

Inquiry into the Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018
Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Submitted online

21 September 2018

Dear Committee Secretary

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

The Employment Law Centre of Western Australia (Inc) (**ELC**) welcomes the opportunity to make a submission to the Education and Employment Legislation Committee (**Committee**) in relation to its inquiry (**Inquiry**) into the Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018 (**Bill**).

Due to the limited time in which to respond, our submission is brief and we have only addressed key issues that appear to be relevant to our client base of vulnerable Western Australian workers.

About ELC

ELC is a community legal centre which specialises in employment law. It is the only not-for-profit legal service in Western Australia dedicated to offering free employment law advice, assistance and representation to vulnerable non-unionised workers.

ELC assists thousands of callers each year through our Advice Line service and provides several hundred employees each year with further assistance from a solicitor.

ELC's support of family and domestic violence leave

In our view, the issue of family and domestic violence (**FDV**) must be addressed both at a societal level and within the employment context. FDV is an issue which should be nonpartisan, having broad political support and commitment from all Parliamentarians to address.

In order to address FDV, it is necessary to take a multi-layered approach. One small part of this is the ability for employees to take leave from their employment where a FDV matter arises.

ELC submits there are two key questions which should be addressed by the Committee when reviewing the Bill. These questions are as follows.

- Should the Bill merely seek to replicate the recent modern award clause dealing with FDV leave or should it provide for a greater entitlement?
- If the answer to the first question is that the Bill should provide for a greater entitlement, then what is that greater entitlement? For example:
 - Should FDV leave be paid (in its entirety or only a portion of the FDV leave entitlement)?
 - Should FDV leave be increased from its five day entitlement under the Bill?
 - Should FDV leave be cumulative?

ELC supports FDV leave being included in the National Employment Standards.

ELC is of the view that the Bill is a welcome start to the issue of FDV in an employment context.

Question 1: Should the Bill merely seek to replicate the recent modern award clause dealing with FDV leave or should it provide for a greater entitlement?

The Explanatory Memorandum to the Bill refers to the new FDV leave clause taking effect in modern awards, and relevantly provides:

A new entitlement to unpaid family and domestic leave in the NES would also ensure, as far as possible, consistency in entitlements for employees in the national system.

...

The entitlement in the Bill to unpaid family and domestic violence leave is consistent with the new modern award entitlements that the Commission inserted into all modern industry and occupation awards.

However, the Fair Work Commission, in undertaking its 4 yearly review of modern awards, was required to take into account the modern awards objective as set out in section 134 of the *Fair Work Act 2009* (Cth) (**Fair Work Act**) when assessing whether to include a FDV leave.

It is in this context that on 3 July 2017, Deputy President Gooley and Commissioner Spencer issued a joint decision regarding their preliminary view that all employees should have access to unpaid FDV leave.¹ In so doing, they stated:²

In making our decision we are not free to decide on the merits what would be desirable to include in modern awards. We are required to determine what is necessary to achieve the modern award objective. However we accept that what is necessary may change over time.

¹ 4 yearly review of modern awards—Family & Domestic Violence Leave Clause [2017] FWCFB 3494

² At para 117.

Parliament is not subject to such constraints. Parliament is free to decide, on the merits, what is desirable to include in the National Employment Standards (**NES**). Therefore, it is both open to Parliament, and indeed desirable, that the NES provide a greater entitlement to FDV leave than that contained in modern awards.

However, while ELC is of the view that there are a number of areas in which the Bill could be strengthened, ELC would prefer that the Bill be enacted in its current form rather than there being no FDV leave provided for in the Fair Work Act because consensus cannot be reached.

ELC is of the view that the Bill should provide a greater entitlement to FDV leave than the new entitlement contained in modern awards.

ELC encourages all Parliamentarians to work collaboratively and in good faith to see this Bill through to enactment as soon as possible – either in its current form or with enhanced entitlements.

Question 2: In what areas could the Bill be strengthened?

In general terms, in ELC’s view the nature and extent of the FDV leave should include terms that deal with the following matters:

- FDV leave be paid;
- FDV leave be for a period of at least 10 days’ leave per annum;
- the FDV leave entitlement be cumulative, instead of non-cumulative; and
- protections from discriminatory treatment.

Of all these matters, of most importance in ELC’s experience for its clients is the issue of whether FDV leave should be paid.

ELC is also of the view that the requests for flexible working arrangements under the NES need to be slightly modified to align with the wording in the Bill, noting that one circumstance in which an employee can request a change in working arrangements is where:

*the employee is experiencing violence from a member of the employee’s family.*³

FDV leave should be paid

In the joint decision on 3 July 2017, Deputy President Gooley and Commissioner Spencer assessed the Australian Council of Trade Unions’ claim for 10 days’ paid leave.

While they were “*not satisfied that the ACTU had made out a case that ten days paid leave for all award covered employees is necessary to meet the modern award objective*”⁴, they did find⁵:

We accept the evidence that the provision of paid leave would assist employees who experience family and domestic violence. It would obviously reduce the financial impact of

³ Section 65(1A)(e) of the Fair Work Act

⁴ Supra note 1, para 68

⁵ Ibid, para 60 - 62

the consequences of the violence. We accept the evidence that employees who experience family and domestic violence face financial difficulties as a result of the family and domestic violence such as relocation costs or becoming a sole parent. Having to lose pay at the same time because of the need to attend to the consequences of family and domestic violence would add to the financial burden faced by these employees. We therefore, would have no difficulty in concluding that the provision of paid leave would be a desirable outcome.

Further we accept the evidence that employees who experience family and domestic violence suffer economic harm as a result of disruption to workforce participation.

...

We note that where employers have introduced family and domestic violence leave, either through enterprise bargaining or by policy, paid leave has been provided. Further, a number of Australian governments have introduced paid domestic violence leave for their own full time and part time employees and unpaid leave for casual employees, or in the case of Queensland, for all employees within the scope of its industrial relations system. Such decisions are to be applauded.

As mentioned above, Parliament is not subject to the modern award objective constraints when reviewing this issue and can decide on the merits whether the Fair Work Act should provide for paid FDV leave.

Paid leave is necessary in order to properly support victims of FDV

There is clearly a need for FDV leave. According to data from the Australian Bureau of Statistics' 2012 Personal Safety Survey, more than one in four employed women who were physically assaulted by a male cohabiting partner took time off work as a result of the assault.⁶ Approximately one in five employed women who were sexually assaulted by a male cohabiting partner took time off work as a result.⁷

There is also evidence that FDV has a financial impact on victims. For example, the Report of the Victorian Royal Commission into Family and Domestic Violence found that “[v]ictims of family violence are more likely to experience financial difficulty and many women experience poverty as a result of family violence, regardless of their prior economic circumstances”.⁸

Additionally, the Victorian Royal Commission heard evidence that “financial security is a significant protective factor in victims gaining freedom from abusive partners.”⁹

ELC is therefore of the view that the provision of FDV leave should be on a paid basis.

⁶ Australian Bureau of Statistics, Personal Safety Survey, Australia, 2012, as cited and analysed in Australia's National Research Organisation for Women's Safety to Reduce Violence against Women & their Children, Horizons Research Report, Violence against women in Australia: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012, Issue 1, 2015, p. 116.

⁷ Ibid.

⁸ State of Victoria, Royal Commission into Family Violence: Report and recommendations, Vol IV, Parl Paper No 132 (2014–16), p.93.

⁹ Ibid.

In ELC's experience, where leave is on an unpaid basis this disincentivises employees from accessing this leave even where they have a lawful entitlement to it.

For example, vulnerable low-income employees, when faced with a stark choice of accessing paid annual leave versus unpaid FDV leave; may often chose to access their annual leave. Indeed, even if the entitlement to FDV leave was increased to 10 days unpaid leave, to access the full amount of this leave would typically cost an employee two weeks' salary.

Paid FDV leave would not impose a significant burden on employers

It is trite to say, but FDV leave is different from annual leave and is more akin to sick leave. It is an entitlement which arises in specified circumstances, and the ability to access FDV leave requires a person to be subject to conduct which cannot be condoned.

Hopefully, it is then leave which all employees will never need to access. However, where an employee is subject to FDV and requires leave to deal with certain matters, this should be facilitated by the employer and should be on a paid basis.

Given the very specific circumstances in which FDV leave may be taken and the relatively small percentage of the population who are likely to experience FDV in a 12 month period, it is unlikely to be widely used. Indeed, according to some analysts, "[o]nly about 1.5 percent of female employees, and around 0.3 of male employees, are likely to utilise paid domestic leave provisions in any given year."¹⁰

On this basis, if paid leave is offered to all national system employees, it is unlikely to impose a significant cost burden on employers.

ELC also notes that this is not a binary issue – that is FDV leave should either be paid or unpaid. While ELC is of the strong view that all FDV leave should be paid, it accepts that it is open to the Committee to consider that only a portion of FDV leave should be paid and the balance of any FDV leave be on an unpaid basis.

ELC is of the view that FDV leave should be on a paid basis.

The FDV leave entitlement should be cumulative, instead of non-cumulative

In ELC's view, FDV leave should be cumulative. ELC appreciates in this regard that the leave is provided as an up-front entitlement. However, ELC is of the view that this leave should be cumulative particularly if the Bill ultimately provides for only 5 days of leave.

ELC is of the view that the entitlement to FDV leave should be cumulative.

¹⁰ Stanford, J., Centre for Future Work at the Australia Institute, *Economic Aspects of Paid Domestic Violence Leave Provisions*, December 2016, p. 3.

Protections from discriminatory treatment

The insertion of FDV leave as a workplace right and as part of the NES will provide a measure of protection to employees from discriminatory and adverse action.

In ELC's view, FDV leave should also be placed in the same category of employment as temporary absence from work because of an illness or injury as prescribed by the regulations.¹¹

ELC is of the view that section 352 of the Fair Work Act and the regulations should be amended to also include where an employee is temporarily absent from work because they are experiencing FDV.

Flexible working arrangements

Section 65(1A)(e) of the Fair Work Act provides that one of the circumstances where the employee may request the employer for a change in working arrangements is where:

the employee is experiencing violence from a member of the employee's family.

While it appears the intention of this clause is to provide that an employee who is experiencing FDV can request a change in working arrangements, the different wording introduces an inconsistency in language and potential ambiguity to the definition of FDV in section 106B of the Bill.

ELC submits that section 65(1A)(e) of the Fair Work Act be amended to provide a relevant circumstance is where "the employee is experiencing family and domestic violence" as defined by section 106B.

Should the Committee require any further information in relation to its Inquiry or on the submissions set out above, ELC would be happy to assist.

Yours sincerely

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¹¹ Section 352