

**NDS Submission on the draft
*Community Services Sector (Portable
Long Service Leave) Bill 2024 (NSW).***



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About National Disability Services

National Disability Services (NDS) is the peak body in Australia for disability service providers, with more than 1000 members nationally. We provide information and networking opportunities to our members and policy advice to all levels of government. NDS has a diverse and vibrant membership, comprised of small, medium, and larger service providers that deliver direct and indirect support to people with disabilities across all regions of Australia.

NDS members collectively offer the full range of disability services; from supported independent living and specialist disability accommodation services to respite, therapy, community access and employment.

Introduction

NDS is committed to improving the disability service system to ensure it better supports people with disabilities and their families and carers and to building a more inclusive community. NDS is also committed to the provision of good employment and an appropriately skilled and sufficient workforce. In alignment with this, NDS welcomes the opportunity to comment on the draft *Community Services Sector (Portable Long Service Leave) Bill 2024 (NSW)*. This submission is informed by extensive consultation with NDS members, who have provided examples of the impact and costs of the portable long service leave (“portable LSL”) on their organisations.

The current labour shortage impacting Australia highlights the need for improved workforce and retention practices. Recruitment of new staff in this environment is difficult and expensive, with current estimates indicating that the NDIS workforce will need to grow from the estimated 280,000 workers in 2021-22 to the 385,000 needed to meet expected demand by June 2025. This poses an opportunity to explore and test workforce retention practices and strategies for their cost-effectiveness to organisations, and whether they will raise the quality of workforce management across the sector.

On 26 March 2024, the New South Wales Government released the draft *Community Services Sector (Portable Long Service Leave) Bill 2024* (“the Bill”). This legislation will expand access to portable long service leave (portable LSL) to all community services employees (excluding aged care) in New South Wales. This legislation is modelled on existing portable LSL schemes that operate in other jurisdictions such as the ACT (commenced 2010), Victoria (2019) and Queensland (2021).

NDS is appreciative of this opportunity to advocate the needs of the disability services sector at the intersection of this draft legislation.

Matthew Zammit

Head of Workforce

matthew.zammit@nds.org.au

P. 0457 882 997

Debbie Jagers

NSW State Manager

debbie.jagers@nds.org.au

P. 0455 592 172

Context of the disability sector

The Bill was released for consultation at a time when the disability sector is completely focussed on the recent release of two seminal reports addressing critical issues that affect the disability sector – the Disability Royal Commission and the Independent Review of the NDIS (“NDIS Review”). These two reports signal critically needed transformational change to the sector to address a broad range of identified issues relating to how disability services are funded, regulated and governed; and the way in which staff working within disability services are trained, paid and regulated. There is also a tranche of recommendations aimed at improving the ecosystem in which disability services operate and the quality of life for Australians living with disability.

Responses to these two extensive reviews will require and elicit responses at a state and national level over at least the next five years. All governments have indicated this will be a large undertaking which importantly requires precise coordination, sequencing and targeted funding to achieve the aims of these complex reforms. The Federal Government has not yet formally responded to the Disability Royal Commission or the NDIS Review, reflecting the enormity of the undertaking.

NDS has been actively working with the disability sector, both at a federal and state level to address the critical challenges facing workforce and are keen to work with Government on finding solutions to support the attraction and retention of this vital workforce. NDS members are committed to delivering high quality services to their clients and recognise the importance of a stable, well trained and supported workforce.

Overall NDS position

The NDIS Review examined portable leave entitlement schemes, such as the schemes operating in Queensland, Victoria and the ACT. Notably, although these schemes aim to increase workforce retention, the NDIS Review could not find any robust evidence showing these schemes support worker attraction and retention.

Portable LSL schemes exist in the construction industry due to the project-based nature of work, which is rarely feature of community services. NDS is concerned that such schemes may decrease job security and erode the important person-centred support relationships that should be incentivised as they are through traditional LSL schemes.

NDS would like to see any portable LSL scheme be a national initiative, to allow full portability between state and territory jurisdictions, and ease of administration for organisations and sole traders.

This could be enacted by state and territory governments referring their industrial powers with respect to long service leave powers back to the Commonwealth, or through the negotiation of identical portable LSL schemes between jurisdictions so as to give effect to the same outcome.

Long service leave originated in colonial Australia in the 1860s. During the 1950's, state jurisdictions passed legislation to insert LSL schemes into their industrial instruments. Since this time, state and territory LSL schemes have grown progressively, however with different accrual rates and benefit periods.

In 2008, consideration was given to developing a national approach. The Explanatory Memorandum of the then *Fair Work Bill 2008* stated that the Commonwealth “is working with the states and territories to develop nationally consistent long service leave entitlements.”

In 2024, Australia is no closer to this goal. And with markedly different portable LSL schemes arising in some states/territories (but not others) and in some industries (but not others), it is reasonable to conclude that we are making it harder to achieve what the Commonwealth set out to do 16 years ago.

Key Issues

Lack of clarity around eligibility

NDS would like to see further clarity in the scope of the scheme. Experience with portable LSL schemes in other jurisdictions has highlighted difficulties where it is:

- **Unclear which organisations are covered.** Where the scheme intends to have different eligibility based on the “main” function of an organisation, then precise definitions are required of how this is determined.
- **Unclear which roles within the organisation are covered.** In addition to the above, the legislation proposes that only frontline employees are covered where employers deliver some eligible services (but not as their main purpose). NDS would like to see absolute definition of what is meant by “frontline employees” and consideration of the career development impacts if frontline leadership roles such as team leaders are excluded. There is a risk of perverse outcomes such as employees not wanting to progress to team leadership roles if they would lose access to their portable LSL scheme credits by doing so.
- **Unclear whether supported employment is included.** Disability social enterprises, formerly called Australian Disability Enterprises (ADEs), provide employment support services to supported employees who live with disability. Supported employees work in a whole range of fields from light manufacturing, timber work, landscaping, packaging, hospitality, cleaning, and more. Although the work performed by supported employees is not community service work, it is due to these services being run through disability service organisations that they may be covered by portable LSL legislation. However, this requires clarification.
- **Unclear if all aged care services are excluded.** Aged care services can be either residential aged care services or home care services provided to people in their private homes. Home care service providers often provide services to any person who needs them, irrespective of being an aged person, NDIS participant, health care recipient, or temporarily injured through a workplace or road accident. Such providers would not be easily defined as being either an aged care service

or a disability service (although they may be both), and their workforce would provide home care services to a variety of people (as described above) in any given week. As such, it is extremely difficult for home care service employers to mediate schemes that may apply to only certain hours of work performed each week, but not others. This presents an opportunity for absolute clarification.

Administrative complexities of implementation

NDS members in Victoria, Queensland and the ACT have reported numerous issues relating to the administrative complexities that arise from portable LSL schemes. These include matters beyond individual portable LSL schemes, such as issues that arise where organisations operate across several jurisdictions, and where workers are situated near state or territory borders. The administrative concerns include:

- **Interaction with existing long service leave provisions.** Where employees are entitled to long service leave in accordance with pre-reform workplace instruments (as per s.113 of the *Fair Work Act 2009*), and noting registered workers' election provisions under s.86 of the *Community Services Sector (Portable Long Service Leave) Bill 2024* (NSW), there are difficulties in administering multiple LSL scheme provisions for the same class of employees within the same employer. These include payroll complexities, different reporting requirements, burden on HR and administrative staff, as well as communicating these complexities to provide employees the best opportunity to make informed choices, where they exist.
- **Determining substantial connection with NSW.** Employees living and working near borders between states or territories often experience different laws applying to different times of their day, depending on their prevailing location. In the case of work that is performed at multiple locations every day (such as home based disability services), this presents challenges for employers in respect of determining appropriate long service leave provisions. This issue has been tested in cases such as *Australian Timken* [1971] AR 246, *International Computers* [1981] 2 NSWLR 64, and *Infosys Technologies* [2021] VSCA 219. For

the avoidance of doubt and so as to provide certainty, it would be constructive if the NSW portable LSL legislation could specify an exact manner by which hours of work performed by a registered worker would be allocatable to the portable LSL scheme. The most efficient way to do this would be if the provisions of s.86 of the Bill applied to *all* hours of work performed by that employee, irrespective of which state or territory each hour of work is physically performed in. In addition to reducing administrative complexity for employers and providing certainty to employees (who do not always choose which clients (and location) they perform services to each week); such a provision might ameliorate the complexities of any reciprocal arrangements that may be made under Part 10 of the Bill.

- **Determining where work is performed.** Disability services are sometimes provided in very remote areas, or to people who live within Aboriginal communities that are situated across borders. In such instances, an exact address for where the work is carried out can be difficult to determine. This is as much an administrative challenge as it is a risk of potential liability for unpaid LSL credits where the employer accidentally misallocates that hour of work. The Bill should provide absolute certainty that *all* work performed by *each* employee is either covered by the LSL scheme or not.
- **Reporting requirements.** NDS members using similar portable LSL schemes in other jurisdictions have reported that payroll staff spend inordinate amounts of time collating the data required to submit quarterly reports to the relevant LSL authority in each jurisdiction. Additionally, employers experience long waiting times between submitting details for a return and the receipt of an invoice on which to make the relevant payment. In return, employers are unable to access data to ascertain total LSL levies paid for each employee, by that employer. This makes internal financial reporting difficult and adds to the administrative burden.

Cost-effectiveness of the scheme

NDS members have consistently reported how costly and onerous portable LSL schemes are for employers, and not a cost-effective strategy to address acknowledged challenges facing the disability sector workforce. While NDS supports measures that contribute to the availability, quality, skills, and satisfaction of staff employed in the disability services sector, there is a lack of evidence to suggest that portable long service leave is a cost effective workforce intervention.

Given that portable LSL schemes require the cash payment of quarterly levies in respect of LSL arrangements, rather than the traditional “book value” of LSL liabilities, there are profound cash-flow implications for NDIS providers, given the pricing structure and payment terms of the NDIS. NDS members in Victoria have cited that the portable LSL scheme there is costing an additional \$35,000 to \$100,000 per annum due to the need to pay into the Scheme from the first day of a worker’s employment, given that they may or may not be eligible for a long service benefits payment in the future. In the words of one disability services provider, *“the scheme adversely affects the balance sheets of organisations that already work on thin margins”*.

Although NDIS pricing is certainly not within the remit of any state or territory government, there is an abundance of evidence outlining the deficiencies within the [NDIS Cost Model](#) and substantiating the recommendations for structural reform of NDIS pricing made by the [NDIS Review](#) and the [Disability Royal Commission](#). The latest Ability Roundtable Financial and Workforce benchmarking data for 2022-23 financial year shows the significant financial stress of the NDIS registered provider sector, including 63% of participating organisations reported a loss, which follows 68.4% of organisations reporting a loss in the 2021-22 financial year.

To determine the true costs and benefits of the scheme to NSW disability service providers, NDS recommends that the NSW Government undertakes an independent cost-benefit assessment to determine the actual cost to productivity of administering the scheme as well as the impact it is having on workforce retention.