



Australian Government
Australian Public Service Commission

Guidance on the Right to Disconnect in the Public Sector



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Purpose

1. This document provides agencies and managers with best practice advice and guiding principles on the implementation of the new right to disconnect provisions in the *Fair Work Act 2009* (Fair Work Act), which will commence on **26 August 2024**. This advice applies to all Commonwealth employment.
2. The Fair Work Commission (FWC) is also preparing a guideline on the right to disconnect. Agencies should read this document alongside the FWC's guideline, once available.
3. This document provides general guidance to Commonwealth employers and is not legal advice.

Overview of the right to disconnect

4. The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* introduced a new right to disconnect into Part 2-9 of the Fair Work Act. Given the right to disconnect is enshrined in legislation, it will apply regardless of whether an agency has specific provisions on the right to disconnect in its enterprise agreement or other collective instrument.
5. The legislation grants all national system employees (which includes employees of Commonwealth agencies) an enforceable workplace right to refuse to monitor, read or respond to contact, or attempted contact, from an employer outside of their working hours, unless such refusal is unreasonable.
6. The right to disconnect also enables an employee to refuse to monitor, read or respond to work-related contact, or attempted contact, from a third party outside of their working hours, unless such refusal is unreasonable. A third party may include colleagues, clients, external stakeholders, members of the public, or employees in other agencies.
7. Importantly, the right to disconnect does not prohibit a manager or third party from contacting or attempting to contact an employee outside of their working hours, but a manager can only expect an employee to monitor, read or respond to out of hours contact when it is reasonable to do so.

What is unreasonable refusal?

8. Whether an employee's refusal to monitor, read or respond to contact is unreasonable is an objective test based on what a reasonable person, having access to all the facts, would consider to be appropriate in the circumstances.
9. The legislation provides the following list of matters that must be taken into account in determining whether an employee's refusal to monitor, read or respond to contact is unreasonable:
 - the reason for the contact or attempted contact;
 - how the contact or attempted contact is made and the level of disruption the contact or attempted contact causes the employee;

- the extent to which the employee is compensated to remain available to perform work during the period in which the contact or attempted contact is made or for working additional hours outside of the employee's ordinary hours of work;
 - the nature of the employee's role and level of responsibility; and
 - the employee's personal circumstances, including family or caring responsibilities.
10. However, the list of matters included in the legislation is non-exhaustive, which means that any other relevant factors can also be taken into account, such as patterns of behaviour.
11. The legislation does not define the term 'contact.' Agencies should interpret the term broadly to include any form of communication used to engage with employees, including phone calls, emails, texts, social media, and messaging services.

Interaction with the general protections regime

12. The right to disconnect is a 'workplace right' for the purpose of the general protections regime in Part 3-1 of the Fair Work Act. This means that a person, including an employer, must not take adverse action against an employee because the employee has a right to disconnect, or has exercised, or proposes to exercise the right to disconnect.
13. Adverse action may include action, or the threat of action, that would disadvantage an employee, such as dismissal or reducing shifts. If an employee believes their employer has contravened the general protections regime, they can make an application to the FWC to seek a remedy, such as reinstatement or compensation.

Dispute resolution

14. If a dispute arises in relation to the right to disconnect, the legislation requires an employer and employee to first attempt to resolve the matter at the workplace level. These procedures may be set out in an enterprise agreement or other policy documents.
15. If an employer and employee cannot resolve the dispute at the workplace level, either party can apply to the FWC for a stop order to stop refusing contact or to stop taking certain actions, or for the FWC to otherwise deal with the dispute. The FWC may dismiss an application if it considers it to be vexatious or frivolous or an exemption applies (see [below](#)).
16. The FWC is empowered to make orders to stop an employee from refusing contact or to stop an employer from taking certain action. This is consistent with the FWC's powers in the existing 'stop bullying' and 'stop sexual harassment' jurisdictions. A person who contravenes a term of a stop order that applies to them may be liable for a civil penalty.
17. The legislation contains safeguards to ensure that Australia's defence, national security and certain Australian Federal Police (AFP) operations are not prejudiced. The dispute resolution provisions will not require or permit an action if it would, or

reasonably could, be prejudicial to Australia's defence, national security, or an existing or future covert operation or international operation of the AFP.

Exemptions

18. The legislation includes an exemption for contact that is required under a law of the Commonwealth, state or territory. This means that it would be unreasonable for an employee to refuse to monitor, read or respond to contact from their employer or a third party that is legally required.

Considerations for managers when making contact

19. The right to disconnect does not prohibit or prevent a manager or employee from making or attempting contact at any time. However, managers should exercise judgement and weigh up all the relevant factors before contacting an employee outside of their working hours if they are expecting or eliciting a response. This section provides best practice advice and guiding principles on the range of factors to consider in these circumstances.

Is the contact necessary or urgent?

20. The legislation provides that the reason for the contact or attempted contact is a relevant factor in determining whether an employee's refusal to monitor, read or respond to contact is unreasonable. As a general principle, it may be appropriate for a manager to contact an employee outside of their working hours and expect the employee to monitor, read or respond if the contact is necessary in the circumstances or relates to an emergency.
21. Contact may be appropriate in an emergency situation. For example, a manager may contact an employee:
 - to notify them of urgent office repairs that would prevent them from safely attending the workplace; or
 - to recall them to duty where there is a serious unfolding crisis and the employee's role is critical to the early response.
22. Contact may also be appropriate if it relates to workforce needs or obligations, such as notifying employees of roster changes, conducting welfare checks for employees travelling outside the bandwidth, or confirming an employee's return to work arrangements. However, it may not be appropriate for a manager to expect employees to monitor or respond to queries about shift availability or other non-urgent matters.

23. In addition, contact may be appropriate if the matter is urgent or time sensitive and cannot reasonably wait until the particular employee returns to work. For example, a manager may need to contact a specific employee if a court has imposed a deadline and action is legally required, or urgent action is necessary to meet legislated timeframes. However, if a matter could wait until the employee's ordinary hours of work or there are other options to address the issue, it is less likely that the contact would be appropriate.

How is the contact made and what is the level of disruption?

24. The legislation provides that how the contact or attempted contact is made and the associated level of disruption is a relevant factor in determining whether an employee's refusal to monitor, read or respond to contact is unreasonable. This may include considerations relating to the time the contact is made and the length of time required to respond to the contact.
25. As a general principle, managers and employees should have regular discussions to set parameters around out of hours contact and managers should ensure that any contact is consistent with these parameters (see [Conversations and Planning](#) below). For example, a manager should contact an employee by phone rather than email if the employee has expressed a preference for this form of contact outside of work hours because it is easier to monitor and reduces disruption.

What is the employee's role or level of responsibility?

26. The legislation provides that the nature of the employee's role and level of responsibility is a relevant factor in determining whether an employee's refusal to monitor, read or respond to contact is unreasonable. As a general principle, managers should avoid contacting junior employees outside of their ordinary hours unless it is an emergency or contact is a recognised part of the employee's role and responsibilities. For example, an APS level 4 officer (or equivalent) may work in a team responsible for IT infrastructure and accepts that out of hours contact is a core part of their role. If that is the case, the agency should consider whether the employee is entitled to receive additional remuneration to compensate for that availability in line with the agency's policies and enterprise agreement or other collective instrument.
27. There is an existing expectation that Executive Level and SES officers (or equivalent) are sometimes required to be contactable and work reasonable additional hours. This is consistent with the seniority of these roles and total remuneration. However, all employees have the right to disconnect and managers should make efforts to minimise out of hours contact. Managers should also consider any potential contact in light of the employee's total workload, any prior contact or reasonable additional hours already worked over the relevant period and any discussions around compensation for additional hours such as Executive Level time off in lieu (TOIL).

Does the employee receive additional remuneration for being contactable?

28. The legislation provides that the extent to which an employee is compensated for remaining contactable is a relevant factor in determining whether an employee's

refusal to monitor, read or respond to contact is unreasonable. Compensation includes the base salary associated with a position as well as any additional remuneration, such as allowances. A legislative note expressly states that non-monetary compensation is included, such as additional leave entitlements for employees who are on-call.

29. As a general principle, a manager may contact an employee outside of their ordinary hours and expect a response if the employee receives additional monetary remuneration to compensate them for being contactable. This remuneration may be provided via an individual flexibility arrangement (IFA) or through an on-call or restriction allowance in the agency's policies and enterprise agreement. For example, a manager may contact a departmental liaison officer to follow up on an urgent Ministerial brief, noting that the officer receives a specific allowance to compensate them for the additional hours required by the role.
30. If agencies use allowances or other arrangements to compensate employees for being contactable out of hours, employers and employees should have clarity on what the remuneration covers. Agencies may include this information in existing policies related to IFA's or allowances.
31. If a manager believes that out of hours contact may lead to an employee completing additional hours of work, the manager should consider the availability of mechanisms in the agency's enterprise agreement to compensate the employee. Depending on the terms of the enterprise agreement, this may include flex credits, paid overtime, time off in lieu (TOIL) or other flexible working arrangements.

What are the personal circumstances of the employee?

32. The legislation provides that an employee's personal circumstances is a relevant factor, including family or caring responsibilities, in determining whether an employee's refusal to monitor, read or respond to contact is unreasonable. There are a broad range of personal circumstances that may affect an employee's ability to monitor, read or respond to contact outside of their working hours. The personal circumstances of the employee may also inform their preferred method for out of hours contact.
33. Where an employee chooses to share personal circumstances affecting their ability to be contactable, managers should take this information into account when considering out of hours contact. Circumstances shared by employees may include family or caring responsibilities, travel and commute times, medical appointments, cultural or religious commitments, study, volunteering, travel to locations with limited connection or reception, and leave.
34. Managers should not disadvantage employees based on assumptions about their personal circumstances. For example, a manager only contacting staff without children out of work hours to offer overtime shifts, based on assumptions rather than information about their availability to respond.
35. Managers should also consider an employee's health and wellbeing and whether the employee's specific work responsibilities – regardless of other factors, such as seniority – increases the importance of being able to disconnect. For example, an employee who regularly views traumatic material may require time to disconnect to support their mental health.

36. Managers should respect the reasonable boundaries put in place by employees relating to their personal circumstances and ensure that any information is managed in line with their privacy obligations. However, managers must weigh up an employee's personal circumstances alongside all other relevant factors when determining whether it is appropriate to make contact if they are expecting a response.

Conversations and Planning

37. The right to disconnect is designed to encourage employers and employees to discuss out of hours contact and set expectations that suit the workplace and the particular role. The right is focused on making sure employees know when they can switch off and what they have to do when they are not working and not being paid. This section provides managers with best practice advice and guiding principles on the steps that can be taken to support employees to disconnect.

When are employees working?

38. As a first step, managers and teams should have an understanding of the ordinary working hours of all employees and any variability, including leave, shift or roster arrangements or casual and part-time arrangements. This is important because the right to disconnect applies to contact outside of an *employee's* working hours, rather than a particular bandwidth or an agency's standard working hours.
39. This question is particularly relevant in the context of flexible working arrangements as an employee may adjust their ordinary working hours on an ongoing or ad hoc basis in line with the agency's policies and enterprise agreement or other collective instrument. If this occurs, the manager and employee should have clarity on when the employee plans to complete their ordinary working hours and, consequently, when the employee is not working and may exercise their right to disconnect. For example, an employee may make a formal request to adjust their working hours on Monday and Friday on an ongoing basis to facilitate school pick-up. In this case, the manager and employee may agree to specific working hours on those days (e.g. 7am to 3pm) to ensure that the manager and employee's colleagues have clarity on when the employee has completed their ordinary hours and is no longer working.

What are the expectations?

40. Managers and employees should regularly discuss the type of circumstances in which an employee may be expected to monitor, read or respond to contact as this may change over time. These discussions may occur in a range of forums, including recruitment and on boarding discussions, performance discussions, one-on-one catch-ups, team meetings, and planning sessions.
41. It is recommended that these conversations take place *before* any out of hours contact is likely to occur, if possible. This may prevent circumstances when an employee misses contact from their manager or third party while disconnected and the manager would otherwise expect a response.

42. Managers and employees should also consider channels for out of hours contact that minimises the disruption and burden on employees, but facilitates contact where necessary. Examples include:
- A small team expects out of hours contact will rarely be necessary, but it may be needed in the case of a serious ICT outage. The team agrees that if a serious ICT outage occurs, the manager would make any out of hours contact by calling employees on their personal device and leaving a voice message if they do not answer. The manager confirms that employees do not need to monitor texts or emails outside of their ordinary hours, but as a key function of the team is keeping an important ICT system operational for the community, they are reasonably expected to answer or return a phone call about serious ICT outages.
 - An SES manager and an executive officer agree that the manager would make necessary out of hours contact by texting the executive officer on their work device. The manager confirms that the executive officer does not need to monitor emails outside of their ordinary hours, unless it is for a specific matter by prior agreement.
 - A geographically dispersed team regularly receives out of hours contact from stakeholders in a different time zone. The team agrees to a rostering system for team members to manage this contact using a 'duty phone', which ensures that all employees regularly have an opportunity to disconnect. In accordance with the terms of the agency's enterprise agreement, an on-call allowance is paid to the rostered employees.
43. Depending on the complexity of these arrangements or the frequency of out of hours contact, managers may formalise these arrangements in writing and provide visibility to senior leaders. Managers and employees may also consider methods to communicate these arrangements to third parties, such as out of office messages.

Is out of hours contact preventable?

44. In tandem, managers should consider whether any workflow or organisational changes would reduce or prevent the need for out of hours contact. For example, if an agency identifies that out of hours contact frequently occurs due to poor handover or lack of information sharing between employees, a manager could introduce new practices to mitigate this risk.

Expectations for Commonwealth employers

45. Agencies should take steps to ensure they are equipped to support managers and employees and prevent potential disputes relating to the right to disconnect. This section sets out a range of steps that agencies may take, noting that agencies can adjust this approach depending on their particular circumstances.
46. In responding to the new legislation, agencies should also consider the Government's commitment to positioning the Australian Public Service as a model

employer and the role of the Government in setting the high standard of employer behaviour it champions.

Identify the agency's risk profile

47. The impact of the new provisions may depend on the individual agency's operational context, risk profile, and type of work conducted. As a first step, agencies should consider their existing practices to determine the potential impact of the right to disconnect on the workplace.
48. Agencies may consider the following factors when considering its risk profile:
- **What are the typical working hours and patterns for employees, both in the office and at home?** Agencies may consider the impact of different time zones, rosters, and flexible work arrangements on the ordinary working hours of employees.
 - **How prevalent is out of hours contact, or attempted contact, in the agency?** Agencies may assess when and how out of hours contact occurs and whether there are specific roles or work areas where out of hours contact is prevalent.
 - **What is the role of third parties?** Agencies may consider the range of third parties that routinely contact employees out of work hours.
 - **What communication methods are used in the agency?** Agencies may identify the range of communication methods that are used to contact employees.
 - **How are roles and responsibilities communicated to employees?** Agencies may consider whether written materials that communicate roles and responsibilities accurately reflect requirements for an employee to be available out of hours, if this is the case.
 - **What arrangements are available to compensate employees for being available out of hours?** Agencies may review existing arrangements relating to out of hours contact and whether it is appropriate to provide additional remuneration to any employees or groups of employees, such as on-call or restriction allowances.
 - **Are any specific personnel required to be contactable by law?** Agencies may examine whether any specific employees are legally required to be contactable under legislation.
49. Agencies should also consider any existing obligations in their enterprise agreement or other collective instrument relating to the right to disconnect. If an agency has existing clauses providing for a right to disconnect, the agency should consider the interaction between the clause and the new legislative right. There are also likely to be existing clauses in the agency's collective instrument that relate to out of hours contact and work, such as clauses on workloads, overtime, restriction or on-call allowances, rest periods between shifts, time off in lieu (TOIL) and flex time.

Develop agency-specific guidance for employees

50. Based on the outcome of the review, agencies may develop agency specific guidance for all employees or a work area. At a minimum, the guidance should provide managers and employees with information on the right to disconnect and relevant complaint handling processes within the agency.
51. Agencies should provide this guidance in a way that is appropriate for the agency and its risk profile.
52. Agency guidance should be consistent with the guiding principles in this document and the FWC's guideline, once available.
53. Consultation on the development and implementation of agency guidance should be consistent with the obligations in the enterprise agreement or other collective instrument.

Deliver training to managers and HR officers

54. Agencies should consider how employees will be informed about the right to disconnect.
55. Agencies may add information on the right to disconnect to existing training and induction materials for HR professionals and managers, including the interaction between the right to disconnect and the general protections regime in the Fair Work Act. All managers should understand that an employee or group of employees should not be subject to adverse action for exercising, or proposing to exercise, their right to disconnect.

Update position descriptions

56. Agencies may review any written materials that set out an employee's role and responsibilities and consider whether they accurately reflect the agency's reasonable expectations for out of hours contact. Agencies may use a variety of tools to communicate an employee's role and responsibilities, such as job advertisements, candidate information packs, performance agreements, section 24(1) determinations, and position descriptions.
57. It is particularly important for these materials to be accurate if out of hours availability is an inherent requirement of the role and/or a person is receiving additional remuneration to be contactable out of hours, such as media officers, departmental liaison officers or executive officers.
58. Agencies should also consider implementing mechanisms to regularly review written materials and ensure they are up to date.

Illustrative examples

59. Jing is a First Assistant Secretary and Max is a junior officer. At 9pm on a Sunday evening, Jing is reviewing a non-urgent brief, and cannot find a relevant document in the electronic filing system. This is a regular issue and Jing often relies on junior employees, including Max, to send document links out of work hours. Jing sends a number of texts to Max's personal mobile to ask him where the documents are stored. Max sees the texts, but chooses not to respond. Based on the circumstances, Max's decision to refuse to respond to Jing's contact is likely to be reasonable as Max is in a junior role, is not receiving specific remuneration to be contactable, and the contact is not necessary or urgent. Jing's conduct is not appropriate. Jing should consider why she cannot access key documents without assistance, particularly when she chooses to clear work out of ordinary business hours, and work to address those issues. Further, Jing or another person in the agency must not take adverse action against Max because he has exercised his right to disconnect.
60. Anh is a client services officer and cares for his elderly father. Anh has a flexible working arrangement and works his ordinary hours from 7am to 3pm to facilitate his caring responsibilities. At 4pm on a Monday afternoon, Anh's supervisor, Michael, sees an urgent inquiry from one of Anh's clients in the team mailbox. Michael weighs up whether to contact Anh and ask him to action the request noting its urgency and his familiarity with the client's circumstances. However, Michael is aware that Anh has to travel to care for his father and is unlikely to be able to address sensitive matters while out of the office. On that basis, Michael contacts a senior client services officer and asks them to address the query and to notify Anh when he returns to work. Based on the circumstances, Michael's conduct is appropriate given Anh's personal situation and that the matter could reasonably be resolved without contact.
61. Alena is the General Counsel for an agency. Jharna is a senior lawyer responsible for leading a small taskforce for 6 weeks to coordinate the agency's response to an important inquiry. Jharna is receiving a higher duties allowance to act as the taskforce lead (as an Executive Level 2). When seeking expressions of interest for the role, Alena noted that some out-of-hours contact and work would be required. Alena noted additional hours worked would be monitored weekly to ensure they remained reasonable, and TOIL could be taken immediately after the 6-week period if warranted by the hours worked. In her second week in the role, Jharna finishes work at 4.30pm. Just after Jharna leaves, Alena is advised the inquiry has ordered the production of additional documents by 10am the next day. The documents need to be reviewed before production, which would take around 2 hours. Alena tries to call Jharna on her personal mobile and sends a detailed text message. Jharna declines the calls as she is about to start a gym class. Jharna reads Alena's message at 11pm, but decides it is too late to respond or meet the deadline. Based on the circumstances, Jharna's refusal to monitor or respond to Alena's contact may be unreasonable and Alena could take steps to address Jharna's conduct, including escalating in line with the agency's policies, if required.
62. Paul is an economic officer in an Australian embassy. Over the past month, Paul has worked a high number of additional hours to support bilateral trade negotiations. At 5pm on a Monday afternoon, Paul's supervisor, Sarah, is notified that the Head of Mission has agreed to meet with a local member of government the following day.

Sarah considers whether to contact Paul to ask him to prepare a briefing note for the meeting. Sarah notes that a meeting brief is not urgent and a verbal briefing in the morning would be sufficient. Sarah also notes that Paul has already worked a number of additional hours and does not receive any additional remuneration to be on-call outside of work hours. On that basis, Sarah sends an email to Paul setting out the task, but clearly marks the email as not requiring action until the following morning. Based on the circumstances, Sarah's conduct is appropriate.

Further information

63. The Department of Employment and Workplace Relations has published a fact sheet on the right to disconnect: <https://www.dewr.gov.au/closing-loopholes/resources/right-disconnect>.
64. The Fair Work Ombudsman's website includes information on the right to disconnect: [Right to disconnect - Fair Work Ombudsman](#).
65. HR practitioners seeking more information on the right to disconnect in the Commonwealth employment context can contact the Workplace Reform Branch at WorkplaceRelations@apsc.gov.au.