

VCCI POSITION PAPER ON LEAVE ENTITLEMENTS FOR EMPLOYEES*



INTRODUCTION

Employees need to have access to leave in order remain healthy, happy and productive. Maternity leave is necessary for the health of both the mother and the child. Sick leave allows employees to take time off work due to short term illnesses, without risking their jobs or their incomes. Annual leave gives employees a chance to “recharge their batteries” after a period of sustained work.

Employers agree that all of these categories of leave are necessary and should be guaranteed in law. Employers remain committed to the law reform process that Vanuatu has been undertaking for the past few years, and agree with the intent of the proposed Employment Relations Bill (ERB), which is stated to be:

Creating a fair and optimum working environment through the maintenance of minimum and acceptable labour standards that are fair to both workers and employers, with the view to building productive and sustained employment relations¹

Employers want fair, workable labour laws that will lead to employment growth and private sector led development for the good of all of Vanuatu. More job opportunities and more job security for workers should be the main aim of any employment law reforms.

The intent of the ERB reflects the principles of decent work, which employers are committed to. Employers are also conscious of that:

Three elements are essential to the achievement of decent work objectives: the need for jobs, the honouring of core labour standards, and the pursuit of further improvements in job quality...[but] beyond some point the achievement of one of these objectives may come at the expense of another.²

Social partners acting to create employment laws and policies that further the decent work agenda have a responsibility to ensure that measures to promote the creation of jobs do not undermine job quality,

* Prepared by Anita Jowitt Employer Representative on the Vanuatu Tripartite Labour Advisory Council and Lecturer in law at the University of the South Pacific for the Vanuatu Chamber of Commerce and Industry. We’d like to hear your views. Please mail the VCCI at Box 189, Port Vila or email employerstpa@vcci.com.vu. More information is on www.vcci.com.vu.

¹ Paragraph A of the Long Title of the Employment Relations Bill 2012.

² Gary S Fields, ‘Decent work and development policies’ (2003) 142(2) *International Labour Review* 239, 240.

but at the same time that measures to improve job quality do not come at the expense of job creation. Employment law reforms in Vanuatu need to reflect this delicate balance in a manner which is appropriate for Vanuatu's social and economic context.

Employers are concerned that both the leave entitlements currently provided in the *Employment Act* [Cap 160] and the proposed leave entitlements in the ERB discourage growth of secure full time employment opportunities. This is particularly bad for the large number of young school leavers and female workers seeking employment. Work with generous conditions and benefits for the small number of skilled workers, but no work or precarious work for the vast majority of low-skilled workers is not decent work and is not in the best interests of the well-being of all people in Vanuatu. Social partners should work together to ensure that the any employment law reforms in Vanuatu avoid this outcome.

This paper presents evidence for the negative consequences of the current leave benefits regime. It then details the employers' position on the leave provisions in the ERB and outlines the employers' proposals as to fair leave benefits to build productive and sustainable work for the good of all of Vanuatu.

SUMMARY OF THE LAW ON LEAVE ENTITLEMENTS IN VANUATU

The *Employment Act* [Cap 160] provides three main types of leave to employees: sick leave, maternity leave and annual leave. The current amounts of leave and payment during leave are:

- Sick leave: 21 days on full pay per year
- Maternity leave: 12 weeks on 66% of pay per confinement, plus 2 hours per day for 2 years on 100% pay for nursing
- Annual leave for all employees except for agricultural workers:
 - 15 days on full pay per year (for employees employed for 1 – 6 years)
 - 21 days on full pay per year (for employees employed for 7 – 19 years)
 - 36 days on full pay per year (for employees employed for 20 – 24 years)
 - 48 days on full pay per year (for employees employed for 25 – 29 years)
 - 72 days on full pay per year (for employees employed for 30 + years)
- Annual leave for agricultural workers:
 - 15 days on full pay per year (for employees employed for 1 – 6 years)
 - 21 days on full pay per year (for employees employed for 7 + years)

Not all employees are entitled to leave. Employees must be in continuous employment for a period of 1 year in order to claim annual leave and in continuous employment for a period of 6 months in order to claim sick leave. Continuous employment for the purposes of leave has been defined by the courts as meaning working 22 days or more per month.³ Maternity leave is available to all pregnant employees, regardless of their length of service and the number of days worked each week.

³ *Daniel v Nguyen Huu Hong* [2004] VUSC 40.

PROBLEMS WITH THE CURRENT LEAVE REGIME: LESS INVESTMENT, JOB LOSSES & LESS SECURE EMPLOYMENT

The current leave regime creates a number of issues for employers. These issues in turn inhibit the growth of secure job opportunities and are bad for workers. Five particular problems arise: (1) labour laws reduce investment, which in turn reduce jobs; (2) high costs of maternity leave reduces jobs for women; (3) high costs of maternity leave and annual leave lead to more use of casual workers; (4) high costs of maternity leave and annual leave lead to lower direct wages; (5) high costs of maternity leave and annual leave discourage informal businesses from formalizing. These issues are discussed in more detail below.

Less investment

Employers in Vanuatu have had longstanding issues with the fact that Vanuatu's leave is some of the highest in the Pacific region. In 1997 McGavin, when analyzing the likely impact of labour laws in Vanuatu noted that:

legislative provisions of the Employment Act of 1983 for termination of employment, sick leave, annual leave etc reflect – or often exceed – employment conditions in industrial nations and seem inappropriate to the conditions of Vanuatu. Their impact is to inhibit job growth and/or increase non-compliance... [T]his regulatory environment seems unrelated to creating conditions for improved development and use of labour resources – and is thus counterproductive to enhancing the utilisation of labour resources.⁴

In 2004 an International Labour Organisation (ILO) consultant had observed that the amount of leave provided by Vanuatu's *Employment Act* [Cap 160] 'requires careful consideration by the social partners because its provisions are far more generous than those of Vanuatu's neighbours. Consequently they may be to the country's disadvantage'⁵ as they act as a disincentive to foreign investors who are assumed to be attracted to invest in environments with lower costs.

Laws that increase labour costs make Vanuatu a less attractive investment environment, both for foreign investors and local investors. As the tables below indicate, Vanuatu has long had the highest length of annual leave and the second highest length of sick leave in the Pacific region. Increasing the amount of annual leave in 2009 simply widened the gap between Vanuatu and other countries.

⁴ Paul McGavin, *Labour resource utilisation in Melanesia* (1997).

⁵ Joni Madrawiwi, 'Labour Laws of the Republic of Vanuatu, Report for the ILO' (Unpublished, 2005), 10.

Amount of annual leave in Pacific countries

Country	Amount of annual leave	Source
Vanuatu current law	1 – 6 years: 15 days/year 7 – 19 years: 21 days/year 20 – 24 years: 36 days/year 25 – 29 years: 48 days/year 30 + years: 72 days/year Except agricultural workers have 12 days per year regardless of length of service.	Section 29 <i>Employment Act</i> [Cap 160]
Vanuatu pre-2009 reform	1 – 19 years: 12 days/year 20 – 24 years: 24 days/year 25 – 29 years: 48 days/year 30 + years: 72 days/year Except agricultural workers have 12 days per year regardless of length of service.	Section 29 <i>Employment Act</i> [Cap 160]
Solomon Islands	15 days per month ⁶	Reg 4(1) <i>Holidays Sick Leave and Passage Rules 1982</i> made under <i>Labour Act</i> [Cap 73]
Papua New Guinea	14 consecutive days paid leave including non-working days	Section 61(1) <i>Employment Act</i> [Cap 373]
Fiji	10 ⁷	Section 59(1) <i>Employment Relations Promulgation 2007</i>
Samoa	10	Section 40 <i>Labour and Employment Relations Act 2013</i>
Tuvalu	0	No provision. <i>Employment Ordinance</i> [Cap 84]
Kiribati	0	No provision. <i>Employment Ordinance</i> [Cap 30]

Amount of sick leave in Pacific countries

Country	Amount of sick leave	Source
Solomon Islands	22 days	Reg 7 <i>Holidays Sick Leave and Passage Rules 1982</i> made under <i>Labour Act</i> [Cap 73]
Vanuatu – current law	21 days	Section 34 <i>Employment Act</i> [Cap 160]
Vanuatu pre-2009 reform	21 days	Section 34 <i>Employment Act</i> [Cap 160]
Samoa	10 days	Section 42 <i>Labour and Employment Relations Act 2013</i>
Fiji	10	Section 68 <i>Employment Relations Promulgation 2007</i>
Papua New Guinea	6 days	Section 65(1) <i>Employment Act</i> [Cap 373]
Tuvalu	0	No provision. <i>Employment Ordinance</i> [Cap 84]
Kiribati	0	No provision. <i>Employment Ordinance</i> [Cap 30]

⁶ In Solomon Islands employers have to pay passage home each year, which can be a considerable expense. Although the length of leave in Solomon Islands is shorter the cost burden may therefore be higher.

⁷ Fiji's *Employment Relations Promulgation 2007* also provides, in section 69, 3 days bereavement leave per year, so annual leave does not need to be used for this purpose. As bereavement leave does not accumulate and unused bereavement leave does not get paid out when an employment contract is terminated it does not extend annual leave to 13 days per year and is not included in the table.

Ranking maternity leave is somewhat more difficult, as there are variations in the length of maternity leave, the amount of the payment during maternity leave, the length of the nursing leave and the amount of the payment during nursing. If costs are calculated on the basis that a woman is working 8 hours a day 5 days a week and, where nursing allowance is not limited by law, takes nursing allowance for 2 years (which is the current time limit set in Vanuatu) it is possible to rank costs. Again Vanuatu comes in at the highest, with women being paid for 97.5 full days of work over the course of maternity plus nursing leave.⁸

Amount of maternity benefit in Pacific countries

Country	Length of maternity leave	Amount of payment	Nursing allowance	Number of full days leave paid during maternity and nursing leave	Source
Vanuatu – current law	6 weeks prior to birth optional; 6 weeks post birth mandatory	66% of salary	2 hours per day on 100% pay for 2 years	97.5 days paid per birth	Section 36 <i>Employment Act</i> [Cap 160]
Solomon Islands	12 weeks in total; 6 weeks post birth mandatory	25% of salary	2 hours per day on 100% pay, with no set limit as to the length of nursing leave	75 days paid per birth	Section 42 <i>Labour Act</i> [Cap 73]
Vanuatu – prior to 2008 reform	6 weeks prior to birth optional; 6 weeks post birth mandatory	50% of salary	1 hour per day on 100% pay, with no set limit as to the length of nursing leave	58.75 days paid per birth	Section 36 <i>Employment Act</i> [Cap 160]
Fiji	84 consecutive days – no mandatory period	First 3 births 100% of salary 4 + births, 50% of salary	Nil	60 days paid per birth for first 3 births, 30 days paid per birth for subsequent births	Section 101 <i>Employment Relations Promulgation 2007</i>
Kiribati	6 weeks prior to birth optional; 6 weeks post birth mandatory	25% of salary	1 hour per day on 100% pay, with no set limit as to the length of nursing leave	48.75 days paid per birth	Section 80 <i>Employment Ordinance</i> [Cap 30]
Tuvalu	6 weeks prior to birth optional; 6 weeks post birth mandatory	25% of salary	1 hour per day on 100% pay, with no set limit as to the length of nursing leave	48.75 days paid per birth	Section 80 <i>Employment Ordinance</i> [Cap 84]
Papua New Guinea	Hospitalisation pre-giving birth, 6 weeks post giving birth, + up to 4 weeks for sickness.	Unpaid	1 hour per day on 100% pay, with no set limit as to the length of nursing leave	28.75 days per birth	Sections 100 & 101 <i>Employment Act</i> [Cap 373]
Samoa	6 weeks	Either 4 weeks on full pay & 2 weeks without pay or 6 weeks on 66% pay	Right to 1 or more daily breaks – payment not expressly required	20 days paid per birth	Sections 44 - 45 <i>Labour and Employment Relations Act 2013</i>

⁸ The calculation is (number of full days work paid whilst on maternity leave: 5 x 12 / the percentage paid whilst on maternity leave) + (number of full days work paid in nursing leave: the number of hours of paid nursing leave per day x 260 / 8) – (6 weeks nursing leave for the period whilst the mother is on maternity leave so not claiming nursing leave: the number of hours of paid nursing leave per day x 5 x 6 / 8).

Foreign investment brings job growth. It also brings a number of other benefits for private sector growth and Vanuatu has long recognised that foreign investment is a necessary source of capital, technological, management and entrepreneurial capacity.⁹ Most importantly foreign investment helps to develop local entrepreneurs as foreign investors share technological, management and entrepreneurial knowledge and help to open up access to markets. This in turn fuels locally driven private sector led development, which is a benefit to all in the country.

The concerns about the impact of labour laws on foreign investment are very real. Between 2008, when increases to annual leave, maternity leave and severance allowance were first passed by Parliament and 2009 there was a decline of 24.4% in the number of foreign investment businesses that sought VIPA renewals, with only 62% of foreign investment businesses that were approved in 2008 choosing to renew in 2009. This can be contrasted with renewal rates of over 80% between 2006 and 2008.¹⁰ This is not good for Vanuatu – it slows job growth or private sector development.

No doubt local investors were also affected. The business license database, maintained by the Vanuatu Customs and Inland Revenue Department, records information on the number of full time equivalent employees employed in formal sector businesses, regardless of whether the business is owned by local or foreign investors. Employment information is based on self-reporting by businesses at the time they renew their business licenses, and the self-reported figures are not subject to verification. This data indicates that between 2008 and 2010 the number of full time equivalent local employees in formal sector businesses in Port Vila and Luganville declined 12.6%, from 11,161 to 9,755.

Statistics on the number of employees actively contributing to the Vanuatu National Provident Fund (VNPf) indicate that between quarter 4 of 2008 and quarter 1 of 2009 the number fell from 22,164 active VNPf contributors to 15,314 active VNPf contributors¹¹ - a decrease of 6,850 employees, or more than a quarter of active VNPf members. If one looks at the average level of contributors from 2008 and 2009, the number still fell from 17549 active VNPf contributors to 15,956 active VNPf contributors¹² – a decrease of 1593 employees.

Survey data on the impact of maternity leave and annual leave

The 2014 employer survey asked employers who were in business in 2008, when leave entitlements changed, what the impact of leave changes were. Data from an employer survey conducted in 2014 suggests that for a long time some employers have managed statutory leave costs by employing less

⁹ Vanuatu National Planning and Statistics Office, *Second National Development Plan 1987 – 1991* (1987), [2.25] and [15.36].

¹⁰ Statistics derived from Vanuatu Investment Promotion Authority, 'Vanuatu Investment Promotion Authority FDI Annual Report 2010' (2011) 5, 10.

¹¹ Reserve Bank of Vanuatu, *Reserve Bank Quarterly Report 1 2011* (2011) Table 46 available at <http://www.rbv.gov.vu/attachments/article/114/Mar%202011%20%28Q1%29%20NUMBER%20OF%20PROVIDENT%20FUND%20CONTRIBUTING%20MEMBERS%20%28FULL%20EMPLOYMENT%29.pdf> (Accessed 15 April 2013).

¹² Ibid.

women and/or offering less secure jobs to unskilled workers, who are often young inexperienced school leavers. This supports VNPF and Business License Database data. A considerable number of employers also changed their employment practices following the increases to annual leave and maternity leave in 2009.

Any labour laws that hinder the employment of women and young people should be a particular concern for the Vanuatu government. The global development agenda as defined by the United Nations Millennium Development Goals (MDGs)¹³ included, as target 1B, 'to achieve full and productive employment and decent work for all, including women and young people'.¹⁴ This suggests that there should be particular concern about inequitable outcomes for women and young people.

Impact of maternity leave

Despite a number of respondents commenting that they preferred to employ women as women tend to be more reliable and efficient employees, maternity leave creates a disincentive to many businesses employing women. Of the 98 respondents who were in business in 2008, 45 reported that maternity leave had one or more negative impacts on the employment of women.

The negative impacts of changes to maternity leave included:

- 6 reduced the number of women employed
- 5 stopped employing women altogether
- 3 restructured contracts to reduce maternity leave costs
- 10 started only employing women who are past child bearing age
- 3 became more selective about employing women

Even prior to increases to maternity leave in 2009 maternity leave had negative impacts on the employment of women:

- 13 businesses have never employed women
- 6 had already structured employment practices to minimize maternity leave payments

Only 22 businesses reported that they were unaffected as they already paid 66% or more of salary during the period of maternity leave.

¹³ The MDGs provide development targets, to be achieved by 2015, in relation to reducing poverty. They 'form a blueprint agreed to by all the world's countries and all the world's leading development institutions.' (United Nations, 'Millennium Development Goals: Background' (undated) <http://www.un.org/millenniumgoals/bkgd.shtml> (Accessed 19 October 2012). There are initiatives to continue progress on the MDGs after 2015 (United Nations, Millennium Development Goals: Beyond 2015'(undated) <http://www.un.org/millenniumgoals/beyond2015.shtml> (Accessed 19 October 2014).

¹⁴ United Nations, 'Millennium Development Goals'(undated) <http://www.un.org/millenniumgoals/poverty.shtml> (Accessed 10 May 2012).

This data supports the ILO position that ‘employer liability [for maternity leave payments] has long been viewed as a disincentive to employers to employ women of child-bearing age, and is thus detrimental to the promotion of equal treatment for men and women.’¹⁵ Indeed, in Vanuatu:

The ILO advises against relying on individual employer liability schemes for paid maternity leave. These may work against the interests of women workers as employers may then be reluctant to hire women who may become pregnant, or who are pregnant, or may seek to find reasons to discharge them in order to avoid the costs of paying for the maternity leave. Also, compliance with individual employer liability schemes is often problematic, particularly in developing countries, and this is currently the case in the Pacific. Individual employer liability can also impose an excessive cost on small and struggling enterprises.¹⁶

It also suggests that the Vanuatu National Council of Women’s concerns about the impact of changes to maternity leave on employment opportunities for women¹⁷ were well-founded.

Impact of annual leave

The changed to annual leave affected employment within 43 businesses.

- 25 reduced the number of staff they employed
- 8 increased the use of part time or casual staff who do not get paid annual leave
- 12 changed wages or other conditions of work to make up for increased annual leave

Thirty-four (34) businesses reported that they were unaffected as they already provided the same, or more, annual leave than that required by law.

This data suggests that, as well as job losses, the two main impacts were casualisation of employment and lower pay.

Why is casualisation a problem?

Casualisation, whether to avoid maternity leave or annual leave, is likely to affect young school leavers who have not yet gained work experience. This is because there is a shortage of skilled labour, which restricts the pool of employees available to fill skilled positions. There is, however, an oversupply of low-skilled employees, including young inexperienced school leavers. Competition for casual, part time or short term minimum wage jobs is likely to exist. This also makes it relatively easy to find a second employee to share a job that was previously only done by one person.

¹⁵ International Labour Organisation, ‘Maternity Protection at Work’ (Report V(I), 87th International Labour Conference, Geneva, 1999) <http://www.ilo.org/public/english/standards/reln/ilc/ilc87/rep-v-1.htm> (Accessed 10 February 2011).

¹⁶ International Labour Organisation, *Social Security for All Men and Women A source book for extending social security coverage in Vanuatu: options and plans* (2006) 309.

¹⁷ ‘Maternity leave pay change in Vanuatu stirs debate’ *Vanuatu Independent* (Port Vila, Vanuatu) 7 December 2008, 10.

Casualisation also pushes people into underemployment, where they work fewer hours for the same hourly wage but receive less weekly take home pay (due to less hours worked) and fewer benefits. Further, using short term contracts does not give the worker any security of job tenure, and makes it hard for workers to make long term plans based on an ongoing, reliable income. These things mean that casual, short term and part time workers are less able to save, and therefore less able to provide their own financial cushion during unemployment.

Why is lower pay a problem?

Lower pay due to high statutory benefits raises the issue of ‘whether people truly want extra leisure rather than extra income’¹⁸ and the degree to which the State should require people to trade-off their income for leisure time. In other words, is a job with more paid leave but less wages more “decent”? A State-imposed trade-off between wages and leisure (caused by employers decreasing direct wages or casualising labour in order to compensate for increased indirect wage costs due to increased statutory leave entitlements) may not be welcome, particularly for low-income earners who want to maximise their weekly incomes in order to meet day to day living expenses.

Informal businesses and leave

The data from the 2014 employer survey showed that some formal businesses are using more informal employment. It also showed that a considerable number of informal sector businesses, that have business licenses but have low turnover so are not registered for VAT, have employees. These businesses are almost entirely ni-Vanuatu owned and operate. In terms of the number of business owners in the country these small informal businesses make up the bulk of the private sector.¹⁹ These businesses often engage family members and casual workers and tend not to use employment law to structure employment relationships.

During interviews and consultations it was apparent that for these small businesses to be able to grow and become more formal laws must be easy to follow and the costs of formalizing must not be too high. There is a perception that employment laws are only for big business and are not made for small ni-Vanuatu businesses.

¹⁸ Aidan Turner, *Just Capital* (2001) 185.

¹⁹ See ‘Report from the Vanuatu Chamber of Commerce and Industry to the National Sustainable Development Plan Working Group: Summary of the VCCI employer survey 2014 results on private sector development priorities 2016- 2030’ 5.

DOES THE EMPLOYMENT RELATIONS BILL ADDRESS CURRENT ISSUES WITH LEAVE?

The Employment Relations Bill (ERB) has taken some measures to address problems caused by the leave provisions in the *Employment Act* [Cap 160]. In particular sick leave is reduced to 10 days per year, bringing into line with other Pacific countries. At the same time the ERB increases maternity leave benefits and adds a new category of leave known as compassionate leave. A flat rate of 20 days per year is set for annual leave, which increases leave for some and reduces leave for others. It also changes eligibility for leave and increases payments for public holidays.

Eligibility

Eligibility is a cross-cutting issue that affects all categories of leave. Currently employees who are “in continuous employment” are entitled to annual leave and sick leave once they have worked for a minimum qualifying period. All employees are entitled to maternity leave regardless of how long they have worked for. These provisions cause a considerable amount of confusion.

First, “in continuous employment” is not clearly defined. Whilst the courts have said that this means working for 22 or more days per month in practice many employers use the definition of continuous employment provided for severance allowance. This definition says that a person employed 4 or more days per week is in continuous employment.

Second, many employers think that there is a minimum qualifying period before a female employee can take maternity leave. Whilst this was not a question in the survey employers raised the matter repeatedly in consultations. Employers who do not discriminate when making employment decisions can end up feeling resentful when they have to pay maternity benefits for a female staff member who has only worked for a short amount of time, particularly if the employee does not return to work. During consultations there were stories of employees who did not return to work and ended up receiving more in maternity benefits than they had in salary for the period worked.

The ERB proposed making leave available for all full time employees, with qualifying periods for each type of leave varying. It also proposes making leave available to part time workers on a pro rata basis. Leave is not available to casual employees. Full time, part time and casual employees are not clearly defined.

Employers rejected the ERB proposals in respect of eligibility for leave.

One major concern was that full time, part time and casual workers were not clearly defined in the ERB. During consultations following the survey employers attempted to find definitions that were clear to everyone and would be easy to apply, but were unable to do so. Employers also thought moving to a pro rata leave system for part time workers would be confusing, with 44% saying it would be confusing and a further 23% being unsure about whether pro rata leave would be confusing. Fifty 59 percent (59%) wanted to keep the current system of eligibility only for employees in full time employment.

Interestingly employed managers were most concerned with the potential for confusion with 55% saying pro rata would be confusing and 66% wanting to keep the current practice of paid leave for employees in continuous service only.

Sick leave

The ERB proposes reducing sick leave to 10 days per year, and allows accumulation of unused sick leave for up to 3 years. It also clarifies requirements in relation to the production of medical certificates.

Employers accepted the ERB proposals in respect of the amount of sick leave and the regulation of medical certificates but rejected the proposal in respect of accumulation of sick leave.

Surveyed employers supported the changes to the amount of leave, with 70% of owners who completed the survey agreeing that the amount was suitable. There were, however, concerns in relation to accumulation of leave, with 50% of owners disagreeing with accumulation. Employers maintain that one of the principles that employment law reforms should be based on is simplicity of use and minimization of red tape. Follow up consultations indicated that whilst the changes to medical certificates were clearer accumulation would be confusing. Rather than making this a legal requirement employers should be advised, via the VCCI Employers' Guidebook of ways to manage sick leave, including allowing accumulation.

Maternity leave

The ERB proposes increasing the amount of maternity leave to 66% pay for 14 weeks. Nursing allowance reduces to 1 hour for every 4 hours worked for the first 6 months and ½ an hour for every 4 hours worked when the baby is between 6 months and 12 months of age. The ERB also provides more protections to ensure that women do not lose their jobs because of pregnancy.

Employers agreed that there should be better protections to make sure women do not lose their jobs and agreed to the proposed nursing allowance changes, but rejected the other proposals in respect of maternity leave.

Only 14% of respondents agreed with increasing maternity leave to 14 weeks. The majority (55%) thought 12 weeks was appropriate, whilst 21% were unsure. There were also a number of other suggestions, most of which said leave should be shorter.

The amount of payment whilst on maternity leave was a particular focus during consultations as the survey data was quite split. Whilst 38% agreed with the amount of payment, 31% said it was too high and 22% were unsure. A consensus that payment whilst on maternity leave should be 50% was reached with the understanding that employers could always voluntarily pay more.

The concept of moving to national maternity insurance as also not clearly supported by survey data, with 38% agreeing, 46% disagreeing and 16% being unsure about moving to national maternity

insurance. During follow up consultations, when preliminary costings were considered, more support for this concept developed, on the basis that a full feasibility study would be done before final agreement was given.

Annual leave and compassionate leave

The ERB proposes setting a flat rate of annual leave at 20 days, paid at full salary, per year. It also introduces compassionate leave, to be taken in the event of the death of a family member, at an amount of 3 days per year. Given the nature of Vanuatu's family structures, and the regularity with which employees currently use some annual leave due to the death of relatives, the inclusion of compassionate leave in the ERB effectively sets annual leave at an amount of 23 days per year.

The ERB increases annual leave entitlements for people who have worked for less than 7 years by 8 days. It increases annual leave entitlements for people who have worked for between 7 and 19 years by 2 days. For employees who have worked 20 or more years annual leave decreases (by 1 day for those who have worked 20 – 24 years, 12 days for those who have worked 25 – 29 years, and 49 days for those who have worked 30 or more years).

Employers rejected the ERB proposals in respect of annual leave and compassionate leave.

Whilst employers support the idea of a flat rate of leave that does not increase with length of service few agreed with the amount of 20 days per year. Forty five percent (42%) of owners disagreed with 20 days with a further 15% being unsure of the length of annual leave. The amount annual leave should be set at was a particular topic of discussion in consultations after the survey. At these consultations it became apparent that 20 days was considered too long and that employers wanted leave to be benchmarked against other Pacific countries. Given that Vanuatu has historically had high amounts of leave 15 days leave was agreed as being appropriate, even though it is higher than the regional benchmark.

Few also agreed with making a category of compassionate leave, with 48% of owners rejecting the concept and a further 15% being unsure of whether compassionate leave would be appropriate. In consultations it became clear that defining family members would be difficult. More significantly, employers thought that this should be left to the personal employer/employee relationship, and that overregulation and mandatory benefits actually dehumanize the working relationship. This does not help to create working environment built on mutual trust, confidence and cooperation.

Employers were also concerned about the regulation of when leave could be taken under the ERB. The drafting of the ERB was complex and confusing, and employers at consultation meetings preferred keeping the current laws on when leave is to be taken as they are familiar to everybody and do not give rise to particular problems.

Public holidays

The ERB proposes requiring that employees be paid for their normal hours on public holidays that they do not work on, and paying employees double time if they work on public holidays. Whilst the change to payment on public holidays a person does not work on does not affect employees who are paid a salary it does affect employees who are paid by the hour or the day. The double time rate is a considerable increase. Whilst the current law is not entirely clear, the most common practice is for employers to treat work on public holidays as overtime and pay it at a rate of 1.5 times the usual rate. The current law also permits employers to give an employee another day off in lieu.

Employers rejected the ERB proposals in respect of payment for public holidays

During consultations two particular industry categories maintained that due to the nature of their operations and employment relations they would be particularly affected by these changes – agriculture and hotels and restaurants. Of the respondents whose primary occupation was agriculture 67% disagreed with paying people for public holidays that they did not work and 84% disagreed with double time for holidays worked. Hotel and restaurant owners were similarly opposed, with 65% disagreeing with paying people for public holidays not worked and paying double time for work on public holidays.

During consultations keeping the current practice of 1.5 times for work on public holidays, with the option of a day in lieu was the consensus.

HOW TO MOVE FORWARD?

The employers' position is that benchmarking the amount of annual leave and sick leave benefits against median practices in other Pacific countries with similar labour markets will reduce barriers to investment, job growth and job security caused by costly labour laws. Employers also recognize that Vanuatu has, historically, had high levels of leave benefits and want to produce a fair solution.

In the short term

Employers acknowledge that considerable work has been done on the ERB. It is, however, very complex and there are many issues with its drafting and content. Rather than introducing a new piece of legislation that is likely to cause confusion amending the existing Employment Act to create a more job opportunities and more secure employment is recommended. Amendments to the leave provisions of the Employment Act that employers propose relate to:

- Eligibility for annual leave and sick leave
- Eligibility for maternity leave
- The amount and regulation of annual leave
- The amount and regulation of sick leave
- The amount and regulation of maternity leave and nursing leave

Employers have prepared a draft of the *Employment Act* [Cap 160] containing proposed amendments to help move the discussion forward. A description of the proposals follows.

Eligibility for annual leave and sick leave

Employers propose amending sections 29 and 34 of the Employment Act (which refer to eligibility for annual leave and sick leave) to specify that the employee must have been in continuous employment for 4 or more days per week.

This proposal is based on current common practice. It is more generous than the current law. It removes the need for trying to differentiate between full time, part time and casual workers and is simple to understand.

Eligibility for maternity leave

Employers propose amending section 36 of the Employment Act to require employees to have worked continuously for 12 months in order to be eligible for maternity leave.

This proposal is more generous to vulnerable workers than the proposal in the ERB. It also recognizes that currently maternity leave applies to casual and part time workers as well as full time workers. It also

enhances consistency of the law. The proposal means that, as with annual leave and sick leave, there will be a minimum period of work in order to be eligible for maternity leave.

The amount and regulation of annual leave

Employers propose amending section 29 of the Employment Act to provide a flat rate of leave of 15 days. Any leave that had accrued prior to the law being amended would remain unaffected. The Employment Act provisions on when leave can be taken should remain unchanged for the sake of simplicity and clarity.

This proposal is based on benchmarking across Pacific countries. Vanuatu's annual leave remains as one of the most generous annual leave entitlements in the Pacific region.

The amount and regulation of sick leave

Employers propose that sick leave should be 10 days per year, with no accumulation required by law, and that the regulation in respect of medical certificates should be based on the clearer drafting in the ERB. Section 34 of the Employment Act should be replaced with new drafting based on the ERB.

This proposal is based on the content of the ERB and benchmarking across Pacific countries. Vanuatu's sick leave becomes on par with sick leave entitlements throughout the Pacific region.

The amount and regulation of maternity leave and nursing leave

Employers propose adopting the drafting of the maternity and nursing leave provisions in the ERB, but setting the length of maternity leave at 12 weeks leave and the payment whilst on maternity leave at 50% of usual pay. Section 36 and 37 should be replaced with a new section 36 and section 37 that follow the drafting of the ERB.

This proposal is based on benchmarking across Pacific island countries. Direct employer funded maternity leave will still inhibit secure job opportunities for women, but in the short term the barriers to employing women will be reduced.

In the medium term

In December 2014 the Vanuatu Tripartite Labour Advisory Council endorsed a consensus policy position on social protection. This recommendation in respect of maternity leave was:

Explore the feasibility of moving to a pooled fund and also measures to reduce disincentives to employing women if the current approach of employers directly paying for maternity leave is maintained.

The rationale for this recommendation was:

Both workers and employers acknowledge that the current approach of a direct payment by employers reduces employment of women. This is a particular issue for the private sector.

Whilst a pooled fund would remove this disincentive there are concerns about the government's administrative capacity to implement such a scheme and the costs of implementing the scheme. The estimated cost of 0.35 – 0.4% of payroll in order to provide a benefit of 66.6% of salary for between 12 – 14 weeks is based on a low number of births per working mother and excludes administration costs.

Employers are committed to this recommendation. A national maternity insurance scheme might be the best way to ensure that the health of working mothers and their babies are protected whilst at the same time removing barriers to employing women. That said, the feasibility of such a scheme must be carefully considered. A number of issues, including who would be eligible for benefits, what the level of payment would be, how long payments would last for, who would make contributions to fund the scheme and who would administer the scheme need to be determined.

Employers propose that a feasibility study into national maternity insurance is undertaken as a matter of urgency.

CONCLUSION

This paper has shown the cost of the current leave regime on private sector development and the creation of secure job opportunities for ni-Vanuatu workers.

The current leave regime decreases employment opportunities for women. It leads to employers using more casual workers. It also leads to employers paying lower direct wages, in order to adjust for higher indirect wage costs. None of these outcomes are good for the majority of workers in Vanuatu who are relatively unskilled and have low productivity, so earn low wages.

If Vanuatu chooses not to reform its leave entitlements then foreign investors can, and will, choose to leave Vanuatu, which is again to the detriment of workers looking for jobs. It is also important to remember that the private sector in Vanuatu is not only made up of foreign owned businesses. Instead, the vast majority of businesses are owned and operated by ni-Vanuatu, and do not use formal employees. For Vanuatu to truly achieve private sector led development and employment growth laws must enable local ni-Vanuatu owned and operated businesses to grow and move into the formal sector. Leave entitlements currently create a major barrier to the formalisation of employment by ni-Vanuatu employers.

The ERB does not address the problems created by the current leave regime and employers reject the leave provisions in the ERB.

The employers' proposal in respect of leave will promote the well-being and prosperity of all people in the Republic of Vanuatu. It will address the negative impacts of the current approach to leave, whilst at the same time increasing job opportunities and job security for workers in Vanuatu and security and coverage of unemployment benefits. It is also straightforward to implement.

The employers' proposal also respects previous tripartite discussions in respect of social security and maternity benefits and other work done to modernize Vanuatu's employment laws.