



Law Council
OF AUSTRALIA

Office of the President

27 September 2018

Senator Slade Brockman
Chair
Senate Education and Employment Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: eec.sen@aph.gov.au

Dear Senator

FAIR WORK AMENDMENT (FAMILY AND DOMESTIC VIOLENCE LEAVE) BILL 2018

1. The Law Council welcomes the opportunity to provide this submission to the Education and Employment Legislation Committee's Inquiry into the Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018 (**the Bill**).
2. The Law Council is grateful for the assistance of its Domestic and Family Violence Working Group, the Industrial Law Committee of the Federal Litigation and Dispute Resolution Section, the Law Society Northern Territory, the Law Society of South Australia and the Australian Capital Territory Law Society in the preparation of this submission.
3. The Bill seeks to amend the *Fair Work Act 2009* (Cth) (**the Act**) to insert a new entitlement in the National Employment Standards (**NES**), being five days of unpaid family and domestic violence leave. The Law Council notes the decision of the Fair Work Commission in March 2018 to grant five days unpaid leave to employees covered by modern awards. The Bill seeks to extend this decision by ensuring that all workers who are covered by the Act will also have access to five days family and domestic violence leave.
4. The Law Council has considered the Bill and is broadly supportive of its aims. However, the Law Council provides several suggestions as to the drafting of the Bill, which in the view of the Law Council, will provide clarity and ensure that all people who have experienced family or domestic violence, or are experiencing family or domestic violence, are entitled to leave.
5. While the Law Council commends the Bill as an important step, the Law Council recommends that additional measures, including increasing the number of leave days and providing for paid leave, in accordance with best practice, be considered in the future.

Value of family and domestic violence leave

6. Family and domestic violence leave is a fundamental aspect of workplace support for victims. Family and domestic violence leave may be required to allow a victim to

effectively deal with a number of different issues. For example, complex family law matters can involve multiple hearings over a period of months and there may be requirements for parties to attend appointments with court-appointed Family Consultants, police prosecutors, lawyers, etc. In addition, there may be more time required for medical appointments, finding alternate accommodation, relocation, psychologist appointments and attending to children's issues. This is certainly not an exhaustive list. Furthermore, it is often impractical or impossible to attend to such matters outside of the ordinary hours of work.

7. The Law Council's Justice Project highlighted the employment-related impact that experiences of family and domestic violence can have for victims:

Family violence often follows victims into their place of work, and as a consequence they may lose (or leave) their job. The 2011 National Domestic Violence and the Workplace Survey found that nearly half of respondents who reported experiencing family violence said the violence had affected their ability to get to work. Research indicates that women who experience family violence have a more disrupted work history, are on lower personal incomes, have had to change jobs frequently and are [more] often employed in casual and part time work, compared to women with no experience of violence.¹

8. The implications of this are serious for victims, who may be suffering financial abuse, and may feel that they are unable to take time-off work in order to leave an abusive relationship out of fear of losing their job. Financial hardship can bind victims, often women, to abusive relationships.²
9. There are currently over 1,200 enterprise agreements which contain some form of domestic and family violence leave (paid or unpaid).³ Despite fears expressed by some groups that including such leave would cause financial hardship to employers through high rates of usage, a 2015 study of 102 employers who offered domestic leave found that the average paid leave taken in the past 12 months was only 43 hours and the average unpaid leave taken (excluding one significant outlier) was 19 hours.⁴ It was found that employees were most typically accessing 2-3 days off work per incident.⁵ The workplaces that participated in the study did not report that providing family and domestic leave was an unaffordable burden for their organisation.⁶

¹ Law Council of Australia, *The Justice Project Final Report (Part 1): People who Experience Family Violence* (August 2018) 22, citing: Special Taskforce on Domestic and Family Violence in Queensland, Queensland Government, *Not Now, Not Ever: Putting an end to domestic and family violence in Queensland* (2015); Ludo McFerran, *Safe at Home, Safe at Work? National Domestic Violence and the Workplace Survey* (2011) 17; Australian Human Rights Commission, *Fact Sheet: Australian Domestic Family Violence – a Workplace Issue, a Discrimination Issue* (2014) 3. See also Ridley et al, *Domestic Violence Survivors at Work: How Perpetrators Impact Employment* (2005) <https://www1.maine.gov/labor/labor_stats/publications/dvreports/survivorstudy.pdf>.

² Law Council of Australia, *The Justice Project Final Report (Part 1): People who Experience Family Violence* (August 2018) 21-2.

³ Ludo McFerran, Workplace Gender Equality Agency (Cth), *Domestic violence is a workplace issue; Australian developments 2009-2016* (June 2016) 5 <<https://www.wgea.gov.au/sites/default/files/mcferran-domestic-violence-workplace-issue-australian-developments.pdf>>.

⁴ Jan Breckenridge et al, Gendered Violence Research Network, University of New South Wales (co-funded by the Australian Council of Trade Unions), *Implementation of Domestic Violence Clauses - An Employer's Perspective* (November 2015) 7.

⁵ Ibid.

⁶ Ibid 14.

10. Studies of the economic feasibility of family and domestic violence leave have shown that the costs associated with employers offering such leave are likely to be offset by the benefits to the organisation, including reduced staff turnover and improvements to productivity.⁷
11. Additionally, there is clear symbolic value to such leave, in employers communicating to their employees that they will support them, and to society that they do not condone family or domestic violence. Further, given the statistics indicating the link between violence and decreased or lost employment, allowing for paid leave is an important part of supporting those who have experienced violence to establish new arrangements without added financial burden.
12. For these reasons the Law Council broadly supports the Bill.

Drafting Suggestions

Subsection 106A(1)

13. The House of Representatives Standing Committee on Social Policy and Legal Affairs in the 2017 report entitled *A better family law system to support and protect those affected by family violence* noted that 'even after family law matters are resolved families which have experienced family violence may still experience some level of risk'.⁸ Research also shows that often survivors need to access leave beyond the immediate crisis. For example, an American study showed that women's experiences of family or domestic violence continued to impact on their employment through higher rates of absenteeism for 3 years post-incident.⁹ The Law Council therefore suggests that the Bill could benefit by the clarification of subsection 106A(1) to ensure that it is clear that an employee can access the 5 days unpaid leave in each 12 month period, for the same instance of family violence in subsequent years.

Paragraph 106A(2)(c)

14. It is not clear whether proposed paragraph 106A(2)(c) covers every employee. Paragraph 106A(2)(c) currently states that family and domestic violence leave 'is available in full to part time and casual employees'. For clarity, the Law Council recommends that this section be amended to state that family and domestic violence leave 'is available in full to: full time; part time; and casual employees'.

⁷ Jim Stanford, Centre for Future Work, The Australia Institute, *Economic aspects of paid domestic violence leave provisions* (2016), 3

<http://www.tai.org.au/sites/default/files/Economic_Aspects_Domestic_Violence_Leave.pdf>.

⁸ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A better family law system to support and protect those affected by family violence* (2017) vi.

⁹ Ludo McFerran, Workplace Gender Equality Agency (Cth), *Domestic violence is a workplace issue; Australian developments 2009-2016* (June 2016) 4 <<https://www.wgea.gov.au/sites/default/files/mcferran-domestic-violence-workplace-issue-australian-developments.pdf>> citing, Adrienne E Adams et al, 'The Impact of Intimate Partner Violence on Low- Income Women's Economic Well-Being: The Mediating Role of Job Stability' (2013) 18(2) *Violence Against Women Journal* 1345; Sarah Shea Crowne et al, 'Concurrent and long-term impact of intimate partner violence on employment stability' (2011) 26(6) *Journal of Interpersonal Violence* 1282.

Subsection 106A(5)

15. The Law Council recommends that proposed subsection 106A(5) be clarified to confirm that employers have the option of offering 'paid leave' as well as the minimum requirements regarding unpaid leave.

Paragraph 106B(1)(a)

16. Proposed paragraph 106B(1)(a) states that leave is available if 'the employee is *experiencing* family and domestic violence' (emphasis added). Many people needing to access leave are likely to have left the violent relationship and may not meet the criteria of paragraph (a), but will need time to need to do something to deal with the impact of the family and domestic violence (i.e. the requirement set out in paragraph (b)). Therefore, the Law Council recommends that proposed paragraph 106B(1)(a) be amended to state: 'the employee has experienced, or is experiencing, family and domestic violence' (or words of similar effect).

Note of subsection 106B(1)

17. The Law Council recommends the removal of the word 'urgent' in the proposed Note of subsection 106B(1) as it would be difficult for employers to determine which court hearings are urgent or non-urgent. For example, people affected by domestic and family violence may be required to attend matters including criminal matters, matters through the Family Court or Federal Circuit Court, domestic violence orders in the Magistrates' Court or District Court, and other civil matters.

Subsection 106B(3)

18. The Law Council submits that the definitions of 'close relative' and 'immediate family' to be inserted in section 12 are too narrow and that many deserving employees may not be entitled to the leave if, for example, the violence is perpetrated towards them by an aunt or uncle or niece or nephew.
19. A further issue is for people who are living with another person who is perpetrating family or domestic violence against them. They may not fall within the scope of this Bill. Some couples may not meet the requirements of being in a de facto relationship, yet they may be in a relationship and living together. Alternately, a couple may be in a relationship but do not live together and they may not meet the requirements of being in a de facto relationship and as such would not be supported under this Bill. The definitions also appear to exclude those people who have experienced or are experiencing family violence perpetrated by a past intimate partner.
20. To address these concerns and to provide consistency with the *Family Law Act 1975* (Cth) (**FLA**) the Law Council recommends the use of the broader terms 'member of the family' and 'relative' as defined in subsections 4(1AB) and 4(1AC) of the FLA. For the purposes of section 4AB of the FLA (i.e. defining the term 'family violence'), these terms are defined as follows:

(1AB) For the purposes of:

(a) the definition of **step-parent** in subsection (1); and

(aa) section 4AB; and

(b) paragraphs 60CC(3)(j) and (k); and

(c) sections 60CF, 60CH and 60CI;

a person (the **first person**) is a **member of the family** of another person (the **second person**) if:

(d) the first person is or has been married to, or in a de facto relationship with, the second person; or

(e) the first person is or has been a relative of the second person (as defined in subsection (1AC)); or

(f) an order under this Act described in subparagraph (i) or (ii) is or was (at any time) in force:

(i) a parenting order (other than a child maintenance order) that relates to a child who is either the first person or the second person and that is in favour of the other of those persons;

(ii) an order providing for the first person or the second person to have custody or guardianship of, or a right of access to, the other of those persons; or

(g) an order under a law of a State or Territory described in subparagraph (i) or (ii) is or was (at any time) in force:

(i) an order determining that the first person or the second person is or was to live with the other of those persons, or is or was to have custody or guardianship of the other of those persons;

(ii) an order providing for contact between the first person and the second person, or for the first person or the second person to have a right of access to the other of those persons; or

(h) the first person ordinarily or regularly resides or resided with the second person, or with another member of the family of the second person; or

(i) the first person is or has been a member of the family of a child of the second person.

(1AC) For the purposes of subsection (1AB), a **relative** of a person is:

(a) a father, mother, grandfather, grandmother, step-father or step-mother of the person; or

(b) a son, daughter, grandson, grand-daughter, step-son or step-daughter of the person; or

(c) a brother, sister, half-brother, half-sister, step-brother or step-sister of the person; or

(d) an uncle or aunt of the person; or

(e) a nephew or niece of the person; or

(f) a cousin of the person; or

(g) if the person is or was married—in addition to paragraphs (a) to (f), a person who is or was a relative, of the kind described in any of those paragraphs, of the person's spouse; or

(h) if the person is or was in a de facto relationship with another person—in addition to paragraphs (a) to (f), a person who would be a relative of a kind described in any of those paragraphs if the persons in that de facto relationship were or had been married to each other.

Future Considerations

21. Whilst a minimum entitlement of five days unpaid leave for family violence is welcomed, a minimum ten days unpaid leave per year could be considered best practice and paid family or domestic violence leave would be advantageous to an employee experiencing domestic or family violence.
22. This has been recognised in a number of other jurisdictions, including New Zealand, where recently passed legislation requires employers to give victims of domestic violence up to ten days of paid leave from work, separate from other leave entitlements such as annual leave and sick leave.¹⁰ The legislation also allows workers who are victims of domestic violence to request flexible working arrangements and adds being a victim of domestic violence as a ground for discrimination under the *Human Rights Act 1993* (NZ).
23. The Law Council notes that in several Australian jurisdictions, paid family and domestic violence leave is available to public sector employees.¹¹
24. The Law Council considers that the Australian Government now has an opportunity, in light of the decision of the Fair Work Commission, to take the lead in relation to domestic and family violence leave at a national level. The Law Council suggests that the possibility of establishing an entitlement up to a minimum of ten days paid family and domestic violence leave for NES employees be considered in the future.

Contact

25. Please contact John Farrell, Policy Lawyer,
in the first instance should you require further
information or clarification.

Yours sincerely

Morry Bailes
President

¹⁰ *Domestic Violence – Victims’ Protection Act 2018* (NZ).

¹¹ The Law Council is advised by the Law Society of South Australia that South Australian public sector employees experiencing family and violence are able to access up to 15 days of ‘Special Leave’ with pay in a 12-month period in addition to existing leave entitlements and any applicable flexible and safe working arrangements. A whole-of-government Domestic and Family Violence Directive was also introduced in Queensland, which provides Queensland government employees with a minimum of 10 days paid Domestic and Family Violence Leave and any applicable flexible work arrangements or reasonable workplace adjustments. The Law Council is also aware of a similar policy in operation in Victoria which offers up to 20 days’ paid leave within a 12-month period for employees affected by family violence, additional to any other leave entitlements of the employee.