



**HSU RESPONSE TO NDIA  
QUALITY AND SAFEGUARDING FRAMEWORK  
CONSULTATION PAPER**

May 2015

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## About the Health Services Union

The Health Services Union (HSU) is a growing member-based union with over 70,000 members working across the health and community services sectors in every state and territory.

Our members work in aged care, disability services, community health, mental health, alcohol and other drugs, private practices and hospitals. Members are health professionals, paramedics, scientists, disability support workers, aged care workers, nurses, technicians, personal care and support workers, clerical and administrative staff, managers, doctors, medical librarians and support staff.

We are committed to advancing and protecting the wages, conditions, rights and entitlements of members through campaigning and workplace activism. HSU also provides a range of services and support to assist members with many aspects of working and family life.

We are a driving force to make Australia a better place.

HSU National is the trading name for the Health Services Union, a trade union registered under the Fair Work (Registered Organisations) Act 2009.

### **Authorised by Chris Brown, National Secretary**

HSU National

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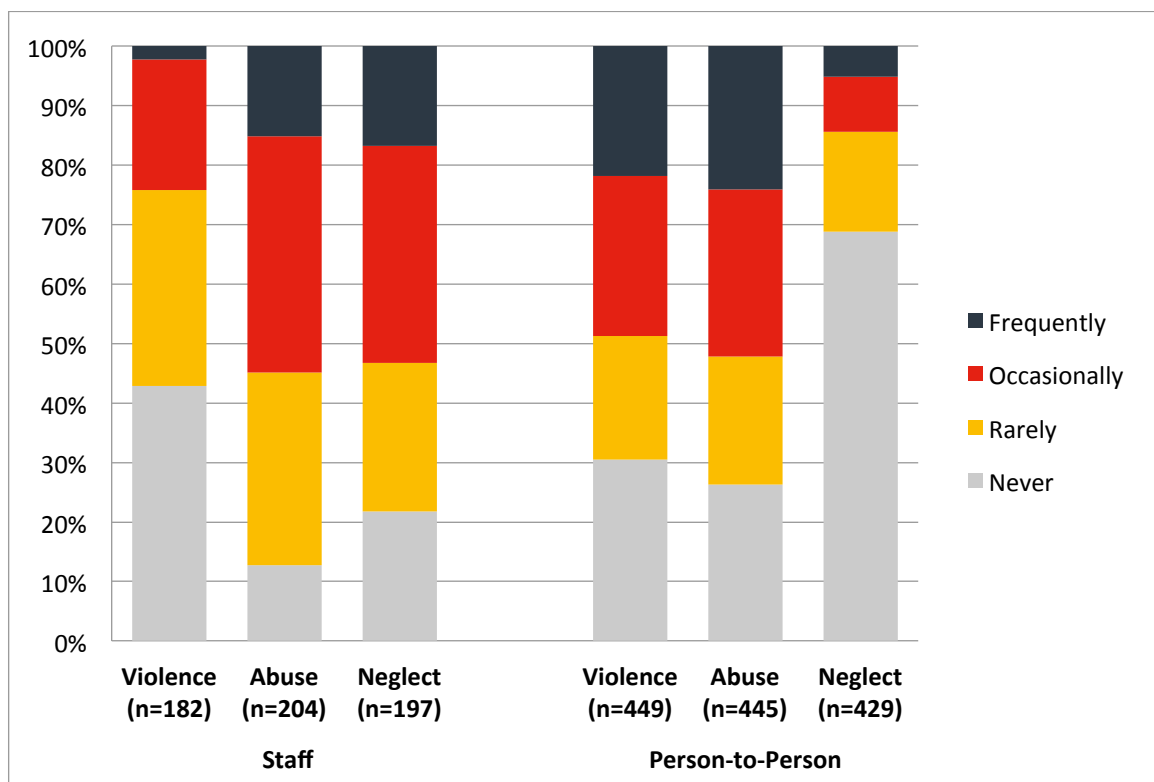
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## 1. Introduction

With nearly 15,000 members working with people with disability the HSU has a keen interest in ensuring that both people with disability and workers are treated with dignity and respect. The HSU welcomes the opportunity to provide a submission to the National Disability Insurance Agency's (NDIA) Consultation Paper: *Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework*. This submission has been prepared by HSU National in consultation with our state branches and is made on behalf of HSU members across Australia.

This submission has been informed by a survey of over 500 members from Tasmania and Victoria (the two states with the highest concentration of HSU members working in the disability sector). The results of the survey raise serious cause for concern. Nearly half of surveyed members (46.79 per cent) reported that they had witnessed violence, abuse or neglect against people with a disability by other staff, either at their current workplace or when working for a previous employer. Furthermore, nearly 1 in 5 respondents (18.07 per cent) reported that while they had not personally witnessed violence, abuse or neglect against people with a disability by staff, they knew colleagues who had. While the prevalence of violence, abuse and neglect is shocking in and of itself, the frequency at which it is occurring highlights the urgency of the task before the NDIA.

**Figure 1 Frequency of violence, abuse and neglect against people with disability by staff and by other people with disability (i.e. person-to-person violence, abuse and neglect)**



As Figure 1 shows, over half of respondents indicated that abuse and neglect against people with a disability by other staff occurred occasionally or frequently. The perpetration of violence, abuse and

neglect, however, is not limited to workers. Our survey results also show that person-to-person violence and abuse is far too prevalent in the sector and that violence, abuse and neglect committed by the family or guardian of the person with a disability—while not as common—gives serious cause for concern. These results demonstrate why strong regulatory and protective measures are essential to ensure that people with a disability are protected from future abuse and empowered to live a life with dignity and respect.

We urge the NDIA to adopt the recommendations for quality and safeguard measures contained within this submission. However, we acknowledge and highlight that these would only form a component of the broader suite of measures required to protect people with disability. In particular, it will be essential to address the systemic workforce issues of attraction and retention facing the sector. Currently, the inadequacy of the NDIS “efficient price” risks entrenching the low wages offered in the sector and which will, in many instances, effectively reduce the wages of current disability support workers. This will make the sector less attractive to prospective workers at the same time the workforce needs to undergo a rapid expansion. Without the ability to attract and retain skilled and qualified workers, the goal of the NDIS to ensure genuine choice and control for people with disability will, at best, remain forever unfulfilled, or, at worst, lead to a decline in the quality of service provision. Indeed, in a sector-wide race-to-the-bottom on wages, conditions and skills we are likely to witness increasing cases of violence, abuse and neglect against people with disability. As one of our members working in the disability sector starkly put it:

*“This industry is already struggling to attract quality, professional people. The work is challenging and the pay average. Without any financial attraction the quality of the workforce will decline further, attracting those who cannot find work anywhere else. Leaving vulnerable people more vulnerable.”*

- House Supervisor, Victoria

The HSU will also be making a submission to the Commonwealth Senate enquiry into violence, abuse and neglect against people with disability in institutional and residential settings. We encourage the NDIS Quality and Safeguards Framework Consultation Team to review our submission once it is made available by the Senate.

## 2. Summary of Recommendations

In response to the issues raised in the Consultation Paper, the HSU makes the following recommendations. Further detail around these recommendations can be found within the relevant sections of this submission.

### **Recommendation I**

The HSU recommends that the NDIA adopt the provider registration system described as Option 4 in the Consultation Paper.

### **Recommendation II**

The HSU recommends that a national, independent complaints body be established within the NDIA, consistent with Option 3a in the Consultation Paper. This complaints body should be made available to all people with a disability that access supports, whether they are NDIS funded or not.

### **Recommendation III**

The HSU recommends that an independent national statutory authority be established to conduct pre-employment screening of workers employed by an NDIA registered provider. This system should be modelled on the ACT's Working with Vulnerable People background checking scheme.

### **Recommendation IV**

The HSU believes that participants who manage their own plans should be entitled to the dignity of risk and recommends that they be free to choose their own providers. However, providers that are not registered with the NDIA should be given the opportunity to voluntarily undergo a separate registration process with limited conditions (Option 3a in the Consultation Paper) if they wish to distinguish themselves in the market.

### **Recommendation V**

The HSU recommends that the use of restrictive practices is nationally legislated and their use would require approval by an external, independent authority, modelled on a body such as the Office of Professional Practice in Victoria. The service provider seeking to use restrictive intervention would need to draft a proposal to seek approval for its use and would be required to report to the independent authority every time it is used.

### 3. NDIA Provider Registration

In order to ensure the safety of NDIS-funded participants, either who are unable or choose not to manage their own plans, the HSU recommends that NDIA-registered providers be required to abide by a formal code of conduct, have transparent internal complaints system and processes, participate in an independently assessed quality evaluation program and undergo external quality assurance that focuses on continuous improvement.

#### **RECOMMENDATION I**

The HSU recommends that the NDIA adopt the provider registration system described as Option 4 in the Consultation Paper.

The HSU recommends that any organisation providing direct care support, accommodation services, forensic services, respite services (in or out of home), works with children or that is required to provide restrictive intervention must undergo external quality assurance checks. The HSU believes that is in the best interests of people with disability that the results of the independent quality evaluation and external quality assurance are made public and providers are reviewed at least every three years. Finally, there must be scope within this model for independent auditors to conduct assessments without prior warning.

With regard to the Code of Conduct, the HSU notes that the Consultation Paper states that it would apply to both organisations and individuals providing NDIS-funded supports. The HSU is aware that the Australian Health Ministers' Advisory Council (AHMAC) is currently in the final stages of developing its own Code of Conduct and regulatory scheme for unregistered health practitioners. Leaving aside our concerns with the AHMAC proposal, the HSU stresses that it would be counterproductive for the AHMAC and NDIS Codes of Conduct to duplicate or contradict requirements imposed on individual workers. We encourage the NDIS Quality and Safeguards Framework Consultation Team to review our submission to the Australian Health Ministers' Advisory Council's (AHMAC) Consultation Paper on *A National Code of Conduct for Health Care Workers*, which is available here: <http://hsu.net.au/publications/submission-to-the-australian-health-ministers-advisory-council-on-draft-code-of-conduct-for-health-workers/>

## 4. Systems for Handling Complaints

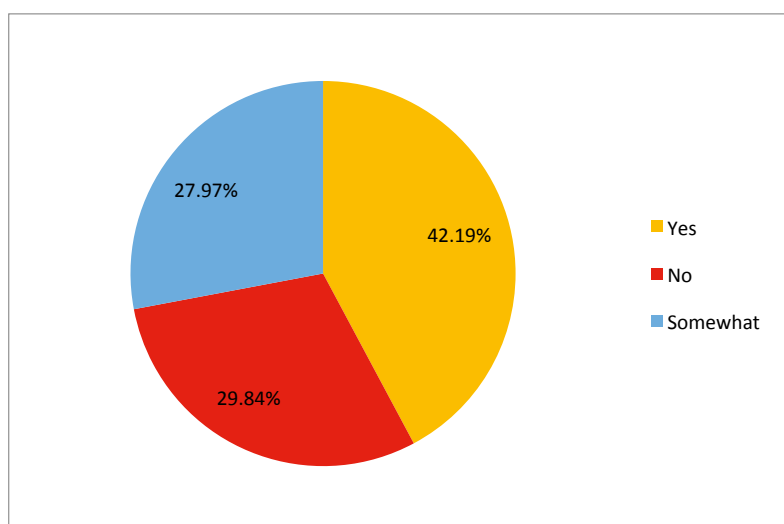
While it should be a requirement for NDIA registered providers to have their own internal complaints handling processes and systems, an independent complaints body with real coercive powers is essential to ensure that people with a disability and the workforce can be confident that their complaints are dealt with and actioned appropriately.

### **RECOMMENDATION II**

The HSU recommends that a national, independent complaints body be established within the NDIA, consistent with Option 3a in the Consultation Paper. This complaints body should be made available to all people with disability that access supports, whether they are NDIS funded or not.

The HSU rationale for a complaints system independent from providers of supports is due to the fact that employer-based systems are often flawed. Indeed, while the vast majority (91.12 per cent) of respondents to our survey indicated that their current employer had a formal system in place for staff to report instances of violence, abuse or neglect against people with disability, the efficacy of these systems is questionable.<sup>1</sup> In a follow-up question respondents were asked if they believed their employer's reporting system was adequate and fewer than half (42.19 per cent) answered in the affirmative (see Figure 2).

***Figure 2 Respondent views on adequacy of employer systems for reporting violence, abuse or neglect against people with disability (n=429)***



<sup>1</sup> The figure of 91.12 per cent represents 431 workers spread across 40 different employers in worksites throughout Victoria and Tasmania. Due to the sensitivity of the topic, respondents were not obligated to provide any personal identifiable information in the survey. Since only 213 of the 431 respondents chose to identify their employer in the survey, the number of employers represented in this figure is likely to be greater than 40.

While various reasons were provided for the lack of confidence in employer-based schemes, the most common explanation was that staff reports are regularly met with bullying and intimidation. From a sample of 198 workers, over half (58.08 per cent) stated they had been bullied or felt targeted by their employer after reporting cases of violence, abuse or neglect. This fear of persecution is captured in the member responses below:

*"I work for [EMPLOYER NAME WITHELD] and my experience has been that they persecute the whistle blowers, not the guilty party. I know of a recent case of massive neglect and all the [EMPLOYER NAME WITHELD] did was shift the house supervisor."*

*"As a casual I'd be ostracised which would in turn result in less shifts offered to 'a dobber'"*

*"Staff are at times too scared to report abuse or neglect as it is either not acted on or you become a victim yourself by being bullied by supervisors or team leaders."*

*"As I work as a casual, I often find examples of neglect and when I report it I am not asked to come back and work at the same house."*

*"When you report concerns, you are either ignored or made feel that you are in the wrong. You are victimised for speaking out about rights and policies and procedures."*

*"I reported to police against advice of a senior manager. Was only supported once police found evidence and laid charges."*

*"Crucified if you report. Especially casuals."*

The comments about casual employment are particularly concerning given that changes in funding and service delivery models under the NDIS are leading to increasing employer engagement of workers on a casual basis. This further cements the need for a complaints body that is independent from providers of support and which empowers both workers and people with a disability to raise serious issues without fear or favour.

Our reason for recommending that the complaints body be established within the NDIA is so that providers are clear that if they are investigated as a result of a complaint they risk being deregistered if the complaint is founded and warrants that response. In instances where an individual worker is referred to the complaints body, a preliminary investigation should take place to determine whether the complaint is founded. Where there appears to be merit to the complainants claim, the individual worker should be referred to the independent statutory authority (described in Part III of this submission) for full investigation that guarantees natural justice, due process and a fair hearing for accused workers.

An external complaints system, however, can only be effective for people with disability and the workforce if they are aware that it exists and it is accessible. It is critical that there is appropriate

training for clients and workers in how the complaints system works and that continued funding is made available for independent advocacy services to assist people with a disability access the complaints system. Finally, the HSU supports a community visitor scheme so long as it is complementary to other safeguards recommended in this submission.

## 5. Ensuring Staff Are Safe to Work with Participants

The current system of state and territory-based background checks is fragmented, inefficient and inadequate to properly safeguard vulnerable people. Given the expanded number of participants under the NDIS and the need to promote inter-jurisdictional labour mobility, the HSU believes that a national, independent body must be established to conduct pre-employment screening of all workers employed by an NDIA registered provider.

### **RECOMMENDATION III**

HSU recommends that an independent national statutory authority be established to conduct pre-employment screening of workers employed by an NDIA registered provider. This system should be modelled on the ACT's Working with Vulnerable People background checking scheme.

The HSU believes that the system should be modelled on the Australian Capital Territory's current scheme, which is legislated as the *Working with Vulnerable People (Background Checking) Act 2011*. In particular, the scheme must balance the rights of people with a disability to live free from violence, abuse and neglect with workers' rights to natural justice and privacy. Consequently, the HSU recommends that the following be features of the scheme:

- The assessment must be conducted by an independent statutory authority, separate from the NDIA.
- The assessment must consider information broader than that covered by a standard police check, including, but not limited to: criminal history, non-conviction information, work history and any other supporting documentation volunteered by the worker such as character references or information from a relevant registered health practitioner. The assessment should also examine international checks when a person has lived and worked overseas.
- The assessment result must be made available to both the worker and the employer, however the employer should only have access to the outcome of the assessment and not the reasons for the decision.
- Successful applicants should receive a risk-based clearance (general, conditional or role-based) valid for three-years.
- The clearance is "owned" by the worker and can move with them between employers as long as it is still valid.
- Successful applicants should have their clearance status published on a national register searchable by the public; similar to the public register of practitioners available via the Australian Health Practitioner Regulation Agency (AHPRA) website.
- Applicants who receive a conditional, role-based or negative assessment must be entitled to appeal the decision. In the first instance, this would occur through a transparent internal review process and failing that, an external appeal.

- If, during a three-year clearance validity period, a worker is convicted or found guilty of a relevant offence they are required to notify the agency. The agency should also be obligated to conduct 12-monthly audits of participants to ensure that this requirement is not being subverted.

This system should supplant all existing state and territory based schemes. The HSU believes that not only will the economies of scale and jurisdictional consistency ensure the scheme is cheaper than the current fragmented and duplicative regime, but it will also ensure that all people with a disability can be sound in the knowledge that the workforce is being held to the same standard irrespective of where they live in Australia. Furthermore, this scheme could also be applied to other community sector workers who work with vulnerable people such as children and the elderly. This would likely assist in improving occupational labour mobility, thereby improving workforce retention within the community services sector more broadly.

While the HSU believes that the pre-employment screening system outlined above is essential, we do not support the creation of a “barred-persons list” as described in the Consultation Paper. We are opposed for several reasons. Firstly, such a scheme is only corrective in that it applies only once serious misconduct has occurred. Secondly, members are reporting that similar schemes are being used vexatiously and punitively. One of our Victorian members commented on the limitations of the state’s Disability Worker Exclusion Scheme (DWES):

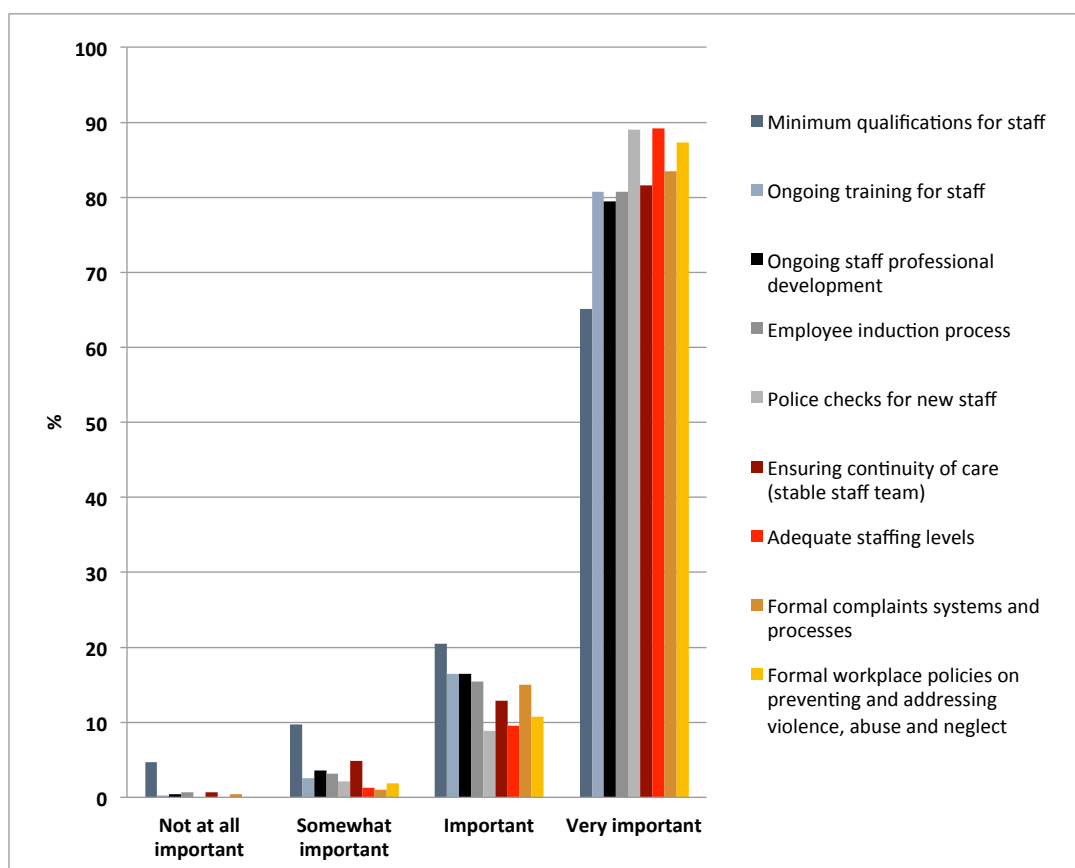
*“There are lots of politics. Issues of abuse have been used by staff to take advantage or revenge on each other or to bully and move someone from their position.”*

Under the Victorian DWES, if a worker resigns during a serious misconduct investigation, but have not been found guilty and the nature of the allegation(s) against them relate to bodily harm, violence or threats of violence, are sexual in nature, involves neglect or dishonesty, they will be placed on the exclusion list. Not only is there a presumption of guilt, but also the manner in which allegations are investigated is not consistent across employers. This is incredibly problematic and demonstrates why the HSU cannot support the creation of a “barred-persons list” as described in the Consultation Paper. Furthermore, the HSU believes that taken together, NDIA provider registration requirements, an independent complaints body, regular auditing of working with vulnerable people clearances and existing legal safeguards (police, etc.), create the same protections for people with disability as a “barred persons list” without denying natural justice to workers.

While there is a substantial body research showing a connection between a person’s criminal history and likely future behaviour, pre-employment screening still only provides an indicator risk. Ultimately, the HSU believes that the best system to ensure staff are safe to work with people with disability is a national, role-based registration and accreditation scheme modelled on AHPRA, which, at a minimum, includes mandated minimum qualifications and ongoing continuing professional

development (CPD) requirements for certain roles. HSU members working in the sector overwhelmingly support these elements, as shown in Figure 3.

**Figure 3 Ranking of importance of selected mechanisms to prevent instances of violence, abuse and neglect by staff against people with disability (n=473)**



Such a scheme could be applied according to risk, that is, the higher the degree of risk, the higher the accreditation standard required. A support worker who works with a person with disability who self-advocates may, for example, require a lesser accreditation level compared to a support worker working with a person who has complex communication needs, an intellectual disability and significant behaviours of concern. Similar principles should apply to accreditation of managers of disability services. The HSU believes that this system would have the dual effect of improving quality and safeguards for people with disability whilst professionalising the sector to improve career perceptions for prospective workers.

## 6. Safeguards for Participants Who Manage their Own Plans

People with disability should not be denied their own agency, however, the nature of some people's disability means that they are unable to make informed decisions about their care and support needs. Consequently, whilst the HSU supports self-managing participants to choose their own providers and support services, there must be appropriate safeguards to determine if an NDIS participant can self-manage and that family members who act as plan nominees will act in the best interests of the person with a disability.

### **RECOMMENDATION IV**

The HSU believes that participants who manage their own plans should be entitled to the dignity of risk and recommends that they be free to choose their own providers. However, providers that are not registered with the NDIA should be given the opportunity to voluntarily undergo a separate registration process with limited conditions (Option 3a in the Consultation Paper) if they wish to distinguish themselves in the market

While the HSU believes that that people with disability are best placed to determine how to manage their own supports, at minimum the NDIA must offer a range of supports and assistance to people who self-manage and/or their plan nominee, including educative materials and resources on:

- Preventing exploitation
- Managing and budgeting plan funds
- Legal responsibilities around engaging workers, including WHS.

## 7. Reducing and Eliminating Restrictive Practices in NDIS Funded Supports

Restrictive practices are currently used in disability services to manage some people's specific behaviours of concern. The HSU stresses that the changing way services are funded under the NDIS will not remove the ongoing need for tightly legislated use of restrictive intervention. In Victoria, the use and reporting of restrictive intervention is mandated by the *Disability Service Act 2006* and the HSU believes it is imperative that use of restricted intervention is tightly legislated at a national level.

### **RECOMMENDATION V**

The HSU recommends that the use of restrictive practices is nationally legislated and their use would require approval by an external, independent authority, modelled on a body such as the Office of Professional Practice in Victoria. The service provider seeking to use restrictive intervention would need to draft a proposal to seek approval for its use and would be required to report to the independent authority every time it is used.

The use of restrictive practices must be legislated and would have to be approved by an external, independent authority, modelled on a body such as the Office of Professional Practice in Victoria. The service provider seeking to use restrictive intervention would need to draft an application to seek approval for its use that identifies the employee responsible for ensuring the intervention is used in line with the Act and would be required to implement a reporting system for each instance it is used. Given that some jurisdictions have had similar measures in place since at least 2006, the HSU does not believe this requirement is onerous on providers.

It is fundamentally important that this inquiry does not avert its eyes from the reality that a person's behaviours are not going to cease just because the method of funding changes. To fail to adequately legislate restrictive practices places some of the most vulnerable people with disability at enormous risk and the HSU believes that society cannot accept this as an option.