

Submission: Portable Long Service Scheme - Draft Regulations

NDS welcomes the opportunity to provide comment as part of the Victorian government's consultation process on the Portable Long Service Scheme and its draft regulations.

As the peak body for disability service providers nationally and in Victoria, NDS supports measures which contribute to the availability, quality, skills and satisfaction of staff employed in the disability services sector. While evidence to suggest that the scheme will bring about these goals remains scarce, we acknowledge the passing of the *Long Service Benefits Portability Act 2018* into legislation, and are keen to work with the Victorian government to ensure that the implementation of the scheme is as smooth as possible. In aid of achieving this, we have consulted with our member organisations; their feedback informs the bulk of this submission.

NDS's position historically

NDS has not historically supported a state-specific portable long service scheme, for a number of reasons. These include¹:

- **NDIS:** the Victorian Portable Long Service Scheme represents the introduction of additional state-based costs on disability service providers, at a time when these providers are transitioning to the federally-run NDIS. These organisations currently operate under a pricing cap set by the NDIA and thus are unable to pass costs onto their clients.
- **Cost:** the scheme introduces a levy which will result in a real cost to providers. Currently providers ring-fence funds for long service leave and are able to re-absorb these funds when employees exit their organisations before accessing the benefit. This will not be the case under the scheme, and so impacts directly on cash flow of organisations and means a loss of funds to providers at a time when many are struggling financially².
- **Administrative burden:** in addition to the added burden experienced by all employers under the scheme, disability is an increasingly complex sector. This is due to many providers receiving funding via multiple streams, providing a mixture of disability and other services and operating under multiple industrial arrangements. Additionally, employees work fluctuating hours, often work for multiple employers simultaneously,

¹ These concerns have been explained more completely to government elsewhere, in material which can be reproduced upon request.

² To NDS's Annual Market Survey, over half of respondent providers indicated they were worried they won't be able to provide NDIS services at current prices. (National Disability Services (November 2018) State of the Disability Sector Report 2018, p11.

<https://www.nds.org.au/pdf-file/d3f2aa1f-52e9-e811-80cf-005056ac7853>)

and work across disability and other sectors. Each of these factors will mean added complexity to operate under the scheme.

The above concerns continue to be held by NDS and, while we acknowledge the passing of the legislation, the following should be considered in addition to the above.

Key concerns with proposed regulations

- **Lack of clarity regarding scope:** when considering the legislation, questions remain unanswered regarding the extent to which a single organisation is included or excluded, whether an employee is included or excluded, and whether the work they do is included or excluded from the scheme. The disability sector is one where organisations provide a multitude of different services to a wide range of clients via an array of funding streams, and one provider may operate under three or more industrial arrangements. Given the tests for applicability laid out in the legislation require organisational interpretation at each of these levels, there is considerable complexity in determining whether a single shift of a worker's - for example - is in scope.
- **Lack of communications to employers:** despite NDS having been vocal for some time about this scheme and its implications for providers, we continue to receive queries from members - some of whom are hearing about the scheme for the first time, and all of whom express serious concern regarding the lack of clarity about whether they will be affected, and the extent to which it will impact their organisation. At the time of writing, there is no "FAQ" page on the Portable Long Service Scheme [website](#); the only material available to employers are the legislation and draft regulations.
- **Lack of preparation time:** the levy at which employers will have to make contributions to the scheme was released on 15 May - six weeks before the scheme is due to commence. Providers require time - not just to understand and digest the details and operations of the scheme, but to assess the expected financial impact on their organisations, and to build these considerations into their budget projections; and to establish appropriate employee-related tracking processes in preparation for the scheme.
- **Multiple areas of complexity, yet to be resolved:** see below.

Complexity/areas still requiring clarity

The following includes some of the areas NDS and its members are still seeking clarity on with regards to the scheme. This list is indicative rather than comprehensive; for more detail, a selection of examples of areas in which providers continue to seek clarity is attached to this submission.

- The scheme's interaction with existing industrial arrangements, and implications
- Questions around determining the predominance of a worker's work
- Questions around determining the predominance of an employer's service provision

- The paying out of the benefit as “cash” and its interaction with income tax, salary packaging and debts (such as HECS/HELP)
- Arrangements for transition into the scheme, including translation of employees’ existing long service leave entitlements
- Interaction with federal instruments stipulating long service leave is to be taken after a certain number of years (in the instance the benefit is taken as cash and no leave is granted by the employer)
- Clarity regarding circumstances in which, and how, funds may travel from the Authority to employers
- The degree to which employers will be expected to ring-fence funds for long service leave entitlements, especially in cases where changes to an employee’s role render them eligible and then ineligible for the scheme variously

Conclusion and Recommendations

The above highlight the various elements of complexity regarding the scheme’s implementation on the ground, and the significant work required to engage employers in order to ensure they are aware of the scheme, understand whether it will affect them and if so how, and are able to make effective provisions for its implementation. **We do not believe that a start date of 1 June (with registration before 1 September) 2019 is appropriate to allow for this.** For providers engaged in NDIS-funded activities, a start date of 1 January 2020 is barely more sufficient.

Given the above, **NDS firmly believes that the scheme, if implemented as planned from 1 July 2019, will lead to a raft of confusion, inefficiency and disarray.** Disability service providers in particular are already experiencing the burden of operating under a scheme which was implemented more quickly than appropriate in the NDIS.

NDS is strongly recommending that implementation of the scheme to community services is delayed by 12 months to 1 July 2020 in order to allow enough time for providers to become aware of the scheme, understand whether and to what extent their organisations are affected, understand the financial and administrative requirements and budget for the imposed costs.

During this extra lead time, NDS suggests the Victorian government engage with employers regarding the scheme and support them to understand how they may be affected. The alternative is a lack of understanding and engagement on the part of providers, which carries the real risk that providers who should be affected may fail to register under the scheme.

NDS is committed to working with the Victorian government to ensure the implementation of the scheme is smooth as it can be, and welcomes continuing engagement - of both NDS and its members - to achieve this end.

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About NDS

National Disability Services (NDS) is the peak body in Victoria and Australia for non-government disability service providers. NDS has more than 200 members in Victoria and almost 1,000 members nationally. NDS provides information and networking opportunities to its members and policy advice to state, territory and Commonwealth governments. We have a diverse and vibrant membership, comprised of small, medium and larger service providers supporting thousands of people with disability. Our members collectively provide the full range of disability services, from accommodation support, respite and therapy to community access and employment. Our members employ over 8,000 people in Victoria alone and are supported by countless volunteers in delivering vital services to Victorians with disability.

NDS is committed to improving the disability service system to ensure it better supports people with disability, families and carers; and to building a more inclusive community. NDS has a deep commitment to supporting the implementation of a successful National Disability Insurance Scheme (NDIS) and is supporting service providers across Victoria as they complete their transition to the new Scheme and attempt to thrive in a new landscape.

31 May 2019

Attachment: Examples of Queries and Areas of Uncertainty Regarding Portable Long Service Scheme

Note: some of these queries may be addressed to some degree by the legislation and draft regulations, but have nonetheless been included as an illustration of the current level of uncertainty among providers.

Transitional arrangements

- What are the arrangements for employees currently accruing Long Service Leave transitioning to the Portable Long Service Scheme? Is there an expectation that employers continue to ring-fence these funds (even after this employee has left their organisation) so that when the employee reaches the threshold to receive their benefit under the current arrangement, they can receive this benefit? If so, does this mean employers will be required to keep these funds set aside for up to seven years in case the employee would like to avail themselves of their benefit under the current arrangements rather than under the Portable Long Service Scheme? Or will the two forms of entitlement (accrued hours and paid levy) be transferred to the staff member?

Interaction with other industrial arrangements

- If a provider has an instrument which is higher than the accrual level in the scheme (e.g. an EBA which is 4 months at 10 years and 2 months at completion of 15 years), how is that treated by the scheme?

Scope

- How are workers treated by the benefits scheme if some of their work is deemed part of the scheme and some is not? (Given tests of predominance only appears in the draft regulations and with regards to employers being considered a health or aged care service and with regards to workers in an executive or management role).
- Similarly, given the draft regulations bring NDIS-funded activities in under the scheme from 1 Jan 2020, until that date there will need to be a way of determining whether a single worker supporting two clients at one time (each of whom is funded under a different funding stream - e.g. NDIS and TAC) is considered to be eligible for the scheme.
- Are workers who perform community based (i.e. in home) aged care funded support work consider eligible community workers?
- If an organisation is providing community-based health sector funded programs, do those workers fall under the scheme?
 - A program funded by a regional health care group (such as a hospital) to provide transitional accommodation and community reconnection supports to assist

persons recovering from mental illness, are those workers out of the scheme by virtue of it being health sector funded.

- Is it fair to assume that Supported Employees (i.e. people with disability, often working for Australian Disability Enterprises) are not covered by the scheme? What about if part of their role involves supporting a colleague, who also has a disability, with their work - would this then cause them to be included in the scheme?

Benefit payment

- Given in the Community Services Sector, the scheme pays out as a lump sum, can it be expected that the ATO will treat this payment as earned in the financial year it is received by the employee? If an employee gets, for example, 6 months' Long Service Leave, paid 2 months prior to the end of the financial year, then the ATO will tax the full payment in that year. Has consideration been given to the various consequences for salary packaging (which is common in the sector), tax-based allowances and debts (such as HECS and HELP) and tax paid in that year?

Other considerations

- For providers who provide disability services but operate under a number of EBAs which are excluded from the scheme, there is the potential perverse incentive to cease providing services which are not under these EBAs, thus saving their organisation the administrative burden of being under the scheme.
- At least one organisation expecting to register as a provider of employment supports has suggested to NDS that the inclusion or otherwise of supported employees may sway their decision.
- Has consideration been given to the risk that, for providers of both aged care and disability supports, or health and disability supports, that the scheme may cause them to alter their balance of service provision away from disability in an effort to be excluded from the scheme?
- Workers often begin at direct support worker level, and then move through the organisation to supervisory and managerial roles. Has consideration been given for the perverse disincentive for workers to progress their careers as, due to the test of predominance in the Draft Regulations at Part 4 Division 1, 9(2)b excluding them from the scheme in the case that they move into an executive/management role which doesn't involve the personal delivery of community services work?