LONG SERVICE BENEFITS PORTABILITY REGULATIONS 2020

Regulatory Impact Statement

Department of Premier and Cabinet Victoria

—

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ABBREVIATIONS AND TERMS

|  |  |
| --- | --- |
| The Authority | The Portable Long Service Benefits Authority |
| DHHS  | Department of Health and Human Services Victoria |
| Double-dipping | Double-dipping refers to situations where an employer might have or accrue an entitlement to a long service benefit under both the LSBP Act and under an existing workplace entitlement where the service that gives rise to the entitlements overlap. |
| FTE | Full-time equivalent  |
| IRV | Industrial Relations Victoria |
| Interim Regulations | The Long Service Benefits Portability Interim Regulations 2019 |
| LSBP Act | *The Long Service Benefits Portability Act 2018* (Vic) |
| NDIS | National Disability Insurance Scheme |
| NES | National Employment Standards |
| Proposed Regulations | The Long Service Benefits Portability Regulations 2020 |
| RIS | Regulatory Impact Statement  |

EXECUTIVE SUMMARY

The *Long Service Benefits Portability Act 2018* (LSBP Act) was passed by the Victorian Parliament on 4 September 2018. The LSBP Act provides portability of long service benefits to employees in the community services, contract cleaning and security industries. The Portable Long Service Benefits Scheme (the Scheme) is administered by the Portable Long Service Authority (the Authority).

This portability has been provided for the purposes of improving access for employees to long service benefits for which eligibility is often limited. The LSBP Act recognises that employees in these industries are often missing out on long service benefits because of the nature of their industry and other factors which are beyond their control. These factors tend to be the contracted nature of these industries, which often see employees continuing to work in the same position with the same responsibilities, but having a new employer.

This Regulatory Impact Statement (RIS) analyses the proposed *Long Service Benefits Portability Regulations 2020* (the Proposed Regulations). The Proposed Regulations will replace the *Long Service Benefits Portability Interim Regulations 2019* (the Interim Regulations), which are due to expire on 6 November 2020.

If the Interim Regulations were to expire on 6 November 2020 and no replacement Regulations are made, the Scheme could not operate as intended. It would reduce clarity for employers and employees who are covered by the Scheme, remove portable long service entitlements from employees employed by the National Disability Insurance Scheme (NDIS) and early childhood education entities, and impact the effective and efficient operation of the Authority. Also, there would be no double-dipping protection for the community services sector, and no reimbursement for community services sector employers who paid an entitlement mandated by a fair work instrument.

The 2019 RIS relating to the *Long Service Benefits Portability Regulations 2019* analysed the case for Regulations in detail. A summary is provided in section 1.4.1. For further information on the operation of the Regulations as a whole, the RIS can be found at <https://www.vic.gov.au/regulatory-impact-statements-2019#long-service-benefits-portability-regulations-2019>.

This RIS will treat the Interim Regulations as the reference case (noting the content of the Interim Regulations was not altered from the *Long Service Benefits Portability Regulations 2019*) and will therefore assess the problems, costs and benefits of options compared to the Interim Regulations. The status quo provides a clearer point of comparison for stakeholders and avoids repeating recently completed work in the 2019 RIS. It allows stakeholders to understand the impact of the options against their current experience of the Scheme.

The analysis is focused on the marginal impacts compared to the Interim Regulations (i.e. the status quo) as opposed to a case with no regulations. Section 1.6 summarises what would happen if there were no regulations.

This RIS is prepared in accordance with the Victorian Guide to Regulation (2016), which provides a step-by-step guide to preparing a RIS.

The problems of the Interim Regulations and objectives of the Proposed Regulations

To better support the primary objectives of the LSBP Act, the Proposed Regulations seek to address specific problems identified with the Interim Regulations which have been identified by various stakeholders since the Scheme commenced operation on 1 July 2019.

Options considered in this RIS seek to support and give effect to the primary objective of the LSBP Act to provide for the portability of long service benefits for employees in sectors that rarely qualify for long service entitlements under traditional long service schemes, due to the contract and project nature of the industries in which they work. Improving access to entitlements will increase equity in sectors with comparable work.

Clarifying what is community service work

The Interim Regulations lack precision as to whether community service work in a private residence is defined as community service work for the purposes of the Scheme. The intention of the Interim Regulations is that all home care work in a private residence is to be treated as community service work, irrespective of the age of the client. The uncertainty has caused confusion for the sector, which could lead to an administrative burden for employers in determining whether their organisation and their employees are engaged in community service work or health and aged care work.

In clarifying whether care delivered in a private residence is defined as community service work for the purposes of the Scheme, the Proposed Regulations should look to:

* Provide certainty to employees and employers about the scope of the community services sector to be covered by the LSBP Act, consistent with the intention of the Interim Regulations; and
* Ensure employees across the community services sector have fair and equitable access to the Scheme.

Clarifying who is regarded as an employer in the community services sector

The Interim Regulations lack precision as to who is regarded as an employer in the community services sector. Three problems have been identified in the Interim Regulations:

* It is not clear how to measure predominance under the existing employer predominance test to determine whether employers and their employees are undertaking community service work (as opposed to health and aged care work) to be eligible for the Scheme;
* It is not clear whether Community Health and Women’s Health Centres are covered by the Scheme, with the Community Health sub‑sector of the firm view that Community Health Centres should be excluded; and
* It is not clear whether for‑profit providers of early childhood services are excluded from the Scheme.

In clarifying who is regarded as an employer in the community services sector, the Proposed Regulations should look to:

* Provide certainty to employees and employers in the sector regarding which employers are covered by the Scheme; and
* Ensure employees across the community services sector have fair and equitable access to the Scheme.

Clarifying who is regarded as an employee in the community services sector

The Interim Regulations lack precision as to who is regarded as an employee in the community services sector. It is not clear how to apply the current employee predominance test to determine whether employees are predominantly undertaking community service work to be eligible for the Scheme. It is not clear whether certain employees are covered by the Scheme, such as support staff, secretarial and managerial employees. Stakeholders across the sector have also reported that it has been difficult to determine whether different activities engaged in by a single employee would cumulatively meet the predominance test for inclusion in the Scheme.

In clarifying who is regarded as an employee in the community services sector, the Proposed Regulations should look to:

* Provide certainty to employers on which employees will be required to be registered for the Scheme and have levies paid to the Authority on their behalf; and
* Ensure employees undertaking community service work have fair and equitable access to the Scheme.

Clarifying who is regarded as an employee in the security sector

The Interim Regulations do not provide a test to clarify who is regarded as an employee in the security sector. In this respect, Schedule 3 to the LSBP Act provides the only test. It is not clear whether certain employees are covered by the Scheme, such as secretarial and managerial employees, or whether an employee needs to undertake a certain amount of security work to be eligible for the Scheme. Stakeholders in the sector have been applying their own tests to determine eligibility and have requested additional clarity.

In clarifying who is regarded as an employee in the security sector, the Proposed Regulations should look to:

* Provide certainty to employers on which employees will be required to have levies paid to the Authority on their behalf; and
* Ensure employees undertaking security work have fair and equitable access to the Scheme.

Reimbursing employers for double-dipping claims in the community services sector under the Long Service Leave Act 2018

*The issue of double-dipping is considered in this RIS, but any reforms will not be included in the Proposed Regulations as it would require concurrent legislative changes to the LSBP Act.*

Double-dipping refers to situations where an employee might have or accrue an entitlement to a long service benefit under more than one of the LSBP Act, the *Long Service Leave Act 2018* or some other Act and/or under an existing workplace entitlement, for the same period of service. Schedule 1 of the LSBP Act states that this should be avoided.

A modern award or enterprise agreement can provide for a long service leave entitlement, which will apply subject to any inconsistency with an applicable State or Territory long service leave law.[[1]](#footnote-1) However, such laws cannot invalidate an entitlement to long service leave under a Federal fair work instrument.[[2]](#footnote-2) This is to be contrasted with pre-modern awards preserved by the National Employment Standards (NES) which apply to the exclusion of the *Long Service Leave Act 2018*.[[3]](#footnote-3)

Therefore, the possibility of double-dipping is not eliminated because an employee covered by the LSBP Act is neither excluded from the coverage of the *Long Service Leave Act 2018* (as compared to employees entitled to long service leave under the *Construction Industry Long Service Leave Act 1997*)[[4]](#footnote-4), nor are they prevented from claiming a long service leave entitlement under a pre-modern award or a fair work instrument.

While it is not wholly possible to prevent the potential for employees of double-dipping, the LSBP Act and Interim Regulations instead include provisions so that employers are reimbursed levies paid if they are required to pay both a levy to the Authority and pay an employee for a long service entitlement under a fair work instrument by the LSBP Act (or the Interim Regulations) for the same period of service.

The double-dipping provisions in the Interim Regulations and LSBP Act do not cover existing entitlements under the *Long Service Leave Act 2018*, because it is not defined as a fair work instrument by the LSBP Act (or the Interim Regulations). This means that, in its current form, employers are not entitled to a reimbursement from the Authority if they paid an entitlement under the *Long Service Leave Act 2018*. This was an oversight in the drafting of the LSBP Act and Interim Regulations, which include provisions to ensure employers are not required to pay both a levy to the Authority and pay an employee for a long service entitlement for the same period of service.

Addressing the residual problem relating to reimbursing employers will still require an amendment to the LSBP Act. As a result, at this time, any regulatory amendments to reimburse employers for double-dipping claims in the community services sector under the *Long Service Leave Act 2018* will not be included in the Proposed Regulations. Any changes will not proceed until 2021 at the earliest. However, this RIS will consider the impact of future regulatory changes to address this residual problem in conjunction with any amendment to the LSBP Act.

Addressing this problem should give effect to the following principle:

* An employer is not to be required to pay an employee for long service leave under an existing workplace law or industrial instrument *and* to pay a levy under the LSBP Act for the employee in respect of the same service period (without reimbursement).

Options for addressing the problems created by the Interim Regulations

In line with the problem statements outlined above, options in each area have been identified to deliver on the objectives identified. For each option identified, the likely impacts on employees, employers and the Authority have been considered.

These impacts have been appraised against the status quo under the Interim Regulations for each residual problem according to an assessment framework which classifies and rates these impacts, based on their impact on equity for employees, financial and administrative costs to employers, and the impact on the Authority.

The criteria used in this assessment are:

* Equity for employees within the covered sector (50% weighting);
* Impact on employers – financial cost of levies (20% weighting);
* Impact on employers – cost of uncertainty and administration (20% weighting); and
* Impact on the Authority (10% weighting).

For each option, scores are assigned against each criterion, ranging from minus three to three, with three representing a high alignment to the criterion in reference to the status quo.

This section outlines the options identified, results of analysis, and the preferred options.

Options to define community service work

Options to clarify whether community service work undertaken in a private residence is defined as community service work for the purposes of the Scheme include:

* Clarifying that care provided in a private residence is defined as community service work for the purposes of the Scheme, irrespective of the age of the client (Option 1);
* Excluding home care work involving ‘aged’ clients from the definition of community service work (Option 2); and
* Excluding all work undertaken in a private residence from the definition of community service work for the purposes of the Scheme (Option 3).

**Analysis** of the options found that Option 1 would promote equity of long service entitlements within the sector. Employers and their employees who deliver community service work, regardless of the setting, would be eligible to be covered by the Scheme. This is consistent with the intent of the LSBP Act and would provide greater clarity than the status quo.

Options 2 and 3 would be administratively burdensome for employers as they would need to track either the age of their employees’ clients or where work is undertaken to determine eligibility for the Scheme. Both options would also undermine equity within the sector as some community sector employees would be covered and others would not be covered.

Under the impact assessment framework, Option 1 scored 2.2, Option 2 scored -1.0, and Option 3 scored -0.6.

The **preferred option** is therefore Option 1, clarifying that employers delivering community service work in a private residence are covered by the Scheme, irrespective of the age of the client. These changes are found in Regulation 8(1)(b) of the Proposed Regulations.

Options to define who is regarded as an employer in the community services sector

Employer predominance test

Options to address the problems applying the employer predominance test to determine whether an employer is covered under the Scheme include:

* Providing additional clarity around the application of the employer predominance test (Option 1); and
* Abolishing the employer predominance test that applies to health or related services (Option 2).

**Analysis** found both options would provide additional clarity regarding whether an employer is covered by the Scheme compared to the status quo.

Option 1 would still require employers to undertake a burdensome assessment on the share of their workforce that undertakes community service work to determine whether they are required to register with the Authority. Some employees who perform community service work will continue to be denied access to portable long service benefits because their employer is not a covered employer for the purposes of the Scheme.

Option 2 promotes equity of long service entitlements within the sector. Eligible employees who deliver community service work will be covered by the Scheme, regardless of whether their employer undertakes community service work as their predominant activity. While this option would increase the scope of covered employers and employees, it would reduce the administrative burden on employers.

Under the impact assessment framework, Option 1 scored 0.6, and Option 2 scored 2.0.

The **preferred option** is therefore Option 2, abolishing the employer predominance test. Employers employing at least one covered employee who undertakes community service work would be required to register with the Authority and pay a levy on their covered employees’ behalf. No employer predominance test is included in Regulation 9 of the Proposed Regulations, which details who is regarded as an employer for the community services sector.

Options to clarify whether Community Health Centres and Women’s Health Centres are included

Options to clarify whether community and Women’s Health Centres are covered by the Scheme are as follows:

* Including Community Health and Women’s Health Centres in the Scheme (Option 1); and
* Excluding Community Health and Women’s Health Centres in the Scheme (Option 2).

**Analysis** of the options found that Option 1 would allow employees in Community Health Centres and Women’s Health Centres to move throughout the broader community services sector without losing their long service benefits. However, this option would have an increased cost impact on providers. This is related to the financial cost associated with being covered by the Scheme. Compared to the cost to providers of provisioning for existing long service leave entitlements before the introduction of the Scheme, actuarial modelling determined that the annual net cost impact for the community services sector as a whole is 0.45 percent of ordinary salary costs for those employees engaged in community service work. This has the potential to increase to 0.85 percent of ordinary salary costs for the Community Health sub‑sector because of a higher employee turnover rate.

Based on detailed analysis set out in this RIS, Option 1 is expected to have an estimated additional sector-wide cost impact of between $215,000 a year (low share of the workforce undertaking community service work) and $2.0 million a year (high share of the workforce undertaking community service work) for the Community Health sub‑sector. It is expected to have an estimated additional sector-wide cost impact of approximately $154,000 a year for the Women’s Health sub‑sector. The cost impact would vary greatly between providers depending on the number of staff they employ.

Option 2 would reduce equity within the community services workforce by clarifying that employees in the Community Health and Women’s Health sub‑sectors are not covered by the Scheme. Employees who move in and out of Community Health and Women’s Health Centres from the broader social services sector would not have their service recognised as these employers are not covered by the Scheme. While an indeterminate number of employees in Community Health Centres currently have access to existing portability entitlements under fair work instruments (including multi-enterprise agreements), the existing portability entitlements do not cover employees who move between certain Community Health Centres (i.e. those who are not expressly covered by the relevant multi-enterprise agreements) and the broader community services sector. Under this option, employees would retain portability of long service benefits within the Community Health sub‑sector only.

Under the impact assessment framework, Option 1 scored 1.3, and Option 2 scored 0.6.

The **preferred option** is therefore Option 1, including community and Women’s Health Centres in the Scheme. This change is found in Regulation 9(d) of the Proposed Regulations.

*Option to clarify coverage of for‑profit providers of early childhood services*

Due to the specific nature of the residual problem, there is only one **option**, aside from the status quo, to clarify whether for‑profit providers of early childhood services are excluded from the Scheme. This is to specifically exclude for‑profit providers from the Scheme. Excluding for‑profit providers is consistent with the intent of the LSBP Act.

Analysis shows this **option** is preferable to the status quo. Under the impact assessment framework, it scored 0.5. This **preferred option** is found in Regulation 9(e) of the Proposed Regulations.

Options or clarification of who is regarded as an employee in the community services sector

Options to clarify who is regarded as an employee in the community services sector include:

* Providing additional clarity around the application of the employee predominance test (Option 1);
* Replacing the employee predominance test with a modern award coverage test (Option 2); and
* Excluding management and administrative activities from the existing employee test (Option 3).

**Analysis** of the options found that Option 1 would assist employers to determine who is regarded as an eligible employee. Although this would reduce administrative burdens for employers, the employee predominance test would remain an administrative burden on employers.

Option 2 would improve equity of long service entitlements within the sector. It provides the greatest clarity to employees and employers as to whether they are covered by the Scheme. This option is expected to result in more employees being covered by the Scheme, which would increase the financial impact on employers. Feedback from stakeholders indicated that this option may increase coverage by 10 to 20 percent, although it was not possible to estimate a precise number of affected employees.

Option 3 reduces equity of long service entitlements within the sector. This is because it is not easy to differentiate between employees directly delivering community services and employees supporting the delivery of community service work through administrative or managerial roles. These activities are often indivisible in the sector and can be carried out by the same employee.

Under the impact assessment framework, Option 1 scored 0.6, Option 2 scored 2.0, and Option 3 scored -0.5.

The **preferred option** is therefore Option 2, replacing the employee predominance test with a modern award coverage test. This change is found in Regulation 10 of the Proposed Regulations.

Options to clarify who is regarded as an employee in the security sector

Options to clarify who is regarded as an employee in the security sector include:

* Introducing an activity-based predominance test for the security industry (Option 1);
* Defining employees in reference to the *Private Security Act 2004* (Option 2); and
* Defining employees in reference to coverage of the *Security Services Industry Award 2010* (Option 3).

Compared to the status quo, **analysis** found that all three options would increase clarity for employers in the sector as to which of their employees they need to register with the Authority. Option 1 adopts an approach consistent with the existing test in the Interim Regulations for the contract cleaning sector, which has been simple for employers to implement. It would also ensure only employees who predominantly perform security activities are covered by the Scheme, preventing ineligible employees from unintentionally being covered, without any impact on equity. Options 2 and 3 might reduce the equity of the Scheme for employees in the security industry as some employees intended to be within or outside the scope of the Scheme may be incorrectly excluded or included, which is why these are not preferred.

Under the impact assessment framework, Option 1 scored 0.7, Option 2 scored 0.6, and Option 3 scored 0.3.

The **preferred option** is therefore Option 1, introducing a predominance test for the security industry. This is found in Regulation 14 of the Proposed Regulations. The test is consistent with the existing employee predominance test in the Interim Regulations for the contract cleaning sector.

Option to reimburse employers for double-dipping claims in the community services sector under the Long Service Leave Act 2018

Due to the specific nature of the residual problem, there is only one **option,** aside from the status quo, to ensure employers are reimbursed for double-dipping claims in the community services sector under the *Long Service Leave Act 2018*. This is to allow employers who pay entitlements under the *Long Service Leave Act 2018* to be entitled to reimbursement.

**Analysis** shows this option is considered preferable to the status quo. It reduces financial and uncertainty costs for employers without reducing equity for employees. Under the impact assessment framework, it scored 0.9.

This change will not be progressed through the Proposed Regulations as concurrent legislative amendments to the LSBP Act are also required to enact this option. Subject to parliamentary approval, any changes will not proceed until 2021 at the earliest and are subject to passage of legislative amendments through Parliament. Regulation 12 of the Proposed Regulations reflects the status quo under the Interim Regulations.

Implementation and evaluation plans

The key requirement for the successful implementation of the Proposed Regulations will be to provide quality information to the affected employers as to their new obligations. It is expected that information will be compiled and sent to affected employers.

All decisions on registration and compliance with the Scheme rest with the Authority.

Evaluation of the Proposed Regulations should be tied to the review periods mandated in the LSBP Act. This will allow streamlined and comprehensive review, including a full understanding of the interactions between the Proposed Regulations and the LSBP Act, as well as their combined impact on the sector. This means evaluation should be conducted as close as possible to the three and seven year anniversaries of the commencement of the LSBP Act (being 1 July 2022 and 1 July 2026).

The year three evaluation will be an ‘implementation review’ which covers the experience of the three sectors in the first phase of implementation of the Scheme and Proposed Regulations. Its focus should be on matters such as the financial and administrative concerns of employers and the uptake of the Scheme.

The year seven review will focus on measuring the extent to which the Proposed Regulations have met the objectives stated in section 3 of this RIS.

Summary of questions to stakeholders

In preparing this RIS, meetings were held with stakeholders, at which stakeholders were asked a number of questions. The below table provides a summary of these questions. Answers to these questions helped develop the various options, and to assess which of the options should be recommended. Stakeholders are welcome to respond to these questions as they review the RIS.

Table 1: Summary of questions to stakeholders

| **Questions for stakeholders** |
| --- |
| **S.1** Are there any other challenges employers in the community services sector face in determining what is defined as community service work?**S.2** Are there any other challenges employers in the community services sector face in determining what share of their work is not health or aged care work under the existing employer predominance test?**S.3** Are there any other sub‑sectors that have been unintentionally excluded from the Scheme through the definition of health and aged care work in the Interim Regulations?**S.4** Are there any other viable options to improve clarity as to whether care delivered in a private residence is defined as community service work for the purposes of the Scheme?**S.5** In relation to the employer predominance test, which option provides employers in the community services sector with the greatest clarity in relation to when they are in-scope?**S.6** Are there any other viable options to improve clarity as to who is regarded as an employer in the community services sector?**S.7** Are there any other viable options to improve clarity as to who is regarded as an employee in the community services sector?**S.8** Are there any other viable options to improve clarity as to who is regarded as an employee in the security sector?**S.9** In relation to work undertaken in a private residence, which option best ensures that employees across the community services sector have fair and equitable access to the Scheme?**S.10** What type of employers (and how many) would be brought within the scope of the Scheme if the employer predominance test was abolished? **S.11** Are there any additional impacts on employers and employees of the options to reform the employer predominance test that are not reflected in this analysis? **S.12** In relation to the employer predominance test, which option best ensures that employees across the community services sector have fair and equitable access to the Scheme?**S.13** What share of the Community Health workforce move into and out of the broader community services sector?**S.14** Does the assessment accurately represent the scope and scale of the Community Health workforce that delivers community service work?**S.15** Does the assessment accurately represent the scope and scale of the Women’s Health workforce that delivers community service work?**S.16** Referring to the inclusion of the Community Health and Women’s Health sub‑sectors in the Scheme, which option best ensures that employees across the community services sector have fair and equitable access to the Scheme?**S.17** Does the assessment accurately represent the likely change in the number of employees covered under each of these options relative to the number of employees covered under the current employee predominance test?**S.18** Referring to who is regarded as an employee in the community services sector, does the assessment accurately represent the financial and administrative costs to employers associated with each option?**S.19** Referring to who is regarded as an employee in the community services sector, which option best ensures that employees across the community services sector have fair and equitable access to the Scheme?**S.20** Would the adoption of a modern awards test to determine who is regarded as an employee in the community services sector exclude employees from the Scheme who should otherwise be included?**S.21** Referring to who is regarded as an employee in the security sector, does the assessment accurately represent the likely change in employees covered under each of these options relative to how stakeholders are currently defining employees under the status quo?**S.22** Referring to who is regarded as an employee in the security sector, which option provides employers with the greatest clarity in relation to when employees in the security industry are in-scope?**S.23** Referring to who is regarded as an employee in the security sector, which option best ensures that employees across the security sector have fair and equitable access to the Scheme?**S.24** Referring to the preferred option to remove the employer predominance test that applies to health or related services, which organisations that were not previously in‑scope of the Scheme under the Interim Regulations, will now be in‑scope?**S.25** Referring to the preferred option to introduce an Awards coverage test, are employees in the community services sector covered by any other Awards?**S.26** Does the introduction of an Awards test represent a significant expansion of the scope of the Scheme?**S.27** Would the adoption of a test to determine who is regarded as an employee in the security industry exclude employees from the Scheme who should otherwise be included?**S.28** Under the proposed updated double-dipping provisions, can stakeholders foresee any circumstances where they would not be able to claim a reimbursement from the Authority for any levy paid once an employee accesses an entitlement under an existing long service entitlement? |

# INTRODUCTION

## Scope of this RIS

This Regulatory Impact Statement (RIS) analyses the implementation of the Portable Long Service Benefits Scheme (the Scheme) for the proposed *Long Service Benefits Portability Regulations 2020* (the Proposed Regulations). The Proposed Regulations are intended to replace the *Long Service Benefits Portability Interim Regulations 2019* (the Interim Regulations), which are due to expire on 6 November 2020.

The purpose of this RIS is to:

* Establish the nature and extent of the problems that would exist if the Interim Regulations were not amended;
* Articulate the desired objectives of addressing the identified problem;
* Identify a set of viable options to address the established problem;
* Assess the impacts of these options, and the expected effectiveness of each option in addressing the problem;
* Identify and describe a preferred option to achieve the desired objectives; and
* Develop an implementation plan and evaluation strategy for the preferred option.

The regulatory options explored in this RIS are compared to the current status quo under the Interim Regulations. This allows for stakeholders to understand the impact of the options against their current experience participating in the Scheme. The 2019 RIS prepared for the *Long Service Benefits Regulations 2019* prosecuted the need for Regulations to support the operation of the Scheme. The Interim Regulations (which are substantively the same as the *Long Service Benefits Regulations 2019*) reflect the preferred options in the 2019 RIS. A summary of the 2019 RIS is provided in section 1.4.1. Section 1.6 summarises what would happen if there were no regulations.

This RIS is prepared in accordance with the Victorian Guide to Regulation (2016), which provides a step-by-step guide to preparing a RIS.

## Long Service Schemes in Victoria and Australia

In Victoria, long service leave is primarily governed by the *Long Service Leave Act 2018* (Vic).[[5]](#footnote-5) Under Victorian legislation, employees who complete at least seven years of continuous employment with one employer are able to apply for long service leave. The *Long Service Leave Act 2018* (Vic)sets out arrangements for long service leave. This Act replaced the *Long Service Leave Act 1992* (Vic).

Portable long service schemes allow for employees to transfer from one employer to another without losing the benefits of long service entitlements or service towards such entitlements already accrued, provided both employers are within the same covered industry. The schemes recognise that, in some sectors of the economy, an employee may find it difficult to achieve continuous service with one employer. Under these schemes, an employee qualifies for long service based on their service across one industry, rather than their service with one employer.

There are a number of portable long service schemes in operation, across a range of industries in Australia. Of note are Victoria’s CoINVEST[[6]](#footnote-6), the Australian Capital Territory (ACT) Leave Scheme[[7]](#footnote-7) (including for the community services sector), as well as QLeave[[8]](#footnote-8) for Queensland’s contract cleaning sector.

On 4 September 2018, the Victorian Government passed the Long Service Benefits Portability Bill 2018. *The Long Service Benefits Portability Act 2018* (the LSBP Act) came fully into effect on 1 July 2019. See Figure 1 below for a brief history of portable long service benefit schemes in Victoria.

The LSBP Act was introduced to enable Victorian employees in the contract cleaning, security and community services industries to retain their entitlement to long service benefits when they change employers. Employees in the security and contract cleaning sectors rarely qualify for long service benefits due to the contract and project nature of the sectors in which they work. Employees in the community services sector face a similar issue, due to cyclical or short-term, project-based funding arrangements in the not for profit sector, as well as high levels of mobility in the sector driven by pressures on wages and a highly casualised workforce.

The LSBP Act requires employers in these sectors to contribute a percentage of an employee’s pay on a quarterly basis to a consolidated fund. The fund then pays out long service, equivalent to 1/60th of the hours of work the employee has been credited with working over the employment period since they became eligible under the Scheme.

Figure 1: A Brief History of Portable Long Service Benefits in Victoria

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| In 2015, the Victorian Parliamentary Economic, Education, Jobs and Skills Committee (the Parliamentary Committee) commenced an inquiry into employer schemes that provide portability of long service entitlements for employees as they move between jobs in the same or similar industries. The Parliamentary Committee tabled its Report in the Victorian Parliament in June 2016.[[9]](#footnote-9) The Report contained recommendations that feasibility studies be conducted into portable long service schemes for the contract cleaning and security industries and a finding that there was merit in further examining a portable long service scheme for the community services sector. In November 2016, the Victorian Government tabled its response to the Parliamentary Committee Report accepting the Report’s recommendations and its finding with respect to the merit of considering a portable long service scheme for the community services sector.[[10]](#footnote-10) The Government committed to conducting a feasibility study into portable long service benefits in the sector. In March 2018, following the completion of the feasibility studies, the Minister for Industrial Relations introduced the Long Service Benefits Portability Bill 2018 to Parliament. The main purpose of the Bill was to provide portability of long service benefits across the contract cleaning, security, and community services industries. Following a number of amendments proposed by the Legislative Council, the Long Service Benefits Portability Bill 2018 received Royal Assent on 18 September 2018. The *Long Service Benefits Portability Regulations 2019* came into operation on 1 July 2019. However, to address an administrative error, they were revoked and remade. The remade Regulations are in the same form as the previous Regulations and are called the *Long Service Benefits Portability Interim Regulations 2019* (the Interim Regulations). The only changes compared to the previous Regulations are the title and the expiry date. The Interim Regulations commenced operation on 20 November 2019 and will operate until permanent Regulations replace them. The Interim Regulations will otherwise expire on 6 November 2020.The Interim Regulationsreflected the preferred options identified in the 2019 RIS prepared for the *Long Service Benefits Portability Regulations 2019*.Since 1 July 2019, more than 60,000 Victorian employees have been registered by their employers for the Scheme. From 1 January 2020, the National Disability Insurance Scheme (NDIS) and certain children's services providers came under the Scheme. |

## Overview of the Long Service Benefits Portability Act 2018

The LSBP Act covers three sectors: contract cleaning, community services, and security. A separate fund has been established for each sector, each of which is to be collected and administered by the Portable Long Service Benefits Authority (the Authority). The funds raised will be invested with the Victorian Funds Management Corporation. The levy rate was determined by the Authority’s Governing Board on 9 May 2019 as 1.65 percent for the community services sector and 1.80 percent for the contract cleaning and security sectors, respectively.

Registered active employers must provide the Authority with a return each quarter which includes:

* The name of each of the employer's employees who performed work for the employer during the quarter; and
* For each of the employer's employees:
* the total ordinary pay paid or payable by the employer to the employee for work performed during the quarter;
* the number of days or part days during the quarter to which the pay relates; and
* any other prescribed information.

At the time of the quarterly return, the employer must also pay the levy that is due for each employee.

All decisions on registration and compliance with the Scheme rest with the Authority.

Employees accrue one day of ‘recognised service’ for each calendar day during the time in which they are employed (except for certain types of leave not specified in clause 14 of Schedule 1).[[11]](#footnote-11) If the employee has recorded 1,400 hours of work over the seven year period, their benefit will be 1/60th of that 1,400 hours, that is, 23.34 days of leave or, in the case of the community services sector, a *payment* of long service from the Authority. The payment rate is based on the employee’s ordinary pay at the time of the application for payment.[[12]](#footnote-12)

Eligibility for the Scheme differs by sector:

* The **community services sector** is defined as the sector in which community service work is performed. In turn, ‘community service work’ is defined as work that provides a range of services (including training and employment support for vulnerable persons, or financial support for vulnerable persons), and stipulates that ‘employers’ for the sector are those who employ people to perform community service work, while ‘employees’ are those individuals employed by an employer for the sector – meaning that the definitions of ‘employers’ and ‘employees’ are also relevant in a multi-factorial test of eligibility. This multi-factorial test of eligibility is illustrated in Figure 2. The Regulations provide further guidance as to the definitions of community service work, who is not regarded as an eligible employer and who is not regarded as an eligible employee for the purposes of the community services sector.
* The **contract cleaning industry** is defined using the same method by reference to the work undertaken in the sector. The Regulations provide further guidance as to who is not regarded as an employee for the purposes of the contract cleaning industry.
* The **security industry** is defined by reference to the *Private Security Act 2004* (Vic).

Figure 2: Multi-factorial test of eligibility for the community services sector

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### The covered sectors

The following table outlines the sectors covered by the LSBP Act, including the composition of the sectors and how the work within them is defined by the LSBP Act. The table also outlines the number of registered workers as at 31 March 2020.[[13]](#footnote-13)

Table 2: Sectors covered by the LSBP Act

| Industry | LSBP Act Definition |
| --- | --- |
| Community Services  | Community service work is work that provides various types of services and/or support to people who are experiencing disadvantaged, vulnerability or a crisis. This includes community services such as advocacy, fundraising for community groups, and community legal services and information services. Separate provisions also grant the power to explicitly include services, and to explicitly exclude activities, from the scope of community service work through Regulations. As at 31 March 2020 there are 36,015 registered workers from the Community Services sector. |
| Contract cleaning | Cleaning work is work that has, as its only or main function, cleaning, or maintaining the cleanliness of premises. This includes the cleaning of a swimming pool and the grounds surrounding a swimming pool. It does not include commercial waste disposal, gardening, or cleaning undertaken on construction sites.As at 31 March 2020 there are 18,470 registered workers from the Contract cleaning sector.  |
| Security | The security industry is defined as the industry where security activities are undertaken by people licensed to do so under the *Private Security Act 2004* (Vic), or under corresponding legislation in other jurisdictions. Certain activities, such as cutting keys, selling self-install security systems, installing locks and operating prisons, are explicitly excluded from the definition.As at 31 March 2020 there are 11,264 registered workers from the security sector. |

## The Long Service Benefits Portability Interim Regulations 2019

Section 79 of the LSBP Act prescribes that Regulations may be made:

*‘for or with respect to any matter or thing required or permitted by this Act to be prescribed or necessary to be prescribed to give effect to this Act.’*

In relation to the community services sector, the Interim Regulationsprescribed matters for the operation of the Scheme in relation to:

* Confirming in-scope employers and employees in the community services sector;
* The definition of the ‘community services sector’, including the inclusion of NDIS services and certain children’s services from 1 January 2020; and
* Confirming who are not employees for the purposes of the contract cleaning industry.

There were also two scheme-wide matters covered by the Interim Regulations:

* Providing the Authority with effective oversight of the Scheme; and
* Allowing the Authority to gain the required taxation information and assist other Victorian Government agencies in their regulatory processes.

No clarifying or specific Regulations were necessary with respect to the security sector.

### The 2019 Regulatory Impact Statement

The *Long Service Benefits Portability Benefits Regulations 2019*, and the subsequent Interim Regulations, were informed by the content of the previous 2019 RIS. The RIS outlined the five residual problems detailed above, a set of viable options to address each problem, the costs and benefits of each option, and a preferred option to address each problem and achieve the desired objectives.

The following sub-sections provide a summary of the 2019 RIS. For further information on the operation of the Regulations as a whole, this RIS can be found at https://www.vic.gov.au/regulatory-impact-statements-2019#long-service-benefits-portability-regulations-2019.

#### Definition of employee and employer

Two options were analysed to address the lack of clarity in the definition of employer and employee, including:

* Relying on a definition from a comparable scheme; and
* Developing a definition tailored to the Victorian scheme.

Analysis of the definitions found in the *Long Service Leave (Portable Schemes) Act 2009* showed that these definitions are inappropriate for the LSBP Act. Adopting the Australian Capital Territory Act’s (ACT) definitions would likely not have had any practical effect on the experience under the base case, as employees would still be defined by reference to the definition of ‘community service work’ in Schedule 1 of the LSBP Act.

Without the definition of community service work changing, there remained the risks that are identified under the base case, including the possibility that the LSBP Act may provide portable long service benefits to employees who do not fit within the intended definition of the LSBP Act.

A definition that is tailored to the Victorian Scheme, on the other hand, would more comprehensively address the residual problems of potential coverage of unintended employees as well as the identified need to avoid constitutional invalidity. The exclusions it adds to the existing definitions gives them a greater likelihood of increasing equity in the community services sector, reducing administrative and financial impact on employers, Government and the Authority.

The preferred option was to develop a definition of “employee” and “employer” that is tailored to the Victorian Scheme.

#### Scope of the community services sector – NDIS and early childhood education

The RIS analysed options of including NDIS entities and the early childhood sector in the Scheme. The Parliament intended that these two sub‑sectors would be incorporated into the scope of the Scheme through Regulations once they had an appropriate amount of time to adjust to federal reforms.

Options for including NDIS entities in the Scheme included:

* Introducing NDIS entities when the Scheme commenced operation on 1 July 2019;
* Introducing NDIS entities six months after the Scheme commences operation on 1 January 2020; and
* Introducing NDIS entities 12 months after the Scheme commences operation on 1 July 2020.

The second option was the preferred option, due to the way it balanced the competing needs of employees and employers. It involved a slight delay in providing equity to NDIS employees, but was considered to strike a fair balance with the needs of employers, reducing the financial pressures on them by allowing more time to prepare for the Scheme, and adjust to operating under the NDIS.

Options for including the early childhood sector in the Scheme included:

* Introducing the early childhood sector when the Scheme commenced operation on 1 July 2019;
* Introducing the early childhood sector six months after the Scheme commences operation on 1 January 2020; and
* Introducing the early childhood sector 12 months after the Scheme commences operation on 1 July 2020.

The second option was the preferred option, due to the way it balanced the competing needs of employees and employers. It involved a slight delay in providing equity to employees, but was considered to strike a fair balance with the needs of employers, reducing the financial pressures on them by allowing more time to prepare for the Scheme, and adjust to the Federal Government’s July 2018 Child Care Package.

#### Double-dipping

Depending on their employment relationship and length of service, employees in the community services sector may have had existing entitlements to long service leave under a fair work instrument. This left open the possibility of employees being entitled to claim two separate benefits relating to the same period of service.

The RIS assessed three options for preventing double-dipping:

* Employer pays levies until the employee claims a fair work benefit;
* Employer pays levies until the employee becomes entitled to claim a fair work benefit; and
* Employer does not pay levies at all for employees who accrue service towards a fair work benefit.

Analysis showed that, due to the complex interactions between State and Federal law, each of the options for preventing double-dipping had deficiencies.

The primary issue with the first option was the requirement for employers to monitor employees who have claimed fair work benefits and to report these to the Authority. In addition, this option required increased administrative work for employers who will be required to make adjustments to their balance sheets.

The primary issue with the second option was the potential for there to be a shortfall in levies if an employee became entitled to a portable long service benefit before a fair work benefit, and then later became entitled to a fair work benefit which they do not claim until some years later.

The primary issue with the third option was that it ran the risk of precluding employees from ever accruing a long service benefit if they left the sector or changed employers before accruing the required service to take their fair work benefit. This defeated the primary objective of the LSBP Act.

Compared to the base case, the RIS found that the preferred option to address double-dipping claims in the community services sector was the first option to require employers to pay levies for all employees, until an employee claims a fair work benefit.

#### Authority oversight of the Scheme

Due to the specific nature of the problem, there was only one option, aside from the base case, that provided the Authority with effective oversight of the Scheme. This was to require employers to inform the Authority of the date when employees leave (if any) during the quarter.

Analysis showed that this option was considered preferable to the base case.

#### Disclosure of information to other entities and authorities

Due to the specific nature of the problem, there was only one option, aside from the base case, that allowed the Authority to gain the required taxation information and assist other Victorian Government agencies in their regulatory processes. This option allowed the Authority to share information with the Australian Taxation Office (ATO) and the Labour Hire Licensing Authority.

Analysis showed this option was considered preferable to the base case.

## The Long Service Benefits Portability Regulations 2020

After reviewing the operation and effectiveness of the Interim Regulations and consulting with stakeholders, the Proposed Regulations seek to clarify five additional residual problems that were not fully resolved in the Interim Regulations:

* What is defined as community service work;
* Who is not regarded as an employer in the community services sector;
* Who are not regarded as employees in the community services sector;
* Who is regarded as an employee in the security industry; and
* Reimbursing employers for double-dipping claims in the community services sector under the *Long Service Leave Act* *2018*.

These changes would impact upon the community services sector and the security sector. There would be no impact on the contract cleaning sector. The remaining elements of the Interim Regulations would remain unchanged in the Proposed Regulations.

As can be seen from the quantification undertaken in the 2019 RIS, remaking the Regulations are likely to impose a burden greater than $2 million on the community services and industry sectors, and therefore a RIS is required, in accordance with the provisions of the *Subordinate Legislation Act 1994* (Vic). This RIS has been prepared in accordance with the Victorian Guide to Regulation.

By issuing the RIS, the Government provides the community services and security sectors with the opportunity to assess the Proposed Regulations in terms of their objectives and effect, as well as alternative approaches to achieving the stated objectives, and an assessment of the costs and benefits of the Regulations and the alternatives.

## What would happen if there were no Regulations?

Regulations can only make rules and specifications about matters permitted by the relevant Act. That is, they are entirely subordinate to a principal Act. The principal legislation will generally set out high-level concepts but may leave technical detail to be specified in Regulations. If an Act specifies that a matter must be prescribed by regulation, generally this matter must be dealt with by the regulation or else the legislation is either not fully effective or the regulatory functions may be incomplete or defective.

If the Interim Regulations were to expire on 6 November 2020 and no replacement Regulations are made, the Scheme could not operate as intended. As detailed in Table 3, allowing the Interim Regulations to expire without replacing them is not seen as a viable option. It would reduce clarity for employers and employees who are covered by the Scheme, remove portable long service entitlements from employees employed by the NDIS and early childhood education entities, and impact the effective and efficient operation of the Authority. Also, if no replacement Regulations are made, employers in the community services sector would be required to pay both a levy to the Authority and pay an employee for a long service entitlement under a fair work instrument, and they would not be entitled to reimbursement to compensate them for any employee double-dipping claims.

As the 2019 RIS made clear, each area of the Interim Regulations set out below is necessary to allow the Scheme to operate as intended. For the purposes of this RIS, the reference case assumes that the status quo elements of the Interim Regulations necessary to ensure the LSBP Act continues to operate remain in place. The case for the Regulations overall was made in the 2019 RIS and is summarised in section 1.4.1 of this document.

The balance of this RIS assesses the problems, costs and benefits of amending the Interim Regulations. The analysis focused on the marginal impacts compared to the Interim Regulations (i.e. the status quo) as opposed to a case with no regulations.

Table 3: How the LSBP Act would work in the absence of Regulations

| **What the LSBP Act leaves to Regulations** | **What happens if no regulations are in place** |
| --- | --- |
| The LSBP Act leaves the definition of which employers and employees in the community services sector are considered in-scope of the Scheme open to refinement through Regulations.  | Any lack of clarity in the definition of who is regarded as an employer or employee in the sector has the capacity to result in unnecessary cost implications for employers who may spend time and money registering and paying levies into the Scheme for employees who are out of scope. At the same time, employees may be disadvantaged if lack of clarity around their eligibility to participate in the Scheme precludes them from accessing – or otherwise limiting the value of – a long service benefit.  |
| The definition of community service work in the LSBP Act explicitly excludes activities funded under the NDIS, and services provided by entities licensed under the *Children’s Services Act 1996*, from the immediate coverage of the Scheme. However, the LSBP Act also explicitly allows for these two aspects of the sector to be reincorporated into the Scheme through Regulations. It was the intention of Parliament when the sub‑sectors were initially excluded that they would be incorporated into scope of the Scheme at a later date, once they have had an appropriate amount of time to consider relevant federal reforms.  | Without Regulations, employees employed by NDIS and early childhood education entities would lose access to the Scheme and their portable long service entitlements.  |
| Regulations provide guidance as to how to avoid double-dipping – employees being entitled to claim two separate benefits relating to the same period of service. Schedule 1 of the LSBP Act states that this outcome is to be avoided. | Without Regulations, employers would have no recourse to claim back portable long service payments where an employee is also entitled to a long service benefit deriving from a fair work instrument (including under an enterprise agreement).  |
| The LSBP Act stipulates a number of matters which employers must disclose in their quarterly returns to the Authority, including any other prescribed information to be detailed in Regulations. | Without Regulations, employers would not have clarity about the information necessary for the Authority to administer the Scheme effectively and efficiently. The Authority would be required to spend time chasing up information on missing employees. |
| The LSBP Act allows the Authority to disclose information to certain Victorian and Federal Government entities, including other prescribed entities as detailed in Regulations.  | Without Regulations, the Authority would not be able to gain the required taxation information from the ATO to accurately deduct tax from portable long service benefits or assist the Victorian Labour Hire Licensing Authority in their regulatory processes.  |
| Regulations provide clarity to employers and employees in the contract cleaning sector regarding who is not considered an employee for the purposes of the contract cleaning industry.  | In the absence of Regulations, employees who are not intended to be within scope of the Scheme may have access to portable long service benefits. Any lack of clarity in the definition of who is regarded as an employee in the contract cleaning sector has the capacity to result in unnecessary cost implications for employers who may spend time and money registering and paying levies into the Scheme for employees who should not be considered within the scope of the Scheme.  |

# THE NATURE OF THE PROBLEM

## Primary problem addressed through the LSBP Act

In industries where certain types of employment structures are prevalent, employees are unlikely to accrue a sufficient number of years of continuous service with one employer to qualify for long service leave under existing legislation, including the *Long Service Leave Act 2018*. Existing research and stakeholder consultation suggests that these pockets of the workforce are missing out on long service benefits because of the nature of their industry and other factors which are beyond their control rather than because they are frequently choosing to change employers or industry. **This results in an inequitable situation where employees are not able to accrue long service leave due to no fault of their own.**

As discussed above in section 1.2, the Portable Long Service Benefits Scheme was introduced under the LSBP Act to enable Victorian employees in the contract cleaning, security and community services industries to retain their entitlement to long service benefits when they change employers. Employees in the security and contract cleaning sectors rarely qualify for long service benefits due to the contract and project nature of the sectors in which they work. Employees in the community services sector face a similar issue, however this is due to the high levels of mobility in the sector driven by pressures on wages, short-term project-based funding arrangements, and a highly casualised workforce.[[14]](#footnote-14)

## Problems addressed in the Interim Regulations

While the LSBP Act was introduced to address the primary problem, residual problems remained. The Interim Regulations were introduced in 2019 to address these problems. The five problems addressed in the Interim Regulations were:

* The lack of clarity on covered employees and employers;
* The scope of the ‘community services sector’;
* The potential for double-dipping;
* Inadequate legislative detail on Authority oversight of the Scheme; and
* Inadequate legislative detail on list of organisations to whom the Authority can disclose information.

These five problems were explored in the 2019 RIS, as section 1.4.1 detailed. The RIS was released for public consultation in May 2019 prior to the *Long Service Benefits Portability Benefits Regulations 2019* commencing operation on 1 July 2019. The remade Interim Regulations commenced operation on 20 November 2019 and will operate until they are replaced by permanent Regulations. Otherwise, they expire on 6 November 2020.

## Residual Problems

After reviewing the operation and effectiveness of the Interim Regulations and consulting with stakeholders, the Department of Premier and Cabinet identified five additional residual problems that were not fully resolved in the Interim Regulations. These five residual problems are in the scope of this RIS:

* What is defined as community service work;
* Who is regarded as an employer in the community services sector;
* Who are regarded as employees in the community services sector;
* Who is regarded as an employee in the security industry; and
* Reimbursing employers for double-dipping claims in the community services sector under the *Long Service Leave Act 2018*.

As illustrated in Figure 2, there is an interrelationship between the first three items above under the multi-factorial test of eligibility in the community services sector to participate in the Scheme.

**The purpose of this RIS is to consider regulatory options to support the LSBP Act to address these residual problems compared to the status quo under the current Interim Regulations.**

### What is defined as community service work

The Interim Regulations lack precision as to whether community service work in a private residence is defined as community service work for the purposes of the Scheme. Regulation 8(1)(b) of the Interim Regulations was designed to clarify that, where support activities are provided in a private residence, it is considered to be home care support and not health or aged care support. However, feedback from stakeholders demonstrates that the current drafting lacks precision. The uncertainty has caused confusion within the sector and has created an administrative burden for employers in determining whether their organisation and their employees are engaged in community service work or health and aged care work.

| **Questions for stakeholders** |
| --- |
| **S.1** Are there any other challenges employers in the community services sector face in determining what is defined as community service work? |

### Who is regarded as an employer in the community services sector

#### Employer predominance test

The Interim Regulations lack precision as to who is regarded as an employer in the community services sector. There is no guidance in the Regulations about how to measure predominance to determine whether an employer is primarily delivering health or aged care work (as opposed to community service work) and is therefore not covered by the Scheme. Stakeholders from the community services sector have expressed concern with the lack of clarity and the impact on employers, employees and the Authority.

Attempts to measure predominance through what is widely known as the employer predominance test have been administratively burdensome for some employers in the sector as they try to determine whether they are covered by the Scheme.[[15]](#footnote-15) For example, it is not clear whether predominance is measured by funding share, headcount of full-time equivalent (FTE) employees, or in terms of the split between community sector work and other work (including health or aged care work). Employers have also stated that the lack of clarity in the Interim Regulations has made it difficult for the Authority to provide consistent advice.

As employers are responsible for determining the share of their work that is not health or aged care work, the lack of clarity has meant some employers in the sector who should be covered by the Scheme have not registered with the Authority. The application of the employer predominance test has resulted in employees who perform community service work being denied access to portable long service benefits because their employer is not a covered employer for the purposes of the Scheme. Peak bodies and unions have also reported the predominance test unintentionally excluding smaller charity and palliative care providers who employ employees to deliver community services.

| **Questions for stakeholders** |
| --- |
| **S.2** Are there any other challenges employers in the community services sector face in determining what share of their work is not health or aged care work under the existing employer predominance test? |

#### Community Health and Women’s Health Centres

There is uncertainty about whether Community Health and Women’s Health Centres are covered by the Scheme. The application of the employer predominance test in the Interim Regulations can potentially exclude from the Scheme employees of a registered Community Health Centre, Women’s Health services and some disability service providers who deliver community services.[[16]](#footnote-16) This is because the Interim Regulations define health and aged care work in reference to the *Health Services Act 1988*.

The Health Services Act governs the operation of these health services providers and, subject to the predominance test, has resulted in their exclusion from the Scheme. This is because health and aged care work is excluded from the Scheme, despite these providers employing employees to deliver community service work (including employees who deliver disability services under the NDIS). This is inconsistent with the LSBP Act, which specifically states that registered Community Health Centre employees undertaking community service work are not excluded from the Scheme. The position for Women’s Health Centres is particularly confusing. Community health providers understood that they were to be covered by the Scheme, because many of the services that Women’s Health centres provide (e.g. family support services, family violence prevention and response, and housing and homelessness services) are included in the definition of community service work in the Interim Regulations.

**Community Health providers are of the firm view that they should be excluded from the Scheme.** Community Health Centres argue that they provide health services and not community services and should not be covered by the Scheme. Community Health providers argue that they have greater funding certainty than the rest of the community services sector and therefore their employees are not as dependent on short-term contracts. They also argue that the Scheme would duplicate existing portability entitlements for some employees in Community Health Centres under fair work instruments (including multi-enterprise agreements). However, the existing portability entitlements do not cover employees who move between Community Health Centres and the broader community services sector.

| **Questions for stakeholders** |
| --- |
| **S.3** Are there any other sub‑sectors that have been unintentionally excluded from the Scheme through the definition of health and aged care work in the Interim Regulations? |

#### For-profit providers of early childhood services

The drafting of the Interim Regulations has led to some uncertainty as to whether for‑profit providers of early childhood services are covered by the Scheme. The Interim Regulations prescribe services provided by an entity that is a licensed children's service under the *Children's Services Act 1996* or an approved provider under the Education and Care Services National Law (Victoria) as community service work. Under Schedule 1 of the LSBP Act, for‑profit providers are excluded from the Scheme, with the exception of entities that employ persons to perform ‘community service work for persons with a disability’.

Some providers have interpreted that, if a for‑profit entity that is a licensed children’s service provider or an approved provider under the Education and Care Services National Law employs a disability worker, the service will come within the scope of the Scheme. Consequently, all other employees who perform community service work will also come within scope. This is an incorrect interpretation, and is inconsistent with the intent of the LSBP Act to exclude for‑profit providers from the Scheme. The Regulations require redrafting to clarify this problem.

In addition, employer groups representing not-for‑profit early learning providers have raised broader concerns with the exclusion of for‑profit providers from the Scheme. It is argued that the exclusion of for‑profit providers undermines the portability of the Scheme. Employees who move from not-for‑profit providers to for‑profit providers will lose their portable long service entitlement. It also creates an uneven playing field between for‑profit and not-for‑profit providers, as it places an additional financial burden on not-for‑profit providers. It is not within the scope of this RIS to re-prosecute the arguments for and against including for‑profit early childhood services providers as for‑profit providers were explicitly excluded by Parliament in the LSBP Act. Any future change to include for‑profit providers will require legislative amendment.

### Who is regarded as an employee in the community services sector

The Interim Regulations lack precision as to who is regarded as an employee in the community services sector. There is no guidance in the Regulations about how to measure predominance to determine whether an employee is primarily delivering health or aged care work (as opposed to community service work) and is therefore not covered by the Scheme. Each eligible employer is responsible for assessing each of their employees to determine what share of their work is health or aged care work. Employers were also uncertain about an employee’s ongoing eligibility for the Scheme if the nature of their work substantially and permanently changed.

As the nature of an employee’s work may change over time, employers also reported challenges in determining at what point and over what time period predominance should be measured. Some stakeholders made anecdotal claims that a single employee could be performing community service work one day and health care work the next. However, stakeholders did not provide any data or specific examples of individuals or jobs that would allow any conclusions to be drawn about the nature and extent of this issue in the sector.

The employee predominance test at Regulation 10(3) of the Interim Regulations states that:[[17]](#footnote-17)

*‘an individual is prescribed not to be an employee for the community services sector if the predominant activity of the individual's substantive role is not the personal delivery of services or the personal performance of activities that are community service work’.*

When applying this test (because of its ability to be interpreted broadly), it is not clear whether certain employees are covered by the Scheme, such as support staff, secretarial and managerial employees. This employee predominance test has resulted in arbitrary exclusions and is more complicated to apply than the equivalent test in the ACT Leave Scheme. In the ACT, all employees of an employer carrying out work in the community services sector are covered. This includes, for example, the chief executive, chef and the administration staff of a childcare centre.

Stakeholders across the sector have also reported that it has been difficult to determine whether different activities engaged in by a single employee would cumulatively meet the predominance test for inclusion in the Scheme. This has been administratively burdensome for employers. This has also made it difficult for employees to understand their entitlements and whether their employer should be registering them with the Authority. The lack of clarity in the Interim Regulations has reportedly led to inconsistent advice being provided by the Authority. Additional clarity is required to aid the sector and the Authority in determining who is regarded as an employee for the purposes of the community services sector.

Employers, peak bodies and unions in the sector have also raised concerns about the impact of the employee predominance test on intra-workplace equity between employees. The application of the test could detrimentally impact workplace culture and harmony where employees who undertake very similar jobs are provided with or denied an additional workplace entitlement under the Scheme. On the other hand, employees within the one workplace can be employed under different terms and conditions or industrial instruments.

### Who is regarded as an employee in the security industry

The Interim Regulations do not provide a test to determine who is regarded as an employee for the purposes of the security sector. The reference to the Private Security Act 2004 in Schedule 3 to the LSBP Act provides clarity as to who is a covered employer in the security industry. However, stakeholders in the sector and the Authority have reported challenges in determining who is a covered employee for the purposes of the Scheme. It is not clear whether employees need to perform a certain amount of security work to be covered by the Scheme. It is also not clear whether managerial and administrative staff are covered by the Scheme. Stakeholders in the security sector have reportedly been applying their own tests to determine eligibility and have requested additional clarity be incorporated into the Regulations to clarify which of their employees they are required to register with the Authority.

### Reimbursing employers for double-dipping claims in the community services sector under the Long Service Leave Act 2018

Double-dipping refers to situations where an employee might have or accrue an entitlement to a long service benefit under more than one of the LSBP Act, the *Long Service Leave Act 2018* or some other act and/or under an existing workplace entitlement, for the same period of service. Schedule 1 of the LSBP Act states that this should be avoided.

A modern award or enterprise agreement can provide for a long service leave entitlement, which will apply subject to any inconsistency with an applicable State or Territory long service leave law.[[18]](#footnote-18) However, such laws cannot invalidate an entitlement to long service leave under a Federal fair work instrument. [[19]](#footnote-19) This is to be contrasted with pre-modern awards preserved by the NES which will apply to the exclusion of the *Long Service Leave Act 2018*.[[20]](#footnote-20) This position is also reflected in section 5(b) of the *Long Service Leave Act 2018* which states that the Act does not apply to employees with an entitlement under an employment agreement (which is defined to include a fair work instrument) to the extent of any inconsistency with that employment agreement, if the long service leave entitlements are more favourable under the agreement than those under the Act. The *Long Service Leave Act 2018* is therefore silent on long service leave entitlements derived under pre‑reform awards preserved by the NES.

Therefore, the possibility of double-dipping is not eliminated because an employee covered by the LSBP Act is neither excluded from the coverage of the *Long Service Leave Act 2018* (as compared to employees entitled to long service leave under the *Construction Industry Long Service Leave Act 1997*)[[21]](#footnote-21), nor are they prevented from claiming a long service leave entitlement under a pre-modern award or a fair work instrument.

While it is possible to amend the LSBP Act and the *Long Service Leave Act 2018* to make coverage under each Act mutually exclusive to the other, this will not of itself eliminate the possibility of double-dipping. It would remain possible for an employee to claim a long service leave entitlement under a pre-modern award or a fair work instrument.

Seeking to eliminate this possibility of double-dipping, by excluding employees with other long service leave entitlements from the coverage of the LSBP Act, would be problematic, as employers could then use enterprise agreements to ‘opt out’ of the Scheme. State laws cannot control the enterprise agreement-making process, including which employees are covered, and the terms of any long service leave entitlement.

Unlike the construction industry and the CoINVEST scheme, enterprise agreements in the community services sector often cover entire workplaces which would include employees eligible for portable long service leave and those who are not eligible. This means that a line cannot be drawn between employees covered by Federal instruments and those who are not covered, as coverage under a fair work instrument would exclude an otherwise eligible employee from the Scheme.

Furthermore, it is not possible to separate the entitlement to long service leave under a fair work instrument and the *Long Service Leave Act 2018*, because that Act effectively acts as a ‘safety net’ in circumstances where the entitlement under a fair work instrument (e.g. an enterprise agreement) is less favourable than the entitlement under the *Long Service Leave Act 2018*. In that case, the *Long Service Leave Act 2018* would apply as a protection as the entitlements under that Act are more favourable.

Completely closing off the possibility of double-dipping between the Scheme and other long service leave entitlements is problematic for the reasons set out above. In addition, the Department considers the risks associated with making the LSBP Act and the *Long Service Leave Act 2018* mutually exclusive, such as creating ‘gaps’ so that some employees who are intended to be covered by the LSBP Act are not covered, are greater than the risks associated with employees double-dipping. Therefore, removing the possibility of double-dipping between the LSBP Act and the *Long Service Leave Act 2018* is not considered further.

As it is not wholly possible to prevent the potential for employees of double-dipping, instead, the LSBP Act and Interim Regulations include provisions to ensure employers are reimbursed if they have paid a levy to the Authority and then have been required to pay an employee for a long service entitlement under a fair work instrument for the same period of service.

However, the LSBP Act, and Interim Regulations, do not refer to existing entitlements in Victorian law, under the *Long Service Leave Act 2018*, which is not defined as a fair work instrument by the LSBP Act (or the Interim Regulations). This means that, in its current form, employers are not entitled to a reimbursement from the Authority if they paid an entitlement under the *Long Service Leave Act 2018*. As currently drafted, Regulation 12 of the Interim Regulations only allows employers to claim a reimbursement for long service entitlements where an employee has an entitlement to long service leave under a fair work instrument for the same service period (for example, under a National Employment Standard, a modern award, an enterprise agreement or a transitional instrument under the *Fair Work Act 2009*). This was an oversight in the drafting of the LSBP Act and the Interim Regulations.

Addressing this problem will require an amendment to the LSBP Act. As a result, at this time, any regulatory amendments to reimburse employers for double-dipping under the *Long Service Leave Act 2018* will not be included in the Proposed Regulations. Subject to Parliamentary approval, any changes will not proceed until 2021 at the earliest. However, this RIS will consider the impact of future regulatory changes to address this residual problem alongside any amendment to the LSBP Act.

# OBJECTIVES

Options for each of the five residual problems should address the primary objective of the LSBP Act to provide for the portability of long service benefits for employees in sectors that rarely qualify for long service entitlements under traditional long service schemes, due to the contract and project nature of the industries in which they work. Improving access to entitlements will increase equity in sectors with comparable work.

In meeting the primary objective of the LSBP Act, options developed to resolve each of the residual problems within the scope of this RIS address a more specific set of objectives.

## What is defined as community service work

In clarifying whether care delivered in a private residence is defined as community service work for the purposes of the Scheme, the Proposed Regulations should look to:

* Provide certainty to employees and employers about the scope of the community services sector to be covered by the LSBP Act; and
* Ensure employees across the community services sector have fair and equitable access to the Scheme.

## Who is regarded as an employer in the community services sector

In clarifying who is regarded as an employer in the community services, the Proposed Regulations should look to:

* Provide certainty to employees and employers in the sector regarding which employers are covered by the Scheme; and
* Ensure employees across the community services sector have fair and equitable access to the Scheme.

## Who is regarded as an employee in the community services sector

In clarifying who is regarded as an employee in the community services sector, the Proposed Regulations should look to:

* Provide certainty to employers on which employees will be required to have levies paid to the Authority on their behalf; and
* Ensure employees undertaking community service work have fair and equitable access to the Scheme.

## Who is regarded as an employee in the security industry

In clarifying who is regarded as an employee in the security sector, the Proposed Regulations should look to:

* Provide certainty to employers on which employees will be required to have levies paid to the Authority on their behalf; and
* Ensure employees undertaking security work have fair and equitable access to the Scheme.

## Reimbursing employers for double-dipping claims in the community services sector under the Long Service Leave Act 2018

Reimbursing employers for double-dipping claims in the community services sector under the *Long Service Leave Act 2018* should give effect to the following principle:

* An employer is not to be required to pay an employee for long service leave under an existing workplace law or industrial instrument and to pay a levy under the LSBP Act for the employee in respect of the same service period (without reimbursement).

# OPTIONS

In line with the problems outlined in section 2 above, there are five primary areas in which options have been identified:

* What is defined as community service work;
* Who is regarded as an employer in the community services sector;
* Who are regarded as employees in the community services sector;
* Who is regarded as an employee in the security industry; and
* Reimbursing employers for double-dipping claims in the community services sector under the *Long Service Leave Act* *2018*.

As illustrated in Figure 2, there is an interrelationship between the first three items above under the multi-factorial test of eligibility for the social services sector to participate in the Scheme.

Options in each area have been identified by reference to the objectives and the nature of the problem outlined in the previous two sections of this RIS.

Options have not been progressed to impact analysis where there are expected to be unworkable technical difficulties in their implementation (see section 4.6). This includes the option of allowing the Interim Regulations to expire without any replacement regulations. As detailed in section 1.6, allowing the Interim Regulations to lapse without replacement would reduce clarity for employers and employees about who is covered by the Scheme, remove portable long service entitlements from employees employed by the NDIS and early childhood education entities, and impact the effective and efficient operation of the Authority. Also, while it is not wholly possible to prevent employees making a claim resulting in double-dipping, if no replacement Regulations are made, employers in the community services sector would be required to pay both a levy to the Authority and pay an employee for a long service entitlement under a fair work instrument, and they would not be entitled to reimbursement.

The 2019 RIS analysed the case for Regulations in detail. A summary is provided in section 1.4.1 of this document. For further information on the operation of the Regulations as a whole, the 2019 RIS can be found at https://www.vic.gov.au/regulatory-impact-statements-2019#long-service-benefits-portability-regulations-2019.

Options determined to be feasible are subjected to a consistent impact analysis framework as set out in section 5.

The following sub-sections detail the options identified for each residual problem.

## What is defined as community service work

Under the status quo, the distinction between community service work and aged care work delivered in a private residence is not clear. Many of the services delivered in a private residence, which are sometimes described as aged care, are only described as aged care because of the age of the client and not because of the type of work that is being delivered. Many of these home care support services are the same services that would be provided to a younger client and would otherwise be classified as community service work.

There are three options to address the problem of whether delivering care in a private residence is defined as community service work for the purposes of the Scheme (discussed in section 2.3.1), including:

* Clarify that care provided in a private residence is defined as community service work for the purposes of the Scheme, irrespective of the age of the client;
* Exclude home care work involving ‘aged’ clients from the definition of community service work; and
* Exclude all work undertaken in a private residence from the definition of community service work for the purposes of the Scheme.

###### Option 1 – Clarify that care provided in a private residence is defined as community service work for the purposes of the Scheme, irrespective of the age of the client

This option would clarify that employers undertaking community service work in the home are employers for the purposes of the Scheme. Healthcare delivered in a private residence would continue to be excluded from the Scheme. All health and aged care work performed in a facility would continue to be excluded from the Scheme, consistent with the intent of the Scheme.

###### Option 2 – Exclude home care work involving ‘aged’ clients from the definition of community service work

This option would exclude from the Scheme all home care work delivered to clients aged 65 years and over. This is the age of eligibility for the Commonwealth Home Support Programme. This would mean that employers undertaking any community service work in a private residence that could be described as ‘aged care’ would be excluded, consistent with the principle that the Scheme does not apply to aged care services. All health and aged care work performed in a facility would also continue to be excluded from the Scheme, consistent with the intent of the Scheme.

###### Option 3 – Exclude all work undertaken in a private residence from the definition of community service work for the purposes of the Scheme

This option would exclude from the Scheme employers delivering community work undertaken in a private residence. In determining whether an employer is covered by the Scheme, employers would not be required to include work undertaken in a private residence. All health and aged care work undertaken in the home or in a health or aged care setting would continue to be excluded from the Scheme.

| **Questions for stakeholders** |
| --- |
| **S.4** Are there any other viable options to improve clarity as to whether care delivered in a private residence is defined as community service work for the purposes of the Scheme? |

## Who is regarded as an employer in the community services sector

### Employer predominance test

Apart from the status quo, there are two options to clarify who is regarded as an employer in the community services sector and address the problems identified with the current employer predominance test (discussed in section 2.3.2.1), including:

* Providing additional clarity around the application of the employer predominance test; and
* Abolishing the employer predominance test.

###### Option 1 – Improve clarity around the application of the employer predominance test

This option would provide additional clarity to employers and the Authority about how predominance should be measured in terms of the split between community service work and health and aged care work. An entity that predominantly performs health or aged care work, and is therefore ineligible for the Scheme, would be defined as one where more than 50 percent of its employees (on a headcount basis) are performing some health or aged care work.

###### Option 2 – Abolish the employer predominance test that applies to health or related services

This option would abolish the current employer predominance test applying to health or related services included at Regulation 8(5) of the Interim Regulations. Instead, an employer in the community services sector would be defined as one that employs employees covered by the employee predominance test (currently included at Regulation 10(3) of the Interim Regulations). This would mean that employers employing at least one covered employee who undertakes community service work would be required to register with the Authority and pay a levy on their covered employees’ behalf.

| **Questions for stakeholders** |
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| **S.5** Which option provides employers in the community services sector with the greatest clarity in relation to when they are in-scope?**S.6** Are there any other viable options to improve clarity as to who is regarded as an employer in the community services sector? |

### Community and Women’s Health Centres

Apart from the status quo, there are two options to clarify the scope of the Scheme in respect to community and Women’s Health Centres (discussed in section 2.3.2.2), including:

* Including community and Women’s Health Centres in the Scheme; and
* Excluding community and Women’s Health Centres in the Scheme.

The option would also exist to include only Community Health Centres within the Scheme and exclude Women’s Health Centres, or vice-versa. However, as both Community Health Centres and Women’s Health Centres are arguably excluded from the Scheme because of the reference to the *Health Services Act 1988* in the Interim Regulations, it is appropriate to consider both sub‑sectors together in determining their inclusion or exclusion from the Scheme.

###### Option 1 – Include community and Women’s Health Centres as eligible employers under the Scheme

Under this option, Community Health Centres, Women’s Health Centres and certain disability services providers who are covered by the *Health Services Act 1988* would be explicitly referenced in the Regulations as covered employers for the purposes of the Scheme, subject to meeting the requirements of the LSBP Act. These providers would be required to register with the Authority and pay a levy to the Authority on behalf of their employees engaged in community service work.

This option reflects calls from unions and some community service peak bodies to include Community Health Centres within the scope of the Scheme because they are part of the sector. The option recognises that these organisations deliver community services, including disability services under the NDIS, and may be health centres in name only.

###### Option 2 – Exclude Community Health and Women’s Health Centres from the Scheme

This option would explicitly carve out Community Health and Women’s Health Centres from the Scheme. Consistent with the argument put forward by Community Health providers, this option would recognise their close relationship with the broader Victorian health sector through the *Health Services Act 1988.* Employees employed by a Community Health or Women’s Health service provider would not be eligible for the Scheme, regardless of whether they undertake community service work.

Option 2 reflects the firm view of the Community Health sub‑sector that they should be excluded from the Scheme.

### For-profit providers of early childhood services

Due to the specific nature of the residual problem, there is only one option, aside from the status quo, that would clarify whether for‑profit providers of early childhood services are excluded from the Scheme to reflect the intent of the LSBP Act (discussed in section 2.3.2.3):

* Specifically exclude for‑profit providers from the Scheme.

This option would clarify that for‑profit licensed children's services under the *Children's Services Act 1996* or an approved provider under the Education and Care Services National Law are not covered by the Scheme and are not required to pay levies to the Authority on behalf on their employees.

## Who is regarded as an employee in the community services sector

Apart from applying the existing employee predominance test under the status quo, there are three options to improve clarity as to who is regarded as an employee in the community services sector (discussed in section 2.3.3), including:

* Provide additional clarity around the application of the employee predominance test;
* Replace the employee predominance test with a modern award coverage test; and
* Exclude management and administrative activities from the existing employee test.

###### Option 1 – Provide additional clarity around the application of the employee predominance test

This option would provide additional clarity to employers and the Authority about how the employee predominance test would be applied. The Regulations would be amended to clarify how predominance should be measured in terms of the split between community service work and health and aged care work. An employee would be expected to spend at least 50 percent of their time performing community service work in any quarter of their employment with an employer to meet the predominance test and be eligible for the Scheme.

**Option 2 – Replace the employee predominance test with a modern award coverage test**

This option would define an employee in the community services sector in reference to the four modern awards that cover the sector:

1. The *Social, Community, Home Care and Disability Services Award 2010*;
2. The *Children’s Services Award 2010*;
3. The *Educational Services (Teachers) Award 2010*; and
4. The *Labour Market Assistance Industry Award 2010.*

Not all employees in Victoria whose employment is covered by these four modern awards would automatically be included in the Scheme. Under this option, an employee would still need to be employed by an eligible employer and be performing community service work, as defined by the Regulations, under the multi-factorial test of eligibility for the sector (see Figure 2). However, this option would clarify that managerial, administrative and support staff whose employment is covered by one of these modern awards and who is employed by an eligible employer would be covered by the Scheme. In particular, the inclusion of the *Educational Services (Teachers) Award 2010* would provide clarification on the position where non-mainstream education and training is provided as part of an eligible community service employer’s activities.

Under this option, it would be clear that employees whose employment is covered by the *Health Professionals and Support Services Award 2010* are not performing community service work for the purposes, and within the meaning, of the Scheme.

This option would apply irrespective of whether an enterprise agreement applies to an employee’s employment; the essential question is whether the relevant modern award covers the employment of that employee.[[22]](#footnote-22) Employers would be required to register these employees with the Authority and pay a levy to the Authority on their behalf.

###### Option 3 – Exclude management and administrative activities from the existing employee predominance test

This option would amend the existing employee predominance test to clarify that employees who predominantly undertake support roles, administrative or management activities relating to the delivery of community service work are not employees for the purposes of the Scheme. Employers would not be required to register these employees with the Authority or pay a levy to the Authority on their behalf.

| **Questions for stakeholders** |
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| **S.7** Are there any other viable options to improve clarity as to who is regarded as an employee in the community services sector? |

## Who is regarded as an employee in the security industry

The Interim Regulations do not provide a test to determine who is regarded as an employee for the purposes of the security sector. Apart from the status quo, there are three options to improve clarity as to who is regarded as an employee in the security sector (discussed in section 2.3.4), including:

* Introduce an activity-based predominance test for the security industry;
* Define employees in reference to the *Private Security Act 2004*; and
* Define employees in reference to the coverage of the *Security Services Industry Award 2010*.

###### Option 1 – Introduce an activity-based predominance test for the security industry

This option would introduce an employee predominance test in the Regulations. This would mean persons employed by eligible employers who are not performing security work, as defined by Schedule 3 of the LSBP Act, as the predominant activity of their employment would be excluded from the Scheme. The test is consistent with the existing test for the contract cleaning sector in the Interim Regulations, which has been simple for employers to implement. Employers would not be required to pay a levy to the Authority on these employees’ behalf. This option would clarify that managers, administrative and sales staff are not covered by the Scheme. This is consistent with the approach taken by most employers under the status quo.

###### Option 2 – Define covered employees in reference to the *Private Security Act 2004*

This option would introduce a test to define who is regarded as an employee in the security industry by reference to the *Private Security Act 2004*. Employees engaging in a ‘class A security activity’ or a ‘class B security activity’, as defined by the *Private Security Act 2004*, would be defined as employees for the purposes of the Scheme, regardless of whether this is their predominant activity.[[23]](#footnote-23) Employers would be required to pay a levy to the Authority on these employees’ behalf. This option would clarify that administrative, sales, managerial and risk-management staff employed by eligible employers are not covered by the Scheme.

This approach would be consistent with the definition of the security industry in Schedule 3 of the LSBP Act, which defines the industry in which security activities are undertaken by persons licensed to undertake them under the *Private Security Act 2004*.

###### Option 3 – Define employees in reference to the coverage of the *Security Services Industry Award 2010*

This option would use a modern awards test to define who is regarded as an employee in the security industry. All employees whose employment is covered by the *Security Services Industry Award 2010* would be covered by the Scheme. Employers would be required to pay a levy to the Authority on these employees’ behalf.

As the *Security Services Industry Award 2010* excludes employees who transport and/or deliver cash or valuables as their primary activity, this option would alter the scope of the Scheme. Employees engaging in this activity would no longer be eligible for the Scheme. The Award also excludes employees who install, maintain or repair electronic alarm and/or monitoring systems. Employees undertaking both of these activities are currently covered by the Scheme under the Interim Regulations but would be excluded from the Scheme under this option. As there is no current test to determine who is regarded as an employee in the security industry, it is not expected that defining employees in relation to this Award would bring any employees not currently covered by the Scheme within the scope of the Scheme.

Administrative and other clerical staff would not be covered by the Scheme under this option. The *Clerks–Private Sector Award 2010* will usually cover the employment of clerical employees of employers covered by the *Security Services Industry Award 2010.* Under this option, this would mean these employees would be excluded from the Scheme.

| **Questions for stakeholders** |
| --- |
| **S.8** Are there any other viable options to improve clarity as to who is regarded as an employee in the security sector? |

## Reimbursing employers for double-dipping claims in the community services sector under the Long Service Leave Act 2018

Due to the specific nature of the residual problem (discussed in section 2.3.5), there is only one option, aside from the status quo, that would address the problem of reimbursing employers for double-dipping claims in the community services sector under the *Long Service Leave Act 2018*:

* **Allowing employers who pay entitlements under the *Long Service Leave Act 2018* to be entitled to reimbursement.**

This option would ensure employers are not required to pay both a levy to the Authority on behalf of an employee and pay the same employee for a long service entitlement under the *Long Service Leave Act 2018* for the same period of service without reimbursement from the Authority. Employers would be entitled to reimbursement from the Authority for any levy paid once an employee accesses an entitlement under the *Long Service Leave Act 2018*. The existing provisions in the Regulations which deal with the ability of employers claiming a reimbursement for long service entitlements where an employee has an entitlement to long service leave under a fair work instrument for the same service period (for example, under a National Employment Standard, a modern award, an enterprise agreement or a transitional instrument under the *Fair Work Act 2009*) would remain in place.

**Any regulatory amendments to reimburse employers for double-dipping under the *Long Service Leave Act 2018* will not be included in the Proposed Regulations at this time.** This is because this option requires both legislative amendments to the LSBP Act and changes to the Regulations.Subject to future Parliamentary consideration of amendments to the LSBP Act, this option would not be implemented until 2021 at the earliest. Notwithstanding this limitation, the option to reimburse employers for double-dipping is considered in this RIS for transparency, to outline the likely legislative and regulatory changes (subject to Parliamentary consideration), and to streamline subsequent amendments to the Regulations.

## Options Not Progressed to Impact Analysis

As well as the options detailed above, there are options that were considered but not progressed to impact analysis, due to unworkable technical difficulties in their implementation.

### Legislative amendments to the LSBP Act

With the exception of the problem of reimbursing employers for double-dipping claims in the community services sector under the *Long Service Leave Act 2018*, addressing the residual problems through legislative amendments to the LSBP Act is not viable. While stakeholders recommended amending the LSBP Act to improve clarity, it is appropriate to deal with the residual problems detailed in section 2 of this RIS through Regulations as the LSBP Act specifically delegates the issue to be prescribed by Regulations. Changes contrary to the intent and drafting of the LSBP Act were not considered in scope.

### Additional guidance issued by the Authority

Addressing confusion within the community services and security sectors through issuing additional guidance from the Authority is not viable. Stakeholders do not believe this option would address their requests for greater clarity. The Authority has also reported that they are not in a position to provide greater clarity through additional guidance without the Regulations or LSBP Act providing greater clarity.

### Opt-in clause for employees to be brought within the scope of the Scheme

The inclusion of an ‘opt-in’ clause to allow excluded employees to enter into an agreement with their employer so that they are brought within the scope of the Scheme is not viable and is not legally viable under the LSBP Act. Stakeholders raised this proposal as an option to reduce the administrative burden associated with determining which employees are covered by the Scheme and increase equity between staff within the workplace. While it may be possible to include a mechanism whereby an employee and employer can agree in writing that an otherwise excluded employee is covered by the Scheme, the Authority is not legally able to accept a levy on behalf of that employee unless the Act was amended to provide for this.

### Only require Community Health employers to make levy payments to the Authority when continuous service under an award- or enterprise agreement-derived long service leave entitlement is broken

In recognition of the existing multi-employer leave portability scheme within the Community Health sub‑sector established under some enterprise agreements, the Victorian Healthcare Association proposed an alternative option to only pay the relevant payments to the Authority when an employee leaves the Community Health sub‑sector.[[24]](#footnote-24) This option aims to ensure employees who move in and out of the Community Health sub‑sector into the broader community services sector, and are therefore not covered by the existing multi-employer leave portability scheme, would be able to access portable long service benefits under the Scheme.

The proposed approach would involve:

1. Community Health Centres registering all in-scope employees with the Authority;
2. Community Health Centres providing the Authority with evidence that the covered employees have an applicable award- or enterprise agreement-derived long service leave entitlement, and that long service leave has been accrued for that employee; and
3. Where termination of employment occurs and therefore continuous service is broken, the employer will then make the relevant payments to the Authority for the service period reported but not paid by the employer.

This option is not viable as it would treat one sub‑sector of the community services sector differently to the broader sector. As all employers in the community services sector have long service leave obligations under an applicable award- or enterprise agreement-derived long service leave entitlement, other sub‑sectors within the broader community services sector could also argue that they should not have to pay the levy to the Authority until an employee leaves the employer. This has the potential to undermine the sustainability of the Scheme.

The existing double-dipping provisions ensure an employer is not required to pay both a levy to the Authority and pay an employee for a long service entitlement under a fair work instrument by the LSBP Act (or the Interim Regulations) for the same period of service. Under the definition in the *Fair Work Act 2009*, a ‘fair work instrument’ includes a multi‑enterprise agreement.[[25]](#footnote-25)

# IMPACT ANALYSIS

## Introduction and Analysis Framework

The purpose of this section is to identify and analyse the impacts of the options identified in section 4. For each option, the outcomes for employees, employers, and the Authority have been considered. For consistency of analysis, these impacts have been appraised according to the analysis framework outlined below which classifies and rates impacts based on their impact on equity for covered employees under the Scheme, costs to employers, and the impact on the Authority.

Impacts have been assessed relative to the status quo under the Interim Regulations as the case for Regulations to support the Act was made in the 2019 RIS. A summary of the 2019 RIS is provided in section 1.4.1.[[26]](#footnote-26) The status quo provides a clearer point of comparison for stakeholders and avoids repeating recently completed work. It allows stakeholders to understand the impact of the options against their current experience of the Scheme.

Drawing on the framework in the 2019 RIS, Table 4 outlines the criteria which have been used to assess the impacts of each feasible option. Each criterion has been assigned a weighting based on its importance, with costs and benefits weighted equally overall.

Assessment of benefits

* The primary benefit of the Scheme and the Proposed Regulations, equity for employees in the covered sectors, has a weighting of 50 percent. Options should look to maximise the number of employees covered by the Scheme that are intended to be covered by the Scheme. Options rate higher if employees performing the same or similar work are covered, regardless of employer.

Assessment of costs

* The cost to employers has an overall weighting of 40 percent, and is broken down into:
* The financial cost to employers of paying the levy to the Authority, which has a weighting of 20 percent; and
* The administrative cost of uncertainty on employers, which has a weighting of 20 percent.

The cost of uncertainty has been given the same weighting as the financial cost of the levy on employers in response to feedback from stakeholders. Different stakeholders weighted the cost of uncertainty differently compared to the financial cost of paying the levy. However, on balance, stakeholders made clear that they were as concerned with ensuring greater clarity (which is one of the biggest problems faced by employers across the covered sectors) as they are about minimising cost (which, in most cases, would be marginal relative to the current costs of participating in the Scheme). Uncertainty can have a range of difficult-to-quantify impacts, including delay, administrative, psychological and legal costs.

* The cost impact on the Authority has a weighting of 10 percent. Options should reduce the administrative burden on the Authority associated with administering the Scheme. The lower weighting for this criterion reflects that the costs to the Authority relating to the Scheme are less than the total financial and administrative costs on employers.

Table 4: Analysis framework and criteria

| Criteria | Assessment against the status quo | Weight |
| --- | --- | --- |
| Equity for covered employees | Options should ensure equity of long service entitlements within the covered sector by ensuring that employees who were intended to be covered by the Scheme are covered.  | 50% |
| Impact on employers – financial cost | Options should minimise the financial cost of levies on employers covered by the Scheme. | 20% |
| Impact on employers – cost of uncertainty  | Options should minimise the administrative cost of uncertainty on employers relating to the operation of the Scheme. | 20% |
| Impact on the Authority  | Options should reduce the administrative burden on the Authority associated with administering the Scheme. | 10% |

For each option, scores are assigned against each criterion, ranging from minus three to three, with three representing a high alignment to the criterion in reference to the status quo. The scoring framework is outlined in Table 5. The analysis framework has a limited scale (three points in the positive and negative scale) in order to not give the analysis a sense of false precision, as there are difficulties in quantifying a good deal of the impact discussed here. For this reason, it is especially important that the evaluation framework in section 8 is implemented, in order to measure the actual impact of the Proposed Regulations.

*Table 5:* *Scoring system for the impact analysis framework*

| Score  |
| --- |
| **3** | A score of three will be provided where the option is much more aligned with the criterion than the status quo. |
| **2** | A score of two will be provided where the option is more aligned with the criterion than the status quo. |
| **1** | A score of one will be provided where the option is somewhat more aligned with the criterion than the status quo. |
| **0** | A score of zero will be provided where there is no change to the status quo. |
| **-1** | A score of minus one will be provided where the option is somewhat less aligned with the criterion than the status quo. |
| **-2** | A score of minus two will be provided where the option is less aligned with the criterion than the status quo. |
| **-3** | A score of minus three will be provided where the option is much less aligned with the criterion than the status quo. |

## Analysis of options

This section uses the above analysis framework to assess the status quo under the Interim Regulations for each residual problem, and then appraises each option.

Due to the multi-factorial test of eligibility for the community services sector, detailed in Figure 2 in section 1.3, options relating to the problems of what is defined as community service work, who is regarded as an employer in the community services sector and who is regarded as an employee in the community services sector will have interrelated, and potentially cumulative, impacts. However, there is no interdependence between the problems or options. A decision can be made on a preferred option to address each problem without this affecting any decisions relating to the preferred option for another problem. Where independencies occur, assumptions about the chosen, interrelated option are clearly stated when estimating impact.

The analysis also considers where uncertainty has resulted in stakeholders applying the Regulations differently to how they were intended. This has been clearly stated where this has occurred.

### What is defined as community service work

As discussed in section 3.1, the objectives for determining what is defined as community service work should provide certainty to employees and employers in the sector about what work is covered by the Scheme, and ensure employees across the community services sector have fair and equitable access to the Scheme.

A summary of the options for providing clarity as to whether care delivered in a private residence is defined as community service work for the purposes of the Scheme, along with their relative scores compared to the status quo, is as follows:

Table 6: Summary of definition of community service work impact analysis

| **Option** | **Scores** |
| --- | --- |
| Employee equity (50%) | Employer financial cost (20%) | Employer uncertainty cost (20%) | Impact on Authority(10%) | **Weighted score** |
| Status quo under the Interim Regulations | 0 | 0 | 0 | 0 | **0** |
| Option 1 – Clarify community service work undertaken in the home is within scope | 3 | -1 | 3 | 3 | **2.2** |
| Option 2 – Exclude home care work involving ‘aged’ patients | -2 | 1 | -2 | 2 | **-1.0** |
| Option 3 – Clarify that all work undertaken in the home is excluded from the Scheme | -3 | 2 | 1 | 3 | **-0.6** |

The rationale for these scores is summarised for each option in the following sub-sections.

###### Analysis of the status quo

The status quo is analysed to provide a point of comparison for the options which follow. Despite the intent of the Interim Regulations to include community service work undertaken in the home within the scope of the Scheme, maintaining the status quo would mean employers, employees and the Authority would lack clarity as to whether work undertaken in a private residence is within scope of the Scheme.

* The lack of clarity could result in eligible employees incorrectly being denied access to, or ineligible employees incorrectly being given access to, portable long service benefits under the Scheme;
* The lack of clarity would continue to add to the administrative burden of uncertainty on employers in determining whether their organisation and their employees are covered by the Scheme; and
* The Authority would continue to be burdened by questions from the sector and be unable to provide clear guidance.

###### Option 1 – Clarify that care provided in a private residence is defined as community service work for the purposes of the Scheme, irrespective of the age of the client

Equity for employees

This option is much more aligned with the criterion compared to the status quo. This option promotes equity of long service entitlements within the sector. Compared to the status quo, employees who deliver community service work, regardless of the setting, would have certainty that they would be eligible to be covered by the Scheme. This is consistent with the intent of the LSBP Act.

Impact on employers – financial cost

This option is somewhat less aligned with the criterion compared to the status quo. It is expected to have a financial impact on employers who, under the status quo, have not registered themselves or their employees with the Authority because of a misunderstanding relating to their eligibility. These employers would now be required to register with the Authority and pay levies to the Authority on behalf of their eligible employees.

Impact on employers – cost of uncertainty and administration

This option is much more aligned with the criterion compared to the status quo. It would provide clarity to employers that community service work undertaken in the home is within scope for the purposes of the Scheme. Under this option, employers would not be required to track where a service is delivered. This would make it easier for employers to determine whether their organisation and their employees who are performing community service work are covered by the Scheme compared to the status quo.

Impact on the Authority

This option is much more aligned with the criterion compared to the status quo. It would provide clarity that care delivered in the home is covered by the Scheme. This would assist the Authority to administer the Scheme and to provide clearer advice to employers and employees. Determining eligibility would remain the responsibility of employers.

###### Option 2 – Exclude home care involving ‘aged’ clients from the definition of community service work

Equity for employees

This option is less aligned with the criterion compared to the status quo. Compared to the status quo, it would significantly undermine equity within the sector as community sector employees deliver services to clients of all ages. Services in a private home should properly be considered community services and not aged care services to promote equity within the sector.

Impact on employers – financial cost

This option is somewhat more aligned with the criterion compared to the status quo. It would reduce the financial impact on employers compared to the status quo, as care work involving ‘aged’ patients would not be covered the Scheme.

Impact on employers – cost of uncertainty and administration

This option is less aligned with the criterion compared to the status quo. It would be a significant additional administrative burden on employers compared to the status quo. Employers would need to track the age of their employees’ clients in addition to the type of work their employees perform to determine whether their organisation and their employees are within scope of the Scheme.

Impact on the Authority

This option is more aligned with the criterion compared to the status quo. This option would provide clarity for the Authority that services provided to ‘aged’ patients are not within the scope of the Scheme. This would assist the Authority to administer the Scheme and provide clearer advice to employers and employees.

While there would be an overall reduction in pressure on the Authority compared to the status quo, the Authority would still expect to field a number of enquiries from employers as a test based on a client’s age is not as easy to administer as a test based on location. This is burdensome for the Authority as it is the responsibility of the employer to apply the test. It is also invasive of the client’s privacy.

###### Option 3 – Exclude all work undertaken in a private residence from the definition of community service work for the purposes of the Scheme

Equity for employees

This option is much less aligned with the criterion compared to the status quo. Compared to the status quo, employees who deliver community services in the home would be denied long service benefit portability because this activity would no longer be defined as community service work for the purposes of the Scheme, whereas, an employee delivering the same service within a community service provider’s premises would be covered by the Scheme. This would undermine equity of long service entitlements within the sector.

Impact on employers – financial cost

This option is more aligned with the criterion compared to the status quo. It would result in some employees losing access to the Scheme which would have a financial benefit for employers who would no longer be required to pay levies to the Authority on their behalf. This is because employers and their employees delivering community services in the home would no longer be performing community service work for the purposes of the Scheme.

Impact on employers – cost of uncertainty and administration

This option is somewhat more aligned with the criterion compared to the status quo. This option would provide clarity to employers that all work undertaken in the home is out of scope for the purposes of the Scheme. However, this option is expected to marginally add to the administrative burden on employers. Compared to the status quo, employers would need to track where work is undertaken in addition to the type of work undertaken in determining eligibility for the Scheme.

Impact on the Authority

This option is much more aligned with the criterion compared to the status quo. This option would provide clarity that all work undertaken in the home is not defined as community service work for the purposes of the Scheme. This would assist the Authority to administer the Scheme and to provide clearer advice to employers and employees. Determining eligibility would remain the responsibility of employers.

| **Questions for stakeholders** |
| --- |
| **S.9** Which option best ensures that employees across the community services sector have fair and equitable access to the Scheme? |

### Who is regarded as an employer in the community services sector

As discussed in section 3.2, the criterion for determining who is regarded as an employer in the community services sector should provide certainty to employees and employers in the sector on which employers are covered by the Scheme, and ensure employees across the community services sector have fair and equitable access to the Scheme.

#### Employer predominance test

A summary of the options for addressing the problems identified with the employer predominance test, along with their relative scores compared to the status quo, is as follows:

Table 7: Summary of employer predominance test impact analysis

|  |  |
| --- | --- |
| **Option** | **Scores** |
| Employee equity (50%) | Employer financial cost (20%) | Employer uncertainty cost (20%) | Impact on Authority(10%) | **Weighted score** |
| Status quo under the Interim Regulations | 0 | 0 | 0 | 0 | **0** |
| Option 1 – Improve clarity around the application of the predominance test | 1 | -1 | 1 | 1 | **0.6** |
| Option 2 – Abolish the employer predominance test | 3 | -2 | 3 | 3 | **2.0** |

The rationale for these scores is summarised for each option in the following sub-sections.

**Analysis of the status quo**

The status quo is analysed to provide a point of comparison for the options which follow. The status quo would leave the employer predominance test as it currently stands in the Interim Regulations unchanged. Leaving the current employer predominance test unchanged means employers, employees and the Authority would lack clarity as to who is not regarded as an employer in the community services sector.

* Community sector employees of employers that predominantly deliver health or aged care services would continue to be denied access to portable long service benefits regardless of the fact that they undertake community service work;
* Employers would continue to be impacted by the administrative burden of applying an unclear test to determine what share of their work is delivering health or related work; and
* The Authority would continue to have difficulties providing clear advice to employers about whether they are required to register with the Scheme.

###### Option 1 – Improve clarity around the application of the employer predominance test

Equity for employees

The option is somewhat more aligned with the criterion compared to the status quo. Compared to the status quo under the Interim Regulations, clearer guidance would reduce the opportunities for employers to misunderstand their requirements or inconsistently apply the predominance test to the detriment of their employees, ensuring that the test is applied consistently across the sector. This would ensure more employees who were intended to be within scope of the Scheme can access portable long service benefits.

However, some employees who perform community service work will continue to be denied access to portable long service benefits because their employer is not a covered employer for the purposes of the Scheme as the employer predominantly performs health or aged care work. Denying a community service employee coverage because of the nature of their employer’s work undermines equity within the Scheme.

Impact on employers – financial cost

This option is somewhat less aligned with the criterion compared to the status quo. Providing greater clarity around the application of the employer predominance test would likely result in marginally more employers being within the scope of the Scheme compared to the status quo. These employers were always intended to be included within the scope of the Scheme. However, this would have a cost impact on the newly covered employers, who will now be required to pay levies to the Authority on behalf of their eligible employees. This cost is not possible to quantify as it depends on the number of employers who have incorrectly applied the predominance test and the number of eligible employees in each employer.

Impact on employers – cost of uncertainty and administration

This option is somewhat more aligned with the criterion compared to the status quo. Providing additional guidance on measuring predominance would make the test marginally less burdensome for employers to apply the employer predominance test. However, employers would continue to be required to undertake an assessment on the share of their workforce that undertakes community service work to determine whether they are required to register with the Authority. Stakeholders have reported that this task is quite burdensome – although this burden would be reduced under this option compared to the status quo. The challenge in measuring predominance is greater in the community services sector than the contract cleaning or security sectors because the workforce undertakes more varied work. It is not easy to differentiate between employees directly delivering community services and employees supporting the delivery of community service work through administrative or managerial roles. These activities are often indivisible in the sector and were intended to be within scope of the Scheme.

Impact on the Authority

This option is somewhat more aligned with the criterion compared to the status quo. Additional clarity around the application of the employer predominance test in the Regulations would assist the Authority provide clearer guidance to the sector compared to the status quo. The Authority would be required to update their guidance notes to the sector.

While there would be an overall reduction in pressure on the Authority compared to the status quo, the Authority would still be expected to field a large number of enquiries from employers seeking assistance with measuring predominance under the test. This is burdensome for the Authority as it is the responsibility of the employer to apply the test.

**Option 2 – Abolish the employer predominance test that applies to health or related services**

Equity for employees

This option is much more aligned with the criterion compared to the status quo. Eligible employees who deliver community service work would be covered by the Scheme, regardless of whether their employer undertakes community service work as their predominant activity. Compared to the status quo, this would ensure that no employee in the sector is excluded because their employer predominantly performs health or aged care work, promoting equity of long service entitlements within the sector.

Impact on employers – financial cost

This option is less aligned with the criterion compared to the status quo. Stakeholders have reported that this option would increase the number of employees covered by the Scheme. Entities with a small proportion of their workforce undertaking community service work who were previously excluded under the employer predominance test will now be in scope. These employers would be subject to the additional financial cost of paying levies on behalf of eligible employees to the Authority on their behalf. This cost is not possible to quantify as stakeholders were not able to estimate the number of employers and employees who are currently excluded from the Scheme because of the employer predominance test. However, it is not expected to impact the majority of employers in the sector.

Impact on employers – cost of uncertainty and administration

This option is much more aligned with the criterion compared to the status quo. Abolishing the employer predominance test would reduce the administrative burden of, and the uncertainty associated with, employers measuring their predominant activity to determine whether they are a covered employer under the Scheme. Instead, employers will only need to determine whether any of their employees deliver community service work for the purposes of the Scheme. This benefit would be sector-wide.

Impact on the Authority

This option is much more aligned with the criterion compared to the status quo. Removing the employer predominance test would simplify the multi-factorial test of eligibility and assist the Authority implement the Scheme, register eligible employers and provide clearer guidance to the sector.

| **Questions for stakeholders** |
| --- |
| **S.10** What type of employers (and how many) would be brought within the scope of the Scheme if the employer predominance test was abolished? **S.11** Are there any additional impacts on employers and employees of the options that are not reflected in this analysis? **S.12** Which option best ensures that employees across the community services sector have fair and equitable access to the Scheme? |

#### Community and Women’s Health Centres

A summary of the options for determining who is regarded as an employer in the community services sector in relation to Community Health and Women’s Health Centres, along with their relative scores compared to the status quo, is as follows:

Table 8: Summary of community and Women’s Health Centres impact analysis

|  |  |
| --- | --- |
| **Option** | **Scores** |
| Employee equity (50%) | Employer financial cost (20%) | Employer uncertainty cost (20%) | Impact on Authority(10%) | **Weighted score** |
| Status quo under the Interim Regulations | 0 | 0 | 0 | 0 | **0** |
| Option 1 – Include Community Health and Women’s Health Centres in the Scheme | 2 | -3 | 3 | 3 | **1.3** |
| Option 2 – Exclude Community Health and Women’s Health Centres from the Scheme | -1 | 1 | 3 | 3 | **0.6** |

The rationale for these scores is summarised for each option in the following sub-sections.

###### Analysis of the status quo

The status quo is analysed to provide a point of comparison for the options which follow. The status quo would leave the definition of who is not regarded as an employer in the community services sector as it currently stands in the Interim Regulations.

* Employees undertaking community service work within a Community Health or Women’s Health Centre may be disadvantaged if a lack of clarity around their eligibility to participate in the Scheme precludes them from accessing – or otherwise limiting the value of – a long service benefit;
* Community Health and Women’s Health Centres would continue to lack certainty as to whether they are within scope of the Scheme, which is administratively burdensome; and
* The Authority would continue to be burdened by questions from the sector and be in no better position to provide clear guidance.

**Option 1 – Include Community Health and Women’s Health Centres as eligible employers under the Scheme**

Equity for employees

This option is more aligned with the criterion compared to the status quo. Employees undertaking community service work in Community Health Centres and Women’s Health Centres would have certainty that they can access portable long service benefits under the Scheme. This includes Community Health employees performing disability services under the NDIS (comparable NDIS entities were brought within scope of the Scheme from 1 January 2020). Community service employees would be able to move throughout the broader community services sector without losing their long service benefits. Under the status quo, these employees have not been given certainty that they can access the Scheme.

The impact on the Community Health sub‑sector and Women’s Health sub‑sector are separately discussed below.

***Community Health Centres***

Compared to the status quo, employees moving into or out of the Community Health sub‑sector would now have their service within the sector recognised. Under the existing multiple-employer portability entitlements within the Community Health sub‑sector, employees need to remain with the Community Health or public health sector to have their service recognised.

Stakeholders were not able to provide an estimate of the share of the Community Health workforce that moves in and out of the broader community services sector and who would therefore benefit under this option. Service providers expected it would be a small proportion and noted that it is the employee’s choice to move to a different employer with potentially different entitlements. Union and employee groups suggested the share would not be insignificant, although they did not provide an estimate.

The long service benefits under the Scheme are less generous than the benefits available under the existing multiple-employer portability entitlements. However, employees would be able to access long service leave benefits under the Scheme after seven years, whereas they need to wait 10 years to access benefits under the multiple-employer scheme. Community Health service providers stated that their inclusion in the Scheme would cause them to look at removing the existing multiple-employer portability entitlements during the next round of enterprise bargaining, which may detrimentally impact all staff within the Community Health sub‑sector if less generous benefits are introduced. It is not possible to estimate the likelihood of this occurring as it would depend on individual arrangements within each workplace and the final outcome negotiated between employers, employees and relevant unions.

| **Questions for stakeholders** |
| --- |
| **S.13** What share of the Community Health workforce move into and out of the broader community services sector? |

###### Women’s Health Centres

Although the majority of Women’s Health Centres have already registered with the Authority (noting that their entire workforce is not currently covered), this option would provide certainty that the estimated 150‑200 eligible employees in the Women’s Health sub‑sector can access portable long service benefits under the Scheme. Compared to the status quo, this would ensure that employees who were intended to be covered by the Scheme are covered.

Impact on employers – financial cost

This option is much less aligned with the criterion compared to the status quo. It would have a much greater financial impact on Community Health and Women’s Health Centres compared to the status quo as it would now be clear that they are required to register with the Authority and pay levies on behalf of their eligible employees. The impact will vary greatly between employers, depending on the size and share of the workforce undertaking community service work, and the salary costs of the eligible workforce undertaking community service work.

While some employees in the Women’s Health sub‑sector are currently covered by the Scheme; for the purposes of estimating the cost impact of this option, it is assumed that Community Health providers and Women’s Health providers are currently not within scope of the Scheme. This assumption is not carried through into the assessment against other criteria. It is also assumed that the employer predominance test has been abolished (which is the preferred option based on the analysis in section 5.2.2.1), and that all providers within the Community Health and Women’s Health sub‑sectors would be within scope of the Scheme regardless of the share of health or health related work they undertake.

This analysis estimates two financial cost impacts associated with the Scheme:

1. **Estimated annual direct levy cost** – this is the cost to the employer of paying the 1.65 percent levy of ordinary wages to the Authority each year for their employees engaged in community service work. This cost is the direct financial cost associated with being covered by the Scheme and paying levies to the Authority each year.
2. **Estimated annual net cost impact** – actuarial modelling determined that the annual net cost impact for the community services sector as a whole is 0.45 percent of ordinary salary costs for those employees engaged in community service work. This has the potential to increase to 0.85 percent of ordinary salary costs for the Community Health sub‑sector because of a higher turnover rate.

The annual net cost impact is lower than the direct levy cost due to the fact that employers already need to account for their employees’ long service entitlements. This is the difference between what organisations would already be accounting for and the direct levy costs payable to the Authority. Figure 3 below provides a summary of how the net cost impact was determined.

Figure 3: Methodology for determining the annual net cost impact of the levy on employers

|  |
| --- |
| In 2018, as a part of a Department of Health and Human Services commissioned study, KPMG consulted employers in the community services sector to identify the potential cost impacts they would incur due to the introduction of the Scheme. A sample of organisations across the community services sector with different characteristics and employee compositions were consulted. A cash flow projection model was then built in accordance with actuarial principles, based on the information gathered from consultations. Key inputs for determining the cost of long service under existing long service leave entitlements (prior to the introduction of the Scheme) included information such as expected salary increases, long service leave taking behaviour, staff turnover rates, accrual rates, employee profiles and existing longer service benefits. KPMG analysis found that, on average, organisations (across the community service sector) set aside approximately 1.2 percent of salary costs each year to account for their existing long service provisions. Costs were demonstrated at an individual and aggregate level. The modelling determined that, for the community services sector as a whole, the Scheme would increase overall costs by 0.45 percent of salary costs (under a levy rate of 1.65 percent for the sector). **For the purposes of the subsequent analysis, it is assumed that a cost increase of 0.45 percent is representative of the annual net cost impact on the Women’s Health sub‑sector.**Data collected from Community Health Centres, suggested the Scheme would increase overall costs by 0.85 percent of salary costs (under a levy rate of 1.65 percent for the sector). **For the purposes of the subsequent analysis, it is assumed that the annual net cost impact on the Community Health sub‑sector would be between 0.45 and 0.85 percent of salary costs.** |

The impact on the Community Health sub‑sector and Women’s Health sub‑sectors are separately discussed below.

***Community Health Centres – sector-wide impacts***

The sector-wide impacts of including Community Health Centres in the Scheme were estimated using feedback from stakeholders and data collected from annual reports relating to the number of employees working in the sub‑sector, the average full-time salary for the sub‑sector, and the estimated share of this workforce undertaking community service work.

* Reporting to the Australian Charities and Not-for‑profits Commission in June 2019 lists 10,191 staff as permanent, part-time and casual employees in the Community Health sub‑sector in Victoria. The Victorian Healthcare Association estimates that the number of staff would now be approaching 10,500 staff employed across the 28 registered Community Health services in Victoria.[[27]](#footnote-27) Feedback from stakeholders suggests that this headcount would roughly equate to an estimated 6,800 FTE employees in the sector (assuming 0.65 FTE employee = 1 headcount employee).
* Based on feedback from Community Health Centres, the average ordinary full time salary for the Community Health sub‑sector is estimated to be approximately $70,000 per annum.
* Based on stakeholder engagement, the estimated share of this workforce undertaking community service work is estimated to be between 10 percent (low workforce share scenario) and 50 percent (high workforce share scenario). Not all Community Health service providers interviewed were able to provide an estimate based on the current definition of an employee under the Interim Regulations. Many providers suggested that all their workforce would be deemed to be undertaking health work, and therefore would be excluded from the Scheme.

As summarised in Table 9, the annual estimated direct levy cost to the Community Health sub‑sector is expected to be between $788,000 (low workforce share scenario) and $3.9 million a year (high workforce share scenario). Taking into account that employers already provision for long service leave (as well as provision for higher benefits than is provided for in the Scheme), the average net cost impact for the Community Health sub‑sector as a whole is between $215,000 to $406,000 (low workforce share scenario) and $1.1 million and $2.0 million a year (high workforceshare scenario).

Figure 4 provides an overview of the assumptions reflected in the estimated impacts.

Table 9: Estimated sector-wide financial impact on the Community Health sub‑sector

|  |
| --- |
| **Approximate annual cost increase (1.65% levy)** |
| 10% of workforce covered by the Scheme (Low scenario) | **$788,000** |
| 50% of workforce covered by the Scheme (High scenario) | **$3.9 million** |
| **Estimated annual net cost increase (0.45 to 0.85% increase)** |
| 10% of workforce covered by the Scheme (Low scenario) | **$215,000 - $406,000** |
| 50% of workforce covered by the Scheme (High scenario) | **$1.1 million - $2.0 million** |

Figure 4: Assumptions reflected in the estimated impact on the Community Health sub‑sector

|  |
| --- |
| **Estimated annual cost increase = Number of employees x average salary x levy rate**Estimated cost increase (Low scenario) = 682 FTE x $70,000 x 1.65% = **$788,000** Estimated cost increase (High scenario) = 3,412 FTE x $70,000 x 1.65% = **$3.9 million** **Estimated annual net cost increase = Number of employees x average salary x net cost increase**Estimate net cost increase (Low) = 682 FTE x $70,000 x (0.45% to 0.85%) = **$215,000 to $406,000**Estimated net cost increase (High) = 3,412 FTE x $70,000 x (0.45% to 0.85%) = **$1.1 million to $2.0 million**Number of employees coveredTotal number of employees in the sub‑sector = 10,500 headcount = 6,825 FTE (1 headcount = 0.65 FTE)Number of employees covered under a **low workforce share scenario** = 10% of 6,825 FTE = **682 FTE** Number of employees covered under a **high workforce share scenario** = 50% of 6,825 FTE = **3,412 FTE**Average salaryThe average FTE salary for the sub‑sector was assumed to be **$70,000 per annum**.Levy rateThe levy rate for the community services sector is **1.65% of ordinary wages**.Net cost increaseAs detailed in Figure 3, the annual net cost impact for the sub‑sector is **0.45% to 0.85% of ordinary wages**.*Note: all figures are rounded to the nearest 1,000* |

***Community Health Centres – impacts on individual service providers***

The size of each Community Health provider varies greatly across Victoria. Therefore, the financial impact on each Community Health Centre would differ depending on the number of employees. Table 10 summarises the estimated cost impact of including Community Health Centres as eligible employers for a small provider (with a total workforce of 100 FTE staff), a medium provider (with a total workforce of 500 FTE staff) and a large provider (with a total workforce of 1,000 FTE staff). It is possible that some providers do not employ any employees to deliver community service work and, therefore, they would not be financially impacted by this option.

Figure 5 provides an overview of the assumptions reflected in the estimated impacts.

Some Community Health providers consulted stated that the cost impacts of the Scheme would be equal to many providers’ operating surplus. A number of providers interviewed made clear that they would seriously consider merging with a state hospital as a way of ensuring they remained outside the Scheme and to improve their financial viability. Service providers also stated that they could only afford the additional cost associated with the Scheme by cutting services or staff.

Table 10: Summary of estimated financial impact on Community Health Centres

|  |
| --- |
| **Approximate annual cost increase per provider (1.65% levy)** |
| 10% of workforce covered by the Scheme | 50% of workforce covered by the Scheme |
| Small provider | **$12,000** | Small provider | **$58,000** |
| Medium provider  | **$58,000** | Medium provider  | **$289,000** |
| Large provider | **$116,000** | Large provider | **$578,000** |
| **Estimated annual net cost increase per provider (0.45 to 0.85% increase)** |
| 10% of workforce covered by the Scheme | 50% of workforce covered by the Scheme |
| Small provider | **$3,000 - $6,000** | Small provider | **$16,000 - $30,000** |
| Medium provider  | **$16,000 - $30,000** | Medium provider  | **$79,000 - $149,000** |
| Large provider | **$32,000 - $60,000** | Large provider | **$158,000 - $298,000** |

In addition to the above costs, providers stated that additional payroll staff and payroll systems would need to be purchased to support administration of the Scheme. Service providers stated that their current HR and payroll systems would not be able to track eligibility for the Scheme alongside the sector’s existing multi-employer portability scheme. Stakeholders consulted were not able to provide an estimate of these costs, although some suggested it would be material.

Figure 5: Assumptions reflected in the estimated impact on Community Health Centres

|  |
| --- |
| **Estimated annual cost increase = Number of employees x average salary x levy rate****Estimated annual net cost increase = Number of employees x average salary x net cost increase**Number of employees covered under low (10%) and high (50%) workforce share scenariosNumber of employees covered in a small provider (100 FTE) = **10 FTE** (low) to **50 FTE** (high)Number of employees covered in a medium provider (500 FTE) = **50 FTE** (low) to **250 FTE** (high)Number of employees covered in a large provider (1,000 FTE) = **100 FTE** (low) to **500 FTE** (high)Average salaryThe average FTE salary for the sub‑sector was assumed to be **$70,000 per annum**.Levy rateThe levy rate for the community services sector is **1.65% of ordinary wages**.Net cost increaseAs detailed in Figure 3, the annual net cost impact for the sub‑sector is **0.45% to 0.85% of ordinary wages**.*Note: all figures are rounded to the nearest 1,000* |

###### Women’s Health Centres

The sector-wide impacts of including Women’s Health Centres in the Scheme were estimated using feedback from stakeholders and data collected from annual reports relating to the number of employees working in the sub‑sector, total staff expenses across the sub‑sector, and the estimated share of this workforce undertaking community service work.

* Feedback from stakeholders and data collected from annual reports suggests that there are approximately 150‑200 people employed across the six state-wide and nine regional-based Women’s Health services.[[28]](#footnote-28)
* Between 90 to 100 percent of this workforce is estimated to be undertaking community service work. We have assumed a 95 percent workforce share for modelling purposes.

Table 11 summarises the estimated cost impact of including Women’s Health Centres as eligible employers under the Scheme. Figure 6 provides an overview of the assumptions reflected in the estimated impacts.

* The annual direct levy cost is estimated to be $563,000 for the sub‑sector as a whole, and $38,000 on average per year for each of the nine providers.
* Recognising that employers already need to provision for long service entitlements, the average annual net cost is estimated to be $154,000 a year for the sub‑sector as a whole, and $10,000 on average per year for each service provider.

The cost impact per provider would vary greatly between providers depending on the number of staff they employ.

While the inclusion of Women’s Health Centres in the Scheme would have a financial impact on providers, feedback from stakeholders made it clear that employers in the sub‑sector would welcome their inclusion in the Scheme. The sub‑sector views portable long service benefits as positive workplace entitlement for the workforce (the majority of which is female).

Table 11: Estimated financial impact on the Women’s Health sub‑sector

|  |
| --- |
| **Approximate annual cost increase (1.65% levy)** |
| Sector-wide | **$563,000** |
| Per service provider | **$38,000** |
| **Estimated annual net cost increase (0.45% increase)** |
| Sector-wide | **$154,000**  |
| Per service provider | **$10,000** |

Figure 6: Assumptions reflected in the estimated impact on the Women’s Health sub‑sector

|  |
| --- |
| **Estimated annual cost increase = Staff expenses x share workforce covered x levy rate****Estimated annual net cost increase = Staff expenses x share workforce covered x net cost increase**Staff expensesDrawing on data from annual reports, staff expenses for the **total sub‑sector** is **$35.9 million per annum**.The estimated average staff expenses for each of the **15 service providers** is **$2.4 million per annum**.Share of the workforce covered by the SchemeBased on feedback from stakeholders, it was assumed that **95% of the workforce** is covered.Levy rateThe levy rate for the community services sector is **1.65% of ordinary wages**.Net cost increaseAs detailed in Figure 3, the annual net cost impact for the sub‑sector is **0.45% of ordinary wages**.*Note: all figures are rounded to the nearest 1,000* |

Impact on employers – cost of uncertainty and administration

This option is much more aligned with the criterion compared to the status quo. Community Health and Women’s Health service providers would have complete certainty that they are covered by the Scheme and would need to pay levies to the Authority on behalf of eligible employees.

Impact on the Authority

This option is much more aligned with the criterion compared to the status quo. The greater clarity would assist the Authority to implement the Scheme, register eligible employers and provide clearer guidance to the sector. It would also reduce the administrative burden on the Authority of dealing with the two sub‑sectors regarding their eligibility for the Scheme.

###### Option 2 – Exclude Community Health and Women’s Health Centres from the Scheme

Equity for employees

This option is somewhat less aligned with the criterion compared to the status quo. Under the status quo, most employees are not currently eligible for the Scheme due to the confusion about whether Community Health and Women’s Health Centres are covered by the Scheme. However, explicitly excluding Community Health and Women’s Health Centres from the Scheme would reduce equity within the community services sector. Compared to the current state of uncertainty under the status quo, this option would clarify that employees in these sub‑sectors are not covered by the Scheme. Employees in Community Health and Women’s Health Centres who undertake community service work would be denied access to portable long service benefits (despite undertaking similar work to employees in the broader community services sector who are covered by the Scheme). The small number of employees in the Women’s Health sub‑sector who are currently registered with the Authority would lose access to the Scheme.

Employees who move in and out of Community Health and Women’s Health Centres from the broader community services sector would not have their service recognised as these employers are not covered by the Scheme. While an indeterminate number of employees in Community Health Centres currently have access to existing portability entitlements under fair work instruments (including multi-enterprise agreements), the existing portability entitlements do not cover employees who move between Community Health Centres and the broader community services sector. Under this option, employees would retain portability of long service benefits within the Community Health sub‑sector only.

Stakeholders were not able to provide an estimate of the share of their workforce that moves in and out of the broader community services sector.

Service providers expected it would be a small proportion and noted that it is the employee’s choice to move to a different employer. However, anecdotal evidence from some service providers about where recent recruits came from suggests that this might not be an insignificant share of the workforce.

Union and employee groups suggested the share might be higher than Community Health Centres estimated, although they did not provide an estimate.

Impact on employers – financial cost

This option is somewhat more aligned to the criterion compared to the status quo. Explicitly excluding Community Health and Women’s Health Centres from the Scheme would be beneficial for employers as they would not have to pay levies to the Authority if it was determined that they were covered by the Scheme. However, under the status quo, Community Health service providers are not paying levies to the Authority on behalf of their employees as they believe they are not covered by the Scheme.

For the small number of Women’s Health Centres that have already registered with the Scheme, this option will be financially beneficial as they will no longer be required to pay levies to the Authority on behalf of their employees.

Impact on employers – cost of uncertainty and administration

This option is much more aligned with the criterion compared to the status quo. Compared to the status quo, Community Health and Women’s Health service providers would have complete certainty that they are not covered by the Scheme and would not be required to pay levies to the Authority on behalf of their employees.

Impact on the Authority

This option is much more aligned with the criteria compared to the status quo. The explicit exclusion of Community Health and Women’s Health providers from the Scheme would not require the Authority to register employers in these sub‑sectors and the Authority could provide clear guidance to the sector.

| **Questions for stakeholders** |
| --- |
| **S.14** Does this assessment accurately represent the scope and scale of the Community Health workforce that delivers community service work?**S.15** Does this assessment accurately represent the scope and scale of the Women’s Health workforce that delivers community service work?**S.16** Which option best ensures that employees across the community services sector have fair and equitable access to the Scheme? |

#### For-profit providers of early childhood services

A summary of the options for determining who is regarded as an employer in the community services sector in relation to for‑profit providers of early childhood services, along with their relative scores compared to the status quo, is as follows:

Table 12: Summary of for‑profit providers of early childhood services impact analysis

|  |  |
| --- | --- |
| **Option** | **Scores** |
| Employee equity (50%) | Employer financial cost (20%) | Employer uncertainty cost (20%) | Impact on Authority(10%) | **Weighted score** |
| Status quo under the Interim Regulations | 0 | 0 | 0 | 0 | **0** |
| Option 1 – Exclude for‑profit providers | 0 | 1 | 1 | 1 | **0.5** |

The rationale for these scores is summarised for each option in the following sub-sections.

###### Analysis of the status quo

The status quo is analysed to provide a point of comparison for the options which follow. The status quo would leave for‑profit early childhood employers, employees and the Authority without the necessary clarity to determine eligibility for the Scheme.

###### Option 1 – Exclude for‑profit providers from the Scheme

Equity for employees

This option would not change the intended scope of employees to be covered by the Scheme under the status quo as the Scheme is not intended to cover for‑profit providers. Most stakeholders understand this. Under this option, some employees employed by for‑profit providers may no longer be eligible for the Scheme if their employer incorrectly registered them with the Authority. However, the LSBP Act never intended for these employees to be within the scope of the Scheme, therefore equity is unaffected.

Impact on employers – financial cost

This option is somewhat more aligned with the criterion compared to the status quo. If any for‑profit providers have incorrectly registered with the Authority under the status quo, they would no longer need to pay levies to the Authority on behalf of their employees.

Impact on employers – cost of uncertainty and administration

This option is much more aligned with the criterion compared to the status quo. It would provide certainty for employers that for‑profit licensed children's services under the *Children's Services Act 1996* or an approved provider under the Education and Care Services National Law are not covered by the Scheme and that they are not required to pay levies to the Authority on behalf on their employees.

Impact on the Authority

This option is much more aligned with the criterion compared to the status quo. Compared to the status quo, the greater clarity would assist the Authority to implement the Scheme, register eligible employers and provide clearer guidance to the sector.

### Who is regarded as an employee in the community services sector

As discussed in section 3.3, the criterion for determining who is regarded as an employee in the community services sector should provide certainty to employers regarding which employees will need to have levies paid to the Authority on their behalf, and ensure employees across the community services sector have fair and equitable access to the Scheme.

A summary of the options for determining who is regarded as an employee in the community services sector, along with their relative scores compared to the status quo, is as follows:

Table 13: Summary of definition of an employee in the community sector impact analysis

|  |  |
| --- | --- |
| **Option** | **Scores** |
| Employee equity (50%) | Employer financial cost (20%) | Employer uncertainty cost (20%) | Impact on Authority(10%) | **Weighted score** |
| Status quo under the Interim Regulations | 0 | 0 | 0 | 0 | **0** |
| Option 1 – Improve clarity around the application of the predominance test | 1 | -1 | 1 | 1 | **0.6** |
| Option 2 – Modern Award coverage test | 3 | -2 | 3 | 3 | **2** |
| Option 3 – Exclude managers and administrative staff from the predominance test | -2 | 1 | 1 | 1 | **-0.5** |

The rationale for these scores is summarised for each option in the following sub-sections.

Acknowledging the interrelationship between who is regarded as an employee in the social services sector and who is regarded as an employer in the social services sector under the multi-criterion test of eligibility, the subsequent analysis assumed that the employer predominance test has been abolished (which is the preferred option based on the analysis in section 5.2.2.1). Therefore, employees who are defined as an employee for the purposes of the Scheme would be in scope regardless of the share of health or aged care work their employer undertakes.

###### Analysis of the status quo

The status quo is analysed to provide a point of comparison for the options which follow. The status quo would leave the definition of who is regarded as an employee in the community services sector as it currently stands in the Interim Regulations. Leaving the current definition unchanged means employers, employees and the Authority would lack clarity as to who is regarded as an employee in the community services sector.

* The lack of clarity could result in eligible employees incorrectly being denied access to, or ineligible employees incorrectly being given access to, portable long service benefits under the Scheme;
* The lack of clarity would continue to add to the administrative burden of uncertainty on employers in determining whether their employees are covered by the Scheme; and
* The Authority would continue to be burdened by questions from the sector and be in no better position to provide clear guidance.

###### Option 1 – Provide additional clarity around the application of the employee predominance test

Equity for employees

This option is somewhat more aligned to the criterion compared to the status quo. Clearer guidance would reduce the opportunities for employers to misapply or inconsistently apply the test. This would marginally increase equity for employees within the social services sector. However, some employees in the sector who do not predominantly perform community service work would continue to be denied access to portable long service benefits. It would remain unclear as to whether administrative and managerial employees are eligible for the Scheme, which may result in some employees in the sector who perform this work being denied access to the Scheme. These employees were intended to be included within the scope of the Scheme as they play an indivisible role supporting the delivery of community service work.

Impact on employers – financial cost

This option is somewhat less aligned with the criterion compared to the status quo. Providing greater clarity around the application of the employee predominance test is expected to bring marginally more employees within scope of the Scheme compared to the status quo, but it is not possible to precisely quantify the number of employers who have incorrectly applied the predominance test under the status quo.

Impact on employers – cost of uncertainty and administration

This option is somewhat more aligned with the criterion compared to the status quo. Providing additional guidance on measuring predominance would make it easier for employers to apply the test to determine who is regarded as an eligible employee. However, they would still be required to undertake an activity-based assessment for each employee to determine which employees should be registered with the Authority. Stakeholders have reported that this task is administratively burdensome and requires a large degree of judgement.

Impact on the Authority

This option is somewhat more aligned with the criterion compared to the status quo. Additional clarity around the application of the employee predominance test in the Regulations would assist the Authority to provide clearer guidance to the sector compared to the status quo. The Authority would be required to update their guidance notes to the sector.

While there would be an overall reduction in pressure on the Authority compared to the status quo, the Authority would still be expected to field a large number of requests from employers seeking assistance with measuring predominance under the test. This is burdensome for the Authority as it is the responsibility of the employer to apply the employee predominance test.

###### Option 2 – Replace the employee predominance test with a modern award coverage test

###### Equity for employees

This option is much more aligned with the criterion compared to the status quo. It vastly improves equity of long service entitlements within the sector. This option is expected to ensure that the 100,000 employees estimated in the 2019 RIS to work in the sector are covered by the Scheme.[[29]](#footnote-29) However, it is possible that the total number of employees covered by the Scheme could be greater depending on what modern award they are covered by. The Victorian Council of Social Service estimates that there were approximately 150,000‑160,000 employees working in the sector.[[30]](#footnote-30)

Employees, regardless of their level or role, who are covered by any of the four modern awards that cover that sector, and who perform community service work as defined by the Regulations as required by the multi-factorial test of eligibility for this sector (see Figure 2), would be covered by the Scheme. Feedback from stakeholders suggested this would be a more equitable test than the current predominance test as it would ensure employees working next to each other each day, doing essentially the same task, would both have access to the Scheme. It would also provide a clearer justification as to why an employee was not eligible for the Scheme.

Consistent with the intent of the Scheme, this option recognises that administrative and managerial employees support the delivery of community service work in the sector. This is not the case with contract cleaning or the security industry, where the distinction between these roles is clearer.

Impact on employers – financial cost

This option is less aligned with the criterion compared to the status quo. This option is expected to result in more employees being covered by the Scheme, which would increase the financial impact on employers as employers would be required to pay a levy to the Authority on behalf of more employees. Feedback from stakeholders and service providers estimated that this option would increase the number of eligible employees by 10‑20 percent compared to the status quo under the current employee predominance test. This is because it would now be clear that administrative and managerial employees covered by these modern awards would be covered in the Scheme. Employees who were not predominantly performing community service work and were excluded under the current employee predominance test would also be covered if they are covered by an applicable modern award.

Impact on employers – cost of uncertainty and administration

This option is much more aligned with the criterion compared to the status quo. The introduction of a modern award coverage test would make it easier for employers to determine who is regarded as an eligible employee, reducing the administrative burden. Generally speaking, employers are aware of which modern award(s) cover the employment of their employees (including the modern award which may underpin their enterprise agreement).

Impact on the Authority

This option is much more aligned with the criterion compared to the status quo. The greater clarity would assist the Authority to implement the Scheme, register eligible employees, provide clearer guidance to the sector, and result in fewer enquiries to the Authority. This option would require the Authority to update their guidance to the sector.

**Option 3 – Exclude management and administrative activities from the existing employee predominance test**

Equity for employees

This option is less aligned with the criterion compared to the status quo. It reduces equity of long service entitlements within the sector by excluding management and administrative activities from the definition of community services work. This is inequitable because these employees support the delivery of community service work through their administrative or managerial roles. These activities are often indivisible with direct service delivery in the sector and were intended to be within scope of the Scheme.

Excluding management and administrative activities from the share of an employee’s work which is included as community service work under the employee predominance test is expected to reduce the number of employees covered by the Scheme. In some cases, it would remove an existing entitlement to portable long service benefits from an employee currently registered under the Scheme. Given the inconsistent application of the current employee predominance test and the challenge in clearly defining roles and activities, it is not possible to estimate how many employees would be impacted by this option.

Impact on employers – financial cost

This option is somewhat more aligned with the criterion than the status quo. It is expected to reduce the financial impact on employers. In response to the lack of clarity in applying the current employee predominance test under the status quo, feedback from stakeholders and service providers suggests that employers have been registering employees who predominantly engage in management or administrative activities. Under this option, employers would no longer be required to pay a levy to the Authority on behalf of these employees.

Impact on employers – cost of uncertainty and administration

This option is somewhat more aligned with the criterion than the status quo. It would clarify that management and administrative activities are not considered community service work for the purposes of applying the current employee predominance test. This has been a key area of uncertainty for stakeholders.

However, applying this test for each employee would remain administratively burdensome. The inclusion of terms such as ‘management’ and ‘administration’ would add another layer of definitional complexity. In many cases, it may not be possible to clearly divide the share of an employee’s work because of the indivisibility of administrative and managerial roles from community service delivery.

Impact on the Authority

This option is somewhat more aligned with the criterion than the status quo. Overall, additional clarity around the exclusion of managerial and administrative activities under the employee predominance test would assist the Authority provide clearer guidance to the sector compared to the status quo. The Authority would be required to update their guidance notes to the sector.

While there would be an overall reduction in pressure on the Authority compared to the status quo, the Authority would still be expected to field a large number of requests from employers seeking assistance with measuring predominance under the test. This is burdensome for the Authority as it is the responsibility of the employer to apply the employee predominance test.

The complexity in separating management and administrative activities from service delivery within the community services sector would add to the administrative burden on the Authority in monitoring enrolment and ensuring compliance.

| **Questions for stakeholders** |
| --- |
| **S.17** Does this assessment accurately represent the likely change in the number of employees covered under each of these options relative to the number of employees covered under the current employee predominance test?**S.18** Does this assessment accurately represent the financial and administrative costs to employers associated with each option?**S.19** Which option best ensures that employees across the community services sector have fair and equitable access to the Scheme?**S.20** Would the adoption of a modern awards test to determine who is regarded as an employee in the community services sector exclude employees from the Scheme who should otherwise be included? |

### Who is regarded as an employee in the security industry

As discussed in section 3.4, the definition of who is regarded as an employee in the security industry should provide certainty to employers on which employees will need to have levies paid to the Authority on their behalf, and ensure employees across the security sector have fair and equitable access to the Scheme.

A summary of the options for defining employees in the security industry, along with their relative scores compared to the status quo, is as follows:

Table 14: Summary of definition of employee in the security sector impact analysis

|  |  |
| --- | --- |
| **Option** | **Scores** |
| Employee equity (50%) | Employer financial cost (20%) | Employer uncertainty cost (20%) | Impact on Authority(10%) | **Weighted score** |
| Status quo under the Interim Regulations | 0 | 0 | 0 | 0 | **0** |
| Option 1 – Introduce a predominance test | 0 | 0 | 2 | 3 | **0.7** |
| Option 2 – Define employees in reference to the *Private Security Act 2004* | -1 | 1 | 3 | 3 | **0.6** |
| Option 3 – Introduce an awards coverage test | -2 | 2 | 3 | 3 | **0.3** |

The rationale for these scores is summarised for each option in the following sub-sections.

###### Analysis of the status quo

The status quo is analysed to provide a point of comparison for the options which follow. The status quo would maintain the current approach in the Interim Regulations to not provide a definition for who is regarded as an employee in the security industry. This would mean employers, employees and the Authority would lack clarity as to who is regarded as an employee in the security industry. Under the status quo, almost all the employees from the sector currently registered with the Authority are intended to be covered by the Scheme.

* The lack of clarity could result in eligible employees incorrectly being denied access to, or ineligible employees incorrectly being given access to, portable long service benefits under the Scheme;
* The lack of clarity would continue to add to the administrative burden of uncertainty on employers in determining whether their employees are covered by the Scheme; and
* The Authority would continue to be burdened by questions from the security sector and be in no better position to provide clear guidance.

###### Option 1 – Introduce a predominance test for the security industry

Equity for employees

This option would result in no change to the status quo. Employees who predominantly perform security activities have access to portable long service benefits under the status quo. It would not change the intended or actual scope of employees to be covered by the Scheme.

Impact on employers – financial cost

This option would result in no change to financial costs relative to the status quo. It is not expected to have a financial impact on employers as it would not increase or decrease the number of covered employees.

Impact on employers – cost of uncertainty and administration

This option is mostly aligned with the criterion compared to the status quo. It would increase clarity for employers in the sector as to which of their employees they are required to register with the Authority. Under the status quo, there is no definition of who is regarded as an employee in the sector for employers to use in determining eligibility. The test is consistent with the existing test in the Interim Regulations for the contract cleaning sector, which has been simple for employers to implement.

Impact on the Authority

This option is much more aligned with the criterion compared to the status quo. The greater clarity would assist the Authority to implement the Scheme, register eligible employees and provide clearer guidance to the sector.

###### Option 2 – Define employees in reference to the *Private Security Act 2004*

Equity for employees

This option is somewhat less aligned with the criterion compared to the status quo. It would have a marginally negative impact on equity within the sector. Introducing a ‘bright line’ test such as this may exclude some people who are currently covered by the Scheme. It may also include some people who are not predominantly performing security activities and who are not intended to be within scope of the Scheme.

Impact on employers – financial cost

This option is somewhat more aligned with the criterion compared to the status quo. Employers who have registered employees under the status quo, but who are not performing a security activity under the *Private Security Act 2004*, would no longer be required to pay levies to the Authority on their behalf.

Impact on employers – cost of uncertainty and administration

This option is much more aligned with the criterion compared to the status quo. Defining employees in reference to the *Private Security Act 2004* would increase clarity for employers in the sector as to which of their employees are covered by the Scheme. Under the status quo, there is no definition of who is regarded as an employee in the sector for employers to use in determining eligibility. Stakeholders in the sector reported that this option would not be an administrative burden on employers.

Impact on the Authority

This option is much more aligned with the criterion compared to the status quo. The greater clarity would assist the Authority to implement the Scheme, register eligible employees and provide clearer guidance to the sector. Any future changes to the definitions of security work in the *Private Security Act 2004* would be reflected in the LSBP Act and Regulations, and would therefore be reflected in the Scheme.

###### Option 3 – Define employees in reference to the coverage of the *Security Services Industry Award 2010*

Equity for employees

This option is less aligned with the criterion compared to the status quo. It would remove employees from the scope of the Scheme who are intended to be within scope. The *Security Services Industry Award 2010* excludes employees who transport and/or deliver cash or valuables and who install, maintain or repair electronic alarm and/or monitoring systems as their primary activity. Employees performing these roles have the same challenges accessing long service benefits with one employer.

Impact on employers – financial cost

This option is more aligned with the criterion compared to the status quo. It would have a small positive financial impact for employers, as a small number of employees would no longer be covered by the Scheme. Employers would no longer be required to pay a levy to the Authority on behalf of these employees.

Impact on employers – cost of uncertainty and administration

This option is much more aligned with the criterion compared to the status quo. It would increase clarity for employers in the sector as to which of their employees are covered by the Scheme. Under the status quo, there is no definition of who is regarded as an employee in the sector for employers to use in determining eligibility. As an employer is likely to be aware of which employees’ employment is covered by this modern award, this option is unlikely to be administratively burdensome.

Impact on the Authority

This option is much more aligned with the criterion compared to the status quo. The greater clarity would assist the Authority to implement the Scheme, register eligible employees and provide clearer guidance to the sector.

| **Questions for stakeholders** |
| --- |
| **S.21** Does this assessment accurately represent the likely change in employees covered under each of these options relative to how stakeholders are currently defining employees under the status quo?**S.22** Which option provides employers with the greatest clarity in relation to when employees in the security industry are in-scope?**S.23** Which option best ensures that employees across the security sector have fair and equitable access to the Scheme? |

### Reimbursing employers for double-dipping claims in the community services sector under the Long Service Leave Act 2018

As discussed in section 3.5, solutions to reimburse employers in the community services sector for employees double-dipping under the *Long Service Leave Act 2018* aim to avoid situations where employers pay an employee for long service leave under an existing workplace law or industrial instrument and also pay a levy under the LSBP Act for the employee in respect of the same service period (without reimbursement).

A summary of the options for reimbursing employers in the community services sector for employees doubling-dipping under the *Long Service Leave Act 2018*, along with their relative scores compared to the status quo, is as follows:

Table 15: Summary of double-dipping in the community services sector impact analysis

|  |  |
| --- | --- |
| **Option** | **Scores** |
| Employee equity (50%) | Employer financial cost (20%) | Employer uncertainty cost (20%) | Impact on Authority(10%) | **Weighted score** |
| Status quo under the Interim Regulations | 0 | 0 | 0 | 0 | **0** |
| Option 1 – Allow employers who pay entitlements under the *Long Service Leave Act 2018* to be reimbursed | 0 | 3 | 1 | 1 | **0.9** |

The rationale for these scores is summarised for each option in the following sub-sections.

###### Analysis of the status quo

The status quo is analysed to provide a point of comparison for the options which follow. Maintaining the status quo would mean the existing arrangements in the Interim Regulations for dealing with double-dipping would not change. Employers would continue to not be entitled to reimbursement from the Authority if they paid an entitlement under the *Long Service Leave Act 2018* for the same period of service. Under the status quo, there is significant uncertainty within the sector about the issue of double-dipping.

###### Option 1 – Allow employers who pay entitlements under the *Long Service Leave Act 2018* to claim reimbursement from the Authority

Equity for employees

This option would have no impact on equity compared to the status quo. This option would not impact on an employee’s ability to access long service benefits.

Impact on employers – financial cost

This option is much more aligned to the criterion compared to the status quo. It would ensure employers are not required to pay both a levy to the Authority and pay an employee for a long service entitlement under the *Long Service Leave Act 2018* for the same period of service without reimbursement. This would reduce the financial burden of the Scheme for some employers in the medium-term as they would now be entitled to a reimbursement from the Authority for any levy paid once an employee accesses an entitlement under the *Long Service Leave Act 2018*.

Impact on employers – cost of uncertainty and administration

This option is somewhat more aligned to the criterion compared to the status quo. Employers would have clarity that they will be reimbursed by the Authority for levy payments for any of their employees who double dip. Under the status quo, there is significant uncertainty within the sector about the issue of double-dipping.

Impact on the Authority

This option is somewhat more aligned to the criterion compared to the status quo. It would treat all existing long service entitlements the same, reducing the complexity for the Authority of administering the Scheme’s double-dipping provisions. However, this option would also have a small financial impact on the Authority. The Authority would be required to pay back levies to employers for any levy paid once an employee accesses an entitlement under the *Long Service Leave Act 2018*. The reduction in complexity is expected to outweigh the additional cost impact to the Authority.

# PREFERRED OPTIONS

This section summarises the preferred options for solving the residual problems in the Interim Regulations identified in section 2 of this RIS.

## Summary of the Proposed Regulations

The analysis conducted in section 2 of this RIS demonstrates problems with the Interim Regulations and the merit in remaking the Interims Regulations. In order to address these problems, aspects of the Regulations that cover the community services and security sector need to be amended. Sections 3, 4 and 5 of this RIS have established means for the appraisal of options for this purpose, and the following Regulations are now proposed.

### What is defined as community service work

It is proposed **to clarify that delivering work in a private residence is defined as community service work for the purposes of the Scheme, regardless of the age of the client**. Health and aged care work performed in a facility that is not a private residence would continue to be excluded from the Scheme. Healthcare delivered in a private residence would continue to be excluded from the Scheme.

Compared to the status quo, employers in the community services sector will have clarity that work in a private residence is covered by the Scheme. Employees who deliver community service work, regardless of the setting or age of the client, would be eligible to be covered by the Scheme. This is consistent with the intent of the LSBP Act.

These changes are found in Regulation 8(1)(b) of the Proposed Regulations.

### Who is regarded as an employer in the community services sector

#### Employer predominance test

It is proposed to **abolish the employer predominance test that applies to health or related services**. Instead, an employer in the community services sector would be defined as one that employs at least one covered employee who undertakes eligible community service work.

No employer predominance test is included in Regulation 9 of the Proposed Regulations, which details who is regarded as an employer for the community services sector.

| **Questions for stakeholders** |
| --- |
| **S.24** With the removal of the employer predominance test, which organisations that were not previously in scope of the Scheme under the Interim Regulations, will now be in scope? |

#### Community and Women’s Health Centres

It is proposed to **explicitly include registered Community Health Centres and Women’s Health Centres as eligible employers** under the Scheme. Community Health and Women’s Health service providers would need to register with the Authority and pay levies on behalf of any covered employees who undertake eligible community service work.

Compared to the status quo, Community Health and Women’s Health service providers will have certainty that they are covered by the Scheme. Employees in these sub‑sectors would be able to move into and out of the broader community services sector without losing their portable long service benefits.

These changes are found in Regulation 9(d) of the Proposed Regulations.

#### For-profit providers of early childhood services

It is proposed to **clarify that for‑profit licensed children's services under the *Children's Services Act 1996* or an approved provider under the Education and Care Services National Law are not covered by the Scheme**.

Compared to the status quo under the Interim Regulations, this will provide clarity to employees, employers and the Authority about who is regarded as an eligible employer in the early childhood sector for the purposes of the Scheme.

These changes are found in Regulation 9(e) of the Proposed Regulations.

### Who is regarded as an employee in the community services sector

It is proposed to **replace the employee predominance test with an Awards coverage test**. An employee in the community services sector would be defined in reference to the four modern awards that cover the sector:

1. The *Social, Community, Home Care and Disability Services Award 2010*;
2. The *Children’s Services Award 2010*;
3. The *Educational Services (Teachers) Award 2010*; and
4. The *Labour Market Assistance Industry Award 2010.*

Employees, regardless of their level or role, as long as they are covered by any of these four modern awards and perform eligible community service work, as defined by the Regulations, would be covered by the Scheme.

Compared to the status quo under the Interim Regulations, this will provide greater clarity to employees, employers and the Authority as to which employees in the community services sector are required to be registered with the Authority and have levies paid to the Authority on their behalf. It is a less burdensome assessment for employers to make to determine employee eligibility compared to the current employee predominance test.

It is recognised that it is not possible to easily differentiate between employees directly delivering community services and employees supporting the delivery of community service work through administrative or managerial roles. This is not the case with contract cleaning or the security industry, where a predominance test is appropriate because the distinction between these roles is clearer.

These changes are found in Regulation 10 of the Proposed Regulations.

| **Questions for stakeholders** |
| --- |
| **S.25** Are employees in the community services sector covered by any other Awards?**S.26** Does the introduction of an Awards test represent a significant expansion of the scope of the Scheme? |

### Who is regarded as an employee in the security industry

It is proposed to **introduce an employee predominance test for employees in the security industry**. This would mean persons employed by eligible employers who are not predominantly performing security work, as defined by Schedule 3 of the LSBP Act, would be excluded from the Scheme. This is consistent with the intent of the LSBP Act.

Compared to the status quo under the Interim Regulations, this will provide clarity to employers, employees and the Authority as to which employees in the security industry need to be registered with the Authority and have levies paid to the Authority on their behalf. This option will provide clarity without altering the intended scope of the Scheme.

The test would be the same test that currently exists in the Interim Regulations for the contract cleaning sector. It is much easier to apply a predominance test in the security industry and contract-cleaning industry than the community services sector.

These changes are found in Regulation 14 of the Proposed Regulations. The test is consistent with the existing test in the Interim Regulations for the contract cleaning sector.

| **Questions for stakeholders** |
| --- |
| **S.27** Would the adoption of a test to determine who is regarded as an employee in the security industry exclude employees from the Scheme who should otherwise be included? |

### Reimbursing employers for double-dipping claims in the community services sector under the Long Service Leave Act 2018

It is proposed to **allow employers who pay entitlements under the *Long Service Leave Act 2018* to be entitled to reimbursement from the Authority for any levy paid once an employee accesses an entitlement under the *Long Service Leave Act 2018*.** This requires both legislative amendments to the LSBP Act and changes to the Regulations.

Referring to the *Long Service Leave Act 2018* in the Regulations and LSBP Act would ensure employers would be entitled to reimbursement from the Authority for any levy paid once an employee accesses an entitlement under a fair work instrument **or** the *Long Service Leave Act 2018* (for the same period of service). Under the status quo in the Interim Regulations, employers would continue to not be entitled to reimbursement from the Authority if they paid an entitlement under *the Long Service Leave Act 2018* for the same period of service.

This change will not be progressed through the Proposed Regulations. Any changes will not proceed until 2021 at the earliest. Regulation 12 of the Proposed Regulations reflects the status-quo under the Interim Regulations.

| **Questions for stakeholders** |
| --- |
| **S.28** Under the proposed updated double-dipping provisions, can stakeholders foresee any circumstances where they would not be able to claim a reimbursement from the Authority for any levy paid once an employee accesses an entitlement under an existing long service entitlement? |

## Impact on Small Business

The purpose of this section is to analyse the Proposed Regulations and assess whether any elements of the Proposed Regulations impose a disproportionate burden on small businesses operating in the community services or security sectors compared to the status quo under the Interim Regulations.

There have previously been concerns raised by stakeholders in the community services sector and across different industries of the impact of a portable long service scheme on small businesses and organisations.

The 2016 Parliamentary Inquiry considered the following key impacts: [[31]](#footnote-31)

* **The capacity of small organisations to absorb costs** as a result of smaller profit margins. As a result, smaller organisations managed their cash flow in a different way, and would not set aside long service entitlements as they accrue, rather they would be set aside upon vesting (that is, once the employee has become eligible for long service leave).
* **The capacity of small organisations to cover the absence of employees** for when they take long service leave. This is because employees under a portable scheme may have a shorter period of time from commencement to the period when the leave is taken.
* **The capacity of small organisations to manage the administrative burden** as they do not employ administrative staff who can undertake the additional administrative burden created by a portable long service scheme.

Based on available evidence, the Parliamentary Inquiry found that the ‘impacts on (small businesses and organisations) would not be so great and that portable long service could benefit some small employers (and organisations)’. There is no evidence to suggest that these findings have changed over the past four years or would not equally apply to the sectors impacted by the Proposed Regulations.

### The impact on small business of the Interim Regulations in the 2019 RIS

The definition used for small organisations in the sector is based on the ABS definition that a small business has less than 20 employees.[[32]](#footnote-32)

Analysis contained in the 2019 RIS indicated that the majority of organisations in the social services sector (85 percent) are defined as small organisations. However, the majority of employees (93 percent) are employed at medium or large organisations.[[33]](#footnote-33) This initial analysis suggests that small businesses are likely to make up the majority of employers affected by the Scheme.

The impact on small business for the two sub‑sectors that the Interim Regulations brought within scope of the Scheme are as follows:

* The number of small businesses in the early childhood sector in Victoria is 625, or 28 percent of all early childhood education businesses in the state.[[34]](#footnote-34)
* The proportion of total NDIS charities which can be classified as small is approximately 36 percent.[[35]](#footnote-35)

The following sub-sections provide a summary of the impact of the Interim Regulations on small business as detailed in the 2019 RIS. The full 2019 RIS can be found at https://www.vic.gov.au/regulatory-impact-statements-2019#long-service-benefits-portability-regulations-2019.

#### Definition of employer and employee

The definitions of employee and employer in the Interim Regulations excluded some employers and employees from the coverage of the Scheme. As they reduced the overall number of small businesses covered by the Scheme, as well as the number of employees that a small business will have to account for under the Scheme (compared to the broader definitions in the LSBP Act itself), the 2019 RIS found that the introduction of these definitions should have an overall net positive impact on small businesses relative to the situation under the LSBP Act without Regulations.

#### Scope of the community services sector – NDIS and early childhood education

The 2019 RIS found that introducing NDIS and early childhood education employers into the coverage of the LSBP Act brought the whole-of-scheme impacts to these sectors. These impacts may have been a benefit for some small businesses. A small number of case studies regarding cost impacts indicated that small businesses may incur lower costs as a percentage of total salary expenses from the Scheme, when compared to larger businesses. It was suggested that this is due to smaller organisations’ lower staff turnover rates. As a result of low staff turnover, small businesses generally assume that employees will remain with the company for some time and they begin setting aside funds for leave from the commencement of their employment. This results in a lower marginal cost impact from the introduction of the Scheme, as these employers already pay out long service benefits for the majority of their employees.

In addition to the direct cost impact from the levies of the Scheme, it was expected that small businesses would require administrative time (and associated cost) to implement the Scheme internally, and to comply with it in an ongoing manner.

#### Double-dipping

The provisions in the Interim Regulations to prevent double-dipping required employers to be aware of, and report to, the Authority when employees claim a fair work benefit. It is expected that this will result in a minimal amount of additional administrative work. Employers would be required to ensure this information is filed for the purposes of quarterly returns as well as their own payroll purposes. This was not expected to disproportionately impact small businesses. The 2019 RIS found that the administrative burden should be seen to be offset by the reduced likelihood of a double-dipping scenario and its attendant costs.

### Additional impact on small business of the Proposed Regulations

The following sub-sections provide a summary of the impact of the Proposed Regulations (detailed in section 6.1) on small business compared to the status quo under the Interim Regulations.

#### What is defined as community service work

Clarifying that delivering care in a private residence, irrespective of the age of the client, is included in the definition of community service work is expected to have a financial impact on small businesses that, under the status quo, have not registered themselves or their employees with the Authority because of a misunderstanding relating to their eligibility. These employers would now need to register with the Authority and pay levies to the Authority on behalf of their eligible employees.

#### Who is regarded as an employer in the community services sector

Removing the employer predominance test would reduce the administrative burden on small business. As detailed in section 5.2.2.1, this is expected to increase the number of employers covered by the Scheme, potentially having a financial impact on small businesses that were previously excluded because they did not predominantly perform community service work.

Clarifying that Community Health Centres are within scope of the Scheme is not expected to impact small businesses. No examples of Community Health Centres employing less than 20 people were identified.

Women’s health centres, including a small number of small operators, will be brought into scope of the Scheme, although the number cannot be quantified as reliable workforce data is not available. Many of these employers have already registered with the Scheme, although they have not registered the majority of their staff. Providing certainty that employees performing community service work at Women’s Health Centres are covered by the Scheme reduce uncertainty costs for employers, but this benefit will be partly offset by greater financial costs (levy payments).

Clarifying that for‑profit early childhood education providers are not covered for the Scheme will be beneficial for any small for‑profit early childhood employers that have currently registered with the Authority as a result of the lack of clarity under the Interim Regulations. It will also mean that for‑profit providers would no longer be required to expend any effort determining whether they need to register with the Authority.

#### Who is regarded as an employee in the community services sector

Introducing a modern awards test to define who is regarded as an employee in the community services sector would reduce the administrative burden on small business. As detailed in section 5.2.3, replacing the current employee predominance test with a modern awards test is expected to result in 10‑20 percent more employees being covered by the Scheme, increasing the financial impact on small businesses.

#### Who is regarded as an employee in the security industry

Introducing an employee predominance test for the security industry would increase clarity for small businesses in the sector as to which of their employees are covered by the Scheme. The test is consistent with the existing test in the Interim Regulations for the contract cleaning sector, which has been simple for employers to implement. The introduction of this definition is not expected to have a financial impact on small businesses as it would not increase or decrease the number of covered employees.

#### Reimbursing employers for double -dipping in the community services sector under the Long Service Leave Act 2018

The Proposed Regulations would be beneficial to small businesses. It would ensure employers are not required to pay both a levy to the Authority and pay an employee for a long service entitlement under the *Long Service Leave Act 2018* for the same period of service without reimbursement. This would reduce the financial burden of the Scheme for some employers in the medium-term as they are now entitled to a reimbursement from the Authority for any levy paid once an employee accesses an entitlement under the *Long Service Leave Act* *2018*.

### Statement of Compliance with National Competition Policy

The National Competition Policy agreements set out specific requirements arising out of new legislation adopted by jurisdictions which are party to those agreements. Clause 5(1) of the Competition Principles Agreement sets out the basic principle which must be applied to both existing legislation, under the legislative review process, and to proposed legislation:

‘The guiding principle is that legislation (including Acts, enactments, Ordinances or Regulations) should not restrict competition unless it can be demonstrated that:

1. *The benefits of the restriction to the community as a whole outweigh the costs; and*
2. *The objectives of the regulation can only be achieved by restricting competition.’*

Clause 5(5) imposes a specific obligation on parties to the agreement with regard to newly proposed legislation:

*‘Each party will require proposals for new legislation that restrict competition to be accompanied by evidence that the restriction is consistent with the principle set out in sub-clause (1).’*

Therefore, all RISs must provide evidence that the proposed regulatory instrument is consistent with these National Competition Policy obligations. The Organisation for Economic Co-operation and Development (OECD) Competition Assessment Toolkit provides a checklist for identifying potentially significant negative impacts on competition in the RIS context. This is based on the following four questions:

* Does the proposed regulation limit the number or range of suppliers?
* Does the proposed regulation limit the ability of suppliers to compete?
* Does the proposed regulation limit the incentives for suppliers to compete?
* Does the proposed regulation limit the choices and information available to consumers?

According to the OECD, if all four of these questions can be answered in the negative, it is unlikely that the Proposed Regulations will have any significant negative impact on competition and further investigation of competition impacts is not likely to be warranted.

#### The impact on competition of the Interim Regulations in the 2019 RIS

The 2019 RIS found that the Interim Regulations did not limit the number or range of suppliers, nor did they limit incentives to compete, or the choices and information available to consumers. However, the Interim Regulations had the potential to limit the ability of certain suppliers to compete. The costs of the Scheme, particularly in combination with Federal legislative changes, may have potential to jeopardise some NDIS and early childhood education employers’ financial viability. Both NDIS and early childhood employers were granted six months to calibrate their operating models with Federal legislative pressures, and to prepare for the implementation of the LSBP Act. It was considered that these costs had been minimised insofar as is possible and that the benefits to employees likely outweigh any costs to employers.

The full 2019 RIS can be found at https://www.vic.gov.au/regulatory-impact-statements-2019#long-service-benefits-portability-regulations-2019.

#### Analysis of the additional impact on competition of the Proposed Regulations

The Proposed Regulations do not limit the number or range of suppliers, nor do they limit incentives to compete, or the choices and information available to consumers.

The Proposed Regulations may limit the ability of certain Community Health and Women’s Health suppliers to compete. As noted in section 5.2.2.2, the annual cost of the levy and the net cost impact on service providers has the potential to jeopardise some Community Health and Women’s Health providers’ financial viability. This risk has been considered in the development of the Proposed Regulations.

A similar cost impact was imposed on all small providers of community services when the Scheme came into operation on 1 July 2019. Since implementation of the Scheme, no evidence from outside of the early childhood education sector (where the additional cost burden of the Scheme is only borne by non-profit providers and not their for‑profit competitors) has been presented showing the additional financial burden limiting the ability of community service providers to compete with each other. Despite the concerns raised by Community Health and Women’s Health providers during consultations, no evidence was provided as to why the impact on competition would be greater for these sub‑sectors than the rest of the community services sector.

Through the double-dipping provisions, it is considered that these costs have been minimised insofar as is possible and that the benefits to employees likely outweigh any costs to employers.

# IMPLEMENTATION PLAN

Following the public comment period, Industrial Relations Victoria (IRV) will consider all submissions and comments made by stakeholders on the Proposed Regulations. Following this review, any necessary changes to the Proposed Regulations will be made. Once the final Regulations have been prepared, the implementation plan will commence as set out below.

All decisions on registration and compliance with the Scheme rest with the Authority.

## Industry Information

As can be seen from the impact analysis section of this document, a number of the proposed regulatory changes are designed to improve clarity for employers and employees. However, alterations to the Regulations necessarily carries the risk that affected employers will not be aware of their new legal obligations and will fail to meet them, costing both the Authority and employers time and money.

The key requirement for the successful introduction of the Proposed Regulations will be to provide quality information to the affected employers as to their new or altered obligations. It is evident from feedback from stakeholders that there is a need for a clear and concerted industry information campaign. Many of the changes are relatively technical and may confuse stakeholders if they are not accompanied by an information campaign.

For employers and employees impacted by changes in the Proposed Regulations, and for peak bodies and other stakeholders, information should include the following:

* any change to the definition of community service work;
* any change to who is regarded as an employer in the community services sector;
* any changes to the definition of who is regarded as an employee in the community services sector and the security sector;
* the dates on which changes and obligations come into effect; and
* the avenues available to relevant employees and employers and where they can go for any questions regarding their obligations or the Scheme generally.

Table 16 outlines the key actions to support the implementation of the Regulations.

*Table 16: Overview of key actions to support the implementation of the Regulations*

|  |  |  |  |
| --- | --- | --- | --- |
| Action | Description | Responsibility | Expected timeframe |
| Consult on the Regulations | Undertake consultation on the Regulations with key stakeholders through the RIS. | IRV  | May-June 2020 |
| Finalise Regulations | Respond to stakeholder feedback and make any necessary changes to the Regulations. | IRV  | June-July 2020 |
| General sector awareness and education | Launch a comprehensive information campaign – noting this will primarily cover employers and peak bodies impacted by the changes in the Proposed Regulations.  | The Authority  | Two months prior to the Regulations taking effect, and ongoing for up to three months after the Regulations take effect. |

## Monitoring

IRV, along with the Authority, will be responsible for monitoring the implementation of the Proposed Regulations. These bodies will be assisted by the Working Party that was established by IRV to support the introduction of the Scheme in 2019. The group includes unions, employer groups, government departments, and peak body organisations. The Working Party meets regularly with IRV to provide feedback on the Scheme and discuss proposed reforms.

## Risk assessment

There are risks associated with implementing the Proposed Regulations. These risks relate to both implementation risks and ongoing risks associated with the operation of the Scheme.

Risk management will be the responsibility of the Authority, which will be overseen by the Board. The Authority has a risk management framework to provide an overarching approach to manage these (and other) risks.

Like most risk management frameworks, each risk will be assessed against its likelihood and consequence (summarised in the table below). Such an approach enables each identified risk to be assigned a risk rating of either ‘low’, ‘medium’ or ‘high’ on the basis of the consequence of the risk, and the likelihood of the risk occurring.

Table 17: Risk rating matrix

|  |  |  |
| --- | --- | --- |
|  |  | Consequences |
| Minor | Moderate | Major |
| **Likelihood** | **Likely** | Medium | High | High |
| **Possible** | Low | Medium | High |
| **Unlikely** | Low | Low | Medium |

As part of the risk assessment for implementation of the Proposed Regulations, a number of specific risks have been identified, and mitigation strategies proposed. These are found in Table 18 over the page. The risks in the table relate to the changes in the Proposed Regulations compared to the status quo under the Interim Regulations.

Table 18: Potential risks and mitigation strategies

| Risk | Description | Risk rating | Mitigation strategy |
| --- | --- | --- | --- |
| Community Health service providers are unable to easily distinguish between in and out of scope employees, leading to employees being denied portability benefits. | Consultation has shown that Community Health providers consider their workforce to be entirely healthcare focused and are of the firm view that they should be excluded from the Scheme. | **Overall risk rating:** **Low****Consequences:** If this occurs, employees may be denied a long service benefit. Considering the likely small number of employees in this category, the consequences are **moderate.****Likelihood:** **Unlikely** as a modern, awards based test will be introduced to determine employee eligibility.  | Significant information (as above in Industry Information) will be provided to employers in the Community Health sub‑sector, along with support provided by the Authority. Determining which employees are in scope based on the four modern awards will also reduce this risk relative to the status quo. |
| Some Community Health and Women’s Health providers may need to reduce services to accommodate increased costs, leading to reduced assistance for those in need. | Consultation has shown that Community Health and Women’s Health providers expect to have to reduce the number of services or staff in order to meet the additional cost of paying the levy to the Authority on behalf of their covered employees.  | **Overall risk rating: Medium.****Consequences:** If this occurs, vulnerable members of the community may be impacted through reduced services. Considering the magnitude of the additional cost impost, the consequences are **moderate.****Likelihood:** This is **possible.** | The Authority will work closely with stakeholders to ensure only eligible employees are registered for the Scheme, minimising the cost burden on service providers. IRV will continue to monitor the impact on services (including through the evaluations proposed in section 8). |
| Some community services sector employees become unintentionally out-of-scope, loosing access to portability benefits. | Due to the operation of the modern awards test to determine community services employees, there is potential that some community service employees may be wrongly excluded from coverage of the Scheme.  | **Overall risk rating: Medium****Consequences:** If this occurs, employees may be denied a long service benefit. Considering the likely small number of employees in this category, and the stakeholder consultations undertaken to date, the consequences are **moderate.** **Likelihood:** This is **possible.**  | The Authority will work closely with IRV and be responsive to wider stakeholder concerns regarding this matter. If the risk *is* realised through these channels, then the Regulations should be modified as required.  |
| Employers in the community services sector do not correctly understand their obligations to pay levies, leading to employees incorrectly accessing or being denied portability benefits. | Due to changes to the definition of who is regarded as an employee and who is regarded as an employer in the social services sector, there is potential that employers do not pay levies to the Authority where they are required to do so.  | **Overall risk rating: Low****Consequences:** If this occurs, employees may be denied a long service benefit. Considering the likely small number of employees in this category, the consequences are **moderate.****Likelihood:** Considering the information campaign, which is to be undertaken by theAuthority, this is **unlikely.** | As detailed above, the Authority will be undertaking an information and awareness campaign to alert employers to their responsibilities. In addition, the Authority should work closely with industry groups to recognise and address any emerging trends in incorrect or missing registrations and payments.  |
| Employers in the security sector do not correctly understand their obligations to pay levies, leading to employees incorrectly accessing or being denied portability benefits. | Due to changes to the definition of who is regarded as an employee in the security industry, there is potential that employers do not pay levies to the Authority where they are required to do so.  | **Overall risk rating: Low****Consequences:** If this occurs, employees may be denied a long service benefit. Considering the likely small number of employees in this category, the consequences are **moderate.****Likelihood:** Considering the information campaign, which is to be undertaken by the Authority, this is **unlikely.** | As detailed above, the Authority will be undertaking an information and awareness campaign to alert employers to their responsibilities. In addition, the Authority should work closely with industry groups to recognise and address any emerging trends in incorrect or missing registrations and payments.  |
| The Authority is not adequately prepared for the registration of newly eligible employers and employees, leading to poor experiences. | Due to changes to the definition of community service work, who is regarded as an employee and who is regarded as an employer in the social services sector, and the introduction of a test to determine who is regarded as an employee in the security industry, there is potential for the Authority to not be prepared for the increase in registrations and enquires from employers. | **Overall risk rating: Low****Consequences:** If the Authority is not prepared, the consequences of employers not having a positive experience with their interactions with the Authority is **minor.** **Likelihood:** As the Authority has already shown that it can support the initial establishment of the Scheme and registration of a large number of employers and employees, this is **unlikely.** | The Authority will ensure systems are in place to support registration and to educate staff about the changes to the Regulations. |
| The number of employers requesting reimbursement for double-dipping is significant, leading to increased calls on claims from the Authority. | There is a risk that the scale of double-dipping in the sector would occur at a higher rate than anticipated in the modelling used to set the levy rate. | **Overall risk rating: Low****Consequences:** Depending on the number of individuals who double dip, the Authority stands to lose levies which were not anticipated, and potentially require actuarial work to ensure the fund is able to pay future benefits. Considering the likely small number of employees in this category, the consequences are **minor.** **Likelihood:** This is **possible.** | For the first seven years after commencement of the Scheme, employers will only require reimbursement for double-dipping on a proportional basis. It is proposed that the Authority and IRV will continue to consider administrative processes to prevent double dipping (e.g. collecting information from employees upon application), and will work with employers to monitor cases of double-dipping.  |

The risks outlined above will be continually monitored and assessed through the risk rating matrix and any new risks identified will equally be subject to this matrix. Actions will be taken as required to mitigate risks.

# EVALUATION STRATEGY

Evaluation is critical to measuring, and supporting, the success of regulations.

The Proposed Regulations are made under the LSBP Act, which contains provisions requiring review of the LSBP Act at three and seven year periods after commencement of the LSBP Act. Evaluation of the Regulations should be undertaken as part of these mandated reviews. This will allow a streamlined and comprehensive review, including a full understanding of the interactions between the Regulations and the LSBP Act, as well as their combined impact on the sector.

The evaluation strategy detailed in this section covers only the changes in the Proposed Regulations compared to the status quo under the Interim Regulations. When undertaking the three and seven year reviews mandated in the LSBP Act, the review content in this RIS should be combined with the relevant review content detailed in the 2019 RIS to ensure all aspects of the Regulations are evaluated. The full 2019 RIS can be found at https://www.vic.gov.au/regulatory-impact-statements-2019#long-service-benefits-portability-regulations-2019.

It is not within the scope of this RIS, or the 2019 RIS, to propose an approach to evaluating the LSBP Act as a whole.

In addition to these two formal reviews, IRV and the Authority will continue to monitor and track the implementation and progress of the Scheme to ensure it remains efficient and effective. Many of the changes contained within the Proposed Regulations, including the improved clarity, are as a result of this ongoing role.

## Year three review

The first review of these Regulations will occur as soon as possible after the three year anniversary of the LSBP Act, on 1 July 2022, as part of the broader mandated three year review of the LSBP Act.[[36]](#footnote-36) This will be an ‘implementation review’ which covers the experience of the sector in transitioning to the Regulations. It should include information such as financial and administrative concerns of employers and the proportion of employees who have been registered in the Scheme. This will coincide with the actuarial investigation of funds which is statutorily required every three years. As such, the focus of this review will be on employers and employees rather than the Authority.

### Proposed Approach

#### Who will conduct the review?

The primary responsibility for the evaluation process will rest with the Minister for Industrial Relations. It is proposed that the Minister establish a review body to organise and undertake the review. In addition to their coordination, the following stakeholders will also be involved in varying capacities:

* The Authority – will provide data on the uptake of the Scheme and the nature of their interactions with employers and employees; and
* Employers, employer groups, peak bodies and employee groups will be consulted to provide feedback on various aspects of the Regulations, as detailed below in Table 19.

#### How will the review be conducted?

The review will require synthesis of data from the Authority with stakeholder input to address the objectives of the review. This will require significant consultation with a broad range of employers to gather data on their experience of the implementation of the Scheme and to inform the analysis and results of the review.

It is proposed that the review body establish a working group who can be used on an ongoing basis to provide feedback and steering throughout the development of the review. This could be modelled on the existing Working Party that has been established by IRV which includes unions, employer groups, government departments, and peak body organisations.

### Content

This will be an ‘implementation review’ which covers the experience of the sector in the first phase of implementation of the Proposed Regulations. Its focus should be on matters such as financial and administrative concerns of employers and the uptake of the Scheme.

Key objectives of the review, proposed measures, and potential data sources are summarised in Table 19 below. This table only relates to the changes in the Proposed Regulations compared to the status quo under the Interim Regulations. Evaluation of the content in the Interim Regulations was discussed in the 2019 RIS.

Table 19: Content of the year three review

| Review objective | Measure | Data sources |
| --- | --- | --- |
| Determine if there is appropriate uptake of the Scheme. | * Number of employees registered at the end of the 12th quarter compared to the number of employees considered to be in-scope at that point (based on actuarial modelling prepared during the development of the Scheme).
* Employee satisfaction that employers are registering covered employees with the Authority.
 | * The Authority’s internal data, particularly the registers established under section 7 of the LSBP Act.
* Consultation with employers, employer groups, employees, employee groups, and peak bodies across the three sectors.
 |
| Measure the ease with which employers have been able to implement the Scheme. | * Employer satisfaction with the implementation processes required by the LSBP Act and Regulations.
 | * Consultation with employers, employer groups and peak bodies across the three sectors.
 |
| Determine if the cost of the Scheme is threatening the financial viability of Women’s Health and Community Health employers. | * Number of Community Health and/or Women’s Health providers that have experienced financial difficulties or are in financial distress as a result of the Scheme.
 | * Consultation with employers in the Community Health and Women’s Health sub‑sectors.
* Comparison of the costs of complying with overall revenue and costs of Community Health and Women’s Health employers.
 |

## Year seven review

The second review of the Regulations will occur as soon as possible after the seven year anniversary of the LSBP Act, on 1 July 2026, as part of the broader mandated seven year review of the LSBP Act.[[37]](#footnote-37) This date has been chosen as it is the first year from which employees can claim benefits under the Scheme. The review of the Regulations will be part of a broader assessment of the extent to which the Scheme’s objectives are being met.

### Proposed Approach

#### Who will conduct the review?

The primary responsibility for the evaluation process will rest with the Minister for Industrial Relations. It is proposed that the review body that was established at the year three review will again conduct this review. In addition to their coordination, the following stakeholders will also be involved in varying capacities:

* The Authority will provide data on the uptake of the Scheme and the nature of their interactions with employers and employees; and
* Employers, employer groups, peak bodies and employee groups will be consulted to provide feedback on various aspects of the Regulations, as detailed in Table 20.

#### How will the review be conducted?

The review will require synthesis of data from the Authority with stakeholder input to address the objectives of review. This will require significant consultation with a broad range of stakeholders to gather data on their experience of the implementation of the Scheme and to inform the analysis and results of the review.

It is proposed that the review body seek input from the working group established at the year three review on an annual basis following that review, to build an appropriate evidence base which responds to the below objectives, to inform the year seven review. In addition, the review body will need to undertake further secondary data analysis and another round of consultations and workshop sessions with the working group to develop the detail required to evaluate the extent to which the Regulations have met their objectives.

### Content

The focus of the review will be on measuring the extent to which the Regulations have met the objectives stated in section 3 of this RIS. These objectives, suggested measures, and potential data sources are summarised over the page in Table 20. This table only relates to the changes in the Proposed Regulations compared to the status quo under the Interim Regulations. Evaluation of the content in the Interim Regulations was discussed in the 2019 RIS.

Table 20: Content of the year seven review

| Regulation element | Objectives | Measure(s) | Data Sources |
| --- | --- | --- | --- |
| What is defined as community service work  | * Provide certainty to employees and employers about the scope of the community services sector to be covered by the LSBP Act; and
* Ensure employees across the community services sector have fair and equitable access to the Scheme.
 | * Quantum of levies paid to the Authority in error.
* Number of employers or employees incorrectly registered, or incorrectly not registered, with the Authority.
* Feedback from stakeholders.
 | * The Authority’s internal data, particularly the registers established under section 7 of the LSBP Act.
* Consultation with employers and employer groups in the community services sector.
 |
| Who is regarded as an employer in the community services sector | * Provide certainty to employees and employers in the sector regarding which employers are covered by the Scheme; and
* Ensure employees across the community services sector have fair and equitable access to the Scheme.
 | * Quantum of levies paid to the Authority in error.
* Number of employers incorrectly registered, or incorrectly not registered, with the Authority.
* Number of Women’s Health and Community Health providers experienced financial difficulties or are in financial distress as a result of the Scheme.
 | * The Authority’s internal data, particularly the registers established under section 7 of the LSBP Act.
* Consultation with employers and employer groups in the community services sector.
 |
| Who is regarded as an employee in the community services sector | * Provide certainty to employers on which employees will need to have levies paid to the Authority on their behalf; and
* Ensure employees undertaking community service work have fair and equitable access to the Scheme.
 | * Quantum of levies paid to the Authority in error.
* Number of employees incorrectly registered, or incorrectly not registered, with the Authority.
 | * The Authority’s internal data, particularly the registers established under section 7 of the LSBP Act.
* Consultation with employers and employer groups in the community services sector.
* Consultation with employees and employee groups in the community services sector.
 |
| Who is regarded as an employee in the security industry | * Provide certainty to employers on which employees will be required to have levies paid to the Authority on their behalf.
* Ensure employees undertaking security work have fair and equitable access to the Scheme.
 | * Quantum of levies paid to the Authority in error.
* Number of employees incorrectly registered, or incorrectly not registered, with the Authority.
 | * The Authority’s internal data, particularly the registers established under section 7 of the LSBP Act.
* Consultation with employers and employer groups in the security industry.
* Consultation with employees and employee groups in the security industry.
 |
| Reimbursing employers for double-dipping claims in the community services sector  | * An employer is not to be required to pay an employee for long service leave under an existing workplace law or industrial instrument and to pay a levy under the LSBP Act for the employee in respect of the same service period (without reimbursement).
 | * Number of instances of double-dipping
 | * Consultation with working group and any employers that have experienced double-dipping.
 |

1. : SCHEDULE 1 AND SCHEDULE 3 OF THE LSBP ACT

In order to cover all three sectors in a coherent manner, the LSBP Act is organised into two key sections. Firstly, the provisions which apply to all three sectors (or the Scheme generally) are included in the main text of the LSBP Act. Secondly, there are three schedules, each of which provides the details of the Scheme in a covered sector. Schedule 1 covers the community services sector, Schedule 2 covers the contract cleaning sector, and Schedule 3 covers the security industry.

The regulatory changes assessed in this RIS only impact the community services sector and security industry. For this reason, a simple summary is provided below of the key provisions in Schedule 1 and Schedule 3 which are relevant to this RIS. A summary of Schedule 2 is not provided as no changes are being proposed to the provisions in the Interim Regulations that apply to the contract cleaning sector.

Table 21: Summary of Schedule 1 – Community Services Sector of the LSBP Act

| Clause and heading | Explanation |
| --- | --- |
| 1. *What is the community services sector?*
 | The community services sector is where community service work is performed. This applies to Victoria as well as other states and territories. Community service work is defined in clause 2.  |
| 1. *What is community service work?*
 | The community services sector has been defined in the LSBP Act as work that provides the following for persons who have a disability or other persons who are vulnerable, disadvantaged or in crisis:* training and employment support;
* financial support or goods;
* accommodation, or accommodation-related support services;
* home-care support services; and
* other support services.

In addition, the LSBP Act also includes work that provides the following: * community and legal services, community education and information services, or community advocacy services;
* community development services;
* fundraising assistance for community groups; and
* services providing assistance to particular culture or linguistically diverse communities.

Notably, the definition of community service work explicitly excludes from the coverage of the LSBP Act activities funded under the NDIS, services provided by entities licensed under the *Children’s Services Act 1996*, and anything that Government may stipulate to be excluded. |
| 1. *Who is an employer?*
 | An employer is a not-for profit, or for-profit entity that employs one or more individuals to perform community service work, or a person who is prescribed to be an employer. The following are not employers: * the Commonwealth;
* the State;
* entities with governing bodies appointed under an Act of the Commonwealth or State;
* a municipal council or other statutory body;
* a public health service or a public hospital under the *Health Services Act 1988; and*
* a person prescribed not to be an employer.
 |
| 1. *Who is an employee?*
 | The definition of an employee is an individual employed by an employer for the sector, and includes those employed on a casual basis. The following are not employees: * those who care for children or coordinate the care of children for a business licensed under the *Children’s Services Act 1996*;
* employees whose employer is a Community Health Centre registered under section 48 of the *Health Services Act 1988* (unless their role is to carry out community service work);
* individuals employed by employers who provide services to persons with a disability but whose primary role is to provide health services to those persons;
* individuals employed under the *Aged Care Award 2010* or other prescribed awards; and
* individuals prescribed not to be employees.
 |
| 1. *What is recognised service?*
 | Recognised service is the amount of time an employee has recorded under the Scheme for the purposes of accessing a portable long service benefit. This is all recorded days minus any days taken off for long service. 365 days of recognised service is considered one year of recognised service.  |
| 1. *Crediting service*
 | An employee is credited one day of service for every day that they are employed, regardless of if they work that day. Employees are not able to accrue more than 365 days of service in a year.  |
| 1. *What is a service period?*
 | A service period is a continuous period starting when the LSBP Act comes into effect, and for employees starting after that date, when they commence employment in the sector. The service period ends when the employee leaves the sector. An employee ceases being employed when there is no ordinary pay recorded on their quarterly returns for any employers they worked for during that quarterly reporting period. A service period is not taken to end if the employee ceases being an employee because of an injury in which they are entitled to workers’ compensation, or if their employment is terminated by an employer who wishes to ensure that the employee is not entitled to long service benefits from them.  |
| 1. *Entitlement to long service benefit payment*
 | Once an employee has seven years of recognised service, they can take a long service payment equivalent to 1/60th of their total recognised service. This equates to 8.76 weeks of pay for each 10 years worked. The payment is calculated based on the employee’s ‘ordinary pay’ at the time of claiming.  |
| 1. *What is ordinary pay?*
 | Ordinary pay is the salary or wages due to an employee for their work. This includes any workers’ compensation payments. It does not include:* overtime;
* reimbursement for expenses;
* equipment provided to the employee (including a car);
* allowances paid to the employee including shift allowances and allowances for travel, meals or protective clothing;
* any payments associated with termination of employment (including payment in lieu of notice, redundancy pay and lump sum payments for accrued leave); and
* superannuation.
 |
| 1. *Determination and payment of long service benefit*
 | Employees may apply to the Authority to determine if they are entitled to a payment under the Scheme, or to have this payment processed.The Authority must respond by determining the employee’s right to payment, informing the employee, and paying their benefit (if applicable).  |
| 1. *Entitlement to payment of benefit on leaving the community services sector or death*
 | If an employee dies or leaves the sector before claiming a benefit, they may apply to the Authority to have this benefit paid. The Authority must pay the employee any benefits owed in accordance with the regulations. |
| 1. *Payment by Authority on reciprocal authority's behalf*
 | Employees registered under the Victorian Scheme who have an entitlement to a benefit under the Victorian Scheme, and another portable long service scheme, may apply to the Victorian Authority to have that benefit payed in accordance with the other Scheme’s rules.  |
| 1. *Payment by reciprocal authority on Authority's behalf*
 | If an Authority from another portable long service scheme pays a benefit that otherwise would have been due by the Victorian Authority, the Victorian Authority is to pay the other scheme the amount owed. This will remove the employee’s entitlement under the Victorian Scheme.  |
| 1. *Periods of absence from work taken to be days of service for crediting service*
 | Many periods of leave are recognised as service under the LSBP Act. These are:* a period of paid leave;
* a period of unpaid leave that is less than or equal to 52 weeks;
* if a period of unpaid leave is more than 52 weeks, the initial 52 weeks;
* periods of leave greater than 52 weeks if they are in accordance with an employment agreement, or were agreed in writing to be employment periods, or is taken due to illness;
* interruptions instigated by employers to avoid their duties under the LSBP Act;
* interruptions based on the transfer of assets (i.e. a sale of business in which the employee works); and
* any other agreed period between the employer and employee.

All other absences are not counted as recognised service.  |
| 1. *No double-dipping*
 | Where an employee has overlapping entitlements to long service benefits under a fair work instrument and the LSBP Act, regulations are to be made to give effect to the following principles:* an employee is not entitled to both long service leave under a fair work instrument and payment of a long service benefit under the LSBP Act in respect of the same service period;
* an employer does not need to pay portable long service levies into the Scheme for the overlapping period; and
* the Authority is not required to pay a benefit for the overlapping period.
 |
| 1. *Annual statement*
 | Within 30 days of the end of financial year, the Authority must provide registered active employees with a statement setting out:* the amount of levy paid for them;
* their current entitlement (if any); and
* any information prescribed by Regulations.
 |

Table 22: Summary of Schedule 3 – Security Industry of the LSBP Act

| Clause and heading | Explanation |
| --- | --- |
| 1. *What is the security industry?*
 | The LSBP Act defines the security industry as:* in relation to Victoria, the industry in which security activities are undertaken by persons licensed under the *Private Security Act 2004*; and
* in relation to reciprocating jurisdictions, the security industry within the meaning of the corresponding law of that jurisdiction.

A ‘security activity’ includes:* acting as an investigator, bodyguard, crowd controller, security guard or private security trainer; or
* acting as a security equipment installer or security adviser.
 |
| 1. *What is security work?*
 | Security work is:* work performed in the security industry; or
* an activity or an activity of a class, prescribed to be security work.
 |
| 1. *Who is an employer?*
 | An employer in the security industry is a person engaged in the industry in Victoria who employs someone else (whether in Victoria or elsewhere) to perform work in the industry. A person is also an employer for the security industry if:* the person employs or engages someone else (the employee) to perform work in the industry for another person engaged in the industry in Victoria for fee or reward; and
* there is no contract to perform the work between the employee and the person for whom the work is performed.

The following are not employers:* the Commonwealth;
* the State;
* an entity that has a governing body appointed under an Act of the Commonwealth or the State;
* a municipal council or other public statutory body;
* a person who is, or is a member of a class prescribed not to be an employer for the security industry.
 |
| 1. *Who is an employee?*
 | An employee for the security industry is an individual employed by an employer for the industry (whether in Victoria or elsewhere) and includes:* an apprentice and any individual required to learn or be taught security employee under their employment agreement; and
* a casual employee or an employee employed on a seasonal basis.

An individual is not an employee for the security industry if:* their name is included on the register of employees kept by the trustee in accordance with the trust deed under the *Construction Industry Long Service Leave Act 1997*; or
* the individual is, or is a member of a class, prescribed not to be an employee for the security industry.
 |
| 1. *Who is a contract employee?*
 | A contract employee for the security industry is an individual who performs work in the industry for another person for fee or reward on the individual’s own account. An individual is not a contract employee for the security industry if:* their name is included on the register of working sub-contractors kept by the trustee in accordance with the trust deed under the *Construction Industry Long Service Leave Act 1997*; or
* the individual is, or is a member of a class, prescribed not to be a contract employee for the security industry.

The following are contract employees (not employees):* directors of a company whose only employees or contract employees are directors, if each of the directors participates in the management of a company or shares in its profits;
* the partners of a partnership.
 |
| 1. *What is recognised service?*
 | Recognised service is the amount of time an employee has recorded under the Scheme for the purposes of accessing a portable long service benefit. This is all recorded days minus any days taken off for long service. 365 days of recognised service is considered one year of recognised service. |
| 1. *Crediting service*
 | An employee is credited one day of service for every day that they are employed, regardless of if they work that day. Employees are not able to accrue more than 365 days of service in a year. |
| 1. *What is a service period?*
 | A service period is a continuous period starting when the LSBP Act comes into effect, and for employees starting after that date, when they commence employment in the sector. The service period ends when the employee leaves the sector. An employee ceases being employed when there is no ordinary pay recorded on their quarterly returns for any employers they worked for during that quarterly reporting period. A service period is not taken to end if the employee stops being an employee because of an injury in which they are entitled to workers compensation, or if their employment is terminated by an employer who wishes to ensure that the employee is not entitled to long service benefits from them. |
| 1. *Entitlement to long service leave*
 | Once an employee has seven years of recognised service they are entitled to an amount of long service leave equivalent to 1/60th of their total recognised service less any period of long service leave taken during that period. This equates to 8.76 weeks of pay for each 10 years worked. The payment is calculated based on the employee’s ‘ordinary pay’ at the time of claiming. Long service leave does not include any public holiday occurring, or annual leave taken, during the period when the long service leave is taken.  |
| 1. *When is long service leave to be taken?*
 | A registered employee may request to take long service leave for a period of not less than one day. If the employer refuses the request, the employee may apply to the Authority for a determination.  |
| 1. *Entitlement to payment in lieu of leave on leaving the security industry or death*
 | If an employee dies or leaves the sector before claiming a benefit, they are entitled to payment in lieu of the long service leave to which they are entitled as at the date of leaving the industry or death.  |
| 1. *What is ordinary pay?*
 | Ordinary pay is the salary or wages, and allowances (including shift allowances) due to an employee for their work. This includes any employees’ compensation payments. It does not include:* overtime;
* reimbursement for expenses;
* equipment provided to the employee (including a car);
* allowances paid for travel, meals or protective clothing;
* any payments associated with termination of employment (including payment in lieu of notice, redundancy pay and lump sum payments for accrued leave); and
* superannuation.
 |
| 1. *Payments for leave*
 | An employee or contract employee may apply to the Authority for payment for the leave. The Authority must pay the applicant the applicable amount calculated under clause 16 if satisfied that the applicant is entitled to long service leave under the LSBP Act, and the applicant has been granted leave by the employer.  |
| 1. *Payment in lieu of leave*
 | The Authority must pay an applicant the amount payable under clause 16 if the Authority is satisfied that the applicant is entitled to payment in lieu of long service leave under the LSBP Act for work performed in the security industry.  |
| 1. *Calculating leave payments for service as an employee*
 | The amount payable for long service leave for service accrued must be calculated:* on the lesser of:

the number of days long service leave granted to the employee under clause 11; andthe number of days of the employee’s remaining long service leave credit; and * on the basis of the employee’s ordinary pay at the time the leave commences.

The amount payable **in lieu** of long service leave for service accrued must be calculated:* on the number of days of the employee’s remaining long service leave credit; and
* on the basis of the employee’s ordinary pay immediately before the employee left the industry or died.
 |
| 1. *Calculating leave payments for service as a contract employee*
 | The amount payable for long service leave, or for payment in lieu of long service leave, for service accrued as a registered active contract employee for the security industry is the total of the following for the service:* amounts paid by the employee to the authority under section 32(2): and
* interest at the determined rate.
 |
| 1. *Payment by Authority on reciprocal authority's behalf*
 | Employees registered under the Victorian Scheme who have an entitlement to a benefit under the Victorian Scheme, and another portable long service scheme, may apply to the Victorian Authority to have that benefit payed in accordance with the other schemes’ rules.  |
| 1. *Payment by reciprocal authority on Authority's behalf*
 | If an Authority from another portable long service scheme pays a benefit that otherwise would have been due by the Victorian Authority, the Victorian Authority is to pay the other scheme the amount owed. This will remove the employee’s entitlement under the Victorian Scheme.  |
| 1. *Periods of absence from work taken to be days of service for crediting service*
 | Many periods of leave are recognised as service under the LSBP Act. These are:* a period of paid leave;
* a period of unpaid leave that is less than or equal to 52 weeks;
* if a period of unpaid leave is more than 52 weeks, the initial 52 weeks;
* periods of leave greater than 52 weeks if they are in accordance with an employment agreement, or were agreed in writing to be employment periods, or is taken due to illness;
* interruptions instigated by employers to avoid their duties under the LSBP Act;
* interruptions based on the transfer of assets (i.e. a sale of business in which the employee works); and
* any other agreed period between the employer and employee.

All other absences are not counted as recognised service.  |
| 1. *Benefits under other laws – election*
 | An employee may elect the law under which the long service benefits are to be taken if they are eligible for long service benefits under the LSBP Act and:* the *Long Service Leave Act 2018*;
* a corresponding law;
* a fair work instrument.
 |
| 1. *Benefits under other laws – reimbursement of employer*
 | The Authority may reimburse the employer the amount paid under the law or instrument under which the employee has elected to take long service benefits, less any amount outstanding that is payable by the employer to the Authority.  |

1. : CONSULTATION SUMMARY

The following stakeholders were consulted to inform the preparation of the RIS:

* Australian Education Union
* Australian Security Industry Association Limited
* Australian Services Union
* CoHealth
* Connect Health & Community
* Department of Education and Training Victoria
* Department of Health and Human Services Victoria
* Early Leaning Association Australia
* Gender Equity Victoria
* Grampians Community Health
* Jobs Australia
* Latrobe Community Health Service
* Merri Health
* National Disability Services
* Portable Long Service Authority
* Victorian Chamber of Commerce and Industry
* Victorian Council of Social Service
* Victorian Healthcare Association
* Victorian Hospitals Industrial Association
* Women’s Health in the South East
* Women’s Health Victoria
1. : OUT-OF-SCOPE FEEDBACK

In addition to the residual issues outlined in this RIS, the following key issues were identified by stakeholders during consultations. These issues are out-of-scope for the purposes of this RIS as they do not relate to the operation of the Interim Regulations or Proposed Regulations.

The Department of Premier and Cabinet and/or the Authority will continue to investigate these issues as appropriate. Some of these issues will be relevant for the three-year review of the Regulations and LSBP Act (detailed in section 8.1).

* **The Scheme is an additional cost on employers**

Employers would like to recover the additional cost impost of levy payments they are required to pay under the Scheme, but they cannot. Security and contract cleaning employers have not been able to pass the cost onto their clients. Stakeholders in the social services sector, including early childhood education providers, have not received additional funding from government. NDIS providers’ costs are fixed nationally.

Employers have also reported that registering employees with the Authority has been administratively burdensome.

* **Small providers may not be aware of their obligations under the Scheme**

Feedback from stakeholders reported that some providers have not had any meaningful interactions with the Authority to date. Smaller providers, such as some community-run early childhood centres, may not be aware of their obligations under the Scheme.

* **The extent of late registration and late filing**

The Authority has faced a problem with employers not registering or filing quarterly reports with the Authority on time.

* **Equity within the early childhood education sector concerning the exclusion of for‑profit providers**

As detailed in section 2.3.2.3, employer groups representing not-for‑profit early learning providers have raised concerns with the exclusion of for‑profit providers from the Scheme. It is argued that the exclusion of for‑profit providers undermines the portability of the Scheme. Employees who move from not-for‑profit providers to for‑profit providers will lose their portable long service entitlement. It also arguably creates an uneven playing field between for‑profit and not-for‑profit providers, as it places an additional financial burden on not-for‑profit providers. It is not within the scope of the RIS to re-prosecute the arguments for and against including for‑profit early childhood services providers as for‑profit providers were explicitly excluded by Parliament in the LSBP Act. Any future change to include for‑profit providers will require legislative amendment.

1. Fair Work Act, s 29. [↑](#footnote-ref-1)
2. Due to the dual operation of sections 51(xx) and 109 of the *Constitution.*  [↑](#footnote-ref-2)
3. Fair Work Act, ss 26 and 27(2)(g). [↑](#footnote-ref-3)
4. See *Long Service Leave Act 2018,* s 5(e). [↑](#footnote-ref-4)
5. For some employees, long service leave derives from other instruments, including pre-modern awards preserved by the National Employment Standards. [↑](#footnote-ref-5)
6. CoINVEST covers the Victorian construction sector. The levy rate is 2.7 percent. Available from: www.coinvest.com.au. [↑](#footnote-ref-6)
7. *ACT* *Leave covers the construction*, contract cleaning, community services, and security sectors. The levy rate is 1.2 percent. Available from: [www.actleave.act.gov.au](http://www.actleave.act.gov.au). [↑](#footnote-ref-7)
8. QLeave covers the building and construction and contract cleaning sectors. The levy rate is 1.0 percent. Available from: [www.qleave.qld.gov.au](http://www.qleave.qld.gov.au). [↑](#footnote-ref-8)
9. Parliament of Victoria, Economic, Education, Jobs and Skills Committee, ‘Inquiry into portability of long service leave entitlements’, 8 June 2016. Available from: [www.parliament.vic.gov.au/images/stories/committees/eejsc/EEJSC\_58-01\_Text\_WEB.pdf](http://www.parliament.vic.gov.au/images/stories/committees/eejsc/EEJSC_58-01_Text_WEB.pdf). [↑](#footnote-ref-9)
10. Victorian Government response to the Victorian Parliamentary Economic, Education, Jobs and Skills Committee inquiry into portability of long service leave entitlements, 23 November 2016. Available from: [www.parliament.vic.gov.au/images/stories/committees/eejsc/Victorian\_Government\_response\_to\_the\_Economic\_\_Education\_\_Jobs\_and\_Skills\_Committee\_inquiry\_into\_portability\_of\_long\_service\_leave\_entitlements\_0mPbGwfN.pdf](http://www.parliament.vic.gov.au/images/stories/committees/eejsc/Victorian_Government_response_to_the_Economic__Education__Jobs_and_Skills_Committee_inquiry_into_portability_of_long_service_leave_entitlements_0mPbGwfN.pdf). [↑](#footnote-ref-10)
11. ‘Recognised service’ refers to all days that occur while the person is employed (i.e. all calendar days) and not days worked. A person cannot receive more than 365 days of recognised service per year. [↑](#footnote-ref-11)
12. *Long Service Benefits Portability Act 2018* (Vic) sch 1 cl 8(2). [↑](#footnote-ref-12)
13. Data received by the Portable Long Service Benefits Authority, April 2020 [↑](#footnote-ref-13)
14. Victoria, *Parliamentary Debates,* Legislative Assembly, 6 October 2010, 4004. [↑](#footnote-ref-14)
15. The Interim Regulations do not explicitly refer to an employer predominance test. This is the language adopted in guidance issued by the Authority and used within the sector when referring to the relevant provisions in the Interim Regulations. [↑](#footnote-ref-15)
16. This problem only relates to the registered Community Health centres under the *Health Services Act 1988*. Integrated Community Health services that are part of rural or metropolitan health services, including small rural health services, are not covered by the Scheme because they are integrated into larger hospitals and health centres and not separately registered as Community Health Centres. [↑](#footnote-ref-16)
17. The Interim Regulations do not explicitly refer to an employee predominance test. This is the language adopted in guidance issued by the Authority and used within the sector when referring to the relevant provision in the Interim Regulations. [↑](#footnote-ref-17)
18. Fair Work Act, s 29. [↑](#footnote-ref-18)
19. Due to the dual operation of sections 51(xx) and 109 of the *Constitution.*  [↑](#footnote-ref-19)
20. Fair Work Act, ss 26 and 27(2)(g). [↑](#footnote-ref-20)
21. See *Long Service Leave Act 2018,* s 5(e). [↑](#footnote-ref-21)
22. Under section 48 of the *Fair Work Act 2009*, a modern award will cover an employee (in relation to particular employment) if the award is expressed to cover the employee. In order for an award to ‘apply’ to an employee (that is, impose obligations or provide entitlements under the award), it must cover the employee and no other provision should displace the application of the award (such as if an enterprise agreement applies to the employee) – see ss.46, 47 and 52 of the *Fair Work Act 2009*. The effect of these provisions is that if an enterprise agreement applies to an employee, any relevant modern award is still capable of ‘covering’ the employee. [↑](#footnote-ref-22)
23. Examples of a ‘class A security activity’ include acting as an investigator; or acting as a bodyguard; or acting as a crowd controller; or acting as a security guard; or acting as a private security trainer. Examples of a ‘class B security activity’ include acting as a security equipment installer; or acting as a security adviser. [↑](#footnote-ref-23)
24. VHA, 2019 Submission: Long Service Benefits Portability Regulations, https://s3.ap-southeast-2.amazonaws .com/hdp.au.prod.app.vic-engage.files/5215/6213/7984/VHA\_submission\_portable\_long\_service\_draft\_regulations\_ Redacted.pdf [↑](#footnote-ref-24)
25. Fair Work Act, s 12 (see definitions of ‘fair work instrument’ and ‘enterprise agreement’). [↑](#footnote-ref-25)
26. For further information on the operation of the Regulations as a whole, the 2019 RIS can be found at https://www.vic.gov.au/regulatory-impact-statements-2019#long-service-benefits-portability-regulations-2019. [↑](#footnote-ref-26)
27. Staffing data provided by the Victorian Healthcare Association. The full list of registered Community Health centres in Victoria is available from the Department of Health and Human Services, https://www2.health.vic.gov.au/primary-and-community-health/community-health [↑](#footnote-ref-27)
28. The full list of Women’s Health Centre services is available from Women’s Health Victoria, https://whv.org.au/about/our-sector [↑](#footnote-ref-28)
29. Based on KPMG analysis of data obtained from Australian Charities and Not-For-Profits Commission, ‘2015 Annual Information Statement Data’ (2015). [↑](#footnote-ref-29)
30. Victorian Council of Social Service, ’10 Year Community Services Industry Plan’ (2018). [↑](#footnote-ref-30)
31. Victorian Government response to the Victorian Parliamentary Economic, Education, Jobs and Skills Committee inquiry into portability of long service leave entitlements, 23 November 2016. Available from: www.parliament.vic.gov.au/images/stories/committees/eejsc/Victorian\_Government\_response\_to\_the\_Economic\_\_Education\_\_Jobs\_and\_Skills\_Committee\_inquiry\_into\_portability\_of\_long\_service\_leave\_entitlements\_0mPbGwfN.pdf. [↑](#footnote-ref-31)
32. Australian Bureau of Statistics, ‘Small Business in Australia’ (Catalogue No 1321.0, 23 October 2002). [↑](#footnote-ref-32)
33. Australian Charities and Not-for‑profits Commission, ‘2016 Annual information statement data’ (2016). [↑](#footnote-ref-33)
34. ABS, ‘8165.0 Counts of Australian Businesses, including Entries and Exits, Jun 2014 to Jun 2018’ (2019). Available at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8165.0June%202014%20to%20June%202018?OpenDocument [↑](#footnote-ref-34)
35. Australian Charities and Not-for‑profits Commission, ‘2016 Annual information statement data’ 2016. [↑](#footnote-ref-35)
36. As per *Long Service Benefits Portability Act 2018* (Vic) s 74(2). [↑](#footnote-ref-36)
37. As per *Long Service Benefits Portability Act 2018* (Vic) s 74(2). [↑](#footnote-ref-37)