

# Queensland Advocacy Incorporated

## Submission to Senate Education and Employment Standing Committee

### **The feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements**

**December 2015**

“Faithless is he that says farewell when the road darkens.”

– J.R.R.Tolkien

“Hold faithfulness and sincerity as first principles.”

– Confucius

“A man is not an orange. You can’t eat the fruit and throw the peel away.”

– Arthur Miller

## About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (QAI) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability.

Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

QAI does this by engaging in systems advocacy work, through campaigns directed to attitudinal, law and policy change, and by supporting the development of a range of advocacy initiatives in this state.

QAI employs a range of staff, including a director, lawyers, paralegals, systems advocates, an office manager and administrative staff. We also engage both law and social work student volunteers to assist with the provision of our services and to train and educate these students about disability, vulnerability, justice, human rights and the law and about working within the community legal sector. Furthermore, we maintain strong relationships with law firms and individual lawyers who provide pro bono support to QAI. Some of these volunteers ultimately end up working in a paid capacity for QAI, as contractors or employees.

Therefore, as an advocacy organisation and community legal sector employer QAI is in an informed position to comment on the issues raised in this inquiry. Through both our systems and individual advocacy work, we also have first-hand experience of the importance of employment and of a safety net of industrial entitlements for the most vulnerable people with disability in Queensland. We have recently made submissions to both stages of the Disability Employment Framework review currently being conducted by the Department of Social Services, to the Willing to Work Inquiry currently being conducted by the Australian Human Rights Commission and are involved in Civil Society Australia's Reforming Employment Services dialogue.

## Background

QAI thanks the Senate Education and Employment Standing Committee for leading an inquiry into this important issue and for the opportunity to make a submission to this inquiry.

QAI considers that issues pertaining to the security of employment and the provision and protection of employment-related benefits for Australians are issues of particular importance for vulnerable and disempowered groups, including people with disability. They are also important issues for people supporting, working with and caring for people with disability.

With the introduction of the NDIS, there will be a significant increase in the number of people with disability directly employing their own staff – this flows directly from the core focus of the NDIS, which is to create a competitive market for disability services. A key component of the government's vision in rolling out the NDIS in Australia is to develop a robust market for the provision of disability services, with a consumer-driven approach through individualised funding ultimately shaping the future NDIS market. This vision was agreed to by the Disability Reform Council in developing the Integrated Market, Sector and Workforce Strategy as a precursor to the full roll out of the NDIS.

One outcome of the new direction introduced by the NDIS is that there will likely be significantly greater staff movement within the disability service sector. This increases the case for the introduction of a national long service leave standard and portable long service leave, as without these safeguards there will be an increasingly large body of workers lacking these industrial entitlements.

A key concern that has been raised about the NDIS is that the pricing range significantly under-estimates the real cost of employing skilled workers. This is currently an issue of concern within the disability service sector and parts of the advocacy sector. This is a very relevant consideration in any discussion of long service leave for two reasons – firstly, it shines the spotlight on the issue of the adequacy of the industrial entitlements of workers, including their rates of pay and leave entitlements, which are presently vital issues requiring redress. Secondly, it emphasises the importance of ensuring that any new scheme, such as a national long service leave standard and portable long service leave, is properly costed prior to implementation. Consistent with the vision in introducing the NDIS, this is vital to ensuring that people with disability are empowered as consumers. At a time when doubts are being cast on the adequacy of the NDIS/NDIA price guides, it is imperative that funds allocated to people with disability as part of their packages are protected.

While we support the validity and importance of both a national long service leave standard and the portability of long service leave entitlements, we consider that issues concerning who pays for these entitlements are issues of vital significance that must be addressed. The

resolution of these issues is important for employers within the social and community service sector, many of whom operate on slim or no profit margins. It is particularly important for people with disability, so that it does not become a further stumbling block to the ability to employ skilled workers.

## The feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements

QAI supports in principle both the vision of creating a national long service leave standard and the portability of long service leave and other industrial entitlements.

There is presently a significant degree of variation between different Australian states and territories in terms of the accrual of long service leave. The minimum length of service required to activate the entitlement to accrue and take long service leave ranges from seven years in the Australian Capital Territory to 15 years in Tasmania. The pro rata amount of leave accrued also differs by jurisdiction. There is also disparity in whether long service leave is portable – in most industries long service leave cannot be transferred on cessation or change of employment, even where the change involves a transfer within the same industry and locality, but in a minority of industries long service leave travels with the worker. Finally, there is also state and territory variation with respect to whether long-term casual employees are entitled to accrue long service leave. These disparities are inequitable.

The source of the entitlement also varies, and can be created by award, industrial agreement or statute. These inconsistencies are confusing and inequitable. More concerningly, there is a significant degree of variation between different industries within Australia in terms of the normative length of employment.

In recent times, it has been recognised that workers in some industries suffer adverse consequences in terms of their entitlement to accrue long service leave as a result of qualities specific to the industry in which they work. For example, workers within the building and construction, coal mining and cleaning industries have been specifically protected through the introduction of portable long service leave legislation passed by each of the states and territories.

Workers within the social and communities services sector do not presently enjoy equivalent protection of their industrial entitlements in Queensland. This is inequitable, given that this

industry is also characterised by frequent changes of employment that are often outside the control of the worker. With the introduction of the NDIS, as people with disability are increasingly empowered to directly employ their own staff, it is likely that there will be an associated increase in staff mobility, which strengthens the case for the necessity of standardising and protecting the industrial entitlements of workers within the disability services sector.

Workers with disability are a vulnerable group who face additional difficulties attaining and maintaining appropriate employment, as a consequence of inflexible employer requirements and attitudes and stigma. They have historically been, and continue to be, subjected to ill treatment within the labour market, including concentration within Australian Disability Enterprises and in menial, low-paid and precarious employment. As such, it is appropriate that this group is provided with additional safeguards in terms of the protection of their industrial entitlements. For this reason, QAI recommends that people with disability are entitled to access portable long service leave irrespective of the calling or occupation within which they are employed.

QAI firmly supports the introduction of a national long service leave standard to ensure that appropriate protection is provided for all workers and the introduction of portable long service leave for workers within the social and community services sector.

QAI makes the following recommendations:

1. A national long service leave standard should be developed that is generous having regard to both the minimum period of service required to be eligible for leave and the duration of leave provided. For workers with disability and for workers within the social and community services sector, access to adequate leave is essential to ensure adequate stress management and work-life balance.
2. The national long service leave standard should apply without distinction or qualification to all workers with disability and all workers within the social and community services, to safeguard equity and to ensure that the coverage is sufficiently broad to make the scheme financially viable.
3. All workers with disability and all workers within the social and community services sector should be entitled to accrue and utilise portable long service leave.

## The number of Australians in insecure work

QAI holds significant concerns about the number of Australians in insecure and precarious work. We witness first-hand the high incidence of this phenomenon of insecure work, in the following ways:

1. for the people with disability we support, many of whom have experienced multiple disadvantage that heightens their vulnerability, including people with disability working in sheltered workshops (Australian Disability Enterprises);
2. for employees of advocacy organisations and within the community legal sector, whose continued employment is dependent on short-term funding cycles that may be insecure and are not guaranteed;
3. for the people who care for people with disability, many of whom have experienced significant periods of absence from and scaled-down participation in the workforce as a consequence of their caring roles.

All people with disability currently working in sheltered workshops (Australian Disability Enterprises) have the right to basic industrial entitlements that are at least equivalent to the minimum award entitlements in Australia. This includes the right to be paid at least minimum award rates, rather than the current productivity rates of pay. No other citizens in Australia are subjected to this kind of assessment and rate of pay according to their level of productivity. When people with disability work the hours to their best ability it should be sufficient for the people to receive the same pay as anyone else. Any shortfalls that employers cannot meet should be met by government support.

It is imperative that all workers, including workers with disability, are remunerated at a rate that is equal or greater to the minimum award wage for the particular industry in which the worker is engaged and provided with all associated industrial entitlements, including long service leave. We consider that the supported wage system, and Australian Disability Enterprises, functions as a significant disincentive to employment for people with disability and can have the effect of demeaning and undervaluing the contribution made by people with disability to the labour market, in terms of the grossly insufficient remuneration provided and the concentration and confinement of workers to a small and undervalued sector of the labour market.

The experience of ADEs has been that people are indirectly compelled into sheltered workshops because that is their only choice. If they want to work they must work under the circumstances that are available for them. This does not amount to choice by any analysis and is an exploitative and debasing model. It contravenes Art 27 of CRPD as it is essentially servitude. Tying the entitlement to accrue long service leave to length of service with one employer is an inducement for employees to remain at ADEs rather than transfer into open employment, which is inappropriate in light of the endemic problems associated with long-term employment within ADEs.

There are some significant, ingrained problems associated with part-time and casual work; it is highly precarious and insecure, with limited rights and entitlements. Yet it is in part-time and casual work that people with disability and their carers, and to a lesser but still significant extent people who work for NGOs and NFP organisations, are overwhelmingly concentrated. The concentration of female carers in part-time and casual work has strengthened the gender divide within the labour market and the associated significant gender wage disparity.

The vast majority of part-time and casual workers work in precarious and insecure employment. The situation is particularly dire for casual workers, who make up a significant portion of the Australian workforce.<sup>1</sup> Casual workers generally lack basic employment benefits such as leave entitlements and superannuation and are often barred from accessing legal remedies in the event of an unfair termination or redundancy. The payment of casual loading is insufficient compensation for the associated loss of rights and security casual work entails.

Part-time workers, both individually and in the industries they dominate, are undervalued. Part-time workers can be offered fewer opportunities for career progression and promotion. This is particularly inappropriate given that the rise in the incidence of casual working arrangements has been largely driven by corporate demand, to enable businesses the flexibility to respond cost-effectively to changes in market demand with fluctuating workforce sizes.

The International Labour Organisation has based its economic and social reform platform around the notion of 'decent work',<sup>2</sup> which incorporates concepts of freedom, equality and security as essential prerequisites to work. Importantly, it is not confined to market work and

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<sup>1</sup> It is estimated that approximately 28 per cent of the workforce is employed on a casual basis: Australian Bureau of Statistics (ABS), Year Book Australia: Labour 'Feature Article – Changes in Types of Employment', *Australian Labour Market Statistics* (ABS, 2004, Cat no 6105); Australian Bulletin of Labour.

<sup>2</sup> International Labour Organisation (ILO), *Report of the Director General: Decent Work* (ILO, 1999).

includes unpaid work such as the work in caring for or supporting a person with disability.

As part of the social and communities services sector, workers in this area have traditionally received low rates of remuneration and minimal employment benefits. The precariousness of their industrial entitlements stands to increase with the roll out of the NDIS, if the predicted labour market mobility within this area eventuates. Workers within the NGO and NFP sectors, including people who care for and support people with disability, are particularly vulnerable to lacking employment benefits such as long service leave. The NFP and NGO sectors, which includes people who work for community legal organisations, are often largely dependent on government funding and grants to remain viable and the financial health of many NGO organisations fluctuates. They typically operate on minimalist profit margins and are vulnerable to three-year programmatic funding cycles which can greatly impact upon their workforce, both in terms of its size and the employment agreements by which the workers are employed.

Accordingly, there is a high degree of movement of employees within the NGO sector. This can mean that workers within this sector regularly change employers and therefore lack the continuity of service that is a necessary prerequisite to, among other things, the entitlement to long service leave.

In comparison to equivalent public servants, who can transfer within the public service whilst maintaining their continuity of service and without sacrificing their industrial entitlements, NGO and NFP workers are disadvantaged. This is not only problematic for the workers, but has broader ramifications for the sector in terms of its ability to employ and retain qualified and skilled workers.

These NGO-specific considerations must also be considered in the context of a growing trend in recent decades towards labour market mobility. In 2013 the Australian Bureau of Statistics reported that 55% of the 11.5 million workers in Australia had worked for their current employer for less than five years, with 75% recording less than 10 years service (with 10 years the minimum period of service necessary to trigger an entitlement to long service leave). However, like the building and construction and cleaning industries, the workforce within NGOs and NFPs and – with the introduction of the NDIS – the disability services sector, is particularly vulnerable to fluctuation and therefore warrants additional protections above the standard.



Against this recognised need to protect workers is the need to ensure that the already stretched financial resources of most NFPs and NGOs are not further challenged. NFPs and NGOs can derive a financial benefit from the fluctuating nature of their workforce, in terms of rarely needing to pay long service leave and other entitlements to workers. Bodies including the NDS criticised the proposal to introduce a portable long service leave scheme for community services sector workers in Victoria, citing cost considerations, the complexity of the scheme, the arbitrariness of its coverage and the scant evidence that it would assist in recruiting or retaining of sector staff as key problems associated with this scheme.<sup>3</sup> QAI considers that these are relevant issues to address, however we do not consider them to be insurmountable problems, nor do they undermine the need for or value of a portable long service scheme.

To ensure that any financial impact on employers within this sector is not adverse or disproportionate, we propose the following measures:

1. Centralised government funding for the scheme, both to aid in its establishment and to subsidise ongoing expenses to ensure employers within the sector are not financially penalised by the introduction of the scheme;
2. Funding for long service leave entitlements should be built into all funding grants, as an additional component;
3. The NDIS price guide must factor in pro rata payment of long service leave for all staff, including casual and part-time workers, and NDIS funding must be increased to cover this additional expense for those who self-manage their plan;
4. Efforts must be made to ensure the scheme is sufficiently comprehensive and broad and so does not arbitrarily discriminate or place a disproportionate burden on certain sectors – we propose a compulsory, statutory scheme that covers all NGOs and NFPs within the social and community services sector;
5. The funds should be paid into a central pool that is independently administered;
6. Appropriate piloting, training and phasing-in of the scheme should be implemented to ensure its financial viability;

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<sup>3</sup> NDS. *Response to the Australian Government's Discussion Paper on Inclusion for people with disability through sustainable supported employment*. November 2010.

7. A feasibility study should be conducted two years post-implementation of the scheme, with necessary modifications considered following review.

## The extent and nature of labour market mobility

QAI has significant concerns about any proposals to increase labour market mobility, as the presence of familial and friendship supports can be particularly important for people with a mental health condition or disability and for the people who support, advocate and care for people with disability.

We now know from sociological research that there is a significant correlation between occupational mobility and social isolation. Research has shown that occupational mobility is detrimental to extended family networks and is part of a broader pattern of social isolation.<sup>4</sup> People with mental health conditions or disability are a group with recognised vulnerabilities who require additional support. Therefore, any focus on increasing labour mobility must specifically exempt these groups unless a specific preference to the contrary is shown.

## The objectives of portable long service leave schemes, and the key components that might apply

The key objectives of any portable long service leave scheme must be to recognise and protect long service leave within a particular calling or industry as a basic employment entitlement of all workers. Intertwined with this is the need to ensure equity in this respect for workers who already experience significant difficulty as a result of the categorisation of their work, both in terms of their employment status (perhaps as a casual, temporary or part-time employee) and by virtue of being within an industry characterised by cyclical funding linked to political agenda.

Queensland presently offers one of the least generous long service leave schemes in Australia. In Queensland, workers are currently provided with 8.6667 weeks on full pay for every 10 years of continuous service (contrast Queensland with, for example, South Australia and the Northern Territory, which offer 13 weeks on full pay after each period of 10 years continuous service). A more generous model should be preferred.

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<sup>4</sup> Talcott Parsons, 'Revised Analytical Approach to the Theory of Social Stratification' in R. Bendix and SM Lipset (eds). *Class, Status and Power: A Reader in Social Stratification* (Free Press, 1953); Robert Stuckert, 'Occupational Mobility and Family Relationships' (1963) 41(3) *Social Forces* 301.

## Which sectors, industries or occupations may, or may not, benefit from such schemes

QAI considers that a portable long service scheme will be most advantageous, equitable and efficient if it provides comprehensive coverage across the social and community services sector.

This will ensure that both the government and employees receive optimum benefits from the introduction of the scheme, and will also help to disburse any costs associated with the scheme. A broad and comprehensive scheme will negate any penalty or disadvantage associated with working for an NGO or NFP organisation within the social and community sector that is linked to the fluctuating nature of these organisation's work and funding. It will position employees of these sectors on a level playing field, insofar as their long service leave entitlements, with workers holding equivalent positions within the public service and private enterprise.

## The operation of a portable long service scheme

We propose that the scheme should be modelled on the successful portable long service leave scheme that functions within the building and construction industry in Queensland. We recommend that core components of the scheme include:

1. An independent, statutory body should be established to administer the scheme.
2. All employees within the sector, whether permanent or casual, full-time or part-time, and irrespective of whether they are working for one or more employer at any time, should be covered by the scheme.
3. All people with disability who employ their own workers under the NDIS must have adequate additional funding built into their packages to enable payment of long service leave to the scheme without reducing their packages.
4. Employers and employees within the relevant sectors should be registered with the scheme automatically, at no cost. Registration could be linked to the lodgement of each employment declaration.

5. All employers should be required to contribute to a central pool of funds, at a pro rata rate calculated pursuant to a set national standard of 10 weeks of long service leave per 10 years of service, for each employee from the commencement of the employee's employment.
6. The costs of administering the scheme (including auditing the scheme) should be paid by the Commonwealth Government.
7. In calculating each worker's service, all periods of service within the sector should be included and there should be no requirement of continuous or unbroken service – it is only the cumulative total that should be relevant in triggering the entitlement to leave. As a national standard, the scheme should include all work in the sector within Australia and should not demarcate service for the purpose of accruing leave into separate state and territory jurisdictions.
8. All workers should be eligible to access long service leave after 10 years of service or, in the event of that the worker retires or ceases to work in the sector, after seven years.

## Conclusion

Matters pertaining to the employment of people with disability and the people who care for them, advocate for them and support them, are core human rights concerns. Having a secure job and an adequate and dependable source of income are fundamental prerequisites to the enjoyment of basic rights by all adults. These are also issues of vital importance in the context of present concerns about the adequacy of NDIS/NDIA price guides and the impact that insufficient funding will have on the ability of people with disability to engage skilled workers.

Being a valued part of the workforce also offers protection against other vulnerabilities – it helps to protect people from homelessness and enables them to access adequate health care. We also know that it is a buffer against becoming involved in the criminal justice system.

As people with disability often have complex needs that may result in heightened financial expense, the ability to earn a decent wage and to have their basic industrial

rights protected is particularly important. Furthermore, the right for people with disability to autonomously access appropriate paid care and support is critical to attaining a reasonable standard of living, and this is something that has been explicitly recognised as driving the introduction of the NDIS. Financial certainty for the future, including in old age and in retirement, is something that all people should be entitled to.