to the Bill to reduce uncertainties arising from the current design and drafting of the Bill (including its heavy

43 Clause 10(1).
44 We note these powers are framed as actions the Minister "may" take: see cl 10(1) and 11(1).
45 Clauses 2 and 4 of Sch 1.

reliance on secondary legislation and Government policy) – this could include, for example, amendments to:

(a) clarify the employment status of family carers who receive payments under an approved DSS programme as well as under other non-approved programmes;

(b) address the issues we have identified in [7.4] above in relation to validated employment agreements;

(c) require the Minister to consult disabled people, their whānau and carers (or, at the very least, representative organisations, as required under Article 4(3) of the CRPD) about proposed Ministerial directions and programmes;

(d) clarify the scope and purpose of Ministerial directions that can be issued under clause 10; and

(e) ensure enduring DSS funding policies will be put in place before the transition period ends (for example, by *requiring* the Minister to establish necessary Ministerial programmes under clause 11, and issue necessary directions under clause 10, before the end of the transition period).

8 Uncertainty regarding the application of duties under the HSWA

8.1 The HSWA seeks to secure the health and safety of workers, other persons and workplaces. One way it achieves this purpose is by imposing duties on any person conducting a business or undertaking (**PCBU**) regardless of whether they conduct the business or undertaking alone or with others, and whether or not their business or undertaking is conducted for profit or gain.[46]

8.2 The RIS identifies that one of the policy objectives of the Bill is to remove operational pressures on MSD to ensure a safe workplace under the HSWA (which may be the family carer's home,[47] where the work completed is not deemed to be 'residential work').[48] However, it is unclear why this has been identified as a policy objective – it may be that, like other policy proposals in the Bill, this particular proposal also seeks to reduce the overall costs of delivering DSS; however, this has not been clearly identified as an underlying purpose.

8.3 We also note the RIS does not include a cost-benefit analysis of this proposal, which considers, for example, any risks of removing obligations that would otherwise apply under the HSWA, and the extent of any fiscal or other benefits this proposal is likely to deliver, which outweigh any risks.

8.4 Finally, we note that, despite the comments in the RIS, the Bill does not seek to amend the HSWA or expressly exclude its application. As a result, it is unclear whether

46 HSWA, s 17.

47 RIS at [25].

48 See s 17(1)(b)(iii), which states: "an occupier of a home to the extent that the occupier employs or engages another person solely to do residential work" is excluded from the definition of PCBU. The term 'residential work' is defined in s 16 of the HSWA as domestic work, or work done to or in respect of a home, by a person who is employed or engaged by the occupier of the home.

obligations under the HSWA would continue to apply under this new legislation during and/or after the 3-year transition period.

8.5 If these reforms are to proceed, the Law Society recommends undertaking a thorough cost-benefit analysis of the proposal to exclude the application of the HSWA. This assessment should take into account the fact that:

(a) there is potential for (at times, significant) hazards and risks to arise in settings involving the care of disabled people; and

(b) multiple PCBUs could owe overlapping duties in relation to the same person,[49] and this could include, for example:

(i) the disabled person (who may be directing their care),

(ii) the family carer (who may be working in their own home),

(iii) any contracted providers (who administer funding), and

(iv) MSD (which funds and sets the parameters of care).

8.6 If it appears that the benefits outweigh the costs, we recommend including a provision in the Bill which:

(a) expressly excludes the application of the HSWA, and

(b) clearly identifies whether this exclusion applies during and/or after the transition period.

8.7 We note here that failures to comply with obligations under the HSWA (*if* the HSWA applies) can result in significant penalties in some circumstances (including imprisonment), and clarity regarding the application of the HSWA is therefore essential.

David Campbell
President

49 HSWA, s 33.