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NSW Fair Trading & Regulatory Services
Department of Customer Service
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Submission: Portable Long Service Leave for Community Services

Introduction

Mental Health Coordinating Council (MHCC) is the peak body for community-managed mental health organisations (CMOs) in New South Wales (NSW). We represent community-based, not-for-profit/non-government organisations who work with people living with mental health challenges. Our members assist people to live well in the community by delivering psychosocial support and rehabilitation services. Our purpose is to promote a strong and sustainable community-managed mental health sector that has the resources it needs to provide effective psychosocial, health and wellbeing programs and services to the people of NSW. MHCC also provides policy leadership, promotes legislative reform and systemic change, and develops resources to assist community-based organisations deliver quality services through a trauma-informed recovery-oriented practice approach.

MHCC work closely with Mental Health Australia, the national peak and Community Mental Health Australia (CMHA), the alliance of seven state and territory mental health peak bodies which together represent more than 700 community-managed organisations delivering mental health and related psychosocial services nationally. MHCC's Learning and Development arm is a Registered Training Organisation providing accredited training and professional development to CMOs and other human services across all levels of the service system.

MHCC thanks the Department of Customer Services for providing us with the opportunity to submit feedback on this proposed Portable Long Service Leave (PLSL) reform, and for extending the deadline which has enabled us to consult with our members and the sector more broadly.

Whilst we acknowledge that informal discussions commenced in August 2023 with the ASU, NCOSS and two front line services (one large and one middle sized) our view is that the delay in consulting community services more broadly is unfortunate. The sector has only just come to know about this initiative, since the publication of the draft Bill.
It is taking some time for the sector to get its head around the nuances of the new system and are somewhat alarmed by the acceleration to get the Bill finalised prior to the end of this financial year. This doesn't mean that MHCC and its members are not in favour of new PLSL arrangements, but we do have numerous concerns and questions that we feel would have been better explored prior to the Bill being drafted and a deadline for its introduction into the Parliament being set for around July 2024.

Such haste will lead to the sector being less 'on-board' with the new initiative. This will likely lead to less trust in the legislation because it will require early amendment as flaws in its drafting emerge, following practical experience on the ground. Negative perspectives may well be exacerbated by the fact that this is not something organisations can 'opt out of'. Additionally, the transition of only one year before full implementation of the scheme, is in our view, inadequate to iron out all the potential 'glitches' that will inevitably appear in the system.

The sector understands that the scheme will be compulsory, and that this represents an election commitment. However, the sector hasn't had time to accept or reject the initiative, which seems somewhat contrary to a truly consultative process. There are also some initial concerns about the exclusion of aged care and children's services. Some of our members core work is in those two areas, but their service programs overlap in terms of deliverables. It would go against natural justice if some employees were covered by the scheme and others not, even if they have their own Enterprise Service Agreement (ESA).

Some member organisations have flagged the fact that they employ identical workers in services operating in other states who are currently employed as though they work in NSW and have concerns that this might lead to potential inequities for some employees. Some members have also flagged that their ESA allows employees to access LSL after 5 years already.

However, MHCC recognises the potential benefits of this scheme for workers, and the potential for it to foster greater sustainability of the workforce and the sector. The aim of keeping workers in the community sector is an important objective, and certainly something we want to encourage. Nevertheless, we are apprehensive of the ability, particularly of smaller organisations, to manage the additional costs and administrative burden.

We appreciate that the scheme will require considerable investment to fund the substantial infrastructure. We are keen to understand what that investment is in real terms, and question whether it may have been directed in other ways to ensure a more sustainable workforce.

The scheme is a complex system that individual employees will need to engage with. In fact, they will be required to take responsibility for checking the accuracy of their own entitlements. This will be a new employee task, and many will not be keen to take on this administrative role despite the benefits.

The **Regulatory Impact Statement** states four 'Objectives and Design Principles' and we have been gathering members feedback concerning the feasibility of those aims in relation to all stakeholders:

The scheme is financially sustainable.

- The estimated 1.7% levy of ordinary wages was an actuarial calculation. As the pool of money collected by the Long Service Corp (LSC) grows, it is expected that this percentage will decrease (based on evidence from existing portable schemes, which were Building and Contract Cleaning). It unlikely that most organisations have been provisioning at a rate close to 1.7%. Furthermore, there is a difference in provisioning, and having the funds readily available. If the Government does not increase funding to account for this, it is highly likely that CMOs will cut services and resources in organisations already financially stretched. This is likely to include a reduction to staffing levels and/or hours of work and in areas such as learning and development and other capacity building resources.

- The cost impact will vary, as some organisation will provision for LSL at a similar percentage to the proposed levy, and therefore the financial accounts may not be impacted significantly. However, their provision is often left in reserves to increase the financial viability of organisations that are characteristically underfunded.

- We have been asked whether the levy is a fair cost for the benefits that the scheme will provide workers. Whilst the figure may be fair to the worker and foster greater sustainability of the sector, this is an assumption that needs further examination. Community organisations are poorly funded and whilst indexation received from Government may cover CPI, it fails to cover Fair Work Commission determinations or wage indexation, increasing superannuation and workers' compensation premiums and other ongoing back of office increases (e.g., increases to peppercorn rent, cyber security resilience etc). The PLSL commitment should include resolutions from the Government to increase funds to services, especially at early stages of the scheme.

- According to data from a small number of NCOSS member organisations (18) collected through a survey, it emerged that they had incurred an average 0.7% payout against ordinary wages in contrast to 1.7% levy required under the new scheme. They also reported that provisioning was generally at around 1% of wages and that they accumulated interest on provisioned funds. Government should support the increased cost of the levy to ensure cuts in services and workforce do not become necessary, particularly during the transition stage of the scheme.

- The levy calculation does not include superannuation. Current LSL legislation requires that superannuation is paid when an employee takes LSL; but when accumulated LSL is paid out on an employee's termination this does not attract super. Members are concerned about this discrepancy and question whether it is anticipated that the LSL Act will be amended to align with the existing benefit.

- The scheme proposes a 12-month gift of service for workers who register in the first six months, i.e., access to leave after 6 years of service as opposed to 7 (currently 10 years). The money will necessarily be paid out 4 years before it would currently be required (10-year access). Moreover, some employees may have left and required no pay out.

  This change will necessitate additional funds many organisations will not have. Moreover, if an employee leaves an organisation, the levy monies paid by the employer stays within the scheme, with no reimbursement to the employer.

- The most significant cost impact will likely be for smaller organisations who monitor their cashflow closely, as this levy is money paid out, as opposed to demonstrating a provision in the financials. For instance, this may have been provisioned and sits in reserves which earn interest for the organisation. This will now need to be paid into the scheme, thus reducing the interest earned for organisations. We propose that special funding for smaller organisations will be necessary to safeguard sustainability and ensure that they will not be financial compromised.

  Scenario: *A small organisation with a wage bill of $1.6M and 20 staff, equivalent to 17 full time staff, would have to find approximately$ 28K p.a. to fund the 1.7% levy. This doesn't factor in additional administration costs attached to managing the scheme or deal with this issue of superannuation if an employee decides to take the LSL as actual leave rather than payout, or if an employee changes jobs but then decides to take LSL.*

- Small organisations are likely to be further impacted when employees are eligible to receive a pro-rata payout after five years if they are leaving the sector permanently. We do not support this proposal and ask that it be removed from the legislation.

- We understand that the old system will run alongside the new and that employees who have already accumulated substantial amounts of LSL within the old system will stay in it. However, if for example a person with 7 years LSL decided to leave the sector, we assume that they will be ineligible to receive a payout. This two-tiered system will inevitably lead to inequities for people who have worked for considerable amounts of time in the sector and never received such a benefit.

- Within the proposed scheme is an additional pro-rata entitlement for years of service beyond 7 years. Once again long-term workers in the old system who may have worked in the sector beyond 7 years, and much more, will not receive any additional bonus. This also represents an unfortunate inequity.

- The proposal states that workers and contractors will be able to take a break for up to 4 years before losing entitlements. Whilst this is focused on people needing to take a break because of illness, parental duties or carer responsibilities, we ask how and will the scheme deal with leave for other reasons. Supposing the worker comes back into the sector but moves to another organisation. This certainly doesn't benefit the organisation that invested in them prior to their departure.

- MHCC understands that under the new scheme workers will need to take leave but may receive a cash pay-out, without taking leave, in limited cases. This will include where they have accrued 5 years of service and intend to leave the sector permanently, or in relation to deceased estates. This will represent a cost to the organisation that does not apply under the existing scheme. How much this may affect an organisation's viability is an unknown that raises concern to members.

- We are unclear about employees' rights when they move interstate or when they come from another state but have worked in the community sector.

The scheme is simple and user focused.

Both during consultation and information sessions attended it was acknowledged that the scheme is complex. Nevertheless, we do acknowledge that the portal design currently in use in other service contexts is sound, as reported through sectors that are using similarly administered schemes.

- Community organisations use different types of contractors, some on an ad hoc basis such as consultants who are self-employed undertaking specific projects on behalf of the organisation and being paid a fee to complete that work. These consultants do not go into the books as employees and therefore do not receive holiday pay, LSL or superannuation from the organisation.

What we now understand is that these people can opt into the scheme and are responsible for their own reporting and levy payment. They are not the responsibility of the organisation.

- As to the question of payouts without taking leave, we propose that that should only apply to people who have worked 5 years or more who are retiring or in relation to deceased estates. However, this will cause inequities for people already in the old system for whom no benefit will accrue if they leave or die prior to the 10 years. We make this proposal to ensure that employees take well-earned breaks given the rates of staff burnout and not use this as a means of receiving more income.

  This gives rise to a question of 'grandfathering' and when this proposed scheme takes effect. For example: if the scheme were to commence 1/7/24, then 5 years would be 1/7/29. Someone under the old scheme who commences before 1/7/24 and decides to leave 1/7/29 will get the same benefit of payout. The sector asks for clarity on this matter.

The scheme is easy to understand and implement.

In terms of governance and administration, the NSW Long Service Commission (LSC) will administer the scheme with a new sector committee established to serve as an appeals and advice body.

- The introduction of a legally complex and adversarial element to what was originally a simple entitlement sits uncomfortably with MHCC. The new committee's primary role will be to adjudicate appeals on LSC decisions such as on registrations, service credits, and levy assessments.

  The committee will also advise on administration, investments, and customer service standards, and serve as a 'Customer Council' to ensure service quality and ensure procedural fairness. We are not sure that the sector will welcome a formal, ongoing role in the administration of the scheme.

- We are likewise uncomfortable that the draft Bill includes such a strong framework that includes enforcement powers and penalties. MHCC is uneasy about another element of compliance to add to their already onerous obligations in terms of audit and assessment processes; evidence of best practice outcomes against practice standards; reporting against funding KPIs and already existing legal commitments under a raft of legislative requirements. This seems like a costly and unnecessarily complex governance structure that will cause more red tape and pressure on the already overworked, underpaid managers and staff in community organisations.

- The compliance and enforcement options proposed to include systems for issuing penalties and recovering debts seems a costly and confrontational model, including onsite inspections and regular audits. Most organisations are currently obliged to undertake intensive accreditation processes that include onsite and independent inspections and audits.

- There will be an online portal registration and employers will need to apply to the LSC to register as an employer within one month of the scheme's commencement, or having become eligible, and thereafter keep details up to date. If this merely involves registration of an organisation, that is not too onerous. However, if the system requires data entry of all employees, then that is another issue, particularly for large organisations with many employees. More time will be required for data entry, and many small community organisations will have no funds to employ additional administrative staff. They often have only one employee to undertake all the organisation's financial responsibilities including payroll, budgeting, and company compliance requirements.

- Whilst we understand that the LSC will calculate and payout the funds, and that this new LSC will ensure accountability, who will that body be accountable to? Who will audit the auditors? We ask that mechanism be instituted to ensure transparency and responsiveness about its operations and decisions.

- Quarterly returns and levy payments will be completed through the portal. This is a new task that will need to be factored into existing administrative tasks. Nevertheless, the level of detail required to report on, is greater than currently being reported and represents a considerable burden.

- It has been suggested that payroll companies (e.g., Xero, MYOB) be asked to modify their systems to provide employee detail to be captured in the format required by LSC or allow an upload of data directly into the LSC online portal. This would certainly make this easier to manage in the long-term; however, would entail additional software upgrades relevant only to NSW customers. To build the software into existing systems will inevitably take time. A myriad of systems used by organisations would initially require an audit to be conducted, to determine which systems organisations are using.

- We have been asked how the scheme will work in terms of LSL applications. Would we be correct in assuming that the employee applies as usual to their employer, who in turn transacts the payment through the scheme on behalf of the employee?

The scheme has integrity, transparency and successfully manages risk.

- We have been asked whether the levy is a fair cost for the benefits that the scheme will provide workers. Whilst the figure may be fair to the worker and foster greater sustainability of the sector; this is an assumption that needs discussion. As we have noted earlier, this scheme is a commitment that government should partner in with increased funding upfront for organisations that will be at considerable risk, especially at early stages of the scheme.

- We understand that investment earnings on contributions are the key supplement to the fund, particularly as the scheme matures. We also understand that some initial seed funding will come from Government for the scheme's roll out, and that the scheme has established, tried, and tested resources and administrative systems and processes in place. However, bearing in mind current uncertainties in global financial markets, there is no saying that Australia will not once again experience a long period of almost negligible interest rates as happened between 2012 – 2022, when RBA rates were very low and almost flat lined in 2020.

  Oil prices are likely to go up over the next two years and the cost of running services will soar without equivalent indexation in community grants. MHCC therefore questions the sustainability of the scheme without raising levies in the short term. This will put the sector in a very vulnerable position - and the scheme at risk if interest rates drop again. We ask how the LSC will manage and absorb those potential losses.

- The scheme will generate annual statements of service on the portal. This will require an employee to check their service records and question if they believe errors have been made.

  MHCC is unsure what engagement has been reported in other service contexts, but the complicated nature of keeping personal records to check against will we suspect lead to inertia. We would like to understand what the feedback is in relation to worker engagement with the system.

- We understand that this scheme will work alongside the existing scheme and that a worker can choose which scheme applies. There will be no double dipping, and that is reasonable, however, our concern is that long term employees who have committed to the sector for most of their professional career will be disadvantaged in terms of payouts whilst continuing to work, and regarding breaks in service that they may have had to take from which they lost benefits and had to start again.

- We ask the question as to how the system interfaces with the Workers' Compensation system? For example: if someone is off work due to injury supported by compensation, will the levies need to continue during this time and how will this 'leave' be factored into the system, i.e., as a break or considered as a continuation of employment as usual? Furthermore, will the levy be included in the definition of remuneration when annual workers compensation premiums are calculated by icare?

Transition and implementation.

- We recommend that a live helpdesk be available to the sector so that organisations can speak to a person about the problems they are experiencing. Whilst websites are of course very important and useful, we feel that the system should recognise the need to be able to share live issues with experts about the scheme to assist organisations and workers. We also note that this may also come at additional costs to running the scheme.

- We understand that the Bill is unlikely to create any significant, direct costs for employees, given that they may apply for registration, primary responsibility for administration rests with the employer. It will be critical that peak bodies such as MHCC are given the support they need to disseminate as much information as possible to members about their role in administering the levy and in communicating the benefits to workers and to realise greater sustainability for the community managed sector.

  As the regulatory impact statement makes clear "the levy will be the main cost for employers, and there will also be one-off and ongoing administration costs for employers and contractors who opt in."

  Both large and small providers may be impacted in different ways. For example, some small providers may be more reliant on a single funding source with more limited cash flow however the total cost of the levy may also be less. In contrast, a large provider may have more diversified revenue, however the total value of the levy may be much greater".

MHCC has reviewed the survey consultations posed by the DCS and found that mostly the questions require somewhat black and white answers. The issues are complex and nuanced and so we hope that our submission goes much further in clearly identifying the issues concerning all the matters listed in the survey. The submission has also enabled us to ask our own specific questions which have arisen in consultation.

We understand that Portable LSL will become law very soon and we express our willingness to collaborate with the Department so that we can assist our members and the sector with information and resources to support them through a smooth transition and implementation of the scheme.

We confirm that the views expressed by NCOSS align with our own and that we endorse their submission.

For any further information regarding this submission please contact Corinne Henderson, Director, Policy & Systems Reform at corinne@mhcc.org.au

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