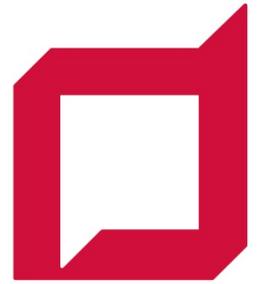


**Submission**  
to Industrial Relations Victoria



**Independent  
Schools** Victoria

# Review of the *Long Service Leave Act 1992 (Vic)*

**Response to the *Victorian Government  
Long Service Leave Discussion Paper  
2016***

**1 April 2016**

# Information about Independent Schools Victoria

The Independent Schools Victoria (ISV) Vision is:

‘A strong independent education sector demonstrating best practice, providing excellent outcomes for students and choice for families.’

To realise this vision, ISV:

- supports quality education
- advocates for excellence in education
- champions Member Schools
- protects the rights of parents to choose where and how their children are educated.

ISV assists 209 diverse Member Schools to continue providing the best possible education outcomes for the citizens of tomorrow.

## Background to this Submission

The provisions of the *Long Service Leave Act 1992 (Vic)* (LSL Act) are relevant to Victorian independent schools. Although many independent schools have placed clauses dealing with long service leave (LSL) in enterprise agreements approved by the Fair Work Commission, the agreement-based entitlements operate in conjunction with many provisions of the LSL Act. As clauses dealing with LSL in enterprise agreements tend to be less comprehensive than the provisions of the LSL Act, the LSL Act remains important to employees and employers in the independent education sector.

In providing a submission in response to the *Victorian Government Long Service Leave Discussion Paper 2016* (Discussion Paper) on behalf of Member Schools, ISV has chosen to respond to Issues 1 to 8 of the Options for Reform (Options A, B and C). Two additional recommendations concerning other changes to the LSL Act have been provided at the end of this submission.

## Option A: Flexibility

### Issue 1 – Making long service leave more flexible

1. It is recommended that the LSL Act preserves the entitlement of an employee to take 13 weeks' LSL upon the completion of 15 years of continuous employment in one block. Retaining this entitlement is in accord with the rationale of LSL, which is to provide a long-serving employee with a reasonable break from the workforce for the purposes of relaxation, refreshment and renewal.
2. It is recommended that the LSL Act is amended to permit an employee to request to take, and an employer to grant, LSL in smaller blocks, should the employee not wish to take the full LSL entitlement in one block. It is recognised that currently employees are requesting to take smaller blocks of LSL more frequently than is permitted by the LSL Act.
3. It is recommended that the provisions of the LSL Act are amended with respect to the taking of the first and subsequent entitlements to LSL. Under the LSL Act, LSL falls due at the end of 15 years of continuous employment, with a further 4.33 weeks' LSL falling due at the end of each successive five year period of continuous employment. It is inconsistent to allow the first LSL entitlement to be taken in two or three blocks (s.67(2)(a)), with the subsequent LSL entitlements also able to be taken in two blocks (s.67(2)(b)), subject to the agreement of both the employee and the employer. Potentially, the LSL Act permits the subsequent entitlements of 4.33 weeks' LSL to be taken in much smaller blocks than the first entitlement of 13 weeks' LSL. In practice, after smaller blocks of LSL have been taken over a period of time, the distinction between the first and subsequent entitlements of LSL become blurred. There is no reason to treat the first and subsequent entitlements to LSL differently.
4. It is recommended that the LSL Act, if amended to provide employees with the option of requesting the LSL entitlement in more than two or three blocks, clearly states that the request may be declined by the employer. The employer should be able to decline the request in circumstances where the request does not meet the employer's operational or business needs.
5. It is recommended that any amendment to the LSL Act recognises that it may not be possible for an employer to grant the LSL entitlement in small and/or more frequent blocks. For example:
  - should an employee request to take one week of LSL during each month over a 13-month period, it may not be possible for an employer to grant such a request. An employer may not be able to engage an appropriate replacement employee for one week in each of 13 consecutive months. In some businesses, engaging a different employee for one week per month over 13 months may adversely affect the continuity of business operations
  - should an employee engaged as a teacher in a school request LSL every Friday for the 40 term weeks of the school year, it may not be possible for an employer to grant the request. If the school has a policy of teaching English and Maths for five periods per week, with no double lessons on any day, then it would not be possible to grant LSL without disrupting student learning. It may be possible if the same replacement teacher could be engaged to work on Friday of each of the 40 term weeks but it may be difficult to engage a replacement teacher wishing to work on this basis.

## Issue 2 – Allow for accrued long service leave to be cashed out

6. It is recommended that the LSL Act is amended to allow an employee to make a request to cash out accrued LSL.
7. It is recommended that the LSL Act is amended to allow an employer to grant or refuse a request to cash out LSL. It is considered that it should not be compulsory for an employer to grant a request to cash out LSL.
8. In amending the LSL Act to permit an employee to request the cashing out of LSL, it is recommended that the following parameters are placed in the LSL Act:
  - an employee must make a request in writing to cash out accrued LSL
  - the request should only be permitted to be made after the employee has completed seven years of continuous employment
  - the request can only be made once in any 12-month period
  - if a request to cash out LSL has been granted previously, any subsequent request to cash out LSL should not be made until 12 months after the granting of the previous request
  - an employer may refuse a request to cash out LSL for reasons of business cash flow, operational needs or where less than 12 months has passed since the employee's previous request to cash out LSL was granted.
9. It is recommended that the LSL Act should not include a provision which would allow the employer to make a request to an employee to cash out the employee's LSL. It is considered important to honour the long-standing principle that the employee makes the request to take leave or, in the alternative, to cash out an accrued LSL entitlement.

## Option B: Consistency and Equity

### Issue 3 – Allow pro rata long service leave to be taken after seven years' service

10. It is recommended that the LSL Act is amended to allow an employee, who has completed at least seven years of continuous employment, to apply to take LSL.
11. In amending the LSL Act, it is recommended that the amount of LSL able to be taken should be limited to the employee's accrued LSL balance.
12. The taking of LSL by an employee after completing seven, but less than 10, years of continuous employment should be subject to the agreement of the employer, with regard being able to be given to the operational requirements of the employer's business.
13. Should the LSL Act be amended to allow an employee to apply to take, or to cash out, LSL after completing seven years of continuous employment, the utility of the following provisions of the LSL Act is limited:
  - a provision restricting the number of blocks over which LSL can be taken or cashed out is limited
  - s.56A of the LSL Act providing for LSL to be taken upon the completion of 10 years of continuous employment.

#### Issue 4 – Paying employees who go on long service leave the same as what they would ordinarily receive if they were still at work

14. It is recommended that an employee should not be entitled to be paid shift, weekend or overtime penalties during a period of LSL. The penalty payment is made to an employee for working either unsocial hours or hours in excess of contracted hours. An employee, who is absent from work on LSL, is not required to attend for work outside of the spread of ordinary hours or in excess of the contracted ordinary hours of work.
15. If penalty payments were to be included in the definition of ordinary pay for a period of LSL, then it may give rise to claims for additional payment which are speculative in nature. That is, an employee, who does not regularly work on a weekend, may suggest that if he/she had been at work, then he/she might have worked a proportion of weekend shifts over the period taken as LSL. Such a situation may give rise to a dispute over payment for a period of LSL.
16. It is recommended that it is reasonable for there to be consistency between the States with respect to the definition of ordinary pay in the LSL Act.
17. It is recommended that an employee, who is entitled to an allowance that is an expense-related allowance such as for the use of car, should not be entitled to receive the allowance during a period of LSL. The expense would not be incurred during a period of LSL.

#### Issue 5 – What happens when the hours of work change over time?

18. It is recommended that the LSL Act is amended to allow hours of work, if they have varied over the period of continuous employment, to be averaged over the period of employment to determine the employment time fraction for the period of LSL being taken.
19. It is recommended that the employee's time fraction, when taking LSL or where LSL is being cashed out, is based on the ordinary hours worked by the employee and not on hours worked for which overtime is paid.
20. It is recommended that at the time that the LSL is taken or paid out, the employee would be paid at the average time fraction using the rate of pay for the employee's current classification.
21. This approach is fair to both the employee and the employer, where the employee's time fractions have varied over the period of continuous employment.
22. It is considered that employers have records that would allow the average time fraction to be correctly calculated for an employee whose time fractions have varied over the period of continuous employment. Calculating the average time fraction over the period of continuous employment is not unduly complex for employers.
23. It is noted that where a part-time employee's hours of work continue to vary, the time fraction at which the first period of LSL is taken may need to be taken into consideration when calculating the average time fraction for a second or subsequent period of LSL. That is, the average time fraction over the whole period of employment may subsequently be higher or lower than the average time fraction that applied when an earlier period of LSL was taken (or paid out) in situations where the LSL entitlement was

not taken in full at the time. Guidelines for calculating the average time fraction in such circumstances may be of assistance to employers and employees.

## Issue 6 – How should family leave be treated?

24. It is recommended that:

- paid leave should accrue LSL
- unpaid leave should not break the continuity of employment but should not accrue LSL. Further, that the period of time for which unpaid leave is taken should have no effect on the continuity of employment.

25. Accordingly, it is recommended that s.63(3) of the LSL Act should be changed. Currently, this section states:

*“(3) Any absence from work referred to in section 62(2)(c) is to be counted as part of the period of an employee's employment unless—  
(a) on it being approved, it was agreed in writing between the employee and the employer (at the request of the employee) that it not be counted;”*

26. As it is recommended that all periods of leave without pay do not accrue LSL, a request in writing from an employee that a period of leave without pay does not accrue LSL would not be necessary. In support of this recommendation, it is unlikely that any employee makes a request that LSL is not to accrue during a period of leave without pay.

27. It is recommended that s.63(2) of the LSL Act is amended to provide greater clarity. This section states:

*“(2) Any absence from work of not more than 48 weeks in any year on account of illness or injury is to be counted as part of the period of an employee's employment, but any absence for that reason in excess of that period is not to be counted.”*

28. In support of this recommendation, both employers and employees find this section of LSL Act confusing to interpret. It may be appropriate to provide an example in the LSL Act to explain the operation of this section.

## Option C: Clarity

### Issue 7 – Casual and seasonal employees

29. It is recommended that the provision of more examples, either in the LSL Act or in guidelines, would assist employers and employees to calculate the LSL entitlement of casual and seasonal employees. The calculation of the actual LSL entitlement rather than whether there is an entitlement seems to be the issue of concern for both employers and employees.

## Issue 8 – Recognising prior service where a business is sold

30. Ensuring that the LSL Act is clearly worded with respect to the recognition of previous service in a transmission of business case would be helpful for both employers and employees.

## Other Recommendations

### Basis of LSL accrual

31. It is recommended that the LSL Act should be changed to refer to LSL being accrued on the basis of continuous service rather than on the basis of continuous employment.
32. In support of this recommendation, it would be clearer and fairer, to both employees and employers, to have LSL based on continuous service. Many employers and employees are not aware of the difference between continuous employment and continuous service and use the terms interchangeably believing them to have the same meaning. It would be helpful to remove this confusion.

### Accrual of leave

33. It is recommended that the accrual of leave entitlements for annual leave, personal/carer's leave and long service leave should be clarified in the LSL Act for the situation where an employee takes LSL for twice the period of time but at half the rate of pay (s.71A).