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| Disability Worker Exclusion Scheme Instruction  Department of Health  Disability Worker Exclusion Scheme Instruction  July 2020 |
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# Glossary

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| **authorised labour hire agency** | A labour hire agency that has entered into an agreement with the department to implement the requirements of the Scheme and the department’s other requirements, and which is named as being an authorised labour hire agency see the department’s [Disability Workers Exclusions Scheme](https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme) website <https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme>. |
| **Authorised Person** | A person nominated by a disability service provider, registered NDIS provider or authorised labour hire agency to make check requests and Notifications to, and receive confidential information from, the DWES Unit in relation to Disability Workers or Workers (as applicable).  All existing authorised persons will continue to be authorised from 1 July 2019, unless a disability service provider, registered NDIS provider or authorised labour hire agency advises the DWES Unit that an authorised person should be removed. |
| **check request** | A request to check the status of a prospective or current Disability Worker or Worker against the List made to the DWES Unit by an Authorised Person of a disability service provider, registered NDIS provider or authorised labour hire agency (as applicable). |
| **client** | A person with a disability who is receiving disability services from a disability service provider or NDIS services from a registered NDIS provider. |
| **criteria** | The List criteria set out section 3 of this Instruction. |
| **department** | Department of Health and Human Services. |
| **Director** | The Director responsible for the DWES Unit at the department. |
| **Disability Act** | *Disability Act 2006* (Vic). |
| **disability service** | A disability service as defined in the Disability Act. |
| **disability service provider** | A disability service provider as defined in the Disability Act. |
| **Disability Worker** | A person engaged by a disability service provider who:   1. provides, or supervises or manages a person who provides, direct support to a person with a disability, and 2. has direct contact or access to a person with a disability |
| **DWES Portal** | An online portal, managed by the DWES Unit, to facilitate the lodgement of check requests and Notifications by Authorised Persons |
| **DWES Unit** | The Disability Worker Exclusion Scheme Unit in the department |
| **Excluded Work** | Work at a disability service:   1. as a Disability Worker, or 2. that involves regular direct contact with or access to a person with a disability. |
| **Instruction** | This Disability Worker Exclusion Scheme Instruction as amended from time to time. |
| **key personnel** | 1. Each of the following is one of the key personnel of a person or entity: 2. a member of the group of persons who is responsible for the executive decisions of the person or entity; 3. any other person who has authority or responsibility for (or significant influence over) planning, directing or controlling the activities of the person or entity 4. Without limiting paragraph (1)(a), a reference in that paragraph to a person who is responsible for the executive decisions of a person or entity includes: 5. if the person or entity is a body corporate that is incorporated, or taken to be incorporated, under the *Corporations Act 2001* (Cth) – a director of the body corporate for the purposes of that Act; and 6. in any other case – a member of the person’s or entity’s governing body   (section 11A of the NDIS Act).  This may include, for example, those holding executive, senior management and operational positions in a registered NDIS provider, such as a Chief Executive Officer, Chairperson or Board Member. |
| **List** | The Disability Worker Exclusion List. |
| **more than incidental contact** | Section 6(1) of the NDIS Worker Screening Rules defines contact to include physical contact, face-to-face contact, oral communication, written communication and electronic communication.  Without limiting what may constitute more than incidental contact, section 6(2) of the NDIS Worker Screening Rules states the normal duties of a role are likely to require **more than incidental contact** with a person with a disability if those duties include:   1. physically touching a person with disability or 2. building a rapport with a person with disability as an integral and ordinary part of the performance of those duties; or 3. having contact with multiple persons with disability:    1. as part of the direct delivery of a specialist disability support or service; or    2. in a specialist disability accommodation setting. |
| **NDIS** | National Disability Insurance Scheme. |
| **NDIS Act** | *National Disability Insurance Scheme Act 2013* (Cth). |
| **NDIS Quality and Safeguards Commission** | Means the NDIS Quality and Safeguards Commission established under section 181A of the NDIS Act. |
| **NDIS Quality and Safeguards Commissioner** | Means the Commissioner of the NDIS Quality and Safeguards Commission referred to in section 181C of the NDIS Act. |
| **NDIS Worker Screening Rules** | *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018* as amended from time to time. |
| **Notification** | A Notification by a disability service provider or registered NDIS provider, notifying the DWES Unit that a former, current or prospective Disability Worker or Worker engaged in a risk assessed role (as applicable) has engaged in conduct which may fall within the criteria. |
| **person engaged by a disability service provider** | A person engaged by a disability service provider as:   1. a full-time, part-time or casual employee 2. a contractor 3. a person engaged through a labour hire agency 4. students on placements, or 5. other volunteers   in connection with the provision of a disability service. |
| **registered NDIS provider** | A person or entity registered under section 73E of the NDIS Act who is registered to provide specified services and supports to people with a disability. The list of specified services and supports can be found on the [NDIS Quality and Safeguards Commission](https://www.ndiscommission.gov.au/document/891) website <https://www.ndiscommission.gov.au/document/891>. |
| **risk assessed role** | Means:   1. a key personnel role of a person or an entity 2. a role for which the normal duties include the direct delivery of specified supports or specified services to a person with disability, or 3. a role for which the normal duties are likely to require more than incidental contact with a person with disability,   (section 5 of the NDIS Worker Screening Rules). |
| **Safety Screeningfor Funded Organisations Policy** | Means the *Safety Screening for Funded Organisation Policy* set out at the [department’s website](https://fac.dhhs.vic.gov.au/service-agreement-information-kit) <https://fac.dhhs.vic.gov.au/service-agreement-information-kit> and as amended from time to time. |
| **Safety Screening Policy for registered NDIS providers operating in Victoria** | Means the *Safety Screening Policy for registered NDIS providers operating in Victoria* set out at the [Victorian Government’s NDIS website](https://www.vic.gov.au/ndis-quality-and-safeguards) <https://www.vic.gov.au/ndis-quality-and-safeguards> and as amended from time to time. |
| **Scheme** | The Disability Worker Exclusion Scheme which is a scheme to collect, store and use information about people who are unsuitable to work with clients in disability services or NDIS funded services. People who are found to be unsuitable are placed on the List and prevented from undertaking Excluded Work in disability services or in a risk assessed role with a registered NDIS provider. |
| **Secretary** | The Secretary of the department. |
| **Service Agreement** | A Service Agreement between the department and a disability service provider. |
| **Worker** | Means a person employed or otherwise engaged by a registered NDIS provider (section 5 of the NDIS Worker Screening Rules).  The term ‘worker’ is a broad term which covers a wide range of people who perform work as part of the business of a registered NDIS provider, and includes employees, contractors, consultants and volunteers.  Where a registered NDIS provider is a sole trader, that provider is also a worker (see Explanatory Statement issued by NDIS Quality and Safeguards Commissioner relating to the NDIS Worker Screening Rules). |

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# The Disability Worker Exclusion Scheme

## Introduction

In September 2014, the department established the Disability Worker Exclusion Scheme (the Scheme) to exclude from employment direct support workers in disability residential services who had been identified as posing a risk to the safety and wellbeing of people with a disability.

The Scheme is designed to protect people with a disability and staff by ensuring that people who are found to be unsuitable are placed on the List and prevented from obtaining further employment in disability services with the department or a disability service provided or registered by the department.

When first established the Scheme applied to disability residential services managed and funded by the department. On 1 November 2017, the Scheme was expanded to apply to all disability services, consistent with the recommendations of the *Inquiry into abuse in disability services* (Parliament of Victoria, May 2016).

In December 2016, the Council of Australian Governments (COAG) endorsed the National Disability Insurance Scheme (NDIS) Quality and Safeguarding Framework (the Framework) setting out a new nationally consistent approach to ensuring high quality supports and safe environments for all NDIS participants. Safety screening plays an important role in providing safer service delivery for persons with a disability.

An assessment of whether a person who works, or seeks to work, with a person with disability poses a risk to such a person (NDIS Worker Screening Check) is an important part of the Framework and will work with other components of the Framework to support the dignity, safety and wellbeing of NDIS participants.

Once fully implemented, the NDIS Worker Screening Check will enable screened Workers to deliver NDIS services and supports. The NDIS Worker Screening Check will be progressively rolled out across jurisdictions as worker screening units are established in each state and territory. The *Safety Screening Policy for registered NDIS providers operating in Victoria* is operational from 1 July 2019 until Victoria’s NDIS Worker Screening Unit is operational. This is expected to occur by 1 February 2021.

The Victorian Government is also implementing the Victorian Disability Workers Registration and Accreditation Scheme (DWRS), which is due to commence from July 2020. The DWSR will apply to all disability workers in Victoria, regardless of whether the disability services are part of the NDIS or funded through other sources. Registration will be voluntary for disability workers and People with disability will be able to exercise choice and control in their lives by electing to engage registered or unregistered workers to deliver their services

This Instruction has been amended to outline the screening obligations of both disability service providers and registered NDIS providers (and the authorised labour hire agencies that engage staff for these providers) that must be complied with by registered NDIS providers until the NDIS Worker Screening Unit is operational (Transition Period) and by disability services providers until the Victorian Disability Worker Registration and Accreditation Scheme is operational in Victoria.

Service providers registered under the Disability Act and NDIS Act are required to comply with both worker screening policies (the *Safety Screening Policy for Funded Organisations* and the *Safety Screening Policy for registered NDIS providers*). Appendix 1 contains a flowchart to assist dually registered providers to comply with the obligations as a registered disability service provider and registered NDIS provider.

## The Disability Worker Exclusion Scheme Policy Framework

The Scheme is established pursuant to sections 8(1)(ca) and 41(2) of the Disability Act.

Section 8(1)(ca) states that one of the Secretary’s functions is to set requirements in relation to screening of persons employed or engaged, or to be employed or engaged, by disability service providers or registered NDIS providers for the purpose of providing services to persons with a disability or NDIS participants, as the case requires.

Section 41(2) provides that the Secretary may impose any conditions or restrictions that the Secretary considers appropriate on the registration of a disability service provider at any time. This may include conditions with respect to staffing arrangements and the appointment, numbers and qualifications of persons to be employed or engaged by disability service providers in the provision of disability services.

It is a condition of registration of a disability service provider that the provider complies with this Instruction and the *Safety Screening for Funded Organisations Policy*.

During the Transition Period, registered NDIS providers that deliver specified supports and specified services to a participant in Victoria must comply with the *Safety Screening Policy for registered NDIS providers operating in Victoria* in order to meet their obligations under the NDIS Worker Screening Rules and thereby comply with their registration requirements (see [NDIS Commission website](https://www.ndiscommission.gov.au/document/891) for further details <https://www.ndiscommission.gov.au/document/891>).

The Scheme provides a mechanism to collect, store and use information about persons who are unsuitable to work with clients in disability services or through registered NDIS providers. People who are found to be unsuitable are placed on the List and prevented from obtaining employment in specified roles in disability services or with registered NDIS providers.

Under section 39A of the Disability Act, the Secretary is able to transfer or disclose any information collected as part of the Scheme about worker screening (including whether a person is on the List) to persons including:

* the NDIS Quality and Safeguards Commission; and
* NDIS Worker Screening Units; and
* relevant disability service providers and registered NDIS providers,

in relation to a person who provided, provides, or seeks to provide, disability services or services in accordance with an NDIS plan.

The Secretary will also disclose whether a person is on the List upon the request of a self-managed NDIS participant or authorised labour hire agency (that is not a disability service provider or registered NDIS provider) if the worker being screened has consented.

The Scheme applies to all disability services that are provided or registered by the department. This also includes registered NDIS providers who are still registered under the Disability Act. The Scheme also applies to the extent specified to registered NDIS providers who are not registered under the Disability Act in line with the requirements outlined in the *Safety Screening Policy for registered NDIS providers operating in Victoria*.

The Scheme also applies to authorised labour hire agencies to the extent they engage staff for disability services providers that are funded or registered by the department or registered NDIS providers.

Disability service providers, registered NDIS providers and authorised labour hire agencies may only check the List for the purposes of the Scheme. Information obtained from the department in respect of the List or individuals whose names are on the List may not be used for any purpose other than determining whether a person is able to:

* be engaged by a disability service provider as a Disability Worker
* be engaged in a risk assessed role with a registered NDIS provider
* continue working as a Disability Worker or perform excluded work.

The purpose of the Scheme is to strengthen the protections and safeguards for people with a disability.

Specifically, the Scheme aims to:

* promote and protect the rights of people with a disability, in particular their right to live free from abuse, neglect or exploitation
* support the provision of high-quality disability services and NDIS services by reducing the risk that unsuitable people will be engaged by disability service providers or registered NDIS providers
* make the department and every disability service provider and registered NDIS provider operating in Victoria accountable to people accessing their services
* ensure disability service providers and registered NDIS providers undertake appropriate due diligence before engaging a person to provide services to a person with a disability
* support organisational consistency
* ensure that allegations of serious misconduct or neglect involving people with a disability are fully investigated and reported even where a Disability Worker resigns from their position in a disability service prior to the completion of an investigation, and
* ensure disability service providers respond in a timely and effective manner where allegations are made about a person’s conduct which indicates that their engagement in a disability service as a Disability Worker may pose a risk to the health and safety of people with a disability.

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| Application of the Scheme to registered NDIS providers During the Transition Period, persons or entities registered under section 73E of the NDIS Act are obliged to comply with the NDIS Worker Screening Rules as part of the NDIS registration requirements.  Under these Rules, registered NDIS providers are required to undertake (or take reasonable steps to ensure that a labour hire agency has undertaken) safety screening of prospective Workers in accordance with the *Safety Screening Policy for registered NDIS providers*, including a check against the List, if they will be engaged in a risk assessed role, that is, if they:   1. are involved in the direct delivery of specified supports and specified services to persons with disability as a part of their normal duties or 2. are likely to have more than incidental contact with people with disability as a part of their normal duties or 3. are key personnel.   Note: (a) and (b) may include supervisors or managers of Workers.  See the [*Safety Screening Policy for registered NDIS providers operating in Victoria*](https://www.vic.gov.au/ndis-quality-and-safeguards) <https://www.vic.gov.au/ndis-quality-and-safeguards> for further detail. |

## Purpose of the Disability Worker Exclusion Scheme Instruction

This Instruction has been designed to assist disability service providers, registered NDIS providers and authorised labour hire agencies and persons employed or otherwise engaged by them to implement and comply with the Scheme. The Instruction replaces and supersedes the *Disability Worker Exclusion Scheme Instruction* dated October 2019.

## The Disability Worker Exclusion Scheme Unit

The DWES Unit, which is part of the department, has been established by the Secretary to administer the Scheme. Its functions include compiling and maintaining the List, responding to queries regarding the List, managing requests for review of decisions and communicating with persons whose names are on, or may be placed on, the List.

The Secretary has authorised the Director responsible for the Scheme to make decisions regarding whether a person's name should be placed on, or removed from, the List.

The DWES Unit operates an online system called the DWES Portal to facilitate the lodgement of DWEL check requests and Notifications. Access to the DWES Portal is limited to Authorised Persons. The DWES Portal can be accessed through the departments [DWES site](https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme) <https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme>.

Self-managed NDIS participants who wish to check whether a worker they propose to engage is on the List may contact the DWES Unit (see details below). Self-managed NDIS participants will require proof of identity and a signed const to conduct the DWES check from the proposed worker.

Any questions about the operation of the Scheme should be directed to the DWES Unit.

Email: [DWESU@dhhs.vic.gov.au](mailto:DWESU@dhhs.vic.gov.au) Phone: (03) 9096 3203

## Further information and additional guidelines

The department may issue supplementary guidelines and other guidance material to support the Instruction. For further information regarding the operation of the Scheme, see the department’s website [Disability Workers Exclusion Scheme](https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme) <https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme>.

# Obligations and responsibilities under the Scheme

## Obligations and responsibilities of Disability Workers and Workers

Disability Workers and Workers must advise each disability service provider, registered NDIS providers and labour hire agencies (as applicable) they are currently engaged by, or seeking to be engaged by, of information relevant to the Scheme including:

* whether their name is on the List,
* if they have been advised by the DWES Unit that they are the subject of a Notification, or
  + whether circumstances exist which may result in their name being placed on the List.

## Obligations and responsibilities of service providers

A high-level overview of the responsibilities of disability service providers, registered NDIS providers and authorised labour hire agencies in relation to the Scheme are outlined below.

### Recruitment obligations

When recruiting a Disability Worker to be engaged directly or indirectly in a disability service, a disability service provider is required to comply with recruitment obligations in accordance with section 8 of this Instruction, particularly advising prospective workers of the Scheme and the pre-employment check requirements.

A registered NDIS provider is required to undertake background screening in accordance with Part C of the department’s *Safety Screening Policy for registered NDIS providers operating in Victoria*.

Disability service providers and registered NDIS providers are not excused from their obligations arising under the Scheme by virtue of the fact that a Disability Worker or Worker is engaged indirectly through a third party (such as a labour hire agency). However, as set out in section 8.3 of this Instruction, there are special arrangements which apply where a person is engaged through an Authorised Labour Hire Agency.

### Notification obligations

If a disability service provider, registered NDIS provider or authorised labour hire agency becomes aware that a Disability Worker or a Worker it currently engages, or intends to engage, is on the List, or has engaged in conduct which may fall within the criteria, it must notify:

* the DWES Unit, and
* the relevant Disability Worker or Worker.

For further guidance on a disability service provider's Notification obligations under the Scheme please see section 4 of this Instruction.

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| Registered NDIS providers who have not been, or have ceased to be, registered under the Disability Act or authorised labour hire agencies who provide these registered NDIS providers with staff must notify the DWES Unit of Workers falling within criterion 1 (see section 4 of this Instruction). All other incident reporting and worker misconduct should occur in line with the *National Disability Insurance Scheme (Practice Standards – Incident Management and Reportable Incidents) Rules 2018*. |

### Investigation obligations

An investigation into the conduct of a Disability Worker falling within criteria (2) to (4) should be carried out by the disability service provider in accordance with the investigation obligations set out in section 5 of this Instruction.

### Exclusion obligations

A disability service provider must not engage a person as a Disability Worker who is on the List or is the subject of a Notification.

Where a disability service provider is informed by a current Disability Worker or is otherwise made aware that the person is:

* on the List, or
* subject of a Notification,

the disability service provider must ensure the person is not engaged as a Disability Worker or does not undertake Excluded Work until the DWES Unit advises that the person has been removed from the List, or that a decision has been made not to place the person on the List.

A disability service provider who has engaged a Disability Worker who is placed on the List after the engagement must not allow the person to continue working as a Disability Worker or undertake Excluded Work.

For further guidance on a disability service provider's exclusion obligations under the Scheme please see sections 8 and 9 of this Instruction.

People who are on the List can apply to be removed from the List (see section 7).

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| Registered NDIS providers and authorised labour hire agencies must not employ or otherwise engage a person in a risk assessed role who is on the List or is the subject of a Notification. |

### Other obligations

In addition to compliance with the Scheme, disability service providers and authorised labour hire agencies are also required to:

* undertake checks prior to engaging each Disability Worker in accordance with the *Safety Screening for Funded Organisations Policy* and
* report incidents in accordance with the relevant incident reporting mechanism*.*

Disability service providers and authorised labour hire agencies are also required to comply with all applicable laws, instruments and standards issued by the department and as directed.

As part of the department’s monitoring of Service Agreements, funded organisations may be asked to provide evidence of compliance with the Scheme. See the [Funded Organisation Performance Monitoring Framework](http://www.dhs.vic.gov.au/facs/bdb/fmu/service-agreement/4.departmental-policies-procedures-and-initiatives/4.10-funded-organisation-performance-monitoring-framework) website for more details <http://www.dhs.vic.gov.au/facs/bdb/fmu/service-agreement/4.departmental-policies-procedures-and-initiatives/4.10-funded-organisation-performance-monitoring-framework>.

The department’s existing performance monitoring and ongoing registration applies to compliance with this policy.

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| Providers seeking de-registration under the Disability Act As the clients of providers who are both a registered disability service provider under the Disability Act and a registered NDIS provider transition to become NDIS participants, such providers may seek to be de-registered under the Disability Act when they no longer have state-funded clients.  Please note, providers who are currently registered under the Disability Act and who are also registered NDIS providers may not be de-registered:   * until outstanding DWES notifications are resolved, and * unless or until the obligations outlined in paragraphs 2.2.2 and 2.2.3 of this Instruction are met in relation to incidents occurring when a person was state-funded, prior to that person becoming an NDIS participant. |

# The Disability Worker Exclusion List Criteria explained

## Introduction

The Scheme specifies four broad categories of conduct which require a Notification to be made (see section 4). These categories of conduct are known as the criteria. A person only needs to fall within one of the criteria to be considered for placement on the List.

## Criterion 1 – criminal offences (including NDIS exclusion offences)

The first situation in which the Scheme criteria may be satisfied is when a finding of guilt has been made against a person about a particular type of criminal offence or offences. The types of offences which may fall within this category are offences which:

* involve bodily harm
* involve violence or threats of violence
* are of a sexual nature
* involve dishonesty
  + involve neglect of a person in their care
  + are category 1 or category 2 NDIS exclusion offences.

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| Category 1 and 2 NDIS exclusion offences The Instruction incorporates two levels of exclusion offences which are comparable to the exclusion and presumed exclusion offences outlined in the *Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme, May 2018* (see clause 61 of the Agreement). Category 1 Exclusion offences (those offences for which a person will automatically be placed on the List) as specified in clause 61b of the *Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme*. These comprise murder and attempted murder, serious assault against a child or vulnerable person including incest, child pornography-related offences, abduction or kidnapping offences against a child or vulnerable person involving a sexual or abusive element and bestiality and serious animal cruelty offences.  A person with a conviction for a Category 1 exclusion offence, where the person was at least 18 years old at the time of the offence, must not be offered a role as a Disability Worker or allowed to undertake Excluded Work with a disability service provider or offered or engaged in a risk assessed role with a registered NDIS provider. |

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| Category 2 Presumed exclusion offences (those offences for which a person will be placed on the List unless there are exceptional circumstances) as specified in clause 61c of the *Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme*. These comprise manslaughter, assault offences not captured in clause 61b, sexual assault offences not captured in clause 61b, dangerous or negligent acts against a person under care, abduction or kidnapping offences not captured in clause 61b, animal cruelty offences not captured in clause 61b, drug trafficking offences, fraud and deception offences against a child or vulnerable person, national security offences and pending charges for offences captured in clause 61b.  A person with a conviction for a Category 2 offence or pending charge for a Category 1 or 2 offence, where the person was at least 18 years old at the time of the offence should not be offered a role as a Disability Worker or allowed to undertake Excluded Work with a disability service provider or offered or engaged in a risk assessed role with a registered NDIS provider unless there are exceptional circumstances.  The Director responsible for DWES will make a determination in each case about whether exceptional circumstances apply. Exceptional circumstances are circumstances the Director responsible for the Scheme considers are unusual, uncommon, or special and result in the Director being satisfied that the person does not pose an unacceptable risk of harm to people with a disability. In determining that there are exceptional circumstances, the Director must consider the safety, welfare and wellbeing of persons with a disability, and in particular, their right to live free from abuse, violence, neglect and exploitation (including financial) as the paramount consideration. |

A person will fulfil this criterion where a finding of guilt has been made, regardless of whether a conviction has been recorded or a fine or a term of imprisonment is imposed or served.

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| For example, a person who was found guilty of an offence of the type listed, a significant number of years ago, with the results still appearing on the person’s National Police Certificate, would satisfy this criterion. |

There is no requirement that a finding of guilt can only be made by an Australian court. This criterion will be satisfied if such a finding is made by a foreign court or tribunal. The legal context in which the finding is made is not relevant to whether this criterion is satisfied.

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| For example, a person may have been found guilty of a relevant offence in a foreign country in circumstances which would not result in a finding of guilt in Australia. A Notification is still required in these circumstances and the Director will consider whether the person’s name should be placed on the List. |

## Criterion 2 – misconduct: resulting in termination

The second category of conduct is where the engagement of a person has previously been terminated or a person has been removed from the role of a Disability Worker for conduct which includes abusing a client, sexual misconduct with a client or otherwise placing a client at risk of serious harm (including financial harm).

It is not a requirement that the conduct in question occurred in a disability service. The relevant consideration is whether the conduct was directed at a client.

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| For example, relevant conduct occurring within the context of a school or nursing home would satisfy this criterion, regardless of whether there was a criminal prosecution. |

## Criterion 3 – misconduct: worker resignation prior to the completion of a workplace investigation

The third category applies where a person has been the subject of a workplace investigation because of an allegation relating to conduct falling within the criteria, but has resigned before the investigation or workplace disciplinary action has concluded.

While resignation by the person is not considered an admission of fault, this criterion is intended to ensure that a person is not able to prevent a finding being made by resigning. If a person wishes to resign following an allegation of conduct falling within the criteria they should be invited to cooperate with any investigation conducted by the disability service provider.

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| There have been several cases where persons engaged in a disability service and under investigation, have resigned from their position and obtained another position with another disability service. They have then been found to have committed further acts of abuse against people with a disability at the subsequent disability service. |

## Criterion 4 – misconduct: other

The fourth criterion applies where there are reasonable grounds to consider that the engagement of a person as a Disability Worker in a disability service would represent an unacceptable risk to the health, safety or welfare of a person with a disability.

Examples include:

* Findings of guilt for types of offences not included in Criterion (1),
* A current or prospective Disability Worker has had similar accreditation or registrations revoked or cancelled (such as a Working with Children Check or nursing registration),
* There is an adverse finding against a current or prospective Disability Worker by a tribunal or regulator (for example, the Suitability Panel or Medical Board of Australia)
* A disability service provider or authorised labour hire agency becomes aware that a prospective Disability Worker has provided falsified credentials (such as qualifications or a police certificate).

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| The primary consideration when making a Notification should be the purported risk to health, safety or welfare of people with a disability posed by the Disability Worker. |

# Notifications

Disability service providers, registered NDIS providers and authorised labour hire agencies are required to manage former, current and prospective employees (and other persons whom they engage) who are the subject of a Notification in accordance with appropriate human resources processes and obligations arising under contract law, legislation and industrial instruments such as awards or enterprise agreements.

## Notifying the DWES Unit

### Notifications required for persons engaged by disability service providers

A disability service provider or authorised labour hire agency is required to notify the DWES Unit, when it becomes aware that a former, current or prospective Disability Worker has engaged in conduct which may fall within criteria (1) to (4) in the following circumstances:

* + 1. It receives an application for engagement as a Disability Worker from a person who may fall within criteria (1) to (4).
    2. It becomes aware that a current or prospective Disability Worker has engaged in conduct that falls within criteria (1) to (4).
    3. It becomes aware that a former Disability Worker (who has been engaged at least since 1 November 2017) has engaged in conduct that falls within criteria (1) to (4).

It commences an investigation into a former or current Disability Worker for conduct, which, if proven, may fall within criteria (1) to (4). This means that:

a disability service provider or authorised labour hire agency should not wait until a formal investigation is completed before notifying the DWES Unit. This is important because a Disability Worker may be concurrently engaged or seeking to be engaged by another disability service provider, registered NDIS provider, or authorised labour hire agency.

the Notification should be made within 5 business days of an investigation commencing, unless the relevant person is cleared by that investigation before the conclusion of this 5 day period. This means, for example, that a Notification would not be required where an investigation immediately establishes that a complaint against the person is vexatious or otherwise unsubstantiated.

the Notification should be updated when the investigation is concluded, and the matter is found to be unsubstantiated or a disciplinary outcome is applied.

the Notification should also be updated if it is established that the investigation cannot be completed. If a Disability Worker resigns before an investigation into matters which may fall within criteria (1) to (4) has been completed, the investigation should continue, and findings made on the available evidence without the input of the worker. The DWES Unit should also be advised why the investigation has not been completed.

All Notifications to the DWES Unit must be made using theDWES Portal by an Authorised Person of the disability service provider or authorised labour hire agency.

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| There may be circumstances where information is provided to the department that a Disability Worker has engaged in conduct which may fall within the criteria (for example, information about past conduct or findings of guilt). In these instances, the department may make an ‘own motion’ Notification or request a service provider to submit a Notification. The DWES Unit will notify the Disability Worker and any disability service provider and the authorised labour hire agency who currently engages the person (if applicable) if it makes an 'own motion' Notification. |

### Notification requirements for persons engaged by registered NDIS providers

During the Transition Period, all registered NDIS providers operating in Victoria are required to submit a Notification if the conduct of a former, current or prospective Worker and other personnel meets criterion (1) only. This also applies to authorised labour hire agencies engaging Workers for registered NDIS providers.

For all other Worker misconduct and incidents which may fall within criteria (2) to (4), registered NDIS providers and authorised labour hire agencies must notify the NDIS Quality and Safeguard Commission of these matters in accordance with the *National Disability Insurance Scheme (Practice Standards – Incident Management and Reportable Incidents) Rules 2018*.

However, if the Worker misconduct or incident involves:

* a state-funded client,
* clients yet to transition to the NDIS, or
  + clients receiving in-kind services under the Disability Act,

registered NDIS providers and the authorised labour hire agency must notify the DWES Unit of any misconduct or incident that falls within any of the criteria (1) to (4).

## Notifying the relevant Disability Worker or Worker

If a disability service provider, registered NDIS provider or authorised labour hire agency submits a Notification to the DWES Unit about a Disability Worker or a Worker (as applicable), it is required to notify that person that pursuant to the Scheme:

* It has submitted a Notification about them.
  + That person is not permitted to apply for or commence or continue to be engaged in a disability service as a Disability Worker or to perform Excluded Work for a disability service provider or in a risk assessed role for a registered NDIS provider until they are advised that their name will not be placed on the List. However, the person can be placed in roles that do not require the person to perform Excluded Work or risk assessed roles (that is, roles with no direct care, contact and access to a person with a disability or key personnel roles).

For a copy of the letter that can be used by a disability service provider, registered NDIS provider or authorised labour hire agency to meet its obligation to notifying a Disability Worker see the department’s [Disability Workers Exclusion Scheme](https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme) website <https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme>. The disability service provider, registered NDIS provider or authorised labour hire agency should however consult with police, if they are involved, prior to sending a letter of this kind (see section 5.6).

Further, a disability service provider, registered NDIS provider or authorised labour hire agency is required to manage persons who are the subject of a Notification in accordance with appropriate human resources processes and obligations arising under contract law, legislation and industrial instruments such as awards or enterprise agreements.

## Notifications involving authorised labour hire agency staff

It is the responsibility of the disability service provider or registered NDIS provider where the incident or alleged misconduct occurred to make the Notification. The disability service provider or registered NDIS provider should also inform the authorised labour hire agency when their staff are the subject of a Notification. This should occur at the time the Notification to the DWES Unit is made. The authorised labour hire agency has an obligation to make their staff available to participate in the investigation. Refer to section 5.2.

## Confidentiality

Notifications to the DWES Unit should remain confidential to a disability service provider or registered NDIS provider, the department, the employing authorised labour hire agency (if applicable) and the relevant Disability Worker or Worker, subject to the circumstances outlined below. Accordingly, a disability service provider, registered NDIS provider or authorised labour hire agency is required to ensure that records relating to List enquiries and Notifications are kept in a safe and secure environment.

There are circumstances in which it will be appropriate to share information regarding Notifications with third parties, such as the Victoria Police, the Disability Services Commissioner, the NDIS Quality and Safeguards Commission, WorkSafe, the Public Advocate and/or divisional departmental managers, in accordance with departmental instructions including the relevant incident reporting mechanism.

The DWES Unit will advise other disability service providers, registered NDIS providers, authorised labour hire agencies and self-managed NDIS participants who currently engage the Disability Worker or worker engaged by a self-managed NDIS participant that the person is the subject of a Notification.

Other disability service providers, registered NDIS providers and authorised labour hire agencies will need to assess whether their engagement of the person who is the subject of a Notification falls within the definition of Excluded Work or a risk assessed role (as relevant).

The Scheme does not affect the ability of a disability service provider, registered NDIS provider, authorised labour hire agency or self-managed NDIS participant to discuss the circumstances giving rise to a Notification with third parties. This means, for instance, that if a disability service provider, registered NDIS provider or authorised labour hire agency would ordinarily disclose information about an incident if asked to give a reference, then the disability service provider, registered NDIS provider or authorised labour hire agency may still disclose this information when responding to a reference enquiry.

1. Investigations

It is expected that disability service providers will properly investigate allegations made or incidents that have arisen. Depending upon the circumstances, this may involve a disability service provider appointing an external investigator. A copy of any investigation report that is produced either by internal or external investigators must be provided to the DWES Unit, including statements relied upon in the investigation report.

There are several resources that can be used to assist disability service providers in conducting their investigations:

* *Client Incident Management Guide* available at the [department’s website](https://providers.dhhs.viv.gov.au/cims) <https://providers.dhhs.viv.gov.au/cims>
* [*Investigations guide: Conducting internal investigations into misconduct*](http://www.ibac.vic.gov.au/docs/default-source/guidelines/investigations-guide---conducting-internal-investigations-into-misconduct.pdf?sfvrsn=2) <http://www.ibac.vic.gov.au/docs/default-source/guidelines/investigations-guide---conducting-internal-investigations-into-misconduct.pdf?sfvrsn=2>
* [*Investigations: Guidance for Good Practice - Investigations of incidents of alleged staff to client assault or unexplained injuries*](http://www.odsc.vic.gov.au/wp-content/uploads/Investigations_Guidance_GoodPractice.pdf)<<http://www.odsc.vic.gov.au/wp-content/uploads/Investigations_Guidance_GoodPractice.pdf>>
* [*Responding to Allegations of Abuse Involving People with Disabilities* *Guidelines*](https://providers.dhhs.vic.gov.au/responding-allegations-abuse-involving-people-disabilities) <https://providers.dhhs.vic.gov.au/responding-allegations-abuse-involving-people-disabilities>.

Registered NDIS providers are required to comply with the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018* and the NDIS Commission’s *Incident Management System Guidance* accessed through the [NDIS Commission website](https://www.ndiscommission.gov.au/document/1086) <https://www.ndiscommission.gov.au/document/1086>.

## Investigating a directly engaged Disability Worker

Disability service providers are required to investigate all allegations of conduct by a Disability Worker which falls within the Scheme’s criteria and notify the DWES Unit of the outcome of such an investigation. This includes where a Disability Worker resigns before an investigation can be concluded.

When conducting an investigation, disability service providers must ensure the following minimum investigation standards are adhered to:

* the person appointed to conduct the investigation must be independent from the decision-maker and have skills proportionate to the seriousness of the allegation(s)
* principles of procedural fairness and natural justice should be adhered to during the investigation
* all allegations of conduct falling within the criteria must be clearly articulated, documented and provided to the relevant Disability Worker at the commencement of the investigation
* wherever possible, the investigator should interview the person with a disability, the relevant Disability Worker and any witnesses, and keep adequate records of such interviews
* the person with a disability should be given the opportunity to have a support person present at any meeting concerning the investigation
* the relevant Disability Worker should be given an opportunity to respond to any allegations which are made
* the relevant Disability Worker should be given the opportunity to have a support person present at any meetings concerning the investigation
* all available evidence should be considered
* any findings should be substantiated on the balance of probabilities (that the conduct was more likely than not to have occurred) having regard to the Briginshaw principle. The decision-maker should satisfy themselves that there is clear and cogent evidence to support the findings
* the results of an investigation must be compiled into an investigation report that includes details of all evidence relied upon and supporting documents
  + this investigation report and supporting material must be provided to the DWES Unit at the completion of the investigation.

The investigation standards and requirements referred to above are minimum standards of investigation and disability service providers must also abide by their own disciplinary procedures and comply with all applicable industrial laws, instruments and standards issued by the department and as directed.

## Investigating an indirectly engaged Disability Worker

It is the responsibility of disability service providers where the incident or alleged misconduct occurred, to conduct the investigation even if the Disability Worker has been engaged through an authorised labour hire agency.

The authorised labour hire agency must assist disability service provider or registered NDIS provider’s investigation by:

* making the Disability Worker available to participate in the investigation
  + directing the Disability Worker to assist in the investigation
  + providing other assistance requested by the disability service provider
  + advising the relevant disability service provider of the outcome of any disciplinary action to enable the disability service provider to update the Notification.

The disability service provider should advise the authorised labour hire agency of the outcome of the investigation to allow the authorised labour hire agency to undertake any disciplinary action.

## Investigation timeframe

A disability service provider must update the Notification and provide the investigation materials and report to the DWES Unit within 7 business days of completing an investigation, whether or not the allegations are substantiated, unless otherwise agreed with the DWES Unit.

The DWES Unit may permit a disability service provider to take longer than 7 business days to provide the relevant investigation materials where the disability service provider can explain to the DWES Unit why additional time is necessary.

## Department requests

In some circumstances, the department may request a disability service provider to revisit investigation outcomes, conduct further investigations or provide more information regarding an investigation, pursuant to sections 10, 206 and 210 of the Disability Act, and the provider’s registration under the Act, this Scheme and their Service Agreement. A disability service provider is required to comply with all such requests.

Depending upon the circumstances, this may also involve a disability service provider appointing an external investigator in order to determine the veracity of allegations and provide a copy of any investigation report that is produced in respect of such investigations to the DWES Unit.

In such instances, the DWES Unit may issue guidance material for a disability service provider to assist them to conduct investigations. In the interim, a disability service provider can obtain advice from the DWES Unit by contacting:

Email: [DWESU@dhhs.vic.gov.au](mailto:DWESU@dhhs.vic.gov.au) Phone: (03) 9096 3203

A request to conduct a further investigation will be discussed with the Authorised Person of the disability service provider. The request will take into account the status of any other investigations being undertaken in relation to the matter.

## Department investigations

The DWES Unit does not conduct investigations and remains impartial to any investigation process. However, in order for the DWES Unit to properly perform its functions, under very limited circumstances, it may be necessary for the department to commission an independent investigation. Disability service providers and authorised labour hire agencies are required to cooperate in any such investigation. In particular, the department may conduct an independent investigation if:

* + the department’s request under section 5.4 of this Instruction has not been adequately addressed, or
  + the DWES Unit determines that there is an unacceptable risk to the health, safety or welfare of people with a disability that requires an independent investigation.

Any investigation conducted by the department will be conducted or overseen by someone who is independent from any person within the department involved in making the decision of whether or not the person who was the subject of the investigation should be placed on the List.

## Impact of police investigations

Matters that might require investigation by Victoria Police should be managed in accordance with the *Responding to Allegations of Abuse Involving People with Disabilities* guidelines*,* available from the [department’s website](https://providers.dhhs.vic.gov.au/responding-allegations-abuse-involving-people-disabilities) *<*https://providers.dhhs.vic.gov.au/responding-allegations-abuse-involving-people-disabilities>.

Disability service providers and authorised labour hire agencies must confer with Victoria Police before undertaking any action that might compromise the police investigation, including actions related to any provider investigation or disciplinary process.

If a police investigation results in no charges being laid, the conduct of a Disability Worker would not fall within Criterion (1) of the criteria (criminal offence) . However, even if a police investigation results in no charges being laid the conduct of a Disability Worker may fall within one or more categories of the other criteria, such as Criterion (4).

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| Notwithstanding the outcome of any relevant police investigations, a separate investigation under the Scheme must occur in order to determine whether the conduct meets the criteria. This is because police investigate matters to a higher standard of proof than required by the Scheme. Disability service providers and registered NDIS providers should not rely on a police investigation to replace an incident investigation as required by the Scheme. It may however be appropriate in some circumstances to delay an investigation under the Scheme whilst a police investigation is active. |

## Person resigning before or during an investigation

If a Disability Worker resigns before or during an investigation, the disability service provider must endeavour to complete an investigation, gather all relevant information and provide the investigation report, supporting documents and relevant findings to the DWES Unit, with or without the involvement of the person.

If a Disability Worker resigns and an investigation is not completed, the DWES Unit may have very little information to consider when making a decision whether to place the person on the List. This factor will be taken into account when considering whether the person should be placed on the List.

## Incomplete investigation

Where an investigation is unable to be completed, an update to the Notification is still required. This includes providing the DWES Unit with all evidence and relevant materials available at that point.

# Consideration and decision to place a person on the List

## Consideration of placement on the List

Once a disability service provider has concluded its investigation in relation to misconduct which may fall under criteria (2) to (4) and provided the DWES Unit with the investigation report and supporting materials, and disability service providers and registered NDIS providers notify the DWES of Disability Workers and Workers who may fall within criterion (1), the Director responsible for the Scheme will then consider whether the conduct of the relevant person satisfies any of the criteria.

A person who satisfies any of the criteria will not necessarily be placed on the List. If the Director finds that the conduct of a person falls within the criteria, the Director will assess the suitability of that person to be engaged as a Disability Worker o in a disability service or in a risk assessed role for a registered NDIS provider. The Director may consider:

* whether the engagement of the person would pose an unacceptable risk to the health, safety or welfare of people with a disability,
* the relevance of the conduct or criminal offence, in relation to the job or placement,
* the nature of the conduct or offence and the relationship of the conduct or offence to the particular job or placement for which the person is being considered,
* the length of time since the relevant conduct took place,
* whether the person was dismissed from their role as a Disability Worker or resigned during the course of an investigation,
* whether the person was convicted or found guilty and placed on a bond,
* whether there is evidence of a history of the person engaging in similar conduct or an extended police record,
* the number of offences committed or incidents involved which may establish a pattern of behaviour which renders the person unsuitable,
* whether the conduct or offence was committed by the person as an adult or a juvenile,
* the severity of any punishment imposed or disciplinary action taken,
* if the person was convicted of a crime, whether the offence has now been decriminalised,
* if the person was convicted of a crime when overseas, whether the offence is a crime in Australia,
* whether there are other factors that may be relevant for consideration, and
  + the general character of the person since the conduct or since the offence was committed.

In addition, the Director will consider matters specified in the *Safety Screening for Funded Organisations* *Policy* for persons engaged by disability service providers and the *Safety Screening Policy for registered NDIS providers operating in Victoria* for persons engaged by registered NDIS providers.

## Provisional Exclusion Assessment

Where the Director considers that the name of a person may be placed on the List, the person will be advised in writing:

* that their name may be placed on the List (Provisional Exclusion Assessment),
* the reasons why their name may be placed on the List,
* that they may not work as a Disability Worker or undertake Excluded Work for a disability service provider or be engaged in a risk assessed role for a registered NDIS provider, unless they are notified that their name is not on the List, and
  + that they have 30 days in which to make a written submission as to why their name should not be placed on the List as set out in section 6.3 of this Instruction (a ‘show cause’ submission).

If further information supporting the placement of the relevant person on the List comes to the attention of the Director following the Notification, then the person will be advised of the substance of that information.

Where the Director considers that the person should not be placed on the List, the person will be advised in writing that their name will not be placed on the List and that they may work as a Disability Worker or undertake Excluded Work for a disability service provider or work in a risk assessed role for a registered NDIS provider.

The Director will also advise any disability service provider, registered NDIS provider and authorised labour hire agency that had engaged the person as a Disability Worker or as a Worker at the time of the Notification that the person is not on the List and may continue to be engaged as a Disability Worker or to undertake Excluded Work for a disability service provider or undertake a risk assessed role for a registered NDIS provider.

## ‘Show cause’ submissions by a person following advice of Provisional Exclusion Assessment

If a person wishes to provide a show cause submission explaining why they should not be placed on the List, they must write to the DWES Unit or submit a *Disability Worker Exclusion Scheme Worker Review Form* available on the [department’s website](https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme-worker-review-form-word) <https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme-worker-review-form-word>. The *Disability Worker Exclusion Scheme Worker Review Form* and any supporting documents must be provided within 30 business days of being notified that a Provisional Exclusion Assessment has been made.

Prior to the expiration of 30 days, a person may seek additional time to make their submission by writing to the DWES Unit. The Director may at their discretion grant an extension of time.

If no submission is received from the person within 30 days, the outcome of the Notification may be recorded as a Decision to Exclude the Disability Worker or Worker and their name placed on the List.

## Decision to Exclude the Worker: placement on the List

In making their Decision to Exclude the Worker, the Director will consider the written material submitted by that person (the ‘show cause’ submission). The Director may also contact the Authorised Person of the disability service provider, registered NDIS provider and, where applicable, the authorised labour hire agency prior to finalising the decision to ensure all relevant information has been considered. There will be no formal hearing in relation to whether a person’s name is to be placed on the List.

The outcome of the Director’s decision will be provided to the person in writing. If the Director’s decision is to place the person on the List, reasons for the Decision to Exclude the Disability Worker or Worker will be provided.

If a person is dissatisfied with a decision to place their name on the List, they can:

* apply to appeal the Director's Decision to Exclude the Disability Worker or Worker (see section 7 of this Instruction), or
* seek a review of the Decision to Exclude the Disability Worker or Worker and have their name removed from the List (see section 7 of this Instruction).

If the Director decides that the person’s name should not be placed on the List, the person and any disability service providers, registered NDIS providers, authorised labour hire agencies or self-managed NDIS participant that had engaged the person at the time of the Notification will be advised accordingly.

# Appeals and reviews of placement on the List

## The Secretary

The Secretary will authorise a Deputy Secretary of the department to consider applications to appeal decisions made by the Director responsible for the Scheme. The Deputy Secretary’s functions include reviewing the original Decision to Exclude the Worker (and to place a person’s name on the List) as well as subsequent Decisions to Exclude.

## Application to appeal placement on the List

Within 30 business days of being notified of the Director’s Decision to Exclude the Disability Worker or Worker and place them on the List, a person may appeal the Decision to Exclude the Disability Worker or Worker to the Secretary by submitting a *Disability Worker Exclusion Scheme Worker Review Form* available on the [department’s website](https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme-worker-review-form-word), <https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme-worker-review-form-word>.

A person will be notified of the outcome of the appeal by the Deputy Secretary.

For further information regarding the review process, see [Disability Workers Exclusion Scheme](https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme) page on the Service Providers website <https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme>.

## Application to review placement on the List

Where an appeal of the Director’s Decision to Exclude the Disability Worker or Worker does not result in the removal of the person’s name from the List, the person may apply to have their name removed from the List, provided a minimum period of three years has elapsed since the most recent decision on their matter.

For a person to apply to have their name removed from the List, they should submit a request in writing to the DWES Unit or submit a *Disability Worker Exclusion Scheme Worker Review Form* available on the [department’s website](https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme-worker-review-form-word), <https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme-worker-review-form-word> and provide any material they wish to provide in support of their request.

An application to remove a person’s name from the List is to be decided by the Director. The person may lodge an appeal requesting the Deputy Secretary review if the Director decides to keep them on the List, in accordance with sections 7.1 and 7.4.

## Matters to be considered during an appeal or review

When applying for appeal or review of placement on the List, a person may provide any information that can be used to determine whether they continue to pose a risk to the health, safety and welfare of people with disability. This may include:

* written references from current or past employers
* evidence of professional development or training the person has undertaken to improve their skills
* evidence that the person is or has been working in a similar role elsewhere
* information regarding the original investigation or allegations
* any changes to the person’s personal situation since the time of their placement on the List that they believe should be taken into consideration.

## Other circumstances

At any time, a person’s name may be removed from the List in the following circumstances:

* where a person can demonstrate that they have been placed on the List because they have been wrongly identified,
* where a person can demonstrate that they have been placed on the List because a public record contains an error, or
* where new information has become available that was not previously considered by the Director or the disability service provider, registered NDIS provider or authorised labour hire agency (as applicable) that made the Notification to the DWES Unit in respect of the person.

# Recruitment and engagement

## Registered NDIS providers worker screening for prospective workers

Registered NDIS providers and authorised labour hire agencies that provide staff to registered NDIS providers are required to undertake background screening in accordance with Part C of the department’s *Safety Screening Policy for registered NDIS providers operating in Victoria* available on the [Victorian Government’s NDIS website](https://www.vic.gov.au/ndis-quality-and-safeguards) <https://www.vic.gov.au/ndis-quality-and-safeguards>

## Direct engagement by disability service providers and engagement by authorised labour hire agencies

Disability service providers and authorised labour hire agencies that provide staff to disability service providers are required to undertake background screening of Disability Workers in accordance with the *Safety Screening for Funded Organisations Policy*.

This section 8.2 provides an overview of these obligations.

Disability service providers and authorised labour hire agencies should also refer to the *Safety Screening for Funded Organisations Policy* to understand their obligations.

### Background screening

A disability service provider is required to undertake background screening in accordance with the *Safety Screening For Funded Organisations Policy* when directly engaging a Disability Worker in a disability service.

Authorised labour hire agencies are also required to undertake the same background screening requirements for staff they engage as a Disability Worker for a disability service provider.

This policy requires a prospective a Disability Worker to:

* consent to the disability service provider or authorised labour hire agency (as applicable) undertaking checks, including police record checks and international police record checks, where applicable, and
  + sign a statutory declaration stating they have fully disclosed to the disability service provider or authorised labour hire agency who proposes to engage them all relevant information regarding their criminal record and employment history.

For a copy of a suggested statutory declaration each prospective Disability Worker should be required to sign, see the [Disability Workers Exclusion Scheme](https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme) webpage on the department’s Service Providers website <https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme>.

If an alternative form of statutory declaration is used, the disability service provider or authorised labour hire agency should ensure it deals with all matters which are dealt with in the example statutory declaration.

Disability service providers and authorised labour hire agencies should also provide an opportunity for prospective employees to disclose criminal record or disciplinary actions as part of the recruitment process.

### Informing a prospective Disability Worker of the Scheme

In order to comply with the requirements of the *Privacy and Data Protection Act 2014* (Vic), a disability service provider or authorised labour hire agency must provide each prospective Disability Worker with information about the Scheme at the beginning of the recruitment process. This includes informing each prospective Disability Worker that the disability service provider or authorised labour hire agency will provide the person’s details to the DWES Unit to check if their name is on the List before permitting them to commence work and that if, they do not agree to participate in the Scheme, they cannot be engaged by a disability service provider as a Disability Worker.

A disability service provider and authorised labour hire agency is also required to advise each prospective Disability Worker that:

* If, during the recruitment process, information comes to light which, if correct, may satisfy the criteria, the disability service provider or authorised labour hire agency will be required to notify the DWES Unit. The DWES Unit may also notify other disability service providers, registered NDIS providers, authorised labour hire agencies or self-managed NDIS participants that currently engage the person.
* The consequence of having their name placed on the List is that they will be prevented from being engaged (directly or indirectly) by a disability service provider as a Disability Worker in a disability service or by a registered NDIS provider in a risk assessed role.
  + The DWES Unit maintains the List and may advise other employers or prospective employers that are disability service providers, registered NDIS providers, authorised labour hire agencies or self-managed NDIS participants, if the person is on the List or is the subject of a Notification.

Job advertisements should include statements about the operation of the Scheme. This information should also be repeated to applicants verbally, particularly during the job interview process.

### Checking prospective staff against the List

Disability service providers and authorised labour hire agencies are required to check prospective Disability Workers against the List before engaging them in those roles in a disability service. Only preferred applicants should be checked against the List, after all other worker-screening checks have been conducted.

In order to check the name of a prospective Disability Worker against the List, a disability service provider or authorised labour hire agency should submit to the DWES Unit, a check request as well as a copy of the *Consent and Acknowledgment Form* (Appendix 2) signed by the prospective worker.

Disability service providers and authorised labour hire agencies and their Authorised Persons should use the applicant’s details as verified against the applicant’s identity documents, not the applicant details from the *Consent and Acknowledgment Form*. This is because the *Consent and Acknowledgment Form* may contain abbreviations or may otherwise differ from police and court records.

Please note the DWES Unit may not undertake a check against the List without a copy of the *Consent and Acknowledgement Form* signed by the prospective worker.

A copy of the check request, the signed *Consent and Acknowledgement Form*, and a copy of the department’s response to the check request, must be kept by a disability service provider or authorised labour hire agency for seven years for ongoing compliance check purposes and so that the disability service provider or authorised labour hire agency can show that it has complied with the requirements of the Scheme.

### Outcome of a check request

When a check against the List is made, the DWES Unit will provide the disability service provider or authorised labour hire agency’s Authorised Person with one of four responses:

|  |  |
| --- | --- |
| Response to check request from the DWES Unit | Requirements under the Scheme |
| Clear | The person is NOT on the List and can be engaged:   * as a Disability Worker and undertake work that falls within the definition of Excluded Work * by a registered NDIS provider as a worker in a risk assessed role. |
| Excluded | The person is ON the List and CANNOT be engaged:   * as a Disability Worker and undertake work that falls within the definition of Excluded Work * by a registered NDIS provider as a worker in a risk assessed role. |
| Subject of Investigation | The person is the subject of a Notification and CANNOT be engaged:   * as a Disability Worker and undertake work that falls within the definition of Excluded Work * by a registered NDIS provider as a worker in a risk assessed role. |
| Current appeal/review | The person is ON the List, but subject to an appeal or review, and CANNOT be engaged:   * as a Disability Worker and undertake work that falls within the definition of Excluded Work * by a registered NDIS provider as a worker in a risk assessed role. |

Where a Disability Worker has been the subject of a Notification and a decision has been made not to place that person on the List, the disability service provider or authorised labour hire agency (as applicable) will receive a Clear response.

The outcome of this list checking should only be disclosed by the Authorised Person to those within the disability service provider or authorised labour hire agency who need to know the outcome of the check (e.g. the relevant hiring manager and human resources) but should not be otherwise disclosed or discussed within the disability service provider or authorised labour hire agency.

### Directly engaging a prospective Disability Worker

It is also recommended that disability service providers and authorised labour hire agencies include a clause along the following lines in the relevant employment contract or engagement instrument, when directly engaging a Disability Worker.

|  |
| --- |
| It is a condition of your engagement that your engagement with [**provider to insert the name of the organisation**] is subject to the operation of the Disability Worker Exclusion Scheme, as amended from time to time, which is maintained by the Department of Health and Human Services (department).  This means that you consent to [**provider to insert the name of the organisation**] and the department collecting your personal information and sensitive personal information, including about your criminal, employment history and engagement history, for the purposes of compiling the Disability Worker Exclusion List (the List) maintained by the department and that both your conduct in relation to your engagement with [**provider to insert the name of the organisation**], and your conduct outside of your engagement with [**provider to insert the name of the organisation**], could result in you being placed on the List and could jeopardise your ability to be engaged by:   1. a disability service provider (as defined in the *Disability Act 2006* (Vic)) as:   a Disability Worker, being a person engaged by a service provider who:  provides, or supervises or manages a person who provides direct support to a person with a disability, and  has direct contact or access to a person with a disability  and excluded from any work at the disability service that falls within the definition of Excluded Work being work at a disability service:  as a Disability Worker, or  that involves regular direct contact with or access to a person with a disability.   1. a registered NDIS provider registered under section 73E of the *National Disability Insurance Scheme Act 2013* (Cth) as:    * + 1. an NDIS worker involved in the direct delivery of specified supports and services to people with a disability as a normal part of their duties or   an NDIS worker likely to require more than incidental contact with people with a disability as a normal part of their duties, or  a key personnel as defined under section 11A of the *National Disability Insurance Act 2013 (Cth)* which may include executive, senior management and operational positions in a registered NDIS provider (such as, a Chief Executive Officer, Chairperson or Board Member).  I accept that a self-managed NDIS participant may also choose not to engage me if my name is placed on the List.  If you are placed on the List or a Notification is made about you, you agree that the department may inform any other disability service provider, registered NDIS provider authorised labour hire agency or self-managed NDIS participant that is currently engaging or considering engaging you, that you are on the List, or that you are the subject of a Notification (that is, a disability service provider, registered NDIS provider, authorised labour hire agency or self-managed NDIS participant has notified the department that you have engaged in conduct which may fall within the List criteria).  Accordingly, you must inform [**provider to insert the name of the organisation**] of the name and address of any other organisation you are engaged in or intend to become engaged by. |

## Indirect engagement

A disability service provider or registered NDIS provider is not excused from its obligations arising under the Scheme to check a prospective worker against the List because the person it proposes to engage is provided by a third party such as a labour hire agency, unless an authorised labour hire agency is used.

The requirements for registered NDIS provider’s use of authorised labour hire agencies are set out in section 15 of the *Safety Screening Policy for registered NDIS providers operating in Victoria*.

### Use of an authorised labour hire agency by a disability service provider

There are a number of labour hire agencies that have agreed to comply with the requirements of the Scheme. These authorised labour hire agencies have agreed that all of their workers will have undertaken DWES checks and other safety screening requirements and are named as being authorised labour hire agencies on the department’s website.

A disability service provider may engage a Disability Worker from such an agency in a disability service, and rely upon checks undertaken by these agencies in respect of that prospective Disability Worker, provided that the following applies:

* The labour hire agency must be named as being an authorised labour hire agency (see the [Disability Workers Exclusion Scheme](https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme) webpage on the department’s website <https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme> at the time of placement;
* The disability service provider must receive written confirmation from the authorised labour hire agency prior to the first occasion that the person is placed with the disability service provider specifying:
  + - that the person is aware of and agrees to be bound by the operation of the Scheme
    - the date when the name of the person was checked against the List and confirmation was received from the DWES Unit that the name of person was not on the List, if applicable
    - that the requirements of the department’s *Safety Screening for Funded Organisations Policy* have been met and the date when screening took place, including when the results of a police record check were received, and the outcome of that check, and
      * that the authorised labour hire agency is not aware of any Notifications in respect of the person and that the authorised labour hire agency consents, and the person has given their consent, to the disability service provider notifying the DWES Unit in respect of the person if they become aware of circumstances requiring Notification under the Scheme.

For a copy of the suggested pro forma confirmation that a disability service provider should require an authorised labour hire agency to provide see the [Disability Workers Exclusion Scheme](https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme) page on the department’s Service Providers website <https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme>.

A copy of the confirmation received should be retained by a disability service provider for a minimum period of seven years.

A disability service provider who engages a Disability Worker indirectly is also encouraged to ensure that they have agreements in place with any authorised labour hire agency that requires the authorised labour hire agency to fully cooperate with any investigation undertaken for the purpose of compliance with the Scheme. This includes any investigation for the purpose of determining whether or not a person should be placed on the List.

A disability service provider must check to ensure that an authorised labour hire agency’s authorisation remains current at the time of placement by confirming the authorised labour hire agency is listed at that time on the [Disability Workers Exclusion Scheme](https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme) page on the Service Providers website <https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme>.

### Use of an agency not authorised by the department

A disability service provider may use labour obtained from an agency that has not been authorised by the department. However, in such circumstances a disability service provider must undertake their own checks in accordance with the Instruction and the department’s *Safety Screening for Funded Organisations Policy* or, alternatively, suggest that the agency become an authorised labour hire agency before the disability service provider engages a worker from that labour hire agency.

### Obtaining authorisation for a labour hire agency

Labour hire agencies that are used by a disability service provider may apply to become authorised labour hire agencies. Generally, this will involve the agency satisfying the department that it is aware of and understands the requirements of the Scheme, the department’s *Safety Screening for Funded Organisations Policy*, the *Safety Screening Policy for registered NDIS providers operating in Victoria* and other department requirements and will implement those requirements (**Requirements**).

If the department is satisfied that an agency is able to meet its Requirements, that agency will be asked to enter into an agreement with the department to implement the Requirements.

To find out more information about how a labour hire agency may become an authorised labour hire agency under the Scheme, please contact the DWES Unit at [DWESU@dhhs.vic.gov.au](mailto:DWESU@dhhs.vic.gov.au) or on (03) 9096 3203.

Authorised labour hire agencies may lose their authorised status in the event that they fail to comply with the Requirements.

## Secondary employment

It is not unusual for a person to be engaged by more than one disability service provider or authorised labour hire agency. It is recognised that conduct which is engaged in by a person outside of their employment, including during alternative employment, may have an impact upon the assessment of the suitability of person to work as a Disability Worker

A disability service provider or authorised labour hire agency may already deal with the issue of secondary employment within their policies and contracts of employment. For disability service providers or authorised labour hire agencies who do this, the department requires that such policies and contracts be reviewed and amended to ensure that they are consistent with the operation of the Scheme.

Where a disability service provider or authorised labour hire agency does not have an outside employment policy, the department recommends that future contracts of employment and policies require workers to disclose secondary employment to the disability service provider or authorised labour hire agency. It is also recommended that policies make it clear that conduct which occurs outside of the disability service provider or authorised labour hire agency’s workplace may still fall within the operation of the Scheme by including a statement along the following lines:

|  |
| --- |
| Whilst you are engaged by [**provider to insert the name of the organisation**] you may engage in paid work for other organisations, but you must inform [**provider to insert the name of the organisation**] of the name and address of any outside employer before you accept or commence any alternative employment.  You also agree that your conduct when working for other organisations may fall within the scope of conduct that may be relevant to the Disability Worker Exclusion Scheme. This means that [**provider to insert the name of the organisation**] and the Department of Health and Human Services (the department) may collect personal and sensitive personal information regarding your employment with other employers, and any criminal history you may have, for the purposes of compiling the Disability Worker Exclusion List (the List) maintained by the department.  This means that your conduct outside of your employment with [**provider to insert the name of the organisation**] could result in you being placed on the List and could jeopardise your employment with [**provider to insert the name of the organisation**], your ability to gain future work in a disability service as defined by the *Disability Act 2006* (Cth) or with a registered NDIS provider as defined by the *National Disability Insurance Scheme Act 2013* (Cth). For example, if your employment was terminated for serious misconduct, your name could be placed on the List even though this conduct occurred while you were employed by another employer if the conduct was within the scope of the Scheme. |

# Ongoing compliance checks

## Compliance checks for disability service providers

Disability service providers are required to undertake a compliance check each year to ensure that every Disability Worker engaged by the disability service provider at the time of the compliance check, is checked against the List. If it is found that a Disability Worker who has been engaged by the disability service provider has not been checked against the List, that check should occur immediately. The disability service provider must maintain a written record of undertaking and completing the annual compliance check.

## Compliance checks for authorised labour hire agencies

Authorised labour hire agencies are required to undertake a compliance check each year to ensure that all Disability Workers engaged by the authorised labour hire agency at the time of the compliance check are checked against the List. If it is found that a person who has been engaged by the authorised labour hire agency has not been checked against the List, that check should occur immediately. The authorised labour hire agency must maintain a written record of undertaking and completing the annual compliance check.

Authorised labour hire agencies are also required to advise the disability service providers who engage them, that the annual compliance check has been satisfactorily completed.

For a copy of the suggested confirmation that an authorised labour hire agency could provide to disability service providers or registered NDIS providers see the [Disability Workers Exclusion Scheme](https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme) page on the Service Providers website <https://providers.dhhs.vic.gov.au/disability-worker-exclusion-scheme>.

A copy of the annual confirmation received from an authorised labour hire agency should also be retained by a disability service provider for a minimum period of seven years.

## Other obligations

Disability service providers are also required to submit as part of its annual Service Agreement Compliance Certification:

* evidence that they have a system in place for staff safety screening, for example a basic spreadsheet that includes DWES Notifications, and
* attest that they are meeting all staff safety screening requirements.

# Management of claims and disputes involving Disability Workers

A disability service provider or authorised labour hire agency should be aware that under the Scheme they are not permitted to enter into terms of settlement with a Disability Worker that would seek to prevent or limit the ability of a disability service provider or authorised labour hire agency to comply with the Scheme and in particular, to notify the DWES Unit if the conduct of the Disability Worker falls within the criteria. In practice, what this means is that if a disability service provider or authorised labour hire agency includes a confidentiality provision within terms of settlement with a Disability Worker, they must include an exclusion which allows that disability service provider to notify the DWES Unit of relevant conduct and to provide relevant investigation material (as outlined in section 5.1 of this Instruction).

In respect of terms of settlement that a disability service provider or authorised labour hire agency may have previously agreed with a Disability Worker whose conduct falls within the criteria, that disability service provider or authorised labour hire agency will need to consider and, if appropriate, obtain their own legal advice, about whether it is appropriate to notify the DWES Unit in respect of that Disability Worker in light of any confidentiality clause in the terms of settlement..

In considering whether to notify the DWES Unit, the disability service provider or authorised labour hire agency should take into account (as applicable):

* + 1. the gravity of the conduct of the Disability Worker
    2. the possible threat to the safety of people with a disability and staff in the event that the Disability Worker is re-engaged in a disability service as a Disability Worker,
    3. their obligations under the *Occupational Health and Safety Act 2004 (Vic)* to keep persons affected by their enterprise as safe as reasonably practicable (section 23)
    4. their obligations generally under the Disability Act, their Service Agreement, Authorised Labour Hire Agreement or conditions of their registration under the Disability Act (as applicable).

# Appendix 1: Dual registered providers



# Reporting requirements for worker screening and incident reporting for dual registered providers

The flowchart above outlines the reporting requirements for registered disability service providers and registered NDIS providers.

Registered disability service providers must comply with the *DWES Instruction* for worker screening reporting, and the relevant reporting mechanism (for example, the Client Incident Management System (CIMS)) for incident reporting.

Registered NDIS providers must comply with the *Safety Screening Policy for registered NDIS providers operating in Victoria* for worker screening and *NDIS (Practice Standards - Incident Management and Reportable Incidents) Rules* *2018* for incident reporting.

Dual registered providers, that is, providers who are registered under both the *Disability Act 2006* and *NDIS Act 2013* need to consider the type of service being provided at the time of the incident. If the provider was providing an NDIS service at the time of the incident, they must comply with the *Safety Screening Policy for registered NDIS providers operating in Victoria* and *NDIS (Practice Standards - Incident Management and Reportable Incidents) Rules 2018*. If the provider was providing a service under the Disability Act, they must comply with the DWES Instruction and the relevant incident reporting mechanism (such as CIMS).

For further information, please refer to the provider factsheets available on the [Victorian Government NDIS quality and safeguards website](https://www.vic.gov.au/ndis-quality-and-safeguards) <https://www.vic.gov.au/ndis-quality-and-safeguards>.