

Australian Services Union

Victorian and Tasmanian Authorities & Services Branch

Submissions in response to Review of the Victorian Long Service Benefits Portability Interim Regulations 2019 -

Exposure Draft Regulations

20 May 2020



Introduction

1. The Australian Services Union Victorian and Tasmanian Authorities and Services Branch (**ASU**) represents workers throughout the community services sector in Victoria. Members of the ASU who work for community service organisations have been fighting for a portable long service leave scheme for over twenty-five years.
2. This campaign was prompted by the combination of the increasingly precarious nature of the work within individual community service organisations due to funding arrangements, and the commitment to the sector that community service workers show.
3. Community service organisations have very flat structures, making promotional opportunities difficult. Funding for programs is often precarious and project based. Due to the highly feminised workforce (about 75% of the workforce is women) workers often take leave to have children or due to other caring obligations. Stressful work, poor working conditions and incidence of vicarious trauma mean career breaks are commonly sought.
4. For these reasons, most workers within community service organisations are not able to stay working for an employer long enough to accrue long service leave. Yet often when a worker leaves one community service organisation, they go to work for another within the same sector, with the same funding sources and challenges.
5. The ASU's campaigning on this issue was instrumental in the formulation of the Community Services Long Service Leave Bill 2010. While this Bill was unfortunately not made an Act, it has provided an important foundation for discussions surrounding the *Long Service Benefits Portability Act 2019* (Vic) (**LSBP Act**).
6. These submissions concern the exposure draft of the *Long Service Benefits Portability Regulations 2020* (the **Proposed Regulations**), which are intended to replace the *Long Service Benefits Portability Interim Regulations 2019* (the **Interim Regulations**).

Summary of Submission

7. In broad summary, the ASU submits:
 - a. 'Health promotion services' should be added to the list of work in reg 8.
 - b. 'Work by peak bodies in the community service sector' should be added to the list of work in reg 8.
 - c. Sub-regulation 8(1)(o) of the Proposed Regulations should be amended such that it reads:

'services and work that support, supervise or manage the provision of any of the services referred to in paragraphs (a) to (n).'
 - d. Sub-regulation 9(d)(iii) of the Proposed Regulations should be amended such that it reads:

'a person, body or organisation that provides, delivers, funds, facilitates access to or provides insurance in relation to health

services, being services that include but are not limited to aged care services, palliative care services or disability services, referred to in paragraph (b)(i)–(iii) and (b)(vii) of that definition’.

- e. The list of awards set out in reg 10(1) of the Proposed Regulations be retained and the following awards be added to it:
 - i. the Aboriginal Community Controlled Health Services Award 2020; and
 - ii. the Supported Employment Services Award 2020.
- f. A new reg 10(3) be added to the Proposed Regulations, which provides:

‘Despite paragraph (1), an individual may be an employee for the community services sector if their role includes the support, supervision or management of the work of employees covered employed under one of the awards specified in paragraph (1)’

- 8. We set out below the reasons for the proposed changes, and responses to the questions posed to stakeholders.

Is the list of services in reg 8 sufficient to capture the range of work performed in the community services sector? Should any other services be included in reg 8? Conversely, should any be excluded?

- 9. No, the list of services in reg 8 is not sufficient. No work in the community services sector should be excluded.
- 10. ‘Health promotion services’ and ‘work by peak bodies’ should be added to the list and sub-reg 8(1)(o) should be expanded to include a wider range of management employees.
- 11. In saying this, the ASU is firmly of the view that there are currently workers excluded from the scheme, in this category and others, that should be properly awarded retrospectivity to 1 July 2019.
- 12. The ASU also supports the amendment made to sub-reg 8(1)(b) in the Proposed Regulations, to extend the scheme to cover home care support services provided in a private residence, irrespective of the age of the client. Employees providing those services often miss out on long service benefits. The services they provide are properly characterised as community services. They deserve to be covered by the scheme.
- 13. These changes rectify any residual ambiguity between the current Regulations, Guidance material from the Portable Long Service Authority and exposure draft content, which as an aggregate the sector and workforce has reported as confusing.

Health promotion services

- 14. ‘Health promotion services’ should be added to the list in reg 8. That work clearly forms part of what is usually considered community services work. Workers who perform that work are subject to the same factors that mean other community service workers miss out on long service benefits. It is appropriate for them to be included in the scheme.

Peak bodies

- 15.** 'Work by peak bodies in the community services sector' should be added to the list in reg 8. That work forms part of what is usually considered community services work. Workers who perform that work are subject to the same factors that mean other community service workers miss out on long service benefits. It is appropriate for them to be included in the scheme.
- 16.** Though sub-reg 8(g) would prima-facie appear to include this form of work, this addition to reg 8 is required because in *Mental Health Australia Ltd v Registrar, ACT Long Service Leave Authority* [2019] ACTSC 188 the ACT Supreme Court found that work by peak bodies in this area are not captured by the regulation referring to advocacy in their PLSL scheme. The inclusion of this sub-regulation will remove potential doubt and ambiguity regarding the coverage of employees who work for peak bodies in the community services sector.

Sub-reg8 (1)(o)

- 17.** The ASU also supports the inclusion of sub-reg 8(1)(o). It has the effect of ensuring that workers in the community services sector who support the performance of community services work are eligible for the scheme.
- 18.** Sub-regulation 8(1)(o) will unambiguously widen the scheme to cover administrative and other professional employees employed by employers in the community services sector, who do not themselves perform community services work directly with service users.
- 19.** The ASU represents administrative, clerical and professional workers in the community services sector. Those workers include clerks, administrative assistants, and solicitors. Those workers often do not directly perform the client facing side of community service work. However, their work is integral to the operation of community services organisations. In the ASU's experience, they often move from one community services organisation to another with their sector knowledge and expertise being valued.
- 20.** Their work is also often tied to precarious funding, non-permanent projects or is defunded by government and other contracts. They are vulnerable to back-of-house restructures due to the low-resource settings and funding arrangements. Like the rest of the sector those roles are highly feminised. For those reasons and other reasons, workers frequently change employers, or leave the sector due to caring responsibilities, before returning to the industry. Consequently, they often miss out on long service benefits. It is appropriate and consistent with the intent of the scheme for sub-reg 8(1)(o) to be included.
- 21.** As well as widening the types of work that will be covered by the scheme, sub-reg 8(1)(o) will have the effect of widening the coverage of the scheme to some management employees who may be currently excluded.
- 22.** The ASU has coverage of all employees in the community services sector. They include operations managers, program managers, service managers and CEOs.

23. Many organisations who provide community services are ‘flat’, in the sense that they have very few employees devoted to administrative or management roles. This is set out in the ASU’s submissions concerning the Interim Regulations, which are set out in **Appendix 1**. That means that often every role within a community service organisation is vital to the provision of frontline services.
24. The flat structure of community service organisations also means that many management employees perform a large amount of ‘hands-on’ service-delivery work. Perhaps as a result, managers in the community services industry are often not paid as highly as management employees in other fields, though they generally carry a high degree of organisational responsibility. They should not be excluded from the scheme merely because of their seniority.
25. The employment of managers in the community services sector is often tied to precarious funding or projects. They often miss out on long service benefits for the same reasons as service-delivery employees: funding and projects frequently turning over. The ASU submits that it is appropriate and consistent with the intention of the scheme for management employees to be covered by the scheme.

Changes to sub-reg 8(1)(o) to ensure management employees are not excluded from the scheme

26. As presently drafted, sub-reg 8(1)(o) may exclude some management employees from the scheme. For example, it might be argued that an employee who supervises the provision of community services might not be said to ‘support’ that service provision. The ASU submits that it is appropriate to resolve the ambiguity to ensure management and supervisory employees are covered by the scheme.
27. This is also consistent with the ‘whole of organisation’ approach that is intended for the scheme. Under a whole of organisation approach, where an employer is covered by the scheme, all their employees are covered. That approach is administratively less burdensome for employers, who need only consider whether they are covered to determine whether they must participate in the scheme. It is also clearer for employees and their representatives: if their employer is covered, so are they. This is consistent with the operation of schemes in other jurisdictions, such as the ACT community sector scheme, where these problems have not arisen.
28. That was the intention of the Community Services Long Service Leave Bill 2010. Lisa Neville, Minister for Community Service at the time, introduced the Bill in her second reading speech by asserting it required ‘that community sector workers be included in the scheme based on a whole-of-organisation approach’.¹ **Appendices 2 and 3** to these submissions further demonstrate that the ‘whole of organisation’ approach was intended in the 2010 Bill.
29. A ‘whole of organisation’ approach was also taken in the Australian Capital Territory portable long service leave scheme. See **Appendix 4** to these submissions, in that regard.
30. Throughout negotiations during the passage of the LSBP Act, representations were made to the ASU that the new Act would take the same ‘whole of organisation’ approach as was taken in the ACT. Those were made by, among others,

¹ Parliament of Victoria, *Parliamentary debates (Hansard)*, book 14, p. 4014.

representatives of the Department of Health and Human Services, Industrial Relations Victoria, other State Government Departments.

31. The Proposed Regulations do not set out a ‘whole of organisation’ approach. Rather, sub-reg 8(1)(o), as drafted, would still exclude some management employees. The ASU submits that it is appropriate and consistent with the intention of the scheme to amend sub-reg (8)(1)(o) to embody a whole of organisation approach and extend coverage to management employees.

32. To that end, the ASU proposes that sub-reg (o) be amended such that it reads:

‘services and work that support, supervise or manage the provision of any of the services referred to in paragraphs (a) to (n)’

Does reg 9 now provide sufficient clarity as to which health or related services, and which for-profit entities, are excluded from the scheme?

33. No, reg 9 does not provide sufficient clarity as to which employers are excluded from the scheme. It excludes employers from the scheme that should be included.

34. Reading reg 9 with cl 3 of Sch 1 of the LSBP Act, the employers covered by the scheme are all NFPs who employ workers to perform community service work, and all for-profits who employ workers to perform community service work for persons with a disability, but excluding:

- a. Commonwealth, state, and local governments;
- b. all public statutory bodies and entities whose governing bodies are appointed by statute;
- c. public health services and public hospitals;
- d. aged care services operated by hospitals;
- e. specified bush nursing centres and bush nursing hospitals;
- f. with some exclusions, health, or related services as specified in the *Health Services Act 1988* (Vic); and

Statutory bodies should be included

35. It remains the ASU’s position that the LSBP Act should be amended to ensure that entities whose governing bodies are appointed by statute should be included in the scheme. The current exclusion leaves some of the community service sector’s largest employers, like the Brotherhood of St Laurence, exempt from the scheme. This was included in the ASU’s submissions on the Interim Regulations, which are **Appendix 1** to these submissions.

Sub-reg 9(d)

36. The ASU also submits that sub-reg 9(d), which carves out some health and related services from the general exclusion for health services, should be amended. The Proposed Regulations should include some health services that are currently excluded.

- 37.** Sub-regulation 9(d) must be understood in its context. The scheme is intended to cover community services but not health services.² However, it is extremely common for community services to be integrated into other services. The overlap between health services and community services is one example of this. A similar overlap occurs where entities that provide aged care, palliative care and disability services also provide community services. Striking an appropriate balance is a key challenge for the Proposed Regulations.
- 38.** Some of the interaction is already dealt with by the LSBP Act. Eg. the Act sets out that an employee whose employer provides services to persons with a disability will not have entitlements under the scheme if their primary role is to provide health services to persons with a disability.³
- 39.** The ASU supports the inclusion of workers who perform community service work for health sector employers. The ASU has coverage of case workers/managers, care coordinators, counsellors who work across aged care, palliative care and disability services employers. For example, the ASU has members who have worked in paediatric palliative care, providing end of life support for children who have been diagnosed with life-threatening conditions, for over two decades and have never received long service leave but were originally excluded from the scheme. Those workers deserve to be covered by the scheme.
- 40.** The purpose of the scheme is to ensure that workers who, through no fault of their own, often miss out on long service benefits no longer miss out. There are a range of reasons why employees in the CSS have often missed out on long service benefits. Key among those reasons are the fact that their work is often tied to precarious funding or projects.
- 41.** The precariousness of work in the CSS attaches to the kind of work it is. A worker who performs community service work is less likely to stay with one employer for long enough to qualify for traditional long service because of the nature of their work. They do not miss out because of the kind of entity that employs them. It follows that the scope of the scheme ought to be determined by the scope of persons who perform the relevant work, not by whom they are employed.
- 42.** Sub-regulation 9(d) creates three carve-outs from the exclusion of the health sector from the scheme. It does so by reference to the *Health Services Act 1988* (Vic) which governs the operations of health services. Unsurprisingly, its definitions do not reflect industrial understandings of the scope of various industries or services. The carve-outs in sub-regulation 9(d) are there to ensure that workers performing community services are not excluded from the scheme merely because they work for employers in the health sector.
- 43.** The ASU submits that the first two carve outs in sub-reg 9(d), for community health centres and women's health services, are appropriate. They should be retained.

Sub-reg 9(d)(iii)

- 44.** The third carve-out from the exclusion is set out in sub-reg 9(d)(iii). It carves out from the exclusion for health services:

² See, *Long Service Benefits Portability Act 2018* (Vic) Sch 1 cl 2(1)(a)–(e); *Long Service Benefits Portability Bill 2018* (Vic), Explanatory Memorandum, 33.

³ *Long Service Benefits Portability Act 2018* (Vic) Sch 1 cl 4.

'a person, body or organisation that provides, delivers, funds, facilitates access to or provides insurance in relation to health services, being services that include but are not limited to disability services, referred to in paragraph (b)(iii) of [the definition of health or related service in the Health Services Act 1988 (Vic)]'

45. The purpose of the sub-reg 9(d)(iii) carve-out is to include health services employers in the scheme who provide community services associated with disability services, but who would otherwise not be included. It is worth remembering that an employer will not be an employer for the scheme unless its employees perform community service work.⁴ For the employer to be covered, its employees must still perform community service work as defined.
46. However, the sub-reg 9(d)(iii) carve-out only extends the scheme to cover employers who provide community services associated with disability services. It does not extend the coverage of the scheme to employers who provide community services associated with other kinds of health services.
47. Some exclusions are justified. Eg., the precariousness of community service work does not affect persons who perform community service work for ambulance services. Similarly, the ASU does not consider that the precariousness that often affects community services affects similar services provided by pharmaceutical or correctional services employers.
48. That, however, is not the case for workers who perform community services work in the aged care and palliative care services. The ASU represents such workers. They often miss out on long service benefits and deserve to be included in the scheme.
49. For those reasons, the ASU submits that sub-reg 9(d)(iii) should be re-drafted such that it reads:

'a person, body or organisation that provides, delivers, funds, facilitates access to or provides insurance in relation to health services, being services that include but are not limited to aged care services, palliative care services or disability services, referred to in paragraph (b)(i)–(iii) and (b)(vii) of that definition'.

50. This is consistent with the purpose of the Act. It is clear from cl 2 of Sch 1 of the LSBP Act that the scheme is intended to apply to work that provides a wide range of services to persons, not just with a disability, but who are otherwise vulnerable, disadvantaged or in crisis.⁵ That work should not be excluded from the scheme just because workers perform it for entities that also provide health services.

Do the Proposed Regulations provide sufficient clarity with respect to who is an employee for the community services sector? Should any additional awards be included in sub-reg 9(1) of the Proposed Regulations?

51. Yes, the Proposed Regulations provide sufficient clarity with respect to who is an employee for the community services sector. However, additional awards should be included in sub-reg 9 of the Proposed Regulations to ensure workers who should be covered by the scheme are covered. A new sub-reg 10(3) should also be added to

⁴ That is a consequence of reading *Long Service Benefits Portability Act 2018* (Vic) Sch 1 cl 3 together with cl 9 of the Proposed Regulations.

⁵ See, especially, *Long Service Benefits Portability Act 2018* (Vic) Sch 1 cl 2(a)–(e).

ensure management employees are covered by the scheme.

Clarity in reg 10

- 52.** Regulation 10 of the Proposed Regulations is a significant improvement to the Interim Regulations. Under the Interim Regulations, an employee was prescribed not to be an employee for the purposes of the CSS if covered by one of a range of Modern Awards and their predominant activities were not the personal performance of activities that are community service work.
- 53.** The Proposed Regulations clarify the exclusions from the scheme by removing the predominance test. The ASU supports the removal of the predominance test. It was difficult to administer. It was also at odds with the 'whole of organisation' intent of the scheme mentioned above.
- 54.** Due to ambiguous wording of the interim regulations and subsequent misinterpretations, some workers were not given access to the scheme. For the avoidance of doubt, the ASU anticipates that anyone who was not given access for these reasons will have their entitlements honoured backdated to scheme commencement. Others previously excluded are also now scoped in due to the Proposed Regulations rectifying the recognised drafting issues in previous versions of the Regulations.

Additional Awards

- 55.** However, the ASU submits that the following awards should be added to the list in sub-reg 9(1):
 - a. the Aboriginal Community Controlled Health Services Award 2020; and
 - b. the Supported Employment Services Award 2020.
- 56.** We address these awards below.

Aboriginal Community Controlled Health Services Award 2020

- 57.** Employees covered by the Aboriginal Community Controlled Health Services Award 2020 include people who deliver holistic and culturally appropriate well-being services to the Aboriginal communities that control them. Some of those services will be health services and, as a result, should remain outside the scheme.
- 58.** However, a wide range of them will not be health services or will be run in conjunction with or by Aboriginal Coops. Some of them will be community services work, such as crisis counselling, material relief, assessment of needs, family support, family violence response and drug and alcohol services to name a few. Like other community services, those services are subject to precarious funding and short-term projects.
- 59.** It is appropriate for employees of Aboriginal Community Controlled Health Services to be covered by the scheme where they perform community services.
- 60.** The ASU submits the Aboriginal Community Controlled Health Services Award 2020 should be included in the list to ensure they do not also miss out on long service benefits.

Supported Employment Services Award 2020

- 61.** The ASU submits that the Supported Employment Services Award 2020 should be added to the list of awards in reg 10 of the Proposed Regulations. That Award covers employers who operate supported employment services and their employees within the classifications listed in the Award.⁶ ‘Supported employment services’ is defined as services defined in s 7 of the *Disability Services Act 1986* (Cth). Those are services to support the paid employment of persons with disabilities.⁷
- 62.** Those employees are clearly intended to be covered by the scheme.⁸ The Supported Employment Services Award 2020 should be added to the list to reflect this intention.

New sub-reg 10(3)

- 63.** One drawback of limiting employees covered by the scheme to the coverage of several Modern Awards is that some covered organisations contend the award coverage does not extend to some management employees due to the misconception that employees paid at above award rate are ‘award free’. That means that management employees in the community services industry, who tend also to perform a large amount of hands-on community services work are frequently deemed by their employers to fall outside of the scheme.
- 64.** To deal with this issue, the ASU submits that a new sub-reg 10(3) be added to the Proposed Regulations, which provides:

‘Despite paragraph (1), an individual may be an employee for the community services sector if they provide services that support, supervise or manage the work of employees covered employed under one of the awards specified in paragraph (1)’

- 65.** This amendment is also required to give effect to the ASU’s proposed amendment to sub-cl 8(1)(o) of the Proposed Regulations. It is appropriate to include the new sub-reg 10(3) for the same reasons it is appropriate to amend sub-reg 8(1)(o) in the manner indicated above.

⁶ Supported Employment Services Award 2020, cl 4.

⁷ *Disability Services Act 1986* (Cth) s 7 definition of ‘supported employment services’.

⁸ *Long Service Benefits Portability Act 2018* (Vic) Sch 1 cl 2(1).