

Ai GROUP SUBMISSION

Senate Education and Employment
Legislation Committee

**Fair Work Amendment (Family and
Domestic Violence Leave) Bill 2018**

24 September 2018



Ai Group Submission to Senate Education and Employment Legislation Committee

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

Ai Group contact for this submission

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Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee's (**Committee**) inquiry into the *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018 (Bill)*.

The Bill would amend the National Employment Standards (**NES**) in the *Fair Work Act 2009 (FW Act)* to implement unpaid family and domestic violence leave entitlements that closely align with those in the Fair Work Commission's (**FWC's**) model award clause which became operative in all modern awards on 1 August 2018 (see **Attachment A**). The clause was the outcome of the FWC's major *Family and Domestic Violence Leave Case*. Ai Group played a leading role throughout the case in representing employers.

The Bill is a sensible legislative change that would extend the 5-day unpaid family and domestic violence leave entitlement in the FWC's model award clause to all employees, including award-free employees and enterprise agreement covered employees.

The close alignment between the provisions in the Bill and the provisions in the FWC's model award clause is important to avoid confusion and uncertainty for employers and employees.

No doubt the unions will argue that the Bill should reflect the 10-day paid leave entitlement that they pursued in the FWC case, but this entitlement was rejected by the independent FWC. In the case, the unions were unable to provide any credible argument for where they came up with their claim for 10 days of paid leave. The evidence in the case was that employees who are experiencing family and domestic violence and take leave, on average take 2-3 days of leave. Paid family and domestic violence leave exists in very few countries.

Family and domestic violence is a community problem and the whole community has a role to play in addressing it.

Employers have different capacities to provide support to employees who are experiencing family and domestic violence. Many large employers have relevant policies to assist employees who are victims of family and domestic violence. Smaller employers often do not have written policies but they typically adopt a reasonable and compassionate approach when their employees suffer genuine hardships. The Bill implements an appropriate safety-net entitlement. It strikes an appropriate balance, as does the model award clause developed by the FWC.

The provisions in the Bill build upon the various existing entitlements and protections in the FW Act, of relevance to those experiencing family and domestic violence, including:

- Various forms of paid and unpaid leave;
- The general protections and unfair dismissal laws which protect employees who need to be absent from work; and

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- The right of an employee who is experiencing family and domestic violence to request flexible work arrangements (s.65(1A)(e)).

Ai Group urges the Committee to recommend that the Bill is passed.

Ai Group’s comments on the specific provisions in Schedule 1 of the Bill are set out in the following table.

Provision in Schedule 1 of the Bill	Ai Group’s position	Ai Group’s comments
Items 2 and 3.	Supported	These are technical and consequential provisions.
Item 1 (Definitions of “close relative” and “family and domestic violence”) and Item 5 – s.106A – Entitlement to unpaid family and domestic violence leave	Supported	Section 106A contains similar entitlements to those in clauses X.1, X.2 and X.3 in the FWC’s model clause. (See Attachment A). These entitlements reflect the outcome of a major FWC case that continued for over two years before a Full Bench of the Commission. The Full Bench made its decision after considering an extensive amount of evidence and detailed submissions.
Item 5 – s.106B – Taking unpaid family and domestic violence leave	Supported	Section 106B closely aligned with clause X.4 in the FWC’s model clause. (See Attachment A).
Item 5 – s.106C – Confidentiality	Supported	The confidentiality provisions in the FWC’s model clause, which have been incorporated into all 122 modern awards, were the subject of a great deal of debate in the proceedings. Eventually the following wording was developed that was acceptable to Ai Group, ACCI and the ACTU: X.7 Confidentiality (a) <i>Employers must take steps to ensure information concerning any notice an employee has given, or evidence an employee has provided under clause X.6 is treated confidentially, as far as it is reasonably practicable to do so.</i> (b) <i>Nothing in clause X prevents an employer from disclosing information provided by an employee if the disclosure is required by an Australian law or is necessary to protect the life, health or safety of the employee or another person.</i>

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Provision in Schedule 1 of the Bill	Ai Group's position	Ai Group's comments
		<p><i>Note: Information concerning an employee's experience of family and domestic violence is sensitive and if mishandled can have adverse consequences for the employee. Employers should consult with such employees regarding the handling of this information.</i></p> <p>Key elements of the confidentiality provisions in the FWC's model clause include:</p> <ol style="list-style-type: none"> 1. The confidentiality obligation on the employer is to 'take steps' – it is not an absolute guarantee of confidentiality. 2. The confidentiality obligation relates only to notice and evidence – not to other information. 3. The obligation only applies 'as far as is reasonably practicable'. <p>The confidentiality provisions in the Bill appropriately contain the above key elements.</p> <p>Employers typically treat information concerning an employee's experience of family and domestic violence in a sensitive manner. However, there are often sound reasons why certain personnel in a business need access to information concerning the family and domestic violence leave that an employee has applied for or taken. For example, managers and payroll staff involved in the approval and administration of leave entitlements would typically need access to this information.</p> <p>Also, circumstances involving family and domestic violence can create work health and safety risks within a workplace that an employer has a legal obligation to address. Security, reception and/or other staff may need to be provided with certain information to address risks to an employee who has applied for or taken family and domestic violence leave and to other employees (e.g. providing the identity of an employee's violent partner to security staff if there is the risk of the person visiting the workplace, or providing the telephone</p>

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Provision in Schedule 1 of the Bill	Ai Group's position	Ai Group's comments
		<p>number of a violent partner to the receptionist if the person is constantly calling to harass the employee).</p> <p>It would be unfair to expose a business and managers in the business to hefty penalties for breaching the law because the business's payroll system gives relevant managers and payroll staff access to leave records. It would also not be reasonable to require businesses to incur the cost of modifying their payroll software or to require them to implement new leave approval systems as a result of the implementation of the Bill.</p>
Item 5 – s.106D – Operation of unpaid family and domestic violence leave and leave for victims of crime	Supported	This is a technical provision that addresses the interaction with State and Territory laws that provide for leave for victims of crime.
Item 5 – s.106E – Entitlement to days of leave	Supported	This is a technical provision that clarifies the intended meaning of a “day” to avoid uncertainty.
Item 6 – Notice and evidence requirements	Supported	It is sensible for the same notice and evidence provisions to apply to all of the various types of leave in Division 7 of Part 2-2 of the FW Act.
Item 7 – s.39 – Entitlement to unpaid family and domestic violence leave	Supported	This is a workable transitional arrangement which addresses the entitlements of persons employed at the time when the legislative amendments commence operation.
Item 7 – s.40 – Resolving uncertainties and difficulties about interaction between enterprise agreements and unpaid family and domestic violence leave	Supported	<p>The family and domestic violence leave provisions in the Bill would become terms of the NES and, as drafted, subject to the very rigid provisions in s.55 of the FW Act concerning the interaction between the NES and enterprise agreements.</p> <p>During the FWC's <i>Family and Domestic Violence Leave Case</i>, Ai Group tendered a detailed analysis of family and domestic violence leave clauses in enterprise agreements. (Annexure 1 in Ai Group's submission of September 2016). The data for the analysis was provided by the Department of Jobs and Small Business' Workplace Agreement Database.</p>

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<i>Provision in Schedule 1 of the Bill</i>	<i>Ai Group's position</i>	<i>Ai Group's comments</i>
		<p>The analysis highlights that the content of enterprise agreement provisions dealing with family and domestic violence leave vary considerably in terms of such matters as:</p> <ul style="list-style-type: none"> • The definition of family and domestic violence; • The circumstances in which leave can be taken; • The quantum of leave; • Whether leave is unpaid or paid; and • Whether an employee can access personal/carer's leave for family and domestic violence purposes. <p>Section 40 in the Bill is a practical provision that would give the FWC the power to resolve uncertainties and difficulties about the interaction between enterprise agreements and the new provisions of the NES.</p> <p>A similar problem was identified and addressed before the NES provisions came into operation on 1 January 2010 through Items 23 and 26 of Schedule 3, Part 5, Division 1, of the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>. It appears that s.40 in the Bill has been modelled on aspects of Items 23 and 26 in the Transitional Act.</p>

Conclusion

The Bill contains worthwhile and balanced reforms. We urge the Committee to recommend that the Bill is passed.

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ATTACHMENT A

MODEL CLAUSE – UNPAID FAMILY AND DOMESTIC VIOLENCE LEAVE

X. Leave to deal with Family and Domestic Violence

X.1 This clause applies to all employees, including casuals.

X.2 Definitions

(a) In this clause:

family and domestic violence means violent, threatening or other abusive behaviour by a family member of an employee that seeks to coerce or control the employee and that causes them harm or to be fearful.

family member means:

- (i) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or
- (ii) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee; or
- (iii) a person related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

(b) A reference to a spouse or de facto partner in the definition of ***family member*** in clause X.2(a) includes a former spouse or de facto partner.

X.3 Entitlement to unpaid leave

An employee is entitled to 5 days' unpaid leave to deal with family and domestic violence, as follows:

- (a) the leave is available in full at the start of each 12 month period of the employee's employment; and
- (b) the leave does not accumulate from year to year; and
- (c) is available in full to part-time and casual employees.

Note:

- 1. A period of leave to deal with family and domestic violence may be less than a day by agreement between the employee and the employer.
- 2. The employer and employee may agree that the employee may take more than 5 days' unpaid leave to deal with family and domestic violence.

X.4 Taking unpaid leave

An employee may take unpaid leave to deal with family and domestic violence if the employee:

- (a) is experiencing family and domestic violence; and
- (b) needs to do something to deal with the impact of the family and domestic violence and it is impractical for the employee to do that thing outside their ordinary hours of work.

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Note: The reasons for which an employee may take leave include making arrangements for their safety or the safety of a family member (including relocation), attending urgent court hearings, or accessing police services.

X.5 Service and continuity

The time an employee is on unpaid leave to deal with family and domestic violence does not count as service but does not break the employee's continuity of service.

X.6 Notice and evidence requirements

(a) Notice

An employee must give their employer notice of the taking of leave by the employee under clause X. The notice:

- (i) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
- (ii) must advise the employer of the period, or expected period, of the leave.

(b) Evidence

An employee who has given their employer notice of the taking of leave under clause X must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for the purpose specified in clause X.4.

Note: Depending on the circumstances such evidence may include a document issued by the police service, a court or a family violence support service, or a statutory declaration.

X.7 Confidentiality

- (a) Employers must take steps to ensure information concerning any notice an employee has given, or evidence an employee has provided under clause X.6 is treated confidentially, as far as it is reasonably practicable to do so.
- (b) Nothing in clause X prevents an employer from disclosing information provided by an employee if the disclosure is required by an Australian law or is necessary to protect the life, health or safety of the employee or another person.

Note: Information concerning an employee's experience of family and domestic violence is sensitive and if mishandled can have adverse consequences for the employee. Employers should consult with such employees regarding the handling of this information.

X.8 Compliance

An employee is not entitled to take leave under clause X unless the employee complies with clause X.