EDUCATION, EMPLOYMENT AND SMALL BUSINESS COMMITTEE

Members present:

Ms LM Linard MP (Chair)
Mr BM Saunders MP (via teleconference)
Mrs SM Wilson MP (via teleconference)
Mr N Dametto MP (via teleconference)
Mr MP Healy MP (via teleconference)

Staff present:

Ms E Jameson (Acting Committee Secretary)
Ms A Beem (Assistant Committee Secretary)

PUBLIC BRIEFING—INQUIRY INTO THE COMMUNITY SERVICES (PORTABLE LONG SERVICE LEAVE) BILL 2019

TRANSCRIPT OF PROCEEDINGS

TUESDAY, 21 JANUARY 2020

Brisbane

TUESDAY, 21 JANUARY 2020

The committee met at 11.54 am.

JAMES, Mr Tony, Executive Director, Office of Industrial Relations

KESSEY, Ms Allison, Director, Compliance and Client Service, QLeave, Office of Industrial Relations

SPIERS, Ms Kate, Acting Director, Industrial Relations Strategic Policy, Office of Industrial Relations

CHAIR: Thank you for appearing to assist the committee today with our understanding of the bill and to provide clarification of matters raised by stakeholders. We always appreciate this opportunity. Thank you also for the response to submissions you have already provided. It is all very helpful. I will kick over to you to raise any particular issues. I imagine you have been listening today. I think some of you have been here the whole day. If you can speak to some of those issues, anything unanswered will go to committee members.

Mr James: I thank the committee for the opportunity to appear today. I also thank QLeave for supporting me today and for the support they have offered us throughout the development of the bill, particularly most recently in working with the stakeholder task force in terms of the implementation. I notice that there were some issues raised about the importance of a strong and solid implementation process. If there is an opportunity, I can outline some of the prospective preparations that we are doing to assist the rollout. I think they are quite important in terms of some of the issues that were raised today.

I appreciate that the committee is best served if the time available to it is for me to answer questions of the committee. I will rely on the advices we have already provided to the committee, in the written briefings and responses, but I suspect that I will get questions on scope. I am happy to address those. If it pleases the chair and if there is an opportunity, I will also address the example of Jenny that was given. It may have been a little bit misunderstood in terms of the operation of the act—the example of Jenny and the access to the five days. We just want to clarify what that five days actually meant. Given the time we have, I am happy to stop there or to clear up the Jenny and the five days issue.

CHAIR: I suggest that the department address those three matters and then go to questions.

Mr James: The example given was that Jenny commenced work on 1 July 2018 and under the Industrial Relations Act she would have an entitlement to her long service leave, 8.667 weeks, at 1 July 2028. The scheme, if it passes, will commence on 1 July 2020. Given that Jenny is in the community services industry and is doing community services work, she would be a registered worker under that scheme. Her service would start accruing into the scheme from July 2020. The example was given that if she left in 2025 she has not reached her IR entitlement—and that is correct; she has not worked the seven years—and she has not served seven years in the scheme from 2020.

If Jenny then connected to another job—if she went across to a new employer—she would work only another two years to accumulate her seven years portable long service leave under the scheme, but if Jenny had stayed with the original employer until 2028 she would have accrued her full entitlement with that one employer under the Industrial Relations Act. It can do your head in thinking about it, but it is important to understand that the scheme introduced recognises portability of service within the industry, commencing from 1 July 2020. It does not displace an employee who was working with a single employer. It does not displace their entitlement to accrue long service leave and then gain it if they last the full distance. As we know from the evidence, not a lot of them do. If Jenny were to get to 2028 and be entitled to the leave, her employer would pay her the leave but the employer would then recover or she would be paid from the scheme for the accumulation from 2020. Is that clear?

CHAIR: I have a question for you but that will come later. Keep going.

Mr James: With regard to the five days access, what the bill is saying is that the minimum application is for five days. In a way, that is to represent that the scheme is about leave. It was purported that you could not have one day in like a transition to retirement. You can. What we are

saying is that to make an application to QLeave for the payout of the scheme it is a five-day minimum application. However, you could have that one day a week over 20 weeks if you were doing a transition to retirement. The issue is the complexity of managing a one-day application for a long service leave claim to attend a doctor's appointment, and that is not to the economy or the efficiency of the scheme. It is a five-day minimum but there is no necessity for it to be a five-day block.

With regard to the planning for a range of communications and stakeholder engagement and implementation issues, we are well advanced and ready to roll should this bill get passage. QLeave will drive and support the implementation of the scheme given their experience with two other schemes. QLeave has been meeting closely with the community services industry stakeholder task force, unions and peak bodies in preparation for the commencement of the scheme should the bill be passed. I am advised by QLeave that the level of engagement with the stakeholder groups has been exceptional. QLeave is preparing for direct, targeted communication with community service industry audiences through face-to-face information sessions—and I notice that the services industry was particularly keen on ensuring that there is face-to-face communication for this industry; digital and traditional media channels; and partnering opportunities with other agencies, unions and peak bodies. Newspaper advertising as well as the online and printed materials are also been being prepared. With regard to the printed materials, I cannot stress enough that QLeave and the Office of Industrial Relations will provide detailed supporting materials particularly including examples of scope and coverage as this scheme comes to fruition.

A website with links to the QLeave customer relationship management system has been prepared and it is ready to go upon the passage of the bill, so there will be no delay between the passage of the bill and getting the information on the ground. There is a particular focus also on regional communities, understanding that community services operate across this state. Pop-up events are anticipated in the major regional centres. As I said, I wanted to keep my opening statement brief. I welcome any questions that the committee may have.

CHAIR: We will open now to questions. I will go last, as I have been doing, because we have members on the phone and I want to make sure they can ask their questions.

Mrs WILSON: We have heard today from several of the witnesses with regard to the definition. Whilst they do not oppose the legislation as it stands at the moment, they are concerned about the definition. Are we looking further at reviewing the definition that is in place when we are talking about the workers that will be part of the scheme?

Mr James: You are right—and it was obvious today—that there is a large degree of support for this scheme. In terms of the scope, I think it is very important that the committee look at the actual bill and work their way through part 2, sections 6 through 9, which walks us through from the meaning of 'community services industry' and the meaning of 'community services' and 'community services work'. The bill itself actually specifies at schedule 1 the types of services that fit within the community that are community services. 'Community services work' is then described as work that provides community services, and a 'worker' is an individual engaged by an employer to perform community services work. An 'employer' is an entity established for, or with purposes including, the provision of community services that engages an individual.

There is no doubt: this is a complex industry. It is a diverse industry. As the Services Union mentioned, it is an evolving industry as well. The way that this scope is presented in this bill ensures that it is broad enough to capture the evolving industry, and it is certainly cognisant of the Deloitte report and the Social, Community, Home Care and Disabilities Services Industry Award. It is cognisant of that award and that publication.

Community service is clarified in terms of the types of services identified in schedule 1. It does allow an employer and an employee, who are best placed, to determine whether they are a community service entity. The question was whether I am reviewing it. I have no instructions to review the construction in the legislation. However, we are certainly aware from the submissions and from conversations that examples and support material are required and would be appreciated by the industry.

I do caution the committee about being swayed by this notion of predominant purpose. Whilst on face value it looks like it would be a silver bullet, it tends to disguise the argument and move it into the margins of 50 per cent versus 49 per cent, community services versus other, and that can be a difficult place to play in terms of determining true coverage. Again, I would point out that the definition in the legislation identifies that if the entity is established for, or with purposes including, the provision of community services it is prima facie in. The next step is to look at the workers that it has—are they providing community services, which are indicated in the legislation at schedule 1?— and this is a community services industry portable long service leave scheme.

Mrs WILSON: Thank you so much for clarifying that for me.

Mr DAMETTO: Firstly, thank you very much for coming along and giving this public briefing to the committee. My question is more about asking for a comparison. The industry I worked in previously was the construction industry. There was a portable long service leave scheme set up for the construction industry. How does the scheme proposed in the bill compare to the one that was done for the construction industry?

Mr James: In many ways the scheme is very comparable in that it has the same governance structure and it relies on QLeave as the authority to administer the scheme. It has similar appeals. The big difference between the scheme proposed under the Community Services Industry (Portable Long Service Leave) Bill and the building and construction industry is the payment of the levies. In the building and construction industry the levies are calculated as a percentage of reportable works. Reportable works are any projects above $150,000 excluding GST, whereas the levies for the community services industry scheme are based on a percentage or a levy on ordinary time earnings.

If I could make a comparison to another scheme, the contract cleaning services portable long service leave scheme is a very comparable scheme. The powers of authorised officers are the same. In fact, we have drawn very closely in terms of the mechanics, operations and administrations of this new scheme with the contract services scheme because we are cognisant of keeping the cost of this scheme to a minimum—it is the principle of the scheme—and it allows QLeave to make the most economies of scale.

Mr DAMETTO: Thank you for clarifying that. As I said, someone who comes from the construction industry sees a fair bit of value in the scheme I was involved in.

Mr HEALY: I just have a quick statement. Thanks for your time, and obviously I am supportive. As you would have heard from just listening to some people today, it would seem there is an element of confusion or misinterpretation. Tony, I appreciate that you have encouraged us to look at the finer points of the legislation. I would just say that people need to be a little clearer about the wording. I think that has come out. I do not have any questions because you have answered the questions similar to the point I have just made.

CHAIR: Tony, can I come back to two points of clarification you have given for further clarification? One is in regard to clause 7 and the schedules. Coming to the scope and the definition of a worker captured by the scheme or those that may be excluded, what has been raised this morning—and I keep referring to the minister's introductory statement in respect of aged-care and childcare services which she made. If I reflect this appropriately—and you will correct me if I do not—they would be captured whether they are a peripheral or related service to a community service that is being provided, but a stand-alone aged-care and childcare service is not intended to be captured by this scheme. I am sure there is a degree of misunderstanding in some respects. However, do you envisage that the flip side of that is where a community service is a peripheral service—and I do not like using the word but I think you used the term dominant or main service—that would be captured?

Mr James: Again, I go to the definition at clause 9, which states—

an entity established for, or with purposes including, the provision of community services ...

If you had an entity that was providing community services and it engages workers who are providing community services, those workers would be applicable to the scheme.

CHAIR: Hence, if it was peripheral then it would be included because it says 'including', which is a really all-encompassing definition, and it is your intention for that to be so?

Mr James: If they are providing community services they are established for, with the purposes including, community services. If they are not just providing them as a peripheral, as an adjunct, but they are actually established for or with purposes including the provision of community services, yes, they would be an employer. In terms of the workers you would then look as to whether the worker is providing community services or support for the provision of community services. Again, community services are those described in schedule 1 of a type.

CHAIR: You know that the Queensland Law Society is going to write to us further, and there is a little bit of a drafting difference of opinion with regard to that. We will continue to resolve that. They are going to write to us and we may seek your further clarification. I think it is important from their point of view—and I respect that—to ensure that those who are covered clearly understand they are covered. That is why I am coming at this. I am not necessarily saying we should be narrowing the scope but just that we should make sure that people can depend on the fact that they think they are captured by a scheme and their entitlements will be there for them.

The other point of clarification is about Jenny. We come back to fictitious Jenny. On your example it would seem to me, though—and this was the point that was being raised by the CLC—that if Jenny has worked for the same employer since 2018, under the scheme she really would be able to access her pro rata. We are checking who we have on the phone. If Jenny started in 2018, by 2025 arguably she would have seven years and then by the time she gets to 2027 she would have nine years. I think the main issue was that they feel that if Jenny is with one employer for however many years prior to 2020 that continued service with that employer should be captured. What you explained to me was that that is not the case and it is not addressing that issue. Could you answer why?

Mr James: The portability and recognition of service for the purposes of portable long service leave will commence notionally, if the bill passes, on 1 July 2020. For the portability scheme, a worker has to serve 2,555 days registered in order to get an entitlement of 6.1 weeks. Let's say Jenny started in 2018 and went right through to 2028, had her 10 years service. Jenny could claim a portable long service leave entitlement of 6.1 weeks in July 2027. When she gets to 2028, she will have her 10 years entitlement with the one employer of 8.667 weeks, but of course she has already had 6.1 weeks so the employer would be responsible for the balance, which was the amount she had accrued prior to the commencement of the scheme.

I can go back even further. If Jenny had started in 2013 and she works right through for 10 years, she will have a long service leave entitlement under the act in 2023, but under the portability scheme her seven years would not be until 2027. She could then claim some portability, but it would have to recognise the amount of long service leave that she has already taken. The bill accommodates that.

CHAIR: Thank you. Anglicare made the comment that this scheme could cost them a million dollars to provide for. TransitCare has similarly said that they could not afford it. I have the act; I know the relevant section and requirement in respect of the obligation to provide this entitlement. Are long service leave entitlements provided for in government contracts? Is that built in to what they are funded for? It seems that organisations are saying, 'It will cost us a lot of money,' but it is actually to deliver an obligation that they currently carry but very rarely ever have to pay out because of the nature of the industry. It does seems to be an inequity to me. I have not worked in that industry, so I would appreciate any additional information and explanation you can give.

Mr James: I will answer the accrual and the entitlement aspects. I am not able to answer on the contractual arrangements that these places move into and what they comprise. I think Mr Martin from the QCU did go to the matter of competitive tendering and the first thing to drop out is long service leave, which is a punt that it will never come up.

The act does not specify, 'You must put away X amount of dollars per year, per month, per day,' but the act does provide for an accrual of a long service leave entitlement for every day you are there. It commences on the commencement of employment. There is no question that in some industries some employers take a punt and do not start putting matters away until five years. I think one of the participants this morning said that they do not start accruing until five years has passed. They are on spec that they will not have to pay anything out and therefore they will have to put aside an accelerated amount after five years to cover off the first five years that they have not put aside a payment for. I am not able to mention what the funding arrangements are for community services industries. I think someone mentioned this morning that it was actually part of their administrative overhead. It is a genuine entitlement that all employers should be putting aside for. Kate, do you have anything to add?

Ms Spiers: Another issue noted by stakeholders in the task force—it is in the task force report—and in some of the submissions is that even if they make provision for it from day one, the money remains within the organisation until they have to pay it out. That can be invested, if it is invested in such a way that it can be easily accessed. That is the difference between provisioning versus a levy. Even if you provision from day one, the money can stay within the organisation or be invested in some way, whereas the levy is paid to the authority and it is investment in that scheme instead of being within the organisation.

Mr James: Even having said that, if the money is set aside for long service leave and then it is reinvested into other matters, it is being spread; it is not actually being put aside for long service leave.

CHAIR: It is an existing obligation that they have to meet. That is, it is a cost of business. It is not a new cost; it is an existing cost of business. I note that the proposed levy is lower than other jurisdictions. That point has been made, too, and I respect that because we need to keep these costs

low. Thank you for the actuarial work that has been done in that respect. Have there been any estimates about the difference between what they are currently required to put aside and that levy, so the actual cost of this?

Mr James: A straight calculation of 10 years for 8.667 weeks is 1.67 per cent. That is the straight calculation. The actuaries have been able to get the levy rate here down to 1.35 on the basis that the levy obviously goes into a pool and it probably will not be called on to any great degree until seven years has been reached. Having said that, there are other examples of Jenny whose employer might make some draw-out. The actuaries have been able to work through, on a reasonable return of investment, that it can reduce the levy rate to 1.35.

To be frank, portable long service leave is of enormous benefit to the industry and the employer because it actually reduces the amount to be put away, from what would have been 1.67 per cent for the duration of the employment. I recognise that not every person comes to the fruition of a long service leave entitlement in this industry, but that is very much the problem that this scheme is seeking to address. It is an industry whose workers do not reach a community norm for accessing long service leave.

CHAIR: Is there an industry norm in another industry about the number of people who actually access long service leave where these sorts of schemes exist? Currently in some organisations only five per cent of people are meeting that threshold or getting to that mark. What is a norm? I know it is always a dangerous question to ask what is normal.

Mr James: I do not have a number. I know that in the RIS process there was some analysis of the industry and of its access to long service leave. I am pulling figures out—I would have liked a bit more time—but in terms of mobility the SAC sector has high levels of employee mobility. The McKell Institute study used ABS data. For the broader industry of health care and social assistance, it estimated that 25 per cent of workers had been with their current employer for less than one year compared to 19.5 per cent of the whole workforce. This is among one of the highest levels of employee mobility in any industry sector. Published data from the ABS's 2015-2017 Participation, Job Search and Mobility survey indicated that 25 per cent of healthcare and social assistance workers, excluding those engaged in hospitals and child care or aged care, have been engaged with their employer for less than 12 months. The figure is above Queensland's average of 18 per cent. We have high degrees of mobility. In answer to your question, 'What is the norm?,' I do not have it but it looks like the mobility rates are significantly lower than what is exercised in this industry.

CHAIR: It would be remiss of me not to raise Mr David Schipp, who was the first stakeholder to appear this morning. You will not be surprised to hear that he gave a very emotional account of the journey that he has been on. I say that you will not be surprised to hear because he certainly spoke, I think it is fair to say, very gratefully to the support, alongside the legal support, that he saw the minister and the department gave in respect of querying what is seen to be an anomaly, to use the minister's wording. He gave a passionate request for retrospectivity, again which will not surprise you. I would have to assume you have received that request yourself over these past years. It is very difficult not to be moved by that, even though, as a member of parliament, I understand the nature and importance of FLPs. Does the department have any access to or understanding of how many other people may have been likewise caught by this anomaly?

Mr James: Chair, I do not have an understanding because there would be people who got paid or did not get paid and moved on. I have spoken to David Schipp, as have my officers, over a long period of time throughout his appeals, and it is not hard to be moved by the situation he has found himself in. I note his comments about retrospective legislation and it may be justified if it is beneficial, curative or validating in nature, and he is correct, but I would point out that retrospective legislation can also adversely affect rights and liberties and impose obligations retrospectively and therefore they are a breach of fundamental legislative principles.

Consideration of legislation of retrospective effect, in my experience, typically has regard to whether the retrospective application is beneficial to all persons, other than the state, and whether some individuals have relied on the legislation and have a legitimate expectation. In this case, it may be that some employers have relied on the provision as it has been interpreted by the commission and the courts. While the government and parliament are not prohibited from enacting retrospective legislation, doing so is a matter for government policy. The committee may be informed by a publication by the Office of the Queensland Parliamentary Counsel. It is their guide to principles of good legislation in FLPs.

CHAIR: We live by this guide!

Mr James: It deals with retrospectivity. If you are asking me whether there are no other parties that would have relied on this that could be adversely affected, I am unable to say, but I suspect that it is possible.

CHAIR: I appreciate that you would not be able to identify that for myriad complex reasons. Are you or the department aware of any other legal precedents such as his where an interpretation of the section has been taken forward?

Mr James: No. This was the first time that this had been brought to light. Hence, Mr Schipp was instrumental in bringing this issue to light.

CHAIR: Thank you very much for your time. If we have any further queries you know that we will write to you. We may well do so in respect of the Queensland Law Society's supplementary questions. There being no supplementary questions from members, I declare the briefing closed.

The committee adjourned at 12.27 pm.