



Submission to the Senate Education and Employment Legislation Committee on the Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018

Introduction

The Department of Jobs and Small Business welcomes the opportunity to provide a submission to the Senate Education and Employment Legislation Committee (the Committee) inquiry into the Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018 (the Bill).

The Bill implements the Commonwealth Government's commitment to extend the Fair Work Commission's (the Commission) decision of 26 March 2018 to include five days' unpaid family and domestic violence leave in modern industry and occupation awards to all employees covered by the *Fair Work Act 2009* (the Act).

It does this by amending the National Employment Standards (NES) in the Act to include a new entitlement to five days' unpaid leave to deal with the impact of family and domestic violence. This minimum entitlement applies to all national system employees, regardless of whether their terms and conditions of employment are set by a modern award, enterprise agreement or individual arrangement. As with other minimum standards established by the NES, it remains open to employers to offer conditions that exceed the minimum entitlement.

By legislating for family and domestic violence leave as a minimum standard in the NES, employees experiencing family and domestic violence will also be protected from being dismissed from their jobs or suffering other adverse treatment when they have to be absent from work to deal with the impact of family and domestic violence.

The Commission's decision covers up to 2.3 million award-reliant workers. Mirroring this provision in the NES will extend the new workplace right to up to a further six million workers covered by the Act.

The Commission indicated it will revisit consideration of the issue of family and domestic violence leave in mid-2021, including whether any changes are needed to the unpaid leave terms and whether provisions should be made for paid family and domestic violence leave.

Background to the Fair Work Commission decision

The Fair Work Commission is Australia's national workplace relations tribunal. It is an independent body with power to carry out a range of functions under the *Fair Work Act 2009*.

The Commission's functions include undertaking a 4 Yearly Review of Modern Awards (s. 156). As part of its review, the Commission may make determinations making, varying or revoking modern awards. Consideration of family and domestic violence leave was undertaken by the Commission as part of its 4 Yearly Review.

Any variation of a modern award arising from the 4 Yearly Review must comply with the requirements of the Act relating to the content of modern awards, including the modern awards objective (section 134).

The modern awards objective requires the Commission to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

As part of the current 4 Yearly Review of Modern Awards, the Commission considered a claim by the Australian Council of Trade Unions (ACTU) for all modern awards to be varied to include a new entitlement to ten days' paid family and domestic violence leave.

On 3 July 2017, the Commission rejected the ACTU's claim for ten days' paid family and domestic violence leave: [\[2017\] FWCFB 3494](#).

The Commission said that:

- it was 'not satisfied, at this time, that it is necessary to provide ten days paid family and domestic violence leave to all employees covered by a modern award' [6] and that 'The ACTU has not provided a satisfactory explanation as to how it arrived at ten days and the evidence does not support a finding that ten days paid leave is necessary' [65];
- there was little evidence about '...the extent to which employers informally or formally provide such leave or the extent to which employees access existing entitlements for family and domestic violence leave' [95]; and
- '...the provision of paid leave will increase costs to employers and that given the lack of data, the impact on employers of that increase in costs is difficult to assess. This supports our conclusion that we should take a cautious approach to the introduction of family and domestic violence leave, particularly paid family and domestic violence leave' [98-99].

Instead, the Commission stated a preliminary view that an unpaid leave entitlement should be inserted into modern awards. It said:

- 'such unpaid leave serves to confirm the significance of family and domestic violence leave as a workplace right and provides an employment protection in circumstances where there is a need to access such leave' [119].

The Commission confirmed its preliminary view on 26 March 2018, when it decided that an entitlement to five days' unpaid family and domestic violence leave should be inserted into modern awards as a minimum entitlement. After broad consultation, on 6 July 2018, the Commission finalised the wording of the model clause to be inserted into modern awards. The new clauses took effect in the 123 modern industry and occupation awards from 1 August 2018.

Submissions were called and hearings were undertaken throughout the Commission's deliberations of family and domestic violence leave. Between October 2014 and July 2018, the Commission considered 68 written submissions from 27 parties, and heard evidence from 26 witnesses over 11 days of hearings.

The Commission indicated it will revisit consideration of the issue of family and domestic violence leave in mid-2021, including whether any changes are needed to the unpaid leave terms and whether provisions should be made for paid family and domestic violence leave.

The Bill mirrors the model award term for family and domestic leave

The new entitlement in the Bill to five days' unpaid family and domestic violence leave reflects the Commission's model award clause. The new entitlement to five days' unpaid leave would, under both the Bill and the model award clause:

- be available in full to full-time, part-time and casual employees;
- be available to an employee who is experiencing family and domestic violence and needs to do something to deal with the impacts of that violence and it is impractical for the employee to do that thing outside of the employee's ordinary hours of work;

- be available in full at the commencement of each 12 month period; and
- not accumulate from year to year.

Both entitlements would also not be available to employees seeking to take leave as a perpetrator of family and domestic violence.

The entitlement in the Bill will operate in the same way as that provided for in the Commission's model award clause, with some minor differences. These differences do not alter the character of the leave entitlement, but are necessary to accommodate the new entitlement within the existing statutory framework. Similarly, a number of model award clause terms have not been replicated in the Bill at all because the content already exists or is otherwise provided for elsewhere in the Act. Further detail on noteworthy differences is at [Attachment A](#).

A minimum standard for 8 million workers

The Fair Work Commission's decision established a minimum safety net for up to 2.3 million award-reliant employees. The Bill will extend this minimum safety net entitlement to all 8 million workers covered by the Act, regardless of whether they are employed on a modern award or under an enterprise agreement or individual arrangement.

As with other minimum standards established by the NES, it remains open to employers to offer conditions that exceed this minimum. Employers and employees can also negotiate workplace specific family and domestic violence-related entitlements in enterprise agreements and workplace policies that suit their particular circumstances.

Consultation

On 2 August 2018, departmental officials also consulted with members of the the National Workplace Relations Consultative Council Committee on Industrial Legislation (which has employer group and union representation) and state and territory government officials under the *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector* on draft provisions of the Bill.

Attachment A: Differences between the Bill and the model clause

	The Bill	The model clause	Comment
1	<p>Arrangements for taking the leave</p> <p>New ss 106A(4) and (5) permit employees to take the leave in a variety of ways including, by agreement with their employer, for periods of less than a day or for more than five days.</p>	<p>Clause X.3 provides employees with the same options, but specified in notes to the clause rather than in the clause itself.</p>	<p>Same effect - Bill provision reflects the drafting for similar occasion-based leave entitlements in the Act (eg. compassionate leave in s 105).</p>
2	<p>Notice and evidence requirements</p> <p>Provision for the new unpaid leave entitlement is added to the existing notice and evidence requirements in s 107 of the Act.</p>	<p>Clause X.6 sets out a full notice and evidence requirement clause.</p>	<p>Same effect - Bill provision reflects the fact that notice and evidence requirements already exist in the Act.</p>
3	<p>Term used to define ‘close relative’</p> <p>The Bill uses the term ‘close relative’ rather than ‘family member’.</p>	<p>The model clause uses the term ‘family member’ (defined in cl X.2).</p>	<p>Same effect - ‘Close relative’ is used in the Bill to ensure the meaning of ‘family’ already in the Act is not impacted.</p>
4	<p>Interaction with ‘leave for victims of crime’</p> <p>New section 106D sets out the interaction between the new entitlement in the Bill with any leave for victims of crime provided by a State or Territory.</p>	<p>N/A</p>	<p>Bill provision required because of the interaction with State and Territory laws and State referral laws. This section ensures that State and Territory laws are not overridden by the Commonwealth’s laws providing unpaid family and domestic violence leave. It further ensures that where these laws overlap, an employee gets the benefit of both laws. With respect to employees who are only in the national system by virtue of State referrals of subject matter to the Commonwealth, this provision also makes clear that those employees can access the new leave to the extent that they are not taking it as leave for victims of crime.</p>

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	The Bill	The model clause	Comment
5	<p>Application provision</p> <p>Clause 39 sets out how the entitlement applies in the first year of operation.</p>	N/A	Bill application provisions are a standard and necessary inclusion.
6	<p>Clarification for casual and fixed term employees</p> <p>New s 106A(3) clarifies that casual employees, and employees engaged for a specified period, task or season, only gain the benefit of the five days of leave once in a 12 month period.</p>	N/A	The Bill provides clarity in relation to how the entitlement operate for casual and fixed term employees.
7	<p>An entitlement to a day of leave</p> <p>New s 106E aligns what is meant by a day of leave for the purposes of the new entitlement with other relevant NES provisions</p>	N/A	The Bill makes it clear that all non-accrual occasion-based entitlements (which includes unpaid family and domestic violence leave) operate in the same way.
8	<p>Interaction with current enterprise agreements</p> <p>New clause 40 provides a mechanism to resolve uncertainties and difficulties about the interaction between enterprise agreements and the new leave entitlement</p>	N/A	Unlike the model clause, the Bill needs to deal with the interaction with enterprise agreements.