



BACKGROUND PAPER

Fair Work Act 2009
s.156 – 4 yearly review of modern awards

4 yearly review of modern awards – Family and domestic violence leave (AM2015/1)

MELBOURNE, 15 SEPTEMBER 2017

Note: This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It has been prepared by staff of the Commission and does not represent the concluded view of the Commission on any issue.

1. Introduction

[1] As part of the 4 yearly review of modern awards (the Review), the Australian Council of Trade Unions (ACTU) made an application to include in all modern awards an entitlement to 10 days’ paid family and domestic violence leave and up to 2 days of unpaid leave on each occasion. A copy of the ACTU’s proposed domestic violence leave clause is at Attachment A to this paper.

[2] In their [Decision](#)¹ dated 3 July 2017, Deputy President Gooley and Commissioner Spencer rejected the ACTU’s claim but expressed the preliminary view:

“... that all employees should have access to unpaid family and domestic violence leave and in addition we have formed the preliminary view that employees should be able to access personal/carer’s leave for the purpose of taking family and domestic violence leave.”²

[3] In a [Statement and Directions](#) issued on 3 August 2017, the Full Bench included at Attachment B a list of issues (the List of Issues) relating to family and domestic violence leave upon which it sought submissions from interested parties by 1 September 2017, and submissions in reply by 29 September 2017.

[4] The purpose of this paper is to assist interested parties in preparing submissions in reply, focussing particularly on the form and content any model term giving effect to the preliminary views referred to in paragraph 2 above should take, were it to be included in the modern awards. To assist this discussion, Attachment B of this paper sets out 3 separate proposed model terms for the consideration of the parties (the Proposed Model Terms). Each Proposed Model Term includes:

¹ [2017] FWCFB 3494

² Ibid at [6]

- an entitlement to access unpaid family violence leave; and
- an entitlement to access paid personal/carer’s leave because of family violence.

[5] Although not necessarily an exhaustive list, five key elements to be considered in the preparation of a model term have been identified. These are:

- (i) the definition of ‘family and domestic violence’ for the purposes of the clause;
- (ii) the purpose of the leave (i.e. in what circumstances an employee can access the leave and which employees may take the leave);
- (iii) unpaid leave – quantum and accrual issues;
- (iv) the evidence requirements; and
- (v) privacy considerations.

Question 1: Do the elements set out above cover the elements necessary for a model term to give effect to the preliminary views? Are there any additional elements that should be considered for inclusion in a model term?

[6] The three Proposed Model Terms each illustrate different ways the above elements might be dealt with, if the Commission were to determine that a family violence term should be included in the modern awards.

2. Defining “family and domestic violence”

[7] The List of Issues included questions about the definition of family violence, both in respect of clauses relating to unpaid family violence leave and extending the NES entitlement to personal/carers leave to incorporate family violence leave.

[8] There is no single agreed definition of “family violence”, “domestic violence” or “family and domestic violence”. Nor is there agreement on whether “family violence”, “domestic violence”, “intimate partner violence” or some other terminology most appropriately captures the range of behaviours and relationships that fall within family violence.³

[9] Definitions of family violence vary across Commonwealth, state and territory legislation. In its 2010 report, *Family Violence – A National Legal Response*,⁴ the Australian Law Reform Commission (ALRC) considered definitions of family violence, noting the different definitions in various Commonwealth, state and territory laws, and observing that “disciplines other than law – for example, the social sciences, health and welfare service providers – may conceptualise family violence differently”.⁵

[10] The Australian Bureau of Statistics has recognised the difficulties in defining family violence, noting that definitions can be based on the relationship between the victim and

³ For ease of reading, this background paper uses the term ‘family violence’.

⁴ Australian Law Reform Commission, *Family Violence – A National Legal Response (ALRC Report 114)*, 11 November 2010

⁵ *Ibid*, at [5.2]

offender, with “family” violence based on interpersonal relationships, while “domestic” violence is based on living arrangements.⁶

[11] An award term that allows an employee to access leave because of family violence does not necessarily have to define family violence. Many enterprise agreements that include an entitlement to family violence leave do not attempt to define the term. Arguably, however, modern awards will be easier to understand if a definition is provided. Of the enterprise agreements that do define family violence, some articulate their own definition while others define family violence by reference to definitions in state or territory legislation.

[12] The ACTU included a definition of family violence in its proposed family violence leave clause. The Full Bench indicated that it found the definition too uncertain, and expressed the view that the providing of leave for family violence should be limited to dealing with the immediate impact of such violence, such as finding alternative accommodation or attending urgent court hearings.⁷

[13] Each of the Proposed Model Terms includes a definition of family violence. Proposed Model Term 1 defines family violence in the same terms as s.4AB of the *Family Law Act 1975* (Cth), although it does not expressly reference the legislation. The definition in Proposed Model Term 2 is based on the definition in the *Family Violence Protection Act 2008* (Vic) - the Victorian Royal Commission into Family Violence expressed strong support for this definition.⁸

[14] Proposed Model Term 3 has been modelled on family violence leave provisions in the *Industrial Relations Act 2016* (Qld) (the IR Act (Qld)). This defines “domestic violence” as having the meaning given by the *Domestic and Family Violence Protection Act 2012* (Qld) (the DFVP Act). Although Proposed Model Term 3 includes the same definition of domestic violence as that in the DFVP Act, it is noted that the DFVP Act’s definition uses some words which are themselves defined terms, e.g. “emotionally and psychologically abusive”, “economically abusive”, “intimate personal relationship”, “family relationship”, “informal care relationship”. Proposed Model Term 3 is arguably sufficiently clear without those definitions, although if it were to be adopted the inclusion of those definitions could be considered.

[15] Although the Proposed Model Terms adopt existing legislative definitions of family violence, the Commission can look to other sources for guidance on an appropriate definition. Consideration might be given, for example, to the following definition of family violence recommended by the ALRC in *Family Violence – A National Legal Response*⁹:

- violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include:
- (a) physical violence;
 - (b) sexual assault and other sexually abusive behaviour;
 - (c) economic abuse;
 - (d) emotional or psychological abuse;
 - (e) stalking;
 - (f) kidnapping or deprivation of liberty;

⁶ Australian Bureau of Statistics, *Conceptual Framework for Family and Domestic Violence - Issues in defining family and domestic violence*, 2009

⁷ Above n1, paragraph [114]

⁸ Victorian Royal Commission into Family Violence, *Report and Recommendations*, page 16

⁹ Above, n 5

- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)-(h) above.¹⁰

Question 2: Are there any other definitions of family and domestic violence that the Commission should consider?

3. Purpose for which the leave is taken

[16] The List of Issues for consideration includes the circumstances in which family violence leave may be accessed (eg attending an appointment related to the violence). It also includes who may access the entitlement. This second question encompasses the type of employee that might take the leave, e.g. permanent full-time or part-time employees, casual employees. It also relates to the purpose for which leave is taken when considered from the perspective of who, within a family violence situation, should be entitled to take leave. Should such an entitlement extend, for example, to a perpetrator?

3.1 Circumstances in which leave might be taken

[17] One option would be to provide that the leave may be used where an employee needs to take the leave because of family violence, without articulating the situations in which this would arise. Proposed Model Term 2 is an example of such a term. A benefit of this approach would be that an employee who needed to take leave because of family violence would not be prevented from doing so because their situation was unique or unusual. An evidentiary requirement could still be included requiring the employee to demonstrate that they had a need to take the leave. The lack of definition would mean, however, that the entitlement to take leave would not be limited to where leave is needed to enable an employee to deal with the immediate impact of family violence.

[18] A second option would be to list the situations in which an employee may use leave because of family violence, such as where they have a court appointment, need to meet their lawyer, need to make alternative housing arrangements or need to make alternative care arrangements for a dependant. This approach would provide clarity as to when an employee can access family violence leave entitlements.

[19] The ALRC, in considering the introduction of family violence leave into the NES, suggested that any family violence leave “should be accessible in a range of circumstances arising from family violence, including to: attend appointments with support services; receive medical attention; receive legal advice or attend court; arrange or undertake child care; arrange accommodation or relocate; or to attend to other immediate safety issues”.¹¹

[20] Were the second option to be adopted, consideration should be given to whether the list of situations in which family violence leave can be taken should include situations where an employee has an existing entitlement to leave under the NES, such as where they are recovering from injury or providing care to a family member because of an unexpected

¹⁰ Ibid, Recommendation 5-1

¹¹ ALRC, *Family Violence and Commonwealth Laws – Improving Legal Frameworks* (ALRC Report 117), para [17.45]

emergency. As an example, the list included at clause X.2 of Proposed Model Term 1 does not include recovering from an injury caused by family violence because this would duplicate a leave entitlement already available under the NES.

Question 3: Parties are asked to consider whether a list of situations in which an employee may access family violence leave should be included in a model term, and if so, which circumstances might be included in such a list?

3.2 Who should be entitled to take the leave?

[21] It is not only individuals to whom family violence is directed who might want to take leave because of family violence. Others who may want to access such leave include:

- family members (including under-age and adult children) who witness family violence; and
- people providing care or support to a person towards whom family violence is directed.

[22] In considering how far any entitlement to family violence leave should extend, it should be noted that terms may and must be included in a modern award only to the extent necessary to achieve the modern awards objective in s.134 of the *Fair Work Act 2009* (the FW Act).¹²

[23] The Proposed Model Terms all provide that a person to whom family violence is directed can take leave. Proposed Model Term 1 describes this person as an “employee who is experiencing family violence”. This is similar to the language in s.65 of the FW Act which allows an employee to request flexible working arrangements where the employee “is experiencing violence from a member of the employee’s family”.

[24] Proposed Model Term 2 refers to a “victim of family violence”, while Proposed Model Term 3 is broader in scope, referring to an employee “exposed to domestic violence”. Arguably “exposed to domestic violence” encompasses a greater range of individuals than “victim of domestic violence”.

[25] The IR Act (Qld) refers to an employee who “has experienced domestic violence”.

[26] The *Royal Commission into Family Violence: Report and Recommendations* uses the terminology “victim”, explaining this as follows:

Apart from when legal proceedings are being described, the Commission generally uses the term ‘victim’ of family violence throughout its report, since this is the term most commonly used in the community. The Commission recognises that some people consider ‘victim’ problematic because it suggests that people who have experienced family violence are helpless or lack the capacity to make rational choices about how to respond to the violence. The Commission uses ‘victim/survivor’ to specifically describe people who have experienced sexual assault, which is consistent with the Centres Against Sexual Assault terminology and general terminology in this field.¹³

[27] Partners for Prevention, a group of 4 United Nations Agencies¹⁴ published a Preferred Terminology document in relation to defining violence.¹⁵ The document makes the following observations in relation to the use of the word “victim”:

¹² 4 yearly review of modern awards – Blood donor leave, [2017] FWCFB 4621 at [62]

¹³ Royal Commission into Family Violence: Summary and Recommendations, March 2016

¹⁴ UNDP, UNFPA, UN Women and UN Volunteers

We recognize that experiences of violence are traumatic and have serious consequences for the emotional, physical and sexual health and well-being of those individuals involved. Terms such as ‘victim,’ ‘survivor’ or ‘perpetrator’ are often used to describe individuals who undergo these experiences. However, P4P believes that this terminology limits individual self-agency and identity. We recognize that experiences of violence do not define the individual, but rather are a piece of a larger self-identity. Labels which focus on experiences of violence, presuppose an individual’s inability to change or undergo personal development, to transform their identity into a peaceful, empowered personality.

Rather than using the terms ‘victim,’ ‘survivor,’ or ‘perpetrator,’ P4P recommends the use of the following terms instead:

- person/woman/man who has experienced violence
- person/woman/man who has perpetrated violence

Where possible and appropriate, it is best to, in both instances, refer to the specific form of violence that has been experienced/ perpetrated. For example, a person/woman/man who has experienced/perpetrated intimate partner violence.

Question 4: Parties are asked to give consideration to the most appropriate terminology for inclusion in the model term.

Question 5: The model terms have been drafted on the basis that the perpetrators of family violence would not be entitled to take family violence leave. Does any party take a different view?

[28] The List of Issues included the availability of leave for part-time and casual employees, both with respect to unpaid family violence leave and to accessing the NES paid personal/carer’s leave entitlement because of family violence.

[29] In expressing their preliminary view in the Decision of 3 July 2017, the Full Bench stated that they considered that “all employees” should have access to unpaid domestic and family violence leave. The Full Bench’s preliminary view at [6] on access to personal/carer’s leave for the purpose of taking family violence leave did not address whether the entitlement should extend to casual employees. The Full Bench did, however, go on to observe that “employees, *other than casual employees*, who experience family and domestic violence, may be able to use personal/carer’s leave, annual leave or long service leave to enable them to deal with that violence”¹⁶ (emphasis added).

[30] The entitlement to paid personal/carer’s leave under the NES applies to employees (including part-time employees), other than casual employees: s.95 of the FW Act. Casual employees have some unpaid leave entitlements under the NES – for example unpaid carer’s leave under s.102 and unpaid compassionate leave under s.104 of the FW Act.

[31] An argument against extending the NES entitlement to paid personal/carer’s leave for casual employees experiencing family violence is that casual employees receive a wage loading which is intended to compensate them for the employment benefits, such as paid personal/carer’s leave, which they do not receive.

¹⁵ http://www.partners4prevention.org/sites/default/files/preferred_terminology_final.pdf

¹⁶ [2017] FWCFB 3494 at [44]

[32] On the other hand, the ALRC, in considering options for reform of the NES to provide access to family violence leave, observed at [17.47]:

There are strong arguments in favour of the need for paid family violence leave, or a combination of paid and unpaid leave, to avoid provision of a ‘hollow’ entitlement, risk further disadvantaging victims of family violence, or to fail to achieve the objects underlying its introduction. Stakeholders emphasised that ensuring leave is paid recognises that people experiencing family violence are often in a position of financial hardship and allows them to maintain their income at a time where maintaining economic independence and financial security is vital to ‘maintaining suitable housing, ensur[ing] future safety and on the ability to secure on-going family stability for them and their children’.¹⁷

[33] Extending the circumstances in which employees with an existing entitlement to paid personal/carer’s leave under the NES can use that entitlement does not alter the quantum of paid leave which an employer is potentially liable to pay for. Extending that entitlement so that casual employees can access such paid leave does alter that quantum.

[34] The Proposed Model Terms do not extend the application of the NES paid personal/carer’s leave entitlement to casual employees. In line with the preliminary view expressed in the Decision of 3 July 2017, they do, however, provide that all employees, including casual employees, can access a form of unpaid leave because of family violence. Proposed Model Term 3 distinguishes between long-term and short-term casual employees in the quantum of their entitlement.

Question 6: If the entitlement under the NES to paid personal/carer’s leave is extended to allow employees to use it if they are experiencing family violence, should casual employees also be able to access this entitlement? Should casual employees be able to access unpaid family violence leave?

4. Unpaid leave

[35] Included in the List of Issues at Attachment B of the 3 August 2017 [Statement and Directions](#) were a number of questions directed to unpaid family violence leave. These included the extent of the unpaid family violence leave entitlement (i.e. quantum) and accrual issues, in particular whether the leave entitlement is available in full at the start of the year or accrues.

[36] The Commission has received submissions from some parties about the quantum of unpaid leave, if any, that should be available. These have ranged from 1 or 2 days per annum to an entitlement which is not capped but arises on a per occasion basis. The quantum determined must be only what is necessary to achieve the modern awards objective in s.134 of the FW Act.

[37] Not all enterprise agreements which include an entitlement to unpaid family violence leave specify a quantum. Of those that do, the annual number of days unpaid family violence leave which an employee is entitled varies.

[38] The quantum of leave may affect the way unpaid family violence leave accrues. If, for example, it is determined that the model term provide that all employees are entitled to one or two days of such leave per year, there may be no utility in the leave entitlement accruing progressively during a year of employment. An employee experiencing family violence may

¹⁷ ALRC, *Family Violence and Commonwealth Laws – Improving Legal Frameworks* (ALRC Report 117), para [17.47]

find having access to their yearly entitlement from the commencement of each year of employment to be of more practical benefit. Further, if the entitlement, like unpaid carer's leave, was not limited to a certain number of days per year but was available on each permissible occasion, then a model term would not need to address accrual.

[39] The effect of both Proposed Model Term 1 and Proposed Model Term 2 is that an employee, including a casual employee, is entitled to take 2 days of unpaid leave for each occasion where they need to take leave as a result of family violence. Proposed Model Term 2 links the entitlement to unpaid family violence leave with the entitlement to unpaid carer's leave in the NES. Additionally, it specifically states that an employee may use their entitlement to unpaid carer's leave where they are caring for a family member who is a victim of domestic violence.

[40] As noted previously, Proposed Model Term 3 is modelled on the family violence provisions in the IR Act (Qld), under which long-term casual employees are entitled to 10 days unpaid domestic and family violence leave per year, while short-term casual employees are entitled to 2 days per year, and domestic and family violence leave does not accumulate from year to year.

Question 7: Should a term providing for employees to take unpaid family violence leave include a cap on the quantum of such leave? Should it accrue from year to year?

5. Evidence to be provided

[41] Section 107 of the FW Act sets out the evidentiary requirements that an employee must comply with if they take leave under ss.97, 103(1) and 105(1) of the FW Act. If modern awards extend the application of paid personal/carer's leave so that it can be taken where an employee is experiencing family violence, it seems appropriate to include a term which clarifies the evidentiary requirements that an employee must satisfy where they take leave for that reason.

[42] One option would be to include a term about evidence which is expressed in similar terms to s.107(3) of the FW Act. An example is included in Proposed Model Term 2, which includes an evidence requirement at clause X.9.

[43] Another option would be to articulate the evidence that an employee can provide in order to satisfy their employer of their need to take leave. Section 54 of the IR Act (Qld) deals with the evidence an employer may request an employee to provide as evidence that leave is taken because of family and domestic violence. This includes [at s.54(3)]:

- (a) evidence from the police; or
- (b) evidence of a legal proceeding or a court report; or
- (c) evidence from a doctor or other health practitioner; or
- (d) evidence from a counsellor; or
- (e) written advice or a statutory declaration from the employee.

[44] Many enterprise agreements which include family violence leave provide guidance to employers and employees about the evidence that an employee may provide to their employer to demonstrate that the leave needs to be taken because of family violence. For example, the *University of New South Wales (Professional Staff) Enterprise Agreement* provides that proof may be required "in the form of an agreed document issued by a police service, a court, a

medical practitioner, a domestic violence support service or lawyer, or a counselling professional”.¹⁸

[45] The purposes for which the leave may be taken may inform the types of evidence an employee may be required to provide. If leave could only be taken in a limited range of circumstances, the types of evidence an employee could provide would correspondingly be limited.

Question 8: Are there any other types of evidence that the Commission should consider?

6. Privacy considerations

[46] Information about an employee’s experience of family violence is personal information which the employee may be reluctant to disclose.

[47] Section 107 of the FW Act includes a statutory note that personal information given to an employer under s.107 may be regulated under the *Privacy Act 1988* (the Privacy Act). Not all employers are regulated by the Privacy Act. The Office of the Australian Information Commissioner provides some [guidance](#) on who has responsibilities under the Privacy Act. For example, businesses and not-for-profit organisations with an annual turnover of more than \$3 million, credit reporting bodies, contracted service providers for a Commonwealth contract and businesses that have opted-in to the Privacy Act, all have responsibilities under the Privacy Act. Other employers may not have obligations under the Privacy Act.

[48] Clause X.3.3 of the ACTU’s proposed model term, at Attachment A, relates to confidentiality. This was the subject of submissions from both the ACTU and employer parties. The Full Bench, in its [Decision](#) of 22 October 2015, said at [21]:

“Without hearing the evidence, we would not be prepared to conclude that clause X.3.3 of the proposed Family and Domestic Violence Leave clause is beyond jurisdiction. It was accepted by the employer parties that the substantive provisions of the Family and Domestic Violence Leave clause, which would establish an entitlement of 10 days per year domestic and violence leave to be taken for specific identified purposes, were authorised by s.139(1)(h) as terms which could be included in a modern award because they were about “leave”. We consider that if there was evidence demonstrating that the confidentiality requirement in clause X.3.3 was necessary in order for the proposed leave entitlement to operate effectively (for example because without confidentiality employees might not be prepared to disclose anything about domestic violence incidents and thus would not be able to access the entitlement), it would be reasonably arguable that clause X.3.3 was authorised by s.139(1)(h) as a term which was about “leave” or “arrangements for taking leave” and/or by s.142(1) as “incidental to a term that is permitted ... to be in the modern award” and “essential for the purpose of making a particular term operate in a practical way”.”

Question 9: Parties are asked to consider whether the Commission can and should include in any model term dealing with family violence a requirement that an employer must keep information about their employee’s experience of family violence confidential.

¹⁸ University of New South Wales (Professional Staff), *Enterprise Agreement 2010*, clause 39.4

Attachment A

FAMILY AND DOMESTIC VIOLENCE LEAVE – ACTU PROPOSED MODEL TERM

X.1 Definition

For the purpose of this clause:

Family and domestic violence is any violent, threatening or abusive behaviour by a person against a current or former partner or member of the person's family or household.

Employee includes part-time and casual employees.

Sensitive personal information means information that identifies the employee and discloses their experience of being subjected to family and domestic violence.

X.2 Family and Domestic Violence Leave

X.2.1 An employee is entitled to 10 days per year of paid family and domestic violence leave for the purpose of attending to activities related to the experience of being subjected to family and domestic violence. Such activities may include (but are not limited to):

(a) attending legal proceedings, counselling, appointments with medical, financial or legal professionals; and/or

(b) relocation or making other safety arrangements.

X.2.2 An employee's paid yearly entitlement to family and domestic violence leave:

(a) becomes available in full, on and from the first day of each year of employment; and

(b) is payable at the ordinary hourly rate applicable to the classification of the employee under the award, including shift loadings and penalties but not including any over-award payments; and

(c) does not accrue for year to year; and

(d) is not payable on termination of employment.

X.2.3 Upon exhaustion of the leave entitlement in clause X.2.1, employees will be entitled to up to 2 days unpaid family and domestic violence leave on each occasion for the purpose of attending to activities related to the experience of being subjected to family and domestic violence.

X.2.4 Family and domestic violence leave may be taken as:

(a) a continuous period;

(b) a single period of one day;

(c) any separate period/s of less than one day which the employer and employee agree.

X.2.5 Family and domestic violence leave is in addition to other leave entitlements in modern awards and the National Employment Standards.

X.3 Notice and Evidentiary Requirements

X.3.1 The employee shall give his or her employer notice as soon as reasonably practicable of their request to take leave under this clause.

X.3.2 If required by the employer, the employee must provide evidence that would satisfy a reasonable person that the leave is for the purpose as set out in clauses X.2.1 and X.2.3. Such evidence may include a document issued by the police service, a court, a doctor (including a medical certificate), district nurse, maternal and child health care nurse, a family violence support service, a lawyer or a statutory declaration.

X.3.3 Sensitive personal information provided by the employee to the employer for the purposes of seeking leave under this clause will be kept confidential to the extent possible, except where disclosure is required by law or to prevent a serious threat to the life, health and safety of any individual.

Attachment B

Proposed model term 1–Taking paid personal/carer’s leave or unpaid leave where an employee is experiencing family violence

X. Taking paid personal/carer’s leave or unpaid leave where an employee is experiencing family violence

Note: Clause X contains provisions, additional to the NES, about the taking of paid personal/carer’s leave or unpaid leave where an employee is experiencing family violence. See Part 2.2, Division 7 of the Act.

X.1 In this clause:

family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful.

Note: Examples of behaviour that may constitute family violence include (but are not limited to) the following:

- (a) an assault;
- (b) a sexual assault or other sexually abusive behaviour;
- (c) stalking;
- (d) repeated derogatory taunts;
- (e) intentionally damaging or destroying property;
- (f) intentionally causing death or injury to an animal;
- (g) unreasonably denying the family member the financial autonomy that they would otherwise have had;
- (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or the family member’s child, at a time when the family member is entirely or predominantly dependent on the person for financial support;
- (i) preventing the family member from making or keeping connections with their family, friends or culture;
- (j) unlawfully depriving the family member, or any member of the family member’s family, of their liberty.

X.2 For the purposes of clause X, an employee may need to take paid personal/carers leave as a result of family violence if the employee has to do any of the following:

- (b) attend an appointment relating to the family violence, including an appointment for counselling, medical treatment or obtaining legal or financial advice; or
- (c) attend an interview with police relating to the family violence; or
- (d) attend legal proceedings relating to the family violence; or
- (e) make safety arrangements, including relocation, because of the family violence; or

(f) organise the care of a child that is necessary because of the family violence.

X.3 In addition to the reasons for taking paid personal/carer's leave specified in section 97 of the Act, an employee, other than a casual employee, who is experiencing family violence may take paid personal/carer's leave if the employee needs to take the leave as a result of the family violence.

X.4 The evidence that an employer may require an employee to provide under section 107(3) of the Act in order to be entitled to take paid personal/carer's leave in accordance with clause X.3 is evidence that would satisfy a reasonable person that the leave is taken because the employee is experiencing family violence and needs to take the leave as a result of the family violence.

X.5 An employee, including a casual employee, who is experiencing family violence is entitled to 2 days of unpaid leave for each occasion (a *permissible occasion*) when the employee needs to take the leave as a result of the family violence.

X.6 An employee may take unpaid leave for a particular permissible occasion if the employee needs to take the leave as a result of the family violence.

X.7 An employee may take unpaid leave for a particular permissible occasion as:
(a) a single continuous period of up to 2 days; and
(b) any separate periods to which the employee and the employer agree.

X.8 An employee is not entitled to take unpaid leave under clause X.5 for a particular permissible occasion if the employee could instead take paid personal/carer's leave in accordance with clause X.3.

X.9 An employee is not entitled to take unpaid leave under clause X.5 unless the employee gives the employer:
(a) notice of the taking of leave by the employee; and
(b) if required by the employer, evidence that would satisfy a reasonable person that the leave is taken because the employee is experiencing family violence and needs to take the leave as a result of the family violence.

Note: Examples of evidence an employee could provide to comply with clause X.9(b) include (but are not limited to) any of the following:

- (a) a statutory declaration;
- (b) a document issued by a medical practitioner;
- (c) evidence of a legal proceeding;
- (d) a police report.

X.10 The notice:
(a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
(b) must advise the employer of the period, or expected period, of the leave.

X.11 An employer must take all reasonable steps to keep confidential any information provided by an employee to the employer concerning family violence.

Proposed model term 2–Reworking existing paid personal/carer’s leave and unpaid leave clause from the NES.

X. Taking paid and unpaid family violence leave

X.1 In this clause:

Family member means:

- (a) a person who is, or has been, the relevant person’s spouse or domestic partner; or
- (b) a person who has, or has had, an intimate personal relationship with the relevant person; or
- (c) a person who is, or has been, a relative of the relevant person; or
- (d) a child who resides with the relevant person or has previously resided with the relevant person on a normal or regular basis; or
- (e) a child of a person who has, or has had, an intimate personal relationship with the relevant person.

Family violence is:

- (a) behaviour by a person towards a family member of that person if that behaviour –
 - i. is physically or sexually abusive; or
 - ii. is emotionally or psychologically abusive; or
 - iii. is economically abusive; or
 - iv. is threatening; or
 - v. is coercive; or
 - vi. in any other way controls or dominates the family member and causes that family member to feel fear for the safety and wellbeing of that family member or another person.
- (b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

X.2 Clause X.3 applies to employees, other than casual employees.

Paid family violence leave

X.3 In addition to the reasons specified in s.97 of the Act for taking paid personal/carer’s leave, an employee who is entitled to such leave and who is a victim of family violence may take it if the employee needs to take leave as a result of the family violence.

X.4 Paid personal/carer’s leave taken in accordance with X.3 is called paid family violence leave.

Unpaid family violence leave

X.5 An employee, including a casual employee, who is a victim of family violence is entitled to 2 days of unpaid family violence leave for each occasion (a *permissible occasion*) when the employee needs to take the leave as a result of the family violence

(unpaid family violence leave).

- X.6 An employee may take unpaid family violence leave for a particular permissible occasion as:
- i. a single continuous period of up to 2 days; or
 - ii. any separate periods to which the employee and the employer agree.

- X.7 An employee cannot take unpaid family violence leave during a particular period if the employee could instead take paid personal/carer's leave.

X.8 Entitlement to unpaid carer's leave

In addition to the reasons for taking unpaid carer's leave specified in s.102 of the Act, an employee may take unpaid carer's leave for each occasion (a *permissible occasion*) when a member of the employee's immediate family, or a member of the employee's household, requires care or support because that person is experiencing domestic violence.

X.9 Notice and evidence requirements

Notice

- (a) An employee must give their employer notice of the taking of leave under this clause by the employee.
- (b) 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.

Evidence

- (c) An employee who has given their employer notice of the taking of leave under this clause must, if required by the employer, give the employer evidence that would satisfy a reasonable person that:
 - i. if it is paid family violence leave – the leave is taken for a reason specified in clause X.3.
 - ii. if it is unpaid family violence leave – the leave is taken for a permissible occasion in circumstances specified in clause X.5.
 - iii. if it is unpaid carer's leave – the leave is taken for a permissible occasion in circumstances specified in clause X.8.

Compliance

- (d) An employee is not entitled to take leave under this clause unless the employee complies with this clause.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988* or state or territory privacy legislation.

Proposed model term 3—Modelled on the Personal and Domestic Violence Leave clause in the *Industrial Relations Act 2016* (Qld)

X Domestic and Family Violence Leave

X.1 In this clause –

Domestic and family violence means behaviour by a person (the *first person*) towards another person (the *second person*) with whom the first person is in a relevant relationship that –

- (a) is physically or sexually abusive; or
- (b) is emotionally or psychologically abusive; or
- (c) is economically abusive; or
- (d) is threatening; or
- (e) is coercive; or
- (f) in any other way controls or dominates the second person and causes the second person to fear for the second person’s safety or wellbeing or that of someone else.

Relevant relationship means –

- (a) an intimate personal relationship; or
- (b) a family relationship; or
- (c) an informal care relationship.

Long-term casual employee means a casual employee who has been engaged by a particular employer, on a regular and systemic basis, for 1 or more periods of employment during the 1 year immediately before the employee seeks to access leave under this clause.

X.2 **Entitlement to leave because of domestic and family violence**

(a) An employee, other than a casual employee, is entitled to take paid personal/carer’s leave accrued in accordance with section 96 of the Act if–

- (i) the employee is exposed to domestic violence; and
- (ii) the employee needs to take leave as a result of the domestic violence.

(b) A long term casual employee is entitled to 10 days of unpaid domestic and family violence leave in a year if –

- (i) the employee is exposed to domestic violence; and
- (ii) the employee needs to take leave as a result of the domestic violence.

(c) A short term casual employee is entitled to 2 days of unpaid domestic and family violence leave a year if –

- (i) the employee is exposed to domestic violence; and
- (ii) the employee needs to take leave as a result of the domestic violence.

(d) Without limiting clause X.2(a), X.2(b) or X.2(c), the employee may need to take domestic and family violence leave if the employee has to do any of the following:

- (i) recovering from an injury caused by the domestic violence; or

- (ii) attend an appointment relating to the domestic violence, including an appointment for counselling, medical treatment or obtaining legal advice; or
- (iii) attend an interview with police relating to the domestic violence; or
- (iv) prepare for a court appearance relating to the domestic violence; or
- (v) attend court for a proceeding relating to the domestic violence; or
- (vi) find housing that is necessary because of the domestic violence; or
- (vii) organise child care or the education of a child that is necessary because of the domestic violence.

(e) If an employee has exhausted the entitlement under clause X.2(a)-(c) the employee may, with the employer's agreement, take additional days of unpaid domestic and family violence leave.

(f) Domestic and family violence leave may be taken for part of a day.

(g) An employee's entitlement to domestic and family violence leave under clause X.2(b)-(c) is available in full upon commencement of each year of employment and does not accumulate from year to year.

(h) The employer must not fail to re-engage a long term casual employee or short term casual employee only because the employee has taken domestic and family violence leave.

X.3 Requirement for employee to give notice

(a) An employee's entitlement to domestic and family violence leave is conditional on the employee giving the employer notice of -

- (i) the employee's absence from work; and
- (ii) if it is possible to notify the employer before the leave is taken – the approximate period the employee will be absent.

(b) The employee must give the employer notice under clause X.3(a) -

- (i) before or on the day the employee is to take leave; or
- (ii) if it is not possible to notify the employer before the leave is taken – during the leave or as soon as possible after the leave ends.

X.4 Employer may request evidence

(a) An employer may ask an employee to give the employer evidence that the employee is exposed to domestic violence and needs to take leave as a result.

(b) The employee must comply with the request.

(c) Without limiting clause X.3(b), the employee may comply with the request by giving the employer –

- (i) evidence from the police; or

- (ii) evidence of a legal proceeding or a court report; or
- (iii) evidence from a doctor or other health practitioner; or
- (iv) a report from a counsellor; or
- (v) written advice or a statutory declaration from the employee.

(d) An employer who receives evidence under this clause must not disclose the evidence to someone else unless the disclosure is required or authorised by law.