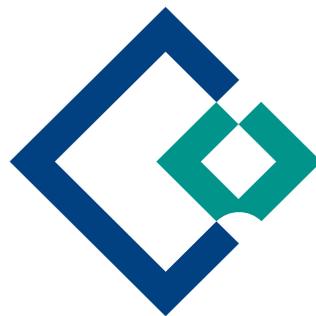


# AUSTRALIAN SERVICES UNION

VICTORIAN AND TASMANIAN AUTHORITIES AND SERVICES BRANCH

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## SUBMISSION TO THE ECONOMIC, EDUCATION, JOBS & SKILLS COMMITTEE INQUIRY INTO PORTABILITY OF LONG SERVICE LEAVE ENTITLEMENTS



**A·S·U**

**Australian Services Union**  
Victorian and Tasmanian  
Authorities & Services Branch

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## **About the Australian Services Union**

The Australian Services Union – Victorian and Tasmanian Authorities and Services Branch, is the principal union with coverage over the Social and Community Sector (SACS) workforce, local government and water.

The ASU has members performing work across a range of occupations within these sectors.

We represent a cross-section of society, our membership being divided between male and female workers; metropolitan based and rural and regional based workers; tertiary qualified and low to unskilled workers; and workers across all age groups.

Through the connection to our predecessor unions, the ASU has been representing workers in Victoria since 1885.

## **A Note About This Submission**

This submission is a joint submission from two ASU branches in Victoria – the Authorities and Services Branch and the Private Sector Branch.

The first part concerns workers falling within the coverage responsibility of the Authorities and Services Branch.

The second part concerns the coverage responsibly of the Private Sector Branch.

The two submissions are delineated by their respective title pages.

It is advised that any queries in relation to matters contained in either part are best directed to the relevant branch of the ASU.

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## Executive Summary

The ASU holds especial interest in the work of this inquiry and welcomes its focus on the community services sector.

The community services sector performs some of the most significant work in the state, helping the community's vulnerable and working for the noble objective of a more just society. Yet employees' performing this vital work are paid poorly. Their general terms and conditions of employment are not much better. Stress levels are high. Consequentially staff turnover and exit from the sector is high, presenting a major hurdle to the retention of a skilled and experienced workforce.

The ASU believes a Portable Long Service Leave (PLSL) scheme will help to address some of the issues facing the community sector workforce. We believe a PLSL scheme will offer employees an incentive to remain in the sector; that it will provide another form of non-wage remuneration to low-paid workers employed with agencies' who themselves are often underfunded by government; and equally importantly the ASU believes a PLSL scheme is a fair acknowledgement of employees' service to the sector, and by extension the community they serve.

Currently many community sector employees are not able to access their long service leave entitlement. This is the case despite many serving the sector for decades, a situation that simply cannot go on any longer.

The ASU believes a community sector PLSL scheme must:

- Be compulsory for all community sector employers and underpinned by legislation thereby ensuring LSL portability across the entire sector
- Provide a consistent LSL standard across the community sector
- Must be flexible enough to acknowledge some occupations are better suited to inclusion in a community sector PLSL scheme, while others are better suited for inclusion in PLSL schemes in operation for other sectors
- Be retrospective
- Provide for earlier access to LSL entitlements and other flexibility arrangements

Most of this submission will address the issue of Portable Long Service Leave (PLSL) for workers employed in the community sector, though we will also discuss some issues with PLSL in local government.

This submission will also address long service leave portability issues in local government and Victorian water authorities. For local government, PLSL has been operative since 1974. However there are several ways this can be improved – for example by widening portability to local government contractors and streamlining the portability system. We have discussed these and other issues pertinent to the local government PLSL system in this submission.

For Victorian water authorities, LSL rights have been whittled away in previous years. The ASU has taken the opportunity presented by this inquiry to highlight these problems and in doing so seek redress for the workers effected in having these changes remedied.

## Recommendations

### *Community Sector*

1. The committee recommend the government commence work forthwith on the establishment of a portable long service leave scheme for the community sector in Victoria, using the PLSL model almost legislated in 2010.
2. The committee recommend that priority be given to the community sector ahead of other industries for the establishment of a PLSL scheme

### *Local Government*

3. That the Victorian government initiate a consultation process with the ASU and the local government sector to inquire into the desirability of creating a central long service leave fund based on the construction industry's CoINVEST model with the aim of streamlining portable long service leave payments between employers
4. That a safeguard protecting portable long service leave and other key features of the local government long service leave system be re-inserted in the Local Government Act 1989.
5. That the local government long service leave portability scheme be expanded to allow portability between Councils and the rest of the Victorian public sector, including water authorities.
6. That the local government long service leave portability scheme be expanded to allow portability between Councils and contractors undertaking out-sourced work on behalf of a Council.
7. That the local government long service leave portability scheme be expanded to allow portability for employees changing employment between contractors undertaking out-sourced work on behalf of a Council.
8. That the local government long service leave regulations be re-written with the purpose of improving their user friendliness, while ensuring current benefits remain intact. This process must not be used as an opportunity to reduce long service leave benefits for workers in any way.

### *Water Authorities*

9. The committee recommend the Victorian government amend the *Water (Long Service Leave) Regulations 2011* so as to restore LSL accrual for workers absent due to a) injuries for which the employee is in receipt of WorkCover payments and b) those on parental leave
10. That the *Water (Long Service Leave) Regulations 2011*, and if required any other relevant legislation, be amended to provide for LSL portability for employees at statutory water authorities to Victorian local government and other Victorian public sector employers in line with the entitlements contained in the *Local Government (Long Service Leave) Regulations 2012*.

## Community Sector Long Service Leave Portability – A Brief History

The issue of a portable long service leave (PLSL) system for the community sector has been debated and almost legislated for over a decade. Community sector representatives identified the creation of a PLSL scheme as one mechanism among many that could serve to strengthen recruitment and retention of staff within the sector.

The Victorian Labor governments of the 2000s considered the proposal and initiated a series of studies and consultation on the matter. In 2007 a feasibility study was undertaken.<sup>1</sup>

In 2008 the Premier announced a PLSL scheme would be established as a means of strengthening the sector and encouraging workforce retention. An actuarial assessment was also conducted.<sup>2</sup>

In the 2008-09 budget \$1.2 million was allocated to undertake preparatory work associated with the scheme.

In 2009 PricewaterhouseCoopers (PwC) was tasked with identifying outstanding issues of contention through a process of consultation with key stakeholders. The focus of the PwC consultation revolved around the design, cost, scope and implementation of the PLSL scheme. PwC conducted a further actuarial investigation in addition to the one mentioned above.

Following the conclusion of the PwC Report in May 2010, the Victorian government committed to the establishment of a PLSL scheme for community sector workers. It was to be prospective, compulsory and statutory.

Detailed work on the design of the scheme was concluded. Legislation was drafted and tabled. The *Community Services Long Service Leave Bill* received its second reading on 6 October 2010.

However, following the defeat of the Brumby Labor government in late November 2010, the Bill lapsed. The new Baillieu government failed to take interest in the matter and did not attempt to legislate for a PLSL scheme for community sector workers.

Community sector workers were to be disappointed and would have to wait four and a half years before the opportunity presented by this inquiry to properly revisit this issue.

We have been here before. We came so close to making PLSL for community sector workers a reality in 2010. The hard work has, in large part, already been done. There is no need to repeat the long, drawn out process described above.

The ASU believes it is time that community sector workers stopped waiting for PLSL – it is the task of this parliament to make it a reality this term.

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<sup>1</sup> See David Quinn-Watson, *Feasibility Study into a Portable Long Service Leave Scheme for the Community Services Sector in Victoria*, Bendzulla Actuarial Pty Ltd, 29 September 2007.

<sup>2</sup> See David Quinn-Watson, *Actuarial Assessment of a Proposed Portable Long Service Leave Scheme for the Community Services Sector in Victoria*, Bendzulla Actuarial Pty Ltd, 8 August 2008.

## Characteristics of Social and Community Services workforce and Community Sector

The issue of PLSL for community sector employees is a significant one. Low-pay, largely female, short term tenure at a single employer though long-term service within the sector is characteristic of the SACS workforce. According to the Victorian Council of Social Services (VCOSS) there are an estimated 97,000 Victorians working in the community sector charities and employed at 2,672 Community Sector Organisations (CSO).<sup>3</sup>

The applicable award for community services employees is the Social, Community, Home Care and Disability Services Industry (SCHCADS) Award 2010. The ASU estimates that approximately 72% of community sector employees are employed under the award, with the remaining 28% relying on the SCHCADS Award to underpin pay and conditions contained in enterprise agreements.

### *Low Pay, High Turnover and Inter-Sector Competition for Staff*

A limited revenue base is inherent in the community sector. Many CSOs are greatly dependent on government funding for recurrent income. Other sources of revenue, be it philanthropic donations or 'tin-rattling' type public appeals, offer supplements to income for most CSOs. A system of 'user pays cost reflective pricing' to generate additional revenue, if applied to the community sector, will defeat the *raison d'être* of almost all community sector organisations. The service of the most vulnerable members of the community is the driving purpose behind all CSOs, meaning a 'user pays cost reflective pricing' business model is not an option.

Thus CSOs are greatly dependent on government for their revenue. And this revenue seldom offers CSOs the ability to pay their staff wages more reflective of the work undertaken – work in a highly stressful environment which often requires some form of tertiary qualification. For example, the average wage of a four year degree qualified and experienced social worker undertaking work in community services is currently \$56,890. According to seek.com 2014 annual salary review, the national average wage across all states and all industries is \$79,767.<sup>4</sup> The discrepancy between the earnings of our tertiary qualified and experienced social worker and the seek.com average wage is an astonishing \$22,877.

It is true to say that passion as much as, if not more than pay, motivates workers in the social and community services sector.

In order to make employment in the community sector more attractive, employers often offer non-cash incentives to attract and retain staff. For example, salary packaging arrangements are common in the community sector, offering alternative forms of remuneration to offset employers' inability to pay higher wages.<sup>5</sup>

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<sup>3</sup> Statistics taken from VCOSS, *Strengthening the State: A Snapshot of Victoria's Community Sector Charities*, 2015, p. 2.

<sup>4</sup> See <http://www.news.com.au/finance/work/how-does-your-salary-stack-up-against-the-rest-of-australia/story-fnkgbb3b-1227044922950> accessed 31 July 2015

<sup>5</sup> For a more detailed discuss of this arrangement and other remuneration related issues in the community sector see *Building Social Inclusion in Australia: Priorities for the Social and Community Services Sector Workforce*, A Discussion Paper Commissioned by the Australian Services Union, ASU National Office, April 2007, pp. 16-17; Productivity Commission 2010, *Contribution of the Not-For-Profit Sector*, Research Report. See also Frank Quinlan, 'Change Choking Charity,' *The Australian*, 25 June 2008.

To a limited extent individual employers find this approach successful in attracting and retaining staff. Of course community sector workers, like other workers in the economy, are attracted to employers where their skills and qualifications are required, where job satisfaction is greater and where terms of employment and remuneration are more attractive to the needs of the worker – i.e., higher cash payments instead of fringe benefits for a lower salary package may be more attractive to some workers, while others may find the inverse to be a more attractive proposition.

While salary packaging serves as a form of competition between CSOs for staff, the community sector as a whole is forced to compete with other sectors to retain experienced staff.<sup>6</sup> Employers in other sectors also have need for the skills provided by the SACS workforce – hospitals; state government agencies; local government; employers in the private sector to name a few. It is on account of this inter-sector competition the community sector struggles to retain staff. It is an observable fact that hospitals, state and local government are able to pay prospective workers better than the majority of CSOs. For example ASU analysis shows the average experienced social worker mentioned above is currently paid 15% less than the equivalent position employed by a public hospital.

#### *Funding Insecurity and Program Changes A Cause of Staff turn-over*

Short-term government funding arrangements and program changes provide a further source of insecurity for the community sector, thus serving as another cause of staff turnover. Since the 1980s and particularly the 1990s, many community services moved away from funding grants to service provision contracts. This included competitive tendering for funding for services or government purchasing of services. A notable example is employment assistance services.

Funding insecurity is inherent under this sort of funding model. When a three-year service contract expires, and the contract holder either does not re-tender for the work or loses the contract, a new CSO steps in. And while workers may transfer their employment from the former provider to the new, and in many cases perform identical work, any prior length of employment service is not counted for the purpose of LSL entitlements. Often though funding expires and community sector workers are simply forced to seek employment elsewhere.

Sudden de-funding of services is an additional feature of the community sector funding reality. Through no fault of their own community sector workers can find themselves unemployed because a funding agency – be it government, philanthropic or otherwise – decided to cease funding a particular service. This scenario is often played out during changes in government, or is the consequence of government ‘belt-tightening.’ And while some workers are able to find alternative employment soon after, or even anticipate de-funding and change employers accordingly, the de-funding of their previous role means a break in continuity of service for the purpose of LSL entitlement. While PLSL schemes operating in other industries allow for limited periods of unemployment without causing a break in recognition of continuity of service, community sector employees enjoy no such benefit. As is shown in the case studies we have included below, the de-funding of services and consequent loss of employment has been a significant contributing factor for many community sector workers never having had the chance to access their LSL entitlement.

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<sup>6</sup> On the issue of the community sector competing with other sectors see *Stronger Community Organisations Project: Report of the Steering Committee, November 2007*, Victorian Department of Planning and Community Development pp. 72-73.

### *Portability Makes Long Service Leave Accessible*

Due to the high rate of staff turnover as a consequence of the above factors, very few community sector employees accrue sufficient length of service with an individual employer to access their long service leave entitlement. Yet it is not uncommon for workers to move from one CSO to another, thus remaining within the community sector. When length of service to the community sector – as opposed to an individual employer – is taken into account, many workers will have spent the greater part of their working lives within the sector. It is fidelity to the community sector, its values and the socially rewarding work being done – not an individual employer *per se* – that holds the attraction for staff to endure the low-pay, high stress environment work in the sector brings.

The ASU believes that loyalty to the community sector needs to be acknowledged through the institution of a portable long service scheme for community sector workers. It is manifestly unfair that individuals performing the type of work required in this sector cannot access their long service leave despite spending decades doing this work. Staff are denied a much needed break from the stresses of community sector work access to long service leave provides.

A further reason counting in favour of PLSL for the community sector is that it offers another form of non-cash remuneration serving to attract and retain a skilled and experienced workforce for the sector. We have already mentioned the low-paid character of work in the sector, the incapacity of many employers to pay higher wages due to limited revenue from government funding and the use of salary packaging arrangements to offset the low level of wages. By having access to long service leave portability – and keeping in mind employers are funded for and required to set aside money to fund staff long service leave entitlements regardless of whether an employee has accrued enough length of service to access the entitlement – many community sector workers will for the first time have access to an entitlement previously beyond their reach, one that may also serve the purpose of retaining skilled and experienced staff for the sector.

Much of the heavy lifting on designing a PLSL scheme for the community sector has already been done. Legislation for a community sector PLSL scheme was almost enacted in 2010. There is no reason why the community sector must wait any longer.

**1. Recommendation: The committee recommend the government commence work forthwith on the establishment of a portable long service leave scheme for the community sector in Victoria, using the PLSL model almost legislated in 2010.**

**2. Recommendation: The committee recommend that priority be given to the community sector ahead of other industries for the establishment of a PLSL scheme**

## Key Features of a Community Sector PLSL System

In the following discussion we will provide the committee with some of the components the ASU believes are required to make a PLSL system for the community sector feasible and accessible for the intended beneficiaries of the scheme, and sustainable.

We must state from the outset our belief that any PLSL scheme must be based around a central fund covering all employers falling within the scheme's scope, backed up by statute. All LSL entitlements must be paid into this fund. The fund will manage these monies, disbursing funds as required. The fund must also be overseen by a board comprising of equal numbers of employer and employee representatives. We wish to draw the committee's attention to an existing fund – CoINVEST<sup>7</sup> - that plays an analogous role in managing the LSL entitlements of construction workers. It's the ASU's strong recommendation that any PLSL fund established for the community sector use CoINVEST as a model for emulation.

### *Scope of Coverage*

Any PLSL scheme for the community sector must be compulsory, retrospective and enabled by legislation. The focus of the scheme should adopt a whole-of-organisation approach, meaning all employees (full-time, part-time and casual) of a not-for-profit, non-government CSO are covered by the PLSL scheme.

For the benefit of committee members, we provide as an example the definition of 'not for profit, non-government organisations' utilised for the proposed community sector PLSL scheme in 2010:

- Any organisation that employs one or more individuals to carry out community service activities that is a corporation not carried on for the profit or gain of its individual members, and that by the terms of its constituent documents, is prohibited from making a distribution to its members, whether in money, property or otherwise;
- Any organisation that is a not-for-profit licensed children's service under the Children's Services Act 1996<sup>8</sup>

A disparate range of occupations and categories of employment fall within this ambit. For the purpose of illustration to committee members, some of these include:

- Social and welfare workers
- Community development
- Community and social housing assistance
- Disability services
- Not-for-profit employment programs
- Community health centres
- Community legal centres
- Counselling and advocacy services
- Migrant services
- Drug and alcohol services

<sup>7</sup> <https://www.coinvest.com.au/>

<sup>8</sup> Department of Human Services, *Community Sector Portable Long Service Leave Scheme: Frequently Asked Questions*, 2010, p. 4.

However some excision of certain occupations may be necessary. For instance, some category of public health workers, kindergarten teachers and assistants may need to be excluded from a community sector PLSL scheme. This is due to these occupations already being covered by separate LSL arrangements, or the occupation better aligning with another sector thus changing employment from one CSO to another is not characteristic of an individual's employment history due to the limited need of CSOs for skills suited to that particular occupation.<sup>9</sup>

Conversely, consideration must be given to the definition of 'community sector' so as not to disadvantage some employees. For example, community service staff employed at registered stand-alone community health centres with wages and conditions of employment underpinned by the SCHCADS award must also fall within the scope of the scheme. The reasoning behind this proposal is that most, if not all, programs delivered in this community health setting are also delivered in the community services setting from the same funding programs. Furthermore there is high likelihood that employees falling within this scenario will seek future employment prospects in the community sector. Under such circumstances it is only fair that community sector LSL portability be extended to workers employed in occupations where employment cross-over between the community sector and other not-for-profit employers is common. Failure to bring these workers into a community sector PLSL scheme may have the unintended consequence of ensuring a break in continuity of service for the purpose of calculating LSL entitlement, thus meaning the effected worker cannot access any long service leave. In addition, it is worth noting that these workers in stand-alone community health centres are excluded from public health portability arrangements which currently apply to their public and allied health colleagues in the same workplace. To deny them access to a portability scheme within the community sector would see them in the unacceptable situation of falling between the cracks of two systems.

Having established the qualifying employers, and taking into account some of the exemptions noted above, the ASU believes any community sector PLSL scheme must be compulsory for all relevant employers. It is self-evident that for there to be a truly portable system all employers falling within the sector or occupational ambit of the portability scheme must form a part of the portability system. The most effective means of achieving this outcome is to legislate for its enablement.

The ASU is unaware of any other means to ensure a system of LSL portability across all employers within a given sector. The enterprise bargaining process cannot deliver a system of portability due to the simple fact that only one employer need to refuse to participate in order for a PLSL scheme to lose its semblance of full portability between all employers. Furthermore, the coverage of enterprise bargaining agreements in the community sector is only approximately 28% of the workforce. Nor is any PLSL system allowing employers to 'opt-in, opt-out' going to deliver full LSL portability across the community sector. Only a legally enabled scheme where all employers must participate will deliver an effective PLSL system.

### *Benefits and Accessibility*

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<sup>9</sup> For example community aged care employees whose work more closely aligns with health services are more likely to seek future employment in the health services sector than in the community sector, thus LSL portability between health services sector employers is more appropriate for this occupation.

The issue of benefits under any PLSL scheme is of essential importance. After all what is the purpose of establishing a PLSL scheme if workers are not able to access its benefits quickly?

To make long service leave as accessible for workers as possible the ASU believes any PLSL scheme must be retrospective in its application, at least recognising an employee's length of service with their current employer. It is unfair on workers in the sector to see the clock re-set to zero so far as length of service is concerned if a worker were to change employers soon after the creation of a PLSL scheme. Moreover employers have already made provision to cover the anticipated LSL costs of their employees, so the ASU does not accept any argument that this proposal imposes any additional cost burden to employers.

A common set of LSL entitlements across the community sector is also an essential requirement in establishing a sector-wide standard. This is best done via legislative instruments, but sufficient flexibility needs to be in-built within the system to recognise improvements made via the enterprise bargaining process. However some of the features a good long service leave regime must include, for example:

- A common, sector-wide entitlement to 3 months leave after 10 years of service, with pro rata access after 7 years
- a common process spelling out LSL calculations for the purpose of accrual of leave, when it is credited to individual employees and the frequency of payments into the PLSL fund
- A clear process for employers paying into a PLSL fund and how workers are able to access their entitlement. Preferably individual workers will not have to apply directly to the fund to access their leave entitlement with all transactions left up to employers
- any LSL is paid-out at current pay, with a definition on the meaning of 'current pay'
- flexibility provisions that allow, for example, workers to take double leave at half-pay, or double-pay at half time
- suitable cash-out provisions
- suitable provisions allowing workers to transition to retirement through the use of LSL entitlements and ensuring no disadvantage occurs in terms of pay or leave entitlement when a worker moves from full-time to part-time as part of a process of retirement transition
- Casual employees to fall within the ambit of the PLSL scheme
- a reasonable dispute settlement procedure

#### *Financing and Establishment of a Long Service Leave Fund*

Significant work has already been undertaken in designing a PLSL scheme for the community sector, including on the matter of establishing a PLSL fund, financing the scheme and its administration. These documents were commissioned by the Victorian government, which endorsed a compulsory statutory model with a centralised fund. The ASU is satisfied that this extensive work need not be repeated and in the event the government determines on the creation of a PLSL scheme for the community sector a 'ready-made' model is already in existence.

The basic structure of the PLSL scheme was to create a central fund where accrued LSL entitlements are paid into. This was the LSL entitlement of each worker is centrally located, external from an

individual employers' budget and therefore able to 'follow' community sector workers as they change employment from one CSO to another.

For the benefit of committee members we will restate some of the key features surrounding this element of a community sector PLSL scheme. To finance the scheme, the modelling of the PLSL system as envisioned under the 2010 policy would see employers pay a levy fixed at 1.6% of workers' wages. This figure constitutes .2% to cover administration costs of operating the scheme and a 1.4% levy to cover workers' direct entitlements.

It should be noted that previous studies found that this is not be an unnecessary additional burden on employers as government funding sources include staff contingencies (such as long service leave) in funding and service agreements.<sup>10</sup> Further, the introduction of a scheme and levy would ensure that the current practice, whereby employers use the LSL component of staff contingency funding as a windfall gain for other purposes, will decline ensuring government funding will be used for the purposes it was intended to fulfil.

To assist with funding concerns in 2010, the then government committed to cover the establishment costs for the scheme. In 2010 these costs were estimated to be approximately \$5 million. These funds were intended to meet certain type of expenses (for example, office space, initial staffing, legal costs) before the fund received revenue from contributions made by employers. The then government also committed \$4 million to defray scheme administration costs, meaning the aforementioned .2% administration levy was to be reduced for the first three years of the scheme's existence. Further an option was offered to community sector employers to outsource the administrative aspects of all their LSL obligations to the central fund itself on a fee-for-service basis. This option was rationalised on the basis that CSOs experience difficulty in reliably managing their LSL liabilities.

Needless to say employees seeking to access their LSL entitlement need only do so with their employer, with the fund then transferring the appropriate sum of money to the employer for payment to the employee.

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<sup>10</sup> David Quinn-Watson, *Feasibility Study into a Portable Long Service Leave Scheme for the Community Services Sector in Victoria*, Bendzulla Actuarial Pty Ltd, 29 September 2007, pp. 28-30.

### **In Their Own Words: Why Community Sector Workers Must Have Portable Long Service Leave**

*I have worked in women's and family violence services for more than thirteen years. During this time I have had ten different employers and no breaks in service. I have built up a high level of professional expertise in my field doing direct service work supporting women and children escaping family violence, but this work is emotionally taxing, which has contributed to times when I have felt burnt out, despite wanting to continue to apply my considerable expertise to the job I love.*

*Some of the reason for needing to change jobs so often in my field has been due to funding insecurity and program changes. Thus, despite my long tenure in the community sector, I have not been able to access any long service leave entitlements which would enable me to take an extended break to allow me time to refresh and recharge so that I can keep doing direct client work. Instead, in order to look after my health, I have had to move to an education and policy role.*

*I feel this is detrimental to both my own career prospects in further developing my professional expertise in a safe way, along with compromising service delivery, through losing experienced frontline workers who can deliver outstanding service.*

*Many of my colleagues are in the same position. The ability to access long service leave to have a break by recognising my years of service within the industry but with different employers would definitely sustain me in being able to continue to work in the sector I love doing direct client work for longer.*

- Ada, Community Services Worker

*Losing talented staff from this sector is easily one of the key challenges that team leaders -and managers face and a functioning Portable Long Service Leave system would be one of the easiest ways to address the issue. Qualified staff know that they can find work in comparable industries with more attractive conditions so anything that can level the playing field for the Social and Community Services sector will provide an incentive.*

*The uncertain nature of funding in this sector makes it less and less likely that the average worker will remain in their one position or even with the one employer for anywhere near long enough to access long service leave unless a portability scheme is put in place. Every time a position ends because the funding runs out or changes workers are missing out, not because they choose to leave their service and not because they haven't done great work but due to the short-term nature of so many positions in the sector. A Portable Long Service Leave scheme is the only action that can fix that.*

*Constantly interviewing to fill empty positions is costly and impacts on the service being delivered to the community. The lack of a Portable Long Service Leave scheme in SACS is a glaring reason for workers to feel less passionate about their work and understandably less dedicated to remaining in the sector for the long run.*

- Adam, Team Leader

*I started working in the sector in mid-1996, which makes it 19 years. In that time I've had 5 employers, for periods of 18 months, 3 years, 6 years 4 months, 2 years 8 months, and currently just over 4 years. I've never been able to access LSL in all that time.*

*Turnover is certainly high in SACS, especially in the homelessness sector where the burnout factor is massive. Additional factors contributing to turnover are the constant uncertainty about ongoing program funding; low pay; non-existent career structures; poorly resourced organisations; and the sense that governments (and the public) really don't care about the human misery the sector works so hard to alleviate.*

- Chris, Manager

*I have had paid work under the SACS award for over 13 years... a number of years included really long hours in residential care (ie 72 hour shifts; 24 hour shifts; 12 hour shifts etc which included sleepovers of approximately 5 hours sleep, plus on-call hours on top of my normal work day). I think my "work hours" would total much more than 13 years of work hours on average.*

*I have worked for different organisations over the years, but in the same sector (social work / welfare work), yet I have never been entitled to long service leave. I have worked really hard in this sector and worked many, many hours above a normal work week due to crisis response and on-call work, as well as sleepovers. I do this work because I care about people individually who need help and support to move beyond crisis and violence... and I also care about the safety of the community. Being in this industry does come at a 'cost'... when crisis hits, you give up family time, social life etc and on top of this you miss out on long service leave.*

*I would love to see Portable Long Service Leave for this industry as programs are funded for certain periods of time, and become de-funded through no fault of the employee. 3 of the organisations I now work for are no longer funded for the role I was employed for. Changing organisations because I was aware de-funding was on the cards, and I moved on to another job in the same sector, has meant that I don't receive any long service leave.*

- Leanne, Case Worker

*I've worked in community services for a bit over 15 years now and have never had long service leave. And, at 53 and having just begun a new role I guess I never will, at best I might have a bit to add to my retirement.*

*I think what's interesting in my case is that for many of those years, the positions I've held in various organisations have been funded from the same pool of Federal money - Men and Family Relationships money, then Family Services Program funding, and that continues for my current role.*

*Having worked in lower levels of management I'm fully aware that costs associated with LSL are*

*included in funding as 'on costs' - in my case the money saved would have been used for other things I guess (perhaps a nice car lease for the CEO??). Portable LSL would have meant that I'd be on my way to my second well-earned break by now.*

- Andrew, Counselling Services

## Long Service Leave Portability in Local Government

### *History and Rationale for Long Service Leave in Local Government*

PLSL has existed in Victorian local government since 1974. At the time the rationale given was expressed by the minister for local government:

The Bill springs from the belief of the Government that service with any municipality is service with local government and that local government should be treated as one service, serving the one public, and that the Bill will contribute to putting the best man into the job and so assist local government most effectively.<sup>11</sup>

Advantages in legislating a PLSL scheme for local government are the same as those in other industries, namely, serving to attract and retain the best staff to the industry. Enhancing career development prospects was a further consideration, particularly for those employees on the cusp of attaining their LSL entitlement. As the MP for Murray Valley put it in the 1974 debate enacting a PLSL scheme for local government:

...some municipal officers suffer under the present restrictions because, if they have been with a municipality for many years and are about to become, entitled to long service leave, they are reluctant to move to other appointments. Municipalities, too, suffer because of this. I am not critical of any particular officer but there have been cases in which both the municipality and the officer would have been better off if there had been a change.<sup>12</sup>

### *Regulatory Framework for Long Service Leave in Local Government and its Available Benefits*

Long service leave in local government is underpinned by the *Local Government Act 1989*. Section 101 of the Act stipulates that Regulations be made in respect to long service leave and that each council must implement appropriate long service leave arrangements in accordance with said Regulations. The current Regulations are titled *Local Government (Long Service Leave) Regulations 2012*. These mechanisms ensure all local government authorities in Victoria comply with the long service leave regime.

The benefits provided under the Regulations are:

- Portability of long service leave entitlements between Councils and some Victorian state public sector authorities, such as water authorities where there is an agreement in place.
- A basic entitlement of 3 months leave after 10 years of service at 'ordinary pay' (as defined), including a pro rata entitlement after 7 years' service
- A system for calculating a worker's LSL entitlement, including permissible absences that will not count as a break in continuity of service and vice versa
- Flexibility provisions, including the ability to take double-time off at half-pay
- A precise process for the transfer of funds between employers upon a worker transferring employment from one Council to another

### *Areas for Improvement*

The PLSL system in local government is somewhat awkward and can be improved.

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<sup>11</sup> Quoted in Milbur Consulting Pty Ltd, *Regulatory Impact Statement: Proposed Local Government (Long Service Leave) Regulations 2012*, 2011, p. 16.

<sup>12</sup> Quoted in Milbur Consulting Pty Ltd, *Regulatory Impact Statement: Proposed Local Government (Long Service Leave) Regulations 2012*, 2011, p. 16.

### *Transfer of Payments Between Councils Can be Streamlined*

An example of the unwieldiness of the PLSL system in local government is the absence of a central LSL fund. Prior to changes to the local government long service leave regulations in 2012, all Councils were required to set aside money in a long service leave fund, separately identified within a Council's budget papers. This fund was intended to cover the LSL entitlements of the Council's own employees, and not a sector wide pool of LSL funds. The requirement for this fund was abolished in 2012, providing a momentary financial windfall for all Councils.

The abolition of the long service leave fund meant each Council must meet its long service leave obligations from its general revenue as these obligations fall due. So long as each employee's LSL entitlement is honoured when due the ASU is not concerned on the precise nature of how each Council budgets for their LSL liabilities.

However, in the event of an employee changing employment from one council to another, a lengthy process of seeking information and accompanying exchange of payment from one council to another has to be undertaken for an employee's LSL entitlement to come across to their new employer. This process is spelled out in the Regulations<sup>13</sup> and is tantamount to a contractual arrangement. Indeed, more formal agreements are required between individual Councils and Victorian water authorities to enable PLSL between those employers, even though PLSL is provided for in the LSL Regulations.<sup>14</sup>

While this system does not seem to cause detriment to employees, there is no doubt a more streamlined system can be developed. The ASU believes it may be worthwhile for the Victorian government to inquire into establishing a system akin to that we proposed above for the community sector, which in turn is modelled on the CoINVEST scheme operating in the construction industry. Of course prior to this type of change consultation between the Victorian government, the ASU and the local government sector is needed to explore the desirability of a reform of this character. However the benefits are clear: payment of LSL entitlements into a central fund eliminates the need for an exchange of information, pseudo (or actual!) contractual arrangements and payments between Councils, allowing an individual worker's LSL entitlement to be readily located.

### **3. Recommendation: That the Victorian government initiate a consultation process with the ASU and the local government sector to inquire into the desirability of creating a central long service leave fund based on the construction industry's CoINVEST model with the aim of streamlining portable long service leave payments between employers**

#### *Long Service Leave Portability is Not Protected in Legislation*

A further problem with PLSL arrangements in local government is that no mechanism exists in the *Local Government Act* that ensures long service leave Regulations made under s 101 provide for a system of portability. It is not inconceivable that a future government re-make LSL Regulations containing no provision mandating portability.

Previously LSL portability was made a requirement under section 101(2) of the *Local Government Act 1989*. This section of the Act ensured that key LSL provisions enshrined in the *Local*

<sup>13</sup> See Local Government (Long Service Leave) Regulations 2012, regulations 20-21.

<sup>14</sup> See Local Government (Long Service Leave) Regulations 2012, regulations 22.

*Government Act 1958* were maintained when the Act was updated in 1989.<sup>15</sup> Unfortunately section 101(2) was abolished in 2012 and no analogous provision was substituted in its place. Thus no legislative provision exists protecting the portability of LSL entitlements for local government workers.

The ASU is deeply concerned by the absence of a legislative safeguard protecting LSL portability in local government. Granted the section 101(2) mechanism was clumsy – it merely stated that LSL Regulations could not provide benefits “which are less than those which applied under the Local Government Act 1958”. Nevertheless it did provide a protection for portability.

The ASU is of the strong opinion that the government must re-insert a safeguard in the *Local Government Act* ensuring LSL portability, and indeed other benefits. We propose that a simple, plain English, five point safeguard be re-inserted into the Act which must expressly serve to ensure that LSL Regulations provide for:

- Portability
- A basic entitlement of 3 months leave after 10 years of service with pro rata access after 7 years service
- An explanation on the rate at which LSL is accrued
- Flexibility provisions that, for example, enable workers to take double time at half-pay
- A set of definitions on the meaning of ordinary pay; ordinary hours and any other definition necessary to ensure consistency across all Councils in Victoria

To this end we believe the government should initiate a consultative process with the ASU and the Local Government sector to develop a LSL safeguard that will protect the key features of the local government PLSL system and ensure no worker is worse off.

**4. Recommendation: That a safeguard protecting portable long service leave and other key features of the local government long service leave system be re-inserted in the Local Government Act 1989.**

*Broaden Portability to All of the Victorian Public Sector and Local Government Contractors*

The ASU believes PLSL needs to be further broadened to include other public sector employers and local government contractors. It is often the case that local government employees seek employment opportunities in the Victorian public sector (including within and between Victorian statutory water authorities), and vice versa. Ensuring a system of portability between local government and the entire Victorian public sector provides the opportunity for many workers to finally realise access to LSL. Further if PLSL were to happen in this respect it should be as seamless as possible, avoiding the convoluted mechanism described above which requires employers to engage in a contractual arrangement so as to permit payment of funds connected to meeting LSL entitlements.

Additionally we believe PLSL needs to be extended to those employees undertaking contracted-out work on behalf of local government. We stress the only employees that should fall within this ambit are those undertaking work directly on local government contracts, not ‘back office’ type roles unlikely to have transferred from employer to employer, or workers employed at the

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<sup>15</sup> Quoted in Milbur Consulting Pty Ltd, *Regulatory Impact Statement: Proposed Local Government (Long Service Leave) Regulations 2012*, 2011, p. 16.

same company but undertaking work in a different industry.<sup>16</sup> It is not uncommon for workers conducting, for example, street cleansing work, to see their employer lose a contract yet the workforce transfers *en masse* to the new contractor. Under this scenario portability of LSL entitlements is fair and makes sense – after all as far as the individual employee is concerned the only discernible change to their work is the presence of a new logo on their uniform. Likewise portability should be available for those workers directly employed by a council whose employment has been outsourced to a private contractor, and vice versa, where a council determines to return a previously out-sourced service back in-house and the employee opts to transfer their employment back to the council.

**5. Recommendation: That the local government long service leave portability scheme be expanded to allow portability between Councils and the rest of the Victorian public sector, including statutory water authorities.**

**6. Recommendation: That the local government long service leave portability scheme be expanded to allow portability between Councils and contractors undertaking out-sourced work on behalf of a Council.**

**7. Recommendation: That the local government long service leave portability scheme be expanded to allow portability for employees changing employment between contractors undertaking out-sourced work on behalf of a Council.**

#### *The LSL Regulations*

The local government LSL Regulations are themselves difficult to understand and not user-friendly. We believe there is a case for the Regulations to be re-written in a way that is easier to understand. However we also urge caution in the fulfilling of this exercise. We do so because following the changes made to the Regulations in 2012, what appeared to be a minor alteration to the definition of ‘ordinary pay’<sup>17</sup> caused disadvantage to workers utilising their LSL entitlement to transition to retirement. We wish to point out that this anomaly has yet to be rectified in the Regulations. This was a clear instance where a technical change caused real injury to some workers.

So while the ASU believes the Regulations need to be re-written we also believe that any exercise to do this must be done carefully so as not to disadvantage any workers. The surest way of doing this is to secure agreement between the ASU and employers on the benefits to be included in the LSL Regulations – with preservation of current benefits being the non-negotiable starting point. A process of consultation between the government and the ASU and employer representatives should follow on the precise wording of the new Regulations. Any dispute on wording can be settled via negotiation or a final decision made by the Victorian government.

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<sup>16</sup> An example of this is the employer Spotless, who hold contracts in local government, with a set workforce employed under it’s own enterprise agreement engaged only on the local government contract, and, for example, contracts for cleaning shopping centres, who would be excluded from a broadened local government PLSL system as they have nothing to do with the local government contract.

<sup>17</sup> The alteration in question saw the removal of the words ‘if a member of Council staff converts from full-time to part-time service or from part-time to full-time service, the members entitlement to long service leave is to be calculated on a pro-rata basis’ and was not replaced with a similar mechanism. This meant that workers who were transitioning to retirement (ie converting from full-time to part-time employment) were paid a LSL entitlement as if they had accrued that benefit as a part-time employee. The ASU is able to provide more detail on this matter on request.

**8. Recommendation: That the local government long service leave regulations be re-written with the purpose of improving their user friendliness, while ensuring current benefits remain intact. This process must not be used as an opportunity to reduce long service leave benefits for workers in any way.**

### Long Service Leave in Statutory Victorian Water Authorities

The ASU also represents workers in statutory water authorities. Victoria's state-owned water sector is made up of 19 water corporations constituted under the *Water Act 1989*. The water corporations provide a range of water services to customers within their service areas comprising water supply, sewage and trade waste disposal and treatment, water delivery for irrigation and domestic and stock purposes, drainage, and salinity mitigation services.

A number of authorities also manage bulk water storages and designated recreational areas. Sixteen water corporations provide water supply and sewerage services to urban customers throughout Victoria.

Four water corporations provide rural water services, which comprise water supply, drainage, and salinity mitigation services for irrigation and domestic and stock purposes.

Melbourne Water Corporation provides bulk water and bulk sewerage services to water corporations in the Melbourne metropolitan area and manages rivers, creeks and major drainage systems in the Melbourne, Port Phillip and Westernport regions. It also supplies recycled water, through a number of retail water corporations, for irrigation and other purposes.

On 8 July, 2014, the then State Government made a change to the Water Industry (Long Service Leave) Regulations 2011 that actively discriminates against injured workers. These changes had the effect that all workers in the water industry unfortunate enough to find themselves injured at work and consequently on WorkCover no longer accrue Long Service Leave whilst on WorkCover. Such exclusions do not apply to other public sector workers.

These changes place employees at water authorities at a disadvantage compared to other workers. The Victorian Long Service Leave Act 1992, which set the basic entitlement to LSL for Victorian workers, includes absences from work due to WorkCover as a period which is to be counted as service and in which LSL entitlements are accrued.<sup>18</sup>

There are approximately 4800-5000 workers employed in the Water Industry in Victoria. On average 68 workers in the Water Industry have WorkCover claims each year.<sup>19</sup> The type of injuries include loss of limbs and appendages, neck and back injuries as well as psychological injury. There are also real concerns about asbestos related disease occurring in the future. For some, these injuries spell the end of their working life and the removal of the accrual of LSL while on WorkCover could mean the difference between receiving a pro-rata payment at termination of employment or nothing at all.

Given the current pressure on the Victorian Water Industry with regard to cost savings and, the fact the then Government promulgated the Regulations without consulting key stakeholders, this new change adds to the many stresses already facing workers employed in the Victorian water industry.

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<sup>18</sup> For information on what must not be included in computing service for Long Service Leave see [http://www.austlii.edu.au/au/legis/vic/consol\\_reg/wslr2011350/s13.html](http://www.austlii.edu.au/au/legis/vic/consol_reg/wslr2011350/s13.html) Regulation 13(1)(f).

<sup>19</sup> These figures are based on the average claims from the years 2002/3 – 2011/12. See Worksafe Victoria, *Worksafe Victoria Statistical Summary 2011-2012*, p. 13 [http://www.vwa.vic.gov.au/\\_data/assets/pdf\\_file/0017/43352/Statistical-Summary-2011-12.pdf](http://www.vwa.vic.gov.au/_data/assets/pdf_file/0017/43352/Statistical-Summary-2011-12.pdf)

It is worth highlighting for the benefit of the committee that this change followed the removal in 2011 of the entitlement to accrue LSL while on parental leave and is a further attack on the conditions of workers in the Water Industry.

The ASU has opposed the removal of entitlements from injured workers and request amendment to the Water (Long Service Leave) Regulations so as to repair the damage done in 2011 and 2014.

**9. Recommendation: The committee recommend the Victorian government amend the *Water (Long Service Leave) Regulations 2011* so as to restore LSL accrual for workers absent due to a) injuries for which the employee is in receipt of WorkCover payments and b) those on parental leave**

**10. Recommendation: That the *Water (Long Service Leave) Regulations 2011*, and if required any other relevant legislation, be amended to provide for LSL portability for employees at statutory water authorities to Victorian local government and other Victorian public sector employers in line with the entitlements contained in the *Local Government (Long Service Leave) Regulations 2012*.**

### Response to Term of Reference b.i

The ASU provides the following observations in respect of term of reference b.i):

In accordance with the *Fair Work (Commonwealth Powers) Act 2009 (Vic)* (**the Vic Referral Act**), and the *Fair Work Act 2009 (Cth)* (**the FW Act**), Victorian employees and employers are respectively national system employees and national system employers for the purpose of the FW Act.

Although Victorian employees and employers are therefore subject to the FW Act, Victoria's referral to the Commonwealth excludes Long Service Leave as a "State subject matter".<sup>20</sup> This is reflected by section 27 of the FW Act, which provides that State and Territory laws dealing with LSL are not excluded by the FW Act, except in relation to an employee who is entitled to LSL under Division 9 of Part 2–2 of the Act. The legal basis for such an exception is the Commonwealth's power to legislate where a head of power in the Constitution allows it to do so.

Section 109 of the Constitution provides that the Commonwealth will prevail over any inconsistent state law, which means that the exception to the operation of State LSL laws is a potential impediment to the creation of portable LSL scheme in Victoria.

The entitlement provided by Division 9 of Part 2–2 of the FW Act is the preservation of LSL entitlements derived from federal system instruments that were in operation prior to the commencement of the FW Act. As the scope of the employees who derive an entitlement from Division 9 of Part 2-2 of the FW Act is narrow, it does not prohibit the creation of a portable LSL scheme in Victoria. Mechanisms could also be established for employees to move out of the scope of Division 9 of Part 2-2.

Any portable long service leave scheme brought into law by the Victorian legislature will need to be carefully adapted to deal with the issue of employees who derive an entitlement from Division 9 of Part 2–2 of the FW Act. This issue can be dealt with, and to do so would not require the Commonwealth to implement legislative change.

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<sup>20</sup> See section 3 of the Vic Referral Act for the full definition of "State subject matter."

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