

# Portable Long Service Scheme – consultation on Draft Regulations



Industrial Relations Victoria

May 31, 2019

## Background

Nillumbik Community Health Service operates 2 community health services:

- Carrington Health in Box Hill has 160 staff that support over 15,000 clients each year.
- healthAbility in Eltham has 164 staff that support over 9,800 clients each year.

Our annual salary budget is \$15.8 million.

Service provision includes:

- Allied health
- NDIS
- Aged care
- General practice
- Mental health

## Feedback

### 1. Is the prescribed additional information appropriate? (section 5)

While the additional information currently specified by Industrial Relations Victoria is appropriate to ensure that leave is accumulated correctly for each registered worker, the regulations fail to account for workers whose role may differ throughout a work day or week or where their engagement in 'community service' work might change.

### 2. Are there any specific matters about privacy of information that you wish to raise as part of this proposed regulation? (section 6)

As long as we are not expected to gain consent from workers regarding the Authority sharing information with external agencies, then we have no concerns.

### 3. Do the exposure draft regulations provide clarity as to the scope of the community services sector, what is community service work, and who is an employer, and an employee of the sector? (sections 7 to 9)

Inconsistencies between the Act and draft regulations with regards to the inclusion of community health services as employers or their staff as in-scope employees must be addressed as a priority. **It is critical that this be clarified and the Community health sector, which already incorporates long service leave portability, be expressly exempt from this legislation.**

# Portable Long Service Scheme – consultation on Draft Regulations



If further clarification must be built into the regulations, rather than a blanket exemption, the following comments are relevant. These points also serve to clarify the complexity of trying to apply this to the community health sector, and the inadvertent conflicts that will arise – therefore reinforcing that the Regulations will not work in this sector.

The Regulations must include a predominance test that clearly sets out, which:

- activities or services are considered in-scope and out-of-scope
- workers are considered in-scope and out-of-scope
- employers are considered in-scope and out-of-scope

In addition to the predominance test, it is recommended that the regulations adopt clear and consistent language with regards to the meaning of the terms ‘service’, ‘activities’, and ‘work’.

There are significant gaps when the Act and draft regulations are applied to community health services as employers, and community health services staff as employees. This stems from a fundamental lack of understanding about the breadth, scope and expertise of community health services and their staff. No one definition will clarify this, and here are some examples and queries which will demonstrate this concern:

An employee who works in an in-scope activity (e.g. case management) but has a qualification in allied health or nursing. Are they excluded from the scheme because of their qualification in allied health or nursing, or included because of their work as a case manager?

An employee has dual roles with separate and distinct contracts with the same organisation. For example, one contract for three days as an allied health professional, and another contract for two days as a social worker. Is this worker included by virtue of their work as a social worker? Are they excluded by virtue of their work as an allied health professional? How should the employer define the predominance of their weekly workload?

An employee may have a single contract to work as an allied health professional, but may provide services across a number of distinct programs and funding streams, requiring different work on certain days (or part-days). For example, an allied health professional delivers NDIS-funded care for three days per week, and care funded by home care packages for the remaining two days per week. Is this worker included in the scheme by virtue of delivering an NDIS-funded activity? Or are they excluded from the scheme by virtue of this activity being a ‘health service’? If they are included in the scheme, is the employer expected to pay the levy for the three days of in-scope activity under the NDIS or is the employer required to pay the levy for all ordinary hours because the predominant activity is the NDIS activity?

An employee is promoted to cover a maternity leave position managing an in-scope community service activity for three days per week, while maintaining their ordinary role delivering case management for the remaining two days per week. Is the employer required to pay the levy for the two days of in-scope case management work, while recording the accrual of long service leave under the fair work instrument for the employee’s entire ordinary hours?

# Portable Long Service Scheme – consultation on Draft Regulations



4. Is the list of awards and agreements at clause 9 of the exposure draft Regulations comprehensive? Should any of those awards or agreements be excluded? Should any other awards or agreements be included?

With more than 150 modern awards, a more efficient and balanced approach to determining inclusion and exclusion in the regulations would be for the Victorian Government to assert that all modern awards are exempt, and to then specify which awards and agreements are considered in-scope.

For example:

## Who is excluded as an employee?

An individual to whom any of the following awards or agreements apply:

- any modern award except for the:
  - Social, Community, Home Care and Disability Services Industry Award 2010;
  - Supported Employment Services Award 2010
  - Children Services Award 2010
- any enterprise agreement that applies to employees covered by the awards excluded by 1.

5. Whilst it is proposed that the Regulations operate and on from 1 July 2019, the regulations bringing children's services, and disability services within the scope of the scheme only operate on and from 1 January 2020. This will enable businesses in those sectors adequate time to prepare for the legislation. Are these appropriate commencement dates?

Given the delay in provision of information, the complexity and lack of clarity provided by the draft regulations and the administrative burden which will require additional resourcing that is not already in place, the current commencement date of 1 July 2019 for community health services is not feasible.

Again, the regulations do not demonstrate an understanding of the Community health sector, which operates across all potential scope areas. Importantly, as providers of NDIS services, community health services will have employees commencing in the scheme at two different points in time. Some employees may have a dual role where a component is delivery of an NDIS funded disability service. These matters will result in avoidable administrative issues. In addition, and at a practical level, the date does not allow sufficient time for community health services to go to market for the required payroll system upgrades, particularly at a time (start of financial year) when payroll vendors are experiencing their busiest period.

The proposed commencement date for community services must be delayed and, at a minimum, match the date for NDIS service provider commencement.

6. Does the proposed Regulation adequately address any risk of double-dipping? (see section 11)

Given the ambiguities of section 11 of the draft regulations and their inability to protect employers from honouring a worker's request to access long service leave under a fair work instrument after receiving a benefit for the same period from the Authority, we propose the following alternative

# Portable Long Service Scheme – consultation on Draft Regulations



approach that maintains the intent of the Act, provides a long service benefit and portability to employees and protects employers from double payment of a levy and benefit:

1. The employer registers an in-scope employee with the Authority
2. The employer provides the Authority with evidence that the employee has an applicable award-derived or enterprise-derived long service leave entitlement, and that long service leave has been accrued for that employee
  - a. This would mean the employer is not required to pay a levy to the Authority, though the employer would still report all other required information to the Authority as part of their quarterly return
3. Where termination of employment occurs and the award- or enterprise-derived continuous service is broken (and with it, any fair work instrument accrual or entitlement to long service leave is negated) the employer will make the relevant payments to the Authority for the service period reported.

## Concerns with the cost impact of the scheme

The Victorian Government must recognise that the cost of compliance with the scheme, which provides a benefit already enjoyed by employees under EA, will require community health services to redirect funding away from service delivery, facilities management and staff training and development.

The government should provide community health services with financial support to enable compliance with the scheme.

Although it is difficult to model the costs, we estimate that the scheme will cost our organisation \$300,000 in the first year, rising to \$400,000 by the seventh year, with a total cost impost of approximately \$2.5 million.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Ronda Jacobs", written over a light blue horizontal line.

Ronda Jacobs  
CEO

**M:** 0413 736 545  
**D:** (03) 8843 2219 (EA)  
**T:** (03) 9890 2220  
**E:** [rjacobs@chha.org.au](mailto:rjacobs@chha.org.au)

carringtonhealth.org.au  
43 Carrington Road Box Hill VIC 3128

healthAbility.org.au  
917 Main Road Eltham VIC 3095