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CIRCULAR TO DEPARTMENTS AND AUTHORITIES NO. 3 OF 2007

PARENTAL LEAVE

This Circular replaces Circular to Departments and Authorities No. 12 of 2006 – Parental Leave.

The model parental leave clause (**Attachment A**) and the guidelines (**Attachment B**) have been revised to:

- clarify a number of provisions;
- incorporate additional flexibilities; and
- reflect obligations of the *Minimum Conditions of Employment Act 1993*.

To assist agencies, a summary of the key areas of change is provided in **Attachment C**.

It is the Government's intention that the provisions of the model clause apply to all public sector employees and for the model clause to be incorporated into awards and agreements as far as possible.

Until awards and agreements are updated to incorporate these provisions, the model clause is to be applied on an administrative basis. Entitlements that are more favourable than the model clause must continue to be applied unless or until award or agreement provisions are amended.

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PARENTAL LEAVE MODEL CLAUSE**1. PARENTAL LEAVE**

1.1 Definitions

For the purposes of this clause, the following terms shall have the following meaning:

- 1.1.1 “child”: all references in this clause to a child should be read as including children of a multiple birth or adoption.
- 1.1.2 “employee” means a person employed by an employing authority in the public sector and includes full time, part time, permanent and eligible casual employees, and fixed term contract employees for the duration of their contract.
- 1.1.3 “employer” means an employing authority in the public sector as defined by the *Public Sector Management Act 1994*.
- 1.1.4 “eligible casual employee”: a casual employee is eligible if the employee:
- (a) has been engaged by a public sector employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and
 - (b) but for an expected birth of a child to the employee or the employee’s spouse or de facto partner or an expected placement of a child with the employee with a view to the adoption of the child by the employee, would have a reasonable expectation of continuing engagement by the public sector employer on a regular and systematic basis.
 - (c) Without limiting subclause 1.1.4 (a) and (b), a casual employee is also eligible if the employee:
 - (i) was engaged by a public sector employer on a regular and systematic basis for a sequence of periods during a period (the first period of employment) of less than 12 months; and
 - (ii) at the end of the first period of employment, the employee ceased, on the employer’s initiative, to be so engaged by the public sector employer; and
 - (iii) the public sector employer later again engaged the employee on a regular and systematic basis for a further sequence of periods during a period (the second period of employment) that started not more than three months after the end of the first period of employment; and
 - (iv) the combined length of the first period of employment and the second period of employment is at least 12 months; and
 - (v) the employee, but for an expected birth of a child to the employee or the employee’s spouse or de facto partner or an expected placement of a child with the employee with a view to adoption of the child by the employee, would have a

reasonable expectation of continuing engagement with the public sector employer on a regular and systematic basis.

- 1.1.5 “primary care giver” means the employee who will assume the principal role for the care and attention of a newly born or newly adopted child as defined by this clause.
- 1.1.6 “replacement employee” means an employee specifically engaged to replace an employee proceeding on parental leave.
- 1.1.7 “partner” means a person who is a spouse or de facto partner.
- 1.1.8 “public sector” means all agencies, ministerial offices and non-SES organisations as defined in section 3 of the *Public Sector Management Act 1994*.

1.2 Entitlement to Parental Leave

1.2.1 Unpaid parental leave

An employee is entitled to a period of up to 52 weeks unpaid parental leave in respect of the:

- (a) birth of a child to the employee or the employee’s partner; or
- (b) adoption of a child who is not the natural child or the stepchild of the employee or the employee’s partner; is under the age of five; and has not lived continuously with the employee for six months or longer.

1.2.2 Paid parental leave

- (a) Subject to 1.2.2 (b) and 1.2.6, an employee is entitled to paid parental leave as follows:
 - (i) 12 weeks continuous paid parental leave from 1 July 2007; and
 - (ii) 14 weeks continuous paid parental leave from 1 July 2008.
- (b) The paid parental leave entitlement provided in 1.2.2 (a):
 - (i) can be accessed by a pregnant employee in accordance with 1.2.6 (a);
 - (ii) can only be accessed by an employee who is the primary care giver of a newly born or newly adopted child;
 - (iii) can only be accessed by an employee who has completed 12 months continuous service in the Western Australian public sector;
 - (iv) is provided only in respect to the:
 - birth of a child to the employee or the employee’s partner; or

- adoption of a child who is not the natural child or the stepchild of the employee or the employee's partner; is under the age of five; and has not lived continuously with the employee for six months or longer;
 - (v) cannot be accessed by eligible casual employees; and
 - (vi) forms part of the 52 week unpaid parental leave entitlement provided in 1.2.1 – Unpaid Parental Leave.
 - (c) The quantum of paid parental leave available to an employee is determined according to the quantum that applied at the date of commencement of the employee's period of paid or unpaid parental leave.
- 1.2.3 An employee may take the paid parental leave specified in 1.2.2 – Paid Parental Leave at half pay for a period equal to twice the period to which the employee would otherwise be entitled.
- 1.2.4 The period of paid parental leave taken by the primary care giver of a newly born or newly adopted child shall not exceed the period specified in 1.2.2 – Paid Parental Leave or its half pay equivalent.
- 1.2.5
- (a) Paid parental leave will count as qualifying service for all purposes under any relevant award, agreement or industrial instrument.
 - (b) Qualifying service for any purpose under any relevant award, agreement or industrial instrument is to be calculated according to the number of weeks of paid parental leave that were taken at full pay or would have been had the employee not taken paid parental leave at half pay. Employees who take paid parental leave on half pay do not accrue award, agreement or other entitlements beyond those that would have accrued had they taken the leave at full pay.
- 1.2.6 Commencement of paid parental leave
- (a) A pregnant employee may commence paid parental leave any time up to six weeks before the expected date of birth.
 - (b) Provided that the period of paid parental leave is concluded within 12 months of the birth or placement of the child, an employee identified as the primary care giver of a newly born or newly adopted child may commence the period of paid parental leave from:
 - (i) the child's birth date; or
 - (ii) for the purposes of adoption, the date of placement of the child; or
 - (iii) a later date nominated by the primary care giver.
 - (c) Notwithstanding 1.2.6 (b), an employer may, in exceptional circumstances, allow an employee to take a period of paid parental leave as prescribed in 1.2.2 – Paid Parental Leave that will result in the employee being on paid parental leave more than 12 months after the birth or placement of the employee's child.

- (d) An employer may require evidence that would satisfy a reasonable person that the circumstances warrant allowing the employee to take their period of paid parental leave such that it will result in the employee being on paid parental leave more than 12 months after the birth or placement of the employee's child.

1.2.7 Shared parental leave

- (a) Subject to 1.2.7 (b), the paid parental leave entitlement may be shared between partners assuming the role of primary care giver of a newly born or newly adopted child.
- (b) Where both partners work in the public sector, the total paid parental leave entitlement provided to the employees shall not exceed the paid parental leave quantum for a single employee as specified in 1.2.2 – Paid Parental Leave or its half pay equivalent.
- (c) The unpaid parental leave entitlement may be shared between partners.
- (d) An employee and their partner may only take paid and/or unpaid parental leave concurrently in exceptional circumstances with the approval of the employer or in accordance with 1.2.13 (c).

1.2.8

- (a) An employee must take parental leave in one continuous period. Where less than the standard parental leave is taken the unused portion of the period of paid or unpaid leave cannot be preserved in any way.
- (b) Notwithstanding 1.2.8 (a):
 - (i) paid parental leave may be taken in more than one continuous period by an employee who meets the requirements of 1.2.13; and
 - (ii) unpaid parental leave may be taken in more than one continuous period where the employee undertakes special temporary or casual employment in accordance with 1.9 – Employment During Unpaid Parental Leave. In these circumstances, the provisions of 1.9 – Employment During Unpaid Parental Leave apply.

1.2.9 Payment for paid parental leave

- (a) Subject to 1.2.9 (b), an employee proceeding on paid parental leave is to be paid according to their ordinary working hours at the time of commencement of parental leave. Shift and weekend penalty payments and higher duties allowances are not payable during paid parental leave.
- (b) Payment for a part time employee proceeding on paid parental leave is to be determined according to:
 - (i) an average of the hours worked by the employee over the preceding 12 months; or
 - (ii) their ordinary working hours at the time of commencement of paid parental leave;

whichever is the greater.

- (c) An employee may elect to receive pay in advance for the period of paid parental leave at the time the parental leave commences, or may elect to be paid the entitlement on a fortnightly basis over the period of the paid parental leave.

1.2.10 (a) An employee is eligible, without concluding their parental leave and resuming duty, for subsequent periods of parental leave, including paid parental leave, in accordance with the provisions of this clause.

- (b) Where an employee has not concluded their period of parental leave and resumed duty, and the employee is entitled to a subsequent period of paid parental leave, the employee's paid parental leave is:

- (i) to be paid according to the employee's status and classification at the time of commencing the original period of parental leave; and

- (ii) not affected by any period of special temporary or casual employment undertaken in accordance with 1.9 – Employment During Unpaid Parental Leave.

1.2.11 Medical certificates

- (a) An employee who has given their employer notice of their intention to take paid or unpaid parental leave, or unpaid partner leave shall provide the employer with a medical certificate from a registered medical practitioner naming the employee, or the employee's partner, confirming the pregnancy and the estimated date of birth.

- (b) A pregnant employee who continues to work during the period of six weeks before the expected date of birth is not required to provide their employer with a medical certificate stating that the employee is fit to work and whether it is advisable for the employee to continue in her present position for a stated period.

- (c) Notwithstanding 1.2.11 (b), where an award or agreement provides an employer with the discretion to request a medical certificate in relation to a pregnant employee who continues to work during the period of six weeks before the expected date of birth, the award or agreement provisions shall prevail.

1.2.12 If the pregnancy results in other than a live child or the child dies during the period of paid parental leave, the entitlement to paid parental leave as provided in 1.2.2 – Paid Parental Leave remains intact. Such paid parental leave cannot be taken concurrently with paid sick or personal leave taken in accordance with subclause 1.4.4 - Sick or Personal Leave.

1.2.13 Paid parental leave when the mother is, for any period of her leave, incapable of being her child's primary care giver

- (a) An employee who commenced paid parental leave prior to her child's birth and:

- (i) who is incapacitated following the birth of her child and is therefore incapable of being its primary care giver; or

- (ii) whose child requires hospitalisation such that the employee and her partner are not their child's primary care giver;

is entitled to remain on paid parental leave, notwithstanding that she is not the child's primary care giver.

- (b) An employee is not entitled to access paid parental leave when they are not their child's primary care giver other than in the circumstances identified in 1.2.13 (a).
- (c) If both parents work in the public sector and the mother is able to remain on paid parental leave in accordance with 1.2.13 (a)(i), the employees may choose which parent will access paid parental leave.
 - (i) If the mother chooses to remain on paid parental leave, her partner may access unpaid parental leave for the period they are their child's primary care giver.
 - (ii) If the mother's partner is their child's primary care giver and chooses to access paid parental leave, the mother may access unpaid parental leave for the period her partner is their child's primary care giver.
 - (iii) Where the mother's partner accesses paid parental leave in accordance with 1.2.13 (b)(ii), the mother is entitled to resume paid parental leave if/when she becomes her child's primary care giver, subject to the provisions of 1.2.7 (b) – Shared Parental Leave.
 - (iv) If the mother resumes paid parental leave in accordance with 1.2.13 (c)(iii), her partner must cease paid parental leave.
- (d) An employee is not entitled to access the provisions of 1.2.13 (c) in the circumstances identified in 1.2.13 (a)(ii).

1.2.14 Adoption of a child

- (a) An employee seeking to adopt a child shall be entitled to two days unpaid leave to attend interviews or examinations required for the adoption procedure. Employees working or residing outside the Perth metropolitan area are entitled to an additional day's unpaid leave. The employee may take any paid leave entitlement to which the employee is entitled in lieu of this leave.
- (b) If an application for parental leave has been granted for the adoption of a child, which does not eventuate, then the period of paid or unpaid parental leave is terminated. Employees may take any other paid leave entitlement to which they are entitled in lieu of the terminated parental leave or return to work.

1.2.15 Confirmation of primary care giver status

- (a) For the purposes of 1.2.2 – Paid Parental Leave, an employer may require an employee to provide confirmation of their primary care giver status.
- (b) Where an employer requires an employee to confirm their status as the primary care giver of a newly born or newly adopted child, the

employee is to provide the employer with evidence that would satisfy a reasonable person of the entitlement to paid parental leave. Such evidence may include a medical certificate or statutory declaration.

1.3 Partner Leave

- 1.3.1 An employee is entitled to unpaid partner leave as prescribed by this subclause in respect of the:
- (a) birth of a child to the employee or the employee's partner; or
 - (b) adoption of a child who is not the natural child or the stepchild of the employee or the employee's partner; is under the age of five; and has not lived continuously with the employee for six months or longer.
- 1.3.2 An employee who is not taking parental leave with respect to the birth of child to their partner shall be entitled to a period of unpaid partner leave of up to one week at the time of the child's birth. In the case of adoption of a child this period shall be increased to up to three weeks unpaid leave.
- 1.3.3 The employee may request to extend the period of unpaid partner leave up to a maximum of eight weeks.
- 1.3.4 The employer is to agree to an employee's request to extend their partner leave under 1.3.3 unless:
- (a) having considered the employee's circumstances, the employer is not satisfied that the request is genuinely based on the employee's parental responsibilities; or
 - (b) there are grounds to refuse the request relating to its adverse effect on the employer's business and those grounds would satisfy a reasonable person. These grounds include, but are not limited to:
 - (i) cost;
 - (ii) lack of adequate replacement staff;
 - (iii) loss of efficiency; and
 - (iv) impact on the production or delivery of products or services by the employer.
- 1.3.5 The employer is to give the employee written notice of the employer's decision on a request for extended partner leave. If the employee's request is refused, the notice is to set out the reasons for the refusal.
- 1.3.6 An employee who believes their request for extended partner leave under 1.3.3 has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the employer to demonstrate that the refusal was justified in the circumstances.
- 1.3.7 The taking of partner leave by an employee shall have no effect on their or their partner's entitlement, where applicable, to paid parental leave under this clause.

1.4 Other Leave Entitlements

1.4.1 Annual and long service leave

- (a) An employee proceeding on unpaid parental leave may elect to substitute any part of that leave with accrued annual leave or long service leave to which the employee is entitled for the whole or part of the period of unpaid parental leave.
- (b)
 - (i) An employee may elect to substitute any part of their entitlement to one week's unpaid partner leave as provided for in 1.3.2 with accrued annual or long service leave to which the employee is entitled for the whole or part of that period of unpaid partner leave.
 - (ii) Where an employer agrees to an employee's request to extend their period of unpaid partner leave under 1.3.3, the employer must allow an employee to elect to substitute any part of that period of unpaid partner leave with accrued annual or long service leave to which the employee is entitled for the whole or part of that period of unpaid partner leave.

1.4.2 Time off in lieu of overtime

An employee proceeding on unpaid parental leave or unpaid partner leave may elect to substitute any part of that leave with accrued time off in lieu of overtime to which the employee is entitled for the whole or part of the period of unpaid parental leave or unpaid partner leave.

1.4.3 Leave without pay

- (a) Subject to all other leave entitlements being exhausted an employee shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two years. The employer is to agree to a request to extend their leave unless:
 - (i) having considered the employee's circumstances, the employer is not satisfied that the request is genuinely based on the employee's parental responsibilities; or
 - (ii) there are grounds to refuse the request relating to its adverse effect on the employer's business and those grounds would satisfy a reasonable person. These grounds include, but are not limited to:
 - cost;
 - lack of adequate replacement staff;
 - loss of efficiency;
 - impact on the production or delivery of products or services by the employer.
- (b) The employer is to give the employee written notice of the employer's decision on a request for leave without pay under 1.4.3 (a). If the request is refused, the notice is to set out the reasons for the refusal.

- (c) An employee who believes their request for leave without pay under 1.4.3 (a) has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the employer to demonstrate that the refusal was justified in the circumstances.
- (d) Any period of leave without pay must be applied for and approved in advance and will be granted on a year-by-year basis. Where both partners work for the employer the total combined period of leave without pay following parental leave shall not exceed two years.

1.4.4 Sick or personal leave

- (a) An employee on paid or unpaid parental leave is not entitled to paid sick or personal leave other than as specified in 1.4.4 (b).
- (b) Should the birth or adoption result in other than the arrival of a living child, the employee shall be entitled to such period of paid sick or personal leave to which the employee is entitled or unpaid leave for a period certified as necessary by a registered medical practitioner. Paid sick or personal leave cannot be taken concurrently with paid parental leave.
- (c) Where a pregnant employee not on parental leave suffers illness related to the pregnancy or is required to undergo a pregnancy related medical procedure the employee may take any paid sick or personal leave to which the employee is entitled or unpaid leave for a period as certified necessary by a registered medical practitioner.
- (d) An employee on unpaid partner leave is not entitled to paid sick or personal leave.

1.4.5 Public holidays

Any public holidays that fall during paid or unpaid parental leave, or unpaid partner leave shall be counted as part of the parental or partner leave and do not extend the period of parental or partner leave.

1.4.6 School vacation leave

- (a) This provision applies to employees who are entitled to receive normal pay during a period of the school vacation.
- (b) Where a period of paid parental leave overlaps with a period of school vacation leave to which an employee is entitled, the period of vacation leave shall not be counted as part of the paid parental leave. It shall therefore extend the period of paid parental leave to the extent of the overlap.

1.5 Notice and Variation

- 1.5.1 (a) The employee shall give not less than four weeks notice in writing to the employer of the date the employee proposes to commence paid or unpaid parental leave, or unpaid partner leave stating the period of leave to be taken.

- (b) Where an award or agreement requires an employee to provide a greater period of notice than that stated in 1.5.1 (a), the notice provisions of the award or agreement shall prevail.
 - 1.5.2 An employee seeking to adopt a child shall not be in breach of subclause 1.5.1 by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.
 - 1.5.3 An employee proceeding on parental leave may elect to take a shorter period of parental leave to that provided by 1.2.4 – Unpaid Parental Leave and may at any time during that period elect to reduce or extend the period stated in the original application, provided four weeks written notice is provided.
- 1.6 Modification of Duties or Transfer to a Safe Job
- 1.6.1 Part time employment during pregnancy
 - (a) A pregnant employee may work part time in one or more periods whilst she is pregnant where she provides her employer with a medical certificate from a medical practitioner advising that part time employment is, because of her pregnancy, necessary or preferable.
 - (b) The terms of part time employment undertaken in accordance with 1.6.1 (b) shall be in writing.
 - (c) Such employment shall be in accordance with the part time employment and parental leave provisions of any relevant award, agreement or other industrial instrument.
 - (d) In the absence of award or agreement provisions, and unless otherwise agreed between an employer and employee, an employee shall provide their employer with four weeks written notice of an intention to:
 - (i) vary part time work arrangements made under 1.6.1 (b); or
 - (ii) revert to full time employment during the employee's pregnancy.
 - (e) An employee reverting to full time employment in accordance with 1.6.1 (d) (ii) will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the employee's skill and abilities as the substantive position held immediately prior to undertaking part time employment.
 - 1.6.2 If an employee gives her employer a medical certificate from a medical practitioner containing a statement to the effect that, in the medical practitioner's opinion, the employee is fit to work, but that it is inadvisable for her to continue in her present position for a stated period because of:
 - (a) illness, or risks, arising out of her pregnancy; or
 - (b) hazards connected with that position;then the employer must modify the duties of the position or alternatively transfer the employee to a safe job at the same classification level for the period during which she is unable to continue in her present position.

- 1.6.3 If an employee's employer does not think it to be reasonably practicable to modify the duties of the position or transfer the employee to a safe job the employee is entitled to paid leave for the period during which she is unable to continue in her present position.
- 1.6.4 An entitlement to paid leave provided in 1.6.3 is in addition to any other leave entitlement the employee has and the employee is to be paid the amount she would reasonably have expected to be paid if she had worked during that period. This entitlement also applies to eligible casual employees.
- 1.6.5 An entitlement to paid leave provided in 1.6.3 ends at the earliest of whichever of the following times is applicable:
- (a) the end of the period stated in the medical certificate;
 - (b) if the employee's pregnancy results in the birth of a living child – the end of the day before the date of birth; or
 - (c) if the employee's pregnancy ends otherwise than with the birth of a living child – the end of the day before the end of the pregnancy.

1.7 Communication During Parental Leave

- 1.7.1 Where an employee is on parental leave and a definite decision has been made to introduce significant change at the workplace, the employer shall take reasonable steps to:
- (a) make information available in relation to any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave; and
 - (b) provide an opportunity for the employee to discuss any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave.
- 1.7.2 An employee shall take reasonable steps to inform their employer about any significant matter that will affect the employee's decision regarding:
- (a) the duration of parental leave to be taken;
 - (b) whether the employee intends to return to work; and
 - (c) whether the employee intends to return to work on a part-time or modified basis.
- 1.7.3 An employee shall also notify their employer of changes of address or other contact details that might affect the employer's capacity to comply with subclause 1.7.1.

1.8 Replacement Employee

- 1.8.1 Prior to engaging a replacement employee the employer shall inform the replacement person of:
- (a) the temporary nature of the employment;
 - (b) the entitlements relating to the return to work of the employee on parental leave or that employee's capacity to undertake special

temporary or casual employment during their period of unpaid parental leave; and

- (c) any consequences for the replacement employee should the employee on parental leave return early from leave or seek an extension to their period of parental leave.

1.8.2 A replacement employee may be employed part time. Such employment shall be in accordance with the part time employment provisions of any relevant award, agreement or industrial instrument.

1.8.3 Nothing in this subclause shall be construed as requiring an employer to engage a replacement employee.

1.9 Employment During Parental Leave

1.9.1 (a) The provisions of 1.9 only apply to employment during:

- (i) unpaid parental leave; and
- (ii) leave without pay taken in conjunction with parental leave as provided for in 1.4.2 – Leave without pay.

(b) An employer cannot employ an employee in special temporary or casual employment whilst the employee is on a period of:

- (i) paid parental leave; or
- (ii) annual or long service leave taken concurrently with a period of unpaid parental leave.

1.9.2 Special temporary employment

(a) For the purposes of 1.9, “temporary” means employment:

- (i) of an intermittent nature;
- (ii) for a limited, specified period;
- (iii) undertaken during unpaid parental leave or leave without pay taken in conjunction with unpaid parental leave; and
- (iv) excluding employment undertaken in accordance with 1.9.3 – Special casual employment.

(b) Notwithstanding any other provision of the parental leave clause, an employee may be employed by their employer on a temporary basis provided that:

- (i) both parties agree in writing to the special temporary employment;
- (ii) public service officers are only employed on a temporary basis in connection with their substantive office, post or position;

- (iii) employees other than public service officers are employed at the level commensurate to the level of the available position under the relevant award or agreement;
- (iv) in the case of a fixed term contract employees, the period of temporary employment is within the period of the current fixed term contract;
- (v) any such period of service shall not change the employee's employment status in regard to their substantive employment; and
- (vi) any period of special temporary employment shall count as qualifying service for all purposes under any relevant award, agreement or industrial instrument.

1.9.3 Special casual employment

- (a) For the purposes of this subclause, "casual" means employment:
 - (i) on an hourly basis for a period not exceeding four weeks in any period of engagement;
 - (ii) for which a casual loading is paid;
 - (iii) undertaken during unpaid parental leave or leave without pay taken in conjunction with unpaid parental leave; and
 - (iv) excluding employment undertaken in accordance with 1.9.2 – Special temporary employment.
- (b) Notwithstanding any other provision of the parental leave clause, an employee other than a public service officer, may be employed by their employer on a casual basis provided that:
 - (i) both parties agree in writing to the special casual employment;
 - (ii) employees are employed at the level commensurate to the level of the available position under the relevant award or agreement;
 - (iii) in the case of a fixed term contract employee, the period of casual employment is within the period of the current fixed term contract;
 - (iv) any such period of service shall not break the employee's continuity of service nor change the employee's employment status in regard to their substantive employment; and
 - (v) any period of special casual employment shall not count as qualifying service other than with respect to entitlements a casual employee would ordinarily be entitled to for any purpose under any relevant award, agreement or industrial instrument.

1.9.4 For every period of special temporary or casual employment, the following records must be kept:

- (a) the agreements made between the parties for periods of special temporary or casual employment;
- (b) the dates of commencement and conclusion of each period of special temporary and/or casual employment;
- (c) the hours worked by the employee during such periods; and
- (d) the classification level at which the employee is employed during such periods.

1.9.5 Effect of special temporary or casual employment on unpaid parental leave

- (a) Subject to 1.9.5 (b), periods of special temporary and/or casual employment shall be deemed to be part of the employee's period of unpaid parental leave or leave without pay taken in conjunction with parental leave as originally agreed to by the parties.
- (b) An employee who immediately resumes unpaid parental leave or leave without pay following parental leave following the conclusion of a period of special temporary or casual employment:
 - (i) is entitled, on written notice, to extend their period of unpaid parental leave or leave without pay taken in conjunction with parental leave by the period of time in which they were engaged in special temporary and/or casual employment; and
 - (ii) shall give not less than four weeks notice in writing to their employer of the new date they intend to return to work and so conclude their period of parental leave or leave without pay taken in conjunction with parental leave.
- (c) An employee who does not immediately resume their period of unpaid parental leave or leave without pay taken in conjunction with parental leave at the conclusion of a period of special temporary or casual employment cannot preserve the unused portion of leave for use at a later date.

1.10 Return to Work on Conclusion of Parental Leave

- 1.10.1 (a) An employee shall confirm their intention to conclude their parental leave or leave without pay following parental leave and return to work by notice in writing to their employer not less than four weeks prior to the expiration of parental leave or leave without pay.
- (b) An employee who intends to return to work on a modified basis in accordance with 1.10.4 – Right to return to work on a modified basis, shall advise their employer of this intention by notice in writing not less than four weeks prior to the expiration of parental leave or leave without pay.
- 1.10.2 An employee on return to work following the conclusion of parental leave or leave without pay following parental leave will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the employee's skill and abilities as the substantive position held immediately prior to proceeding on parental leave.

1.10.3 Where an employee was transferred to a safe job or proceeded on leave as provided for in 1.6.3 – Modification of Duties and Transfer to a Safe Job, the employee is entitled to return to the position occupied immediately prior to the transfer or the taking of the leave.

1.10.4 Right to return to work on a modified basis

- (a) An employee may return on a part time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with the part time employment provisions of the relevant award and agreement.
- (b) An employee may return on a modified basis that involves the employee working on different days or at different times, or both; or on fewer days or for fewer hours or both, than the employee worked immediately before starting parental leave.

1.10.5 Right to revert

- (a) An employee who has returned on a part time or modified basis in accordance with 1.10.4 may subsequently request the employer to permit the employee to resume working on the same basis as the employee worked immediately before starting parental leave or full time work at the same classification level.
- (b) An employer is to agree to a request to revert made under 1.10.5 (a) unless there are grounds to refuse the request relating to the adverse effect that agreeing to the request would have on the conduct of operations or business of the employer and those grounds would satisfy a reasonable person.
- (c) An employer is to give the employee written notice of the employer's decision on a request to revert under 1.10.5 (a). If the request is refused, the notice is to set out the reasons for the refusal.
- (d) An employee who believes their request to revert under 1.10.5 (a) has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the employer to demonstrate that the refusal was justified in the circumstances.

1.11. Effect of Parental Leave and Partner Leave on the Contract of Employment

1.11.1 An employee employed for a fixed term contract shall have the same entitlement to parental leave and partner leave, however the period of leave granted shall not extend beyond the term of that contract.

1.11.2 (a) Absence on unpaid parental leave or unpaid partner leave shall not break the continuity of service of employees.

(b) Where an employee takes a period of unpaid parental leave or unpaid partner leave exceeding 14 calendar days in one continuous period, the entire period of such leave shall not be taken into account in calculating the period of service for any purpose under any relevant award, agreement or industrial instrument. Periods of unpaid leave of 14 days or less shall, however, count for service.

1.11.3 An employee on parental leave or partner leave may terminate employment at any time during the period of leave by written notice in accordance with any relevant award, agreement, or industrial instrument.

1.11.4 An employer shall not terminate the employment of an employee on the grounds of the employee's application for parental leave or partner leave or absence on parental leave or partner leave but otherwise the rights of the employer in respect of termination of employment are not affected.

1.12 Casual Employees

1.12.1 To avoid doubt, an eligible casual employee has no entitlement to paid leave under this clause with the exception of the entitlement to paid leave as provided under subclause 1.6.3 – Modification of Duties and Transfer to a Safe Job.

1.12.2 Nothing in this clause confers a change in the employment status of a casual employee.

1.12.3 Service performed by an eligible casual employee for a public sector employer shall count as service for the purposes of determining 12 months continuous service as per clause 1.2.2 (b)(iii) where:

- (a) the eligible casual employee has become a permanent or fixed term contract employee with the same employer; and
- (b) the break between the period of eligible casual employment and permanent or fixed term contract employment is no more than three months.

PARENTAL LEAVE GUIDELINES

1. Purpose

These guidelines are to be read in conjunction with the 'Parental Leave Model Clause' and provide guidance for agencies in the application of parental leave entitlements. All references in these guidelines to the 'model clause' are references to the 'Parental Leave Model Clause'.

2. Transitional Arrangements

The increases in paid parental leave are available to employees, other than eligible casual employees as defined, who commence paid parental leave on or after 1 July 2007 (12 weeks leave) or 1 July 2008 (14 weeks leave).

3. Definitions

3.1 Paid parental leave is available to the primary care giver of a newborn or newly adopted child. A primary care giver is a person who provides the majority of care and attention to such a child. Only one person can be the primary care giver at any one time.

3.2 All references to a 'child' in the parental leave clause should be read as including 'children' of a multiple birth or adoption. Consequently, where the employee:

- (a) or their partner gives birth or adopts more than one child at one time, the employee is entitled to the period of unpaid parental leave they would have received had only a single child been born or adopted;
- (b) is the primary care giver of children of a multiple birth or adoption, the employee is only entitled to the period of paid parental leave they would have received were they the primary care giver of a single child; and
- (c) takes partner leave in accordance with 1.3 - Partner Leave of the model clause and the employee's partner has given birth to more than one child or, in the case of adoption, more than one child has been adopted at one time, the employee is entitled to the period of partner leave they would have received had only a single child been born or adopted.

4. Entitlement to Parental Leave

4.1 Parental leave, including paid parental leave, is only available to employees:

- (a) with respect to the birth or adoption of a child to the employee or their partner. This means, for example, that extended family members of an employee with a newly born or adopted child are not entitled to parental leave; and
- (b) who will be providing the primary care to a newly born or newly adopted child. This means that paid parental leave is not available to employees to care for their and/or their partner's other children.

4.2 There is a single exception to the requirement that an employee be their child's primary caregiver in order to access paid parental leave. Where an employee has already commenced paid parental leave prior to her child's birth and:

- (a) she is incapacitated following the birth of her child and is consequently physically or mentally incapable of being her child's primary caregiver; or

- (b) her child requires hospitalisation such that she and her partner are not their child's primary caregiver;

the employee may remain on paid parental leave, notwithstanding that she is not the child's primary care giver. This provision does not apply to situations where the mother returns to work or takes annual leave following her child's birth.

- 4.3 The quantum of parental leave available to an employee is determined according to the quantum that applied at the date of commencement of the employee's period of paid or unpaid parental leave. This means, for example, an employee who commenced their paid or unpaid parental leave before July 2008 is not entitled to an additional two weeks paid parental leave if their period of leave extends past July 2008.
- 4.4 Employees may only access parental leave in one continuous period. Where less than the standard parental leave is taken, the unused portion of that period of paid or unpaid leave cannot be preserved in any way for use at a later date. Where parental leave is shared between partners, each employee can only access their share of parental leave in one continuous period. This effectively means that parental leave cannot be shared between partners on a day-by-day, week-by-week or month-by-month basis.
- 4.5 Notwithstanding paragraph 4.4 of these guidelines,
 - (a) An employee who meets the requirements of 1.2.13 of the model clause may take paid parental leave in more than one continuous period. This provision, however, only applies to an employee who commenced her paid parental leave prior to her child's birth and who was subsequently incapable of being her child's primary care giver following the child's birth due to the employee's physical or mental incapacitation. This provision does not apply to situations where the mother returns to work or takes annual leave following her child's birth.
 - (b) An employee who undertakes special temporary or casual employment during unpaid parental leave is able to take their unpaid parental leave in more than one period, subject to the provisions of subclause 1.9 of the model clause.
- 4.6 Paid parental leave may be shared between partners assuming the role of primary care giver. Where both partners work in the WA public sector, the total paid parental leave entitlement provided to the employees shall not exceed the quantum provided to a single person in subclause 1.2.2 of the model clause or its half pay equivalent. This applies to all employees of the WA public sector, regardless of award coverage.
- 4.7 An employee who has previously taken paid parental leave is eligible to take another period of paid parental leave without accruing a further 12 months of continuous service and without concluding their unpaid parental leave or leave without pay taken in conjunction with parental leave and so resuming duty.

5. Commencement of Paid Parental Leave

- 5.1 A pregnant employee may commence a period of paid parental leave any time up to six weeks before the expected date of birth. The model clause does not require a pregnant employee who wishes to work during the six weeks prior to the expected date of birth to provide a certificate from a medical practitioner certifying that she is fit for work. If, however, an award or agreement does provide the employer with the discretion to request such a medical certificate, the award or agreement provisions will prevail.
- 5.2 Subject to the period of paid parental leave being concluded within 12 months of the birth or placement of the child, the commencement of paid parental leave may commence from:

- (a) the child's birth date;
- (b) for the purposes of adoption, the date of the placement of the child; or
- (c) a later date nominated by the primary care giver.

- 5.3 Notwithstanding paragraph 5.2 of these guidelines, an employer has the discretion, in exceptional circumstances, to allow an employee to take a period of paid parental leave that will result in the employee being on paid parental leave more than 12 months after the birth or placement of the employee's child. This may occur, for example, where a child requires a lengthy hospitalisation following its birth which then makes it impossible for an employee to commence their paid parental leave as the child's primary care giver within the required time frame.
- 5.4 Where an employer does allow an employee to take a period of paid parental leave that will result in the employee being on paid parental leave more than 12 months after the birth or placement of the employee's child the period of paid parental leave must not exceed the quantum prescribed by 1.2.2 of the model clause or its half pay equivalent. The employer may also require evidence that would satisfy a reasonable person that the circumstances warrant allowing the employee to take their period of paid parental leave such that it will result in the employee being on paid parental leave more than 12 months after the birth or placement of the employee's child.

6. Payment on Paid Parental Leave

- 6.1 Subject to paragraph 6.2 of these guidelines, an employee proceeding on paid parental leave is to be paid according to their ordinary working hours at the time of commencement of parental leave. This provision applies where the employee may have changed employment status – for example, from part time to full time – immediately prior to commencing paid parental leave.
- 6.2 Paid parental leave will be paid on a pro-rata basis for part time employees. A part time employee has the capacity to choose the method by which their ordinary working hours are calculated for paid parental leave purposes.
- 6.3 Where an employee has not resumed duty following the conclusion of their parental leave and the employee is entitled to a subsequent period of paid parental leave, the employee's paid parental leave is to be paid according to the employee's status and classification at the time of commencing the original period of parental leave. Special temporary or casual employment undertaken by the employee has no effect on this, notwithstanding that the employee may have undertaken special temporary or casual work at a different classification or on a different basis to their substantive position.

7. Confirmation of Primary Care Giver Status

- 7.1 With respect to paid parental leave only, the employer may require an employee to provide confirmation of their primary care giver status. Where the employer requires the employee to confirm their status as the primary care giver, the employee is to provide the employer with evidence that would satisfy a reasonable person of the entitlement to parental leave.
- 7.2 Confirmation may be provided by, but is not limited to:
- (a) a statutory declaration containing sufficient details to satisfy a reasonable person of the employee's entitlement to paid parental leave;

- (b) a medical certificate addressing any incapacity the child's mother may have to be its primary care giver;
- (c) details of any leave being taken by the child's mother;
- (d) details of the mother's working arrangements; and/or
- (e) details of the child's care arrangements.

8. Entitlement to Partner Leave

- 8.1 An employee who is not taking parental leave with respect to the birth or placement of their child is entitled to one week's unpaid partner leave. An employee who is entitled to partner leave may also request an extension of unpaid partner leave up to a maximum of eight weeks¹.
- 8.2 An employer must agree to a request to extend unpaid partner leave unless there are reasonable grounds not to agree². Reasonable grounds for refusal and an employee's right to seek enforcement are set out in subclauses 1.3.4 and 1.3.6 of the model clause respectively.
- 8.3 The employer must provide the employee with written notice of their decision concerning an employee's request to extend their period of unpaid partner leave for up to a maximum of eight weeks. If the employee's request is refused, the employer must set out the reasons for the refusal in the written notice³.

9. Casual Employees

- 9.1 Eligible casual employees who meet the definition in subclause 1.1.4 of the model clause are entitled to unpaid parental leave⁴ and unpaid partner leave. Eligible casual employees are not entitled to paid parental leave.
- 9.2 Any reference in the model clause that allows an employee to utilise paid leave entitlements such as annual leave and sick leave do not extend to eligible casual employees who do not have such entitlements and are paid a loading in lieu of leave entitlements.
- 9.3 Eligible casual employees are entitled to proceed on paid leave as provided for under subclause 1.6 – Modification of Duties and Transfer to a Safe Job provisions of the model clause if it is not reasonably practicable for the employer to modify the employee's duties or to transfer the casual employee to a safe job⁵.
- 9.4 If the eligible casual employee proceeds on paid leave under subclause 1.6 of the model clause the employer must pay the amount that the employee would reasonably expect to be paid if the employee had worked during that period.
- 9.5 Where an eligible casual employee becomes a permanent or fixed term contract employee with the same public sector employer within three months of completing their last period of casual employment, their service as an eligible casual employee will count as qualifying service for paid parental leave.

¹ Section 33(5) of the *Minimum Conditions of Employment Act 1993*.

² Section 38B(1) of the *Minimum Conditions of Employment Act 1993*.

³ Section 38B (3) of the *Minimum Conditions of Employment Act 1993*.

⁴ Section (2) and (3) of Division 6 – Parental leave of the *Minimum Conditions of Employment Act 1993*

⁵ Section 689 of Div 6 – Parental leave of the *Workplace Relations Act 1996*

10. Notice and Variation

An employee who wishes to commence paid or unpaid parental leave, or unpaid partner leave must provide their employer with no less than four weeks notice in writing. If, however, an award or agreement applying to the employee requires a greater period of notice – for example, 10 weeks – then the notice provisions of the award or agreement are to apply to the employee.

11. Modification of Duties and Transfer to a Safe Job

- 11.1 Subject to a number of requirements, a pregnant employee is entitled to work on a part time basis during her pregnancy. She may work in one or more part time periods depending upon the demands of her pregnancy. This entitlement must be read in conjunction with any part time employment provisions contained in relevant awards or agreements.
- 11.2 The entitlement in subclause 1.6.3 of the model clause to paid leave where an employer does not think it is reasonably practicable to modify an employee's duties or provide an employee with a transfer to a safe job is available to all pregnant employees including eligible casual employees as defined.
- 11.3 This paid leave entitlement is in addition to other leave entitlements and a pregnant employee who proceeds on paid leave will have no change to her terms and conditions of employment.
- 11.4 An entitlement to paid leave under these circumstances applies irrespective of any award or agreement requirement for a pregnant employee to proceed on parental leave six weeks prior to the expected date of birth or otherwise. This means, if an employee is certified as either being unfit for work, or fit for work but it is inadvisable for her to continue in her present position in the period of six weeks up to the expected date of birth, she is entitled to:
- (a) have the duties of her position modified;
 - (b) be transferred to a safe job at the same classification level; or
 - (c) paid leave as per subclause 1.6.3 of the model clause.

12. Employment During Unpaid Parental Leave

- 12.1 Where both the employer and employee agree, an employee may be employed by their employer on a special temporary or casual basis during a period of unpaid parental leave or leave without pay taken in conjunction with unpaid parental leave. An employee may not be employed during any period of paid leave taken concurrently with a period of unpaid parental leave.
- 12.2 Public service officers can only be employed in connection with their substantive office, post or position. They are therefore unable to undertake special casual employment unless they are employed substantively as an eligible casual employee. Public service employees are able to undertake temporary employment in a higher duties position as they retain a connection with their substantive office, post or position.
- 12.3 Employees other than public service officers are not limited to working only in connection with their substantive position. Employees other than public servants, and subject to the parties' agreement, may be employed in special temporary or casual employment in any position and on a full time, part time or casual basis. They must, however, be employed at the level commensurate to the level of the available position.
- 12.4 Special temporary or casual employment is treated as part of the employee's period of unpaid parental leave or leave without pay unless the employee provides written notice to

their employer that they will be extending their period of leave. If written notice is provided, the employee's period of leave can be extended by a period up to or equal to the total period of time they were engaged in temporary or casual employment.

- 12.5 Any unused portion of unpaid parental leave or leave without pay must be recommenced immediately following the completion of a period of temporary or casual employment. If the unused portion of parental leave or leave without pay is not recommenced, it will not be preserved. This means, for example, that an employee cannot take annual or long service leave following a period of temporary or casual employment and preserve their unused unpaid parental leave or leave without pay.
- 12.6 Except for employees undertaking special casual employment, periods of temporary employment undertaken in accordance with the model clause shall count as qualifying service for all purposes under any relevant award, agreement or industrial instrument. Such periods of temporary employment shall therefore, for example, count as service with respect to annual, sick or personal, and long service entitlements, and salary/wage increments.
- 12.7 Notwithstanding paragraph 12.6 of these guidelines, where a casual employee would ordinarily receive an entitlement under an award, agreement or industrial instrument, periods of special casual employment shall also count as qualifying service.
- 12.8 Any temporary or casual employment undertaken by an employee shall have no adverse effect on their entitlements with respect to their substantive position. For example, where an employee undertakes temporary employment on a part time basis or at a lower classification level to their substantive position, the employee's entitlement to annual leave shall not be diminished.
- 12.9 When considering the use of special temporary or casual employment, employers should give consideration to the impact on the employment of any replacement employee.

13. Return to Work on Conclusion of Parental Leave and Right to Revert

- 13.1 Employees returning to work on the conclusion of parental leave have the right to return, not simply the right to request to return to work, on a modified basis. This includes working part-time, working fewer days and/or fewer hours or working different days and/or at different times than the employee was working before proceeding on parental leave. This right must be read in conjunction with the part time employment provisions of any relevant award or agreement.
- 13.2 An employee who has returned to work on a modified basis on the conclusion of parental leave has the right to request a reversion to working on the same basis as they worked either immediately before starting parental leave or on a full time basis at the same classification level⁶.
- 13.3 Employers must agree to a request to revert unless there are reasonable grounds not to agree. Reasonable grounds for refusal and an employee's right to seek enforcement are set out in subclause 1.10.5 of the model clause.
- 13.4 An employer must provide an employee with written notice of their decision concerning an employee's request to revert. If the employee's request is refused, the employer must set out the reasons for the refusal in the written notice⁷.

⁶ Section 38(5) of the *Minimum Conditions of Employment Act 1993*.

⁷ Section 38B (3) of the *Minimum Conditions of Employment Act 1993*.

SUMMARY OF KEY CHANGES TO THE MODEL PARENTAL LEAVE CLAUSE

New clause	Previous provision and clause number	New provision
1.1.1 – child	No definition.	A definition of a <i>child</i> has been included to clarify that an employee is only entitled to one period of parental or partner leave where there is a multiple birth or adoption.
1.2.6 – commencement of paid parental leave	A primary care giver must commence paid parental leave no later than four weeks after the birth or placement of a child (1.2.4).	<ul style="list-style-type: none"> ▪ The primary care giver parent may nominate a date from which the leave will commence but the period of paid parental leave must be concluded within 12 months of the birth or placement of the child. ▪ Where both employees work in the WA public sector and wish to take paid parental leave, the entitlement must be shared between them. ▪ Employers have the discretion, in exceptional circumstances, to allow an employee to take a period of paid parental leave that would result in the employee being on paid parental leave more than 12 months after the birth or placement of the child.
1.2.5 (b) – accrual of entitlements while on half pay	During paid parental leave at half pay all entitlements will accrue as if the employee had taken the entitlement to paid parental leave at full pay (1.9.2).	No substantive change: rather a rewording to clarify that employees who take paid parental leave on half pay do not accrue entitlements beyond those they would have accrued had they taken leave at full pay.
1.2.11 – medical certificates	No relevant provisions.	<ul style="list-style-type: none"> ▪ A medical certificate certifying that a pregnant employee is fit for work and whether it is advisable for the employee to continue in her present position during the 6 weeks up to the expected date of birth is not required. ▪ However, where an award or agreement does provide an employer with the discretion to request such a certificate, the award/agreement provision will prevail.

New clause	Previous provision and clause number	New provision
1.2.13 (a) – paid parental leave when the mother is incapable of being her child’s primary care giver	No relevant provisions.	<p>An employee who commences her paid parental leave prior to her child’s birth and:</p> <ul style="list-style-type: none"> ▪ who is, due to her physical or mental incapacitation, incapable of being her child’s primary care giver following the child’s birth; or ▪ whose child is hospitalised following its birth; <p>is entitled to remain on paid parental leave, notwithstanding that she is not the child’s primary care giver</p>
1.2.13 (c) – paid parental leave when the mother is incapable of being her child’s primary care giver	No relevant provisions.	<ul style="list-style-type: none"> ▪ Where both parents work in the public sector and the mother is eligible to remain on paid parental leave under 1.2.13 (b), the employees may choose which parent will access paid parental leave. ▪ In these circumstances, one employee may be on paid parental leave whilst the other is on unpaid parental leave.
1.2.15 – confirmation of primary care giver status	The previous definition of primary care giver gives an employer the discretion to require confirmation of an employee’s primary care giver status (1.1.4).	Additional provision that where an employer requires an employee to confirm their primary care giver status, the employee must provide the employer with evidence that would satisfy a reasonable person of their entitlement to paid parental leave.
1.3 – partner leave	The clause was silent on the employer’s <i>Minimum Conditions of Employment Act</i> obligations vis a vis partner leave (1.2.11).	<p>This provision has been redrafted to reflect <i>Minimum Conditions of Employment Act</i> partner leave obligations:</p> <ul style="list-style-type: none"> ▪ an employer is to consent to an employee’s request for up to 8 weeks unpaid partner leave unless there are reasonable grounds to refuse; and ▪ an employee is entitled to receive notice of the employer’s decision in writing including any reasons for refusal. ▪ The clause has also been amended to give employees the right to substitute unpaid partner leave with annual or long service leave.

New clause	Previous provision and clause number	New provision
1.6.1 – part time employment during pregnancy	No relevant provisions.	Subject to a number of conditions, a pregnant employee may work part time in one or more periods while she is pregnant.
1.9 – employment during parental leave	No relevant provisions.	Employees, both public servants and non-public servants, are able to engage in periods of special temporary or casual employment with their employer during unpaid parental leave or leave without pay taken in conjunction with parental leave.
1.12 – casual employees	No relevant provisions.	Where an eligible casual employee becomes a permanent or fixed term contract employee with the same public sector employer within three months of completing their last period of casual employment, their service as an eligible casual employee will count as qualifying service for paid parental leave.