



Australian Government
**Department of Employment
and Workplace Relations**

Senate Education and Employment Committee Inquiry into the Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022

Submission of the Department of
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The Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022

1. The Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (the Bill) delivers the first legislative commitment in the Government's Secure Australian Jobs Plan and is a significant milestone for the Government's women's safety and economic security agenda.
2. The Bill replaces the existing entitlement in the National Employment Standards (NES) of 5 days of unpaid family and domestic violence leave with 10 days of paid family and domestic violence leave. The Bill:
 - 2.1 provides 10 days of paid family and domestic violence leave in a 12-month period for full-time, part-time, and casual employees
 - 2.2 provides the full entitlement of 10 days upfront, either on commencement of the relevant provisions for existing employees or on commencement of employment for new employees
 - 2.3 provides for employees to access paid family and domestic violence leave at their full rate of pay for the hours they would have worked had they not taken the leave
 - 2.4 extends the definition of family and domestic violence to include conduct of a current or former intimate partner of an employee, or a member of an employee's household.
3. The provisions in the Bill are scheduled to take effect from:
 - 3.1 1 February 2023 for national system employers other than small businesses (with fewer than 15 permanent and 'regular casual employees' who are employed on a regular and systematic basis), recognising the need to provide reasonable preparation time to ensure the entitlement can be confidentially and sensitively administered
 - 3.2 1 August 2023 for national system employers that are small businesses, recognising many small businesses have limited human resource and payroll capabilities
 - 3.3 3 months after the International Labour Organisation Convention (No. 190) concerning Violence and Harassment comes into force for Australia for non-national system employers.

Family and domestic violence in Australia

4. It is estimated that in 2015-16, the cost of violence against women and their children in Australia was \$26 billion per year, which includes costs relating to health services, criminal justice processes and lost productivity.¹
5. Since the age of 15, approximately one in four women have experienced violence by an intimate partner.² First nations women are at least 32 times more likely to be hospitalised due to family and domestic violence than non-Indigenous women.³ On average, one woman is killed by her current or former partner every ten days in Australia.⁴
6. More than 68 per cent of people experiencing family and domestic violence are in paid work. Many of them are not able to leave violent situations without risking joblessness, financial stress, homelessness, and poverty.⁵
7. Experiences of family and domestic violence can result in victim-survivors needing time off work because of physical and psychological injury, or the need to seek alternative accommodation, receive police or court services, and care for children.
8. Women are more likely to take time off work after experiencing violence by a current or previous partner than men.⁶ Victim-survivors may quickly exhaust their leave entitlements such as annual leave and personal leave.

National Policy Framework

9. Paid family and domestic violence leave will provide an important additional practical support within the broader suite of options available to help victim-survivors to both leave a violent relationship and access the supports they need for recovery and healing.
10. This includes supports for victim-survivors such as the Escaping Violence Payment, 1800RESPECT, Keeping Women Safe in their Homes, and DV-alert training for workplaces.
11. It supplements the Government's commitment to the \$1.3 billion in women's safety for initiatives to support the implementation of the National Plan, as well as \$157.8 million over 4 years for an additional 500 frontline and community sector workers in domestic and family violence organisations.

¹ KPMG (2016), The cost of violence against women and their children in Australia.

² [2022] FWCFB 2001: 419, citing Australian Bureau of Statistics (2016) *Personal Safety, Australia*, accessed 12 August 2022.

³ Family, domestic, and sexual violence in Australia, 2018, Summary - Australian Institute of Health and Welfare.

⁴ Australian Institute of Criminology (2015) 'Domestic/family homicide in Australia', National Homicide Monitoring Program (Cussen & Bryant).

⁵ E Roff, *Family violence and the workplace: Recent developments in Australian law*, Alternative Law Journal Volume: 45 issue: 1, 2019, <https://doi.org/10.1177/1037969X19887558>.

⁶ K Seymour, S Wendt, K Natalier and R Hirsh, 'Family and Domestic Violence Leave Entitlement in Australia: A Systemic Review', Social Work Innovation Research Living Space, Flinders University, 3 November 2021, p 5.

12. It will also align with the objectives of the draft *National Plan to End Violence against Women and Children 2022-2032* (the National Plan), the focus areas around response and recovery.
13. The National Plan will be the national policy framework that describes how all Australians will all work together towards ending violence against women and children over the next 10 years. The National Plan will be underpinned by two five-year action plans and a dedicated Aboriginal and Torres Strait Islander Action Plan and these will detail how each of the priority focus areas will be translated into actions for implementation.

Development of family and domestic violence leave standards

14. In August 2018, as part of the 4 yearly review of modern awards, a Full Bench of the Fair Work Commission varied 123 industry and occupation based modern awards to include an entitlement to unpaid family and domestic violence leave.⁷ The Fair Work Commission proposed to review the effectiveness of these provisions including examining the necessity of providing paid family and domestic violence leave after the provisions had been operating for three years.
15. In December 2018, the Australian Parliament passed the *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018* which provides for 5 days of unpaid family and domestic violence leave in the NES, closely mirroring the Fair Work Commission's model clause.
16. In April 2021, a Full Bench of the Fair Work Commission (the Full Bench) commenced the *Family and Domestic Violence Leave Review 2021*.
17. On 16 May 2022, the Full Bench issued a decision expressing a provisional view that it was necessary to vary modern awards to include an entitlement to paid family and domestic violence leave to ensure they provide a fair and relevant minimum safety net of terms and conditions.
18. The provisional model term proposed by the Full Bench for a paid family and domestic violence leave entitlement in modern awards is as follows:
 - 18.1 full time employees and, on a pro-rata basis, part-time employees, should be entitled to 10 days paid family and domestic violence leave per year
 - 18.2 the entitlement should:
 - 18.2.1 accrue progressively during a year of service
 - 18.2.2 accumulate from year to year, subject to a 'cap' whereby the total accrual available does not exceed 10 days at any given time
 - 18.2.3 be accessible in advance of an entitlement to such leave accruing, by agreement between an employer and employee
 - 18.2.4 be paid at the employee's 'base rate of pay'.

⁷ [2018] FWCFB 1691.

19. On 28 July 2022, the Government introduced the Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 into the Parliament. On 11 August 2022, the Full Bench issued a Statement, proposing not to take any further steps at this time in relation to its *Family and Domestic Violence Leave Review 2021*. However, it remains open at any time for parties to request that the Fair Work Commission list the matter for conference.

Key characteristics of the Bill

Providing paid family and domestic violence leave to all employees including casuals

20. Family and domestic violence is both a cause and consequence of gender inequality. Women who are experiencing or have experienced family and domestic violence have a more disrupted work history, are on lower personal incomes, have had to change jobs more frequently, and are more likely to be employed in casual and part-time work, than women with no experience of violence.⁸
21. The existing entitlement to unpaid family and domestic violence leave in the NES applies to full-time, part-time, and casual employees and provides 5 days unpaid leave, upfront and credited annually on an employee's anniversary date.
22. Providing paid family and domestic violence leave to all employees, including casuals, is important to ensure the entitlement is available to those in most need, including women and younger workers who are more likely to experience family and domestic violence.
23. In February 2022, 22.8 per cent of Australian employees (around 2.6 million) were casual employees.⁹ Female employees are over-represented in casual employment. In February 2022, of all casuals, 54.1 per cent were female and the remaining 45.9 per cent were male.¹⁰
24. The Bill provides paid family and domestic violence leave to all employees, including full-time, part-time, and casual employees. While this departs from some other NES paid leave entitlements, which do not extend to casuals, the Full Bench found there was intrinsic merit in extending financial support to casual employees experiencing family and domestic violence.¹¹ As a general proposition, the Full Bench accepted casual employees experiencing family and domestic violence need the financial support provided by paid leave.¹²

⁸ [2022] FWCFB 2001: 813.

⁹ Australian Bureau of Statistics (February 2022) *Labour Force, Detailed*, accessed 12 August 2022.

¹⁰ Australian Bureau of Statistics (February 2022) *Labour Force, Detailed*, accessed 12 August 2022.

¹¹ [2022] FWCFB 2001: 814.

¹² [2022] FWCFB 2001: 812.

25. The Full Bench ultimately did not propose to extend an award-based paid leave entitlement to casuals in its provisional view expressed in the 16 March 2022 decision on the basis that:
 - 25.1 At the time of the decision, the NES did not extend a paid leave entitlement to casuals.
 - 25.2 There would be operational difficulties in framing a term for casual employees, which would be particularly pronounced for casual employees who do not work rostered shifts.
26. The Full Bench expressly stated that they had no view on whether the NES should be varied to provide for paid family and domestic violence leave in the terms of its provisional view, recognising setting of the NES is a matter for Parliament, not the Fair Work Commission.
27. The Bill addresses the operational issues for casual employees, identified by the Full Bench in its review, by clarifying how family and domestic violence leave applies for both rostered and un-rostered hours.
28. New paragraph 106BA(1)(b) allows a casual employee who takes a period of paid family and domestic violence leave to be paid at the employee's full rate of pay worked out as if the employee had worked the hours in the period for which the employee was rostered.
29. Entitlement to payment for family and domestic violence leave relies on casual employees having a rostered shift – rostering takes its ordinary meaning but may be simply understood as including (without limiting):
 - 29.1 The employer publishing or otherwise providing a written roster
 - 29.2 An electronic exchange where an offer of a shift is made and accepted.
30. The words 'hours in the period for which the employee was rostered' are intended to take their ordinary meaning. This would include situations where the employer publishes a roster in advance setting out shifts of casual employees.
31. To avoid doubt, in less formal rostering scenarios, new subsection 106BA (2) clarifies that, without limiting the ordinary meaning of rostered hours, an employee is taken to have been rostered to work hours in a period if the employee has accepted an offer by the employer of work for those hours.
32. New subsection 106BA(3) makes clear that a casual employee can take a period of family and domestic violence leave that does not include hours for which the employee is rostered to work. In this circumstance, the employer would not be required to pay the employee for the un-rostered hours.
33. This ensures casual employees who are not able to make themselves available for a shift, and who have not been rostered for a shift, cannot be adversely treated because they need to do something to deal with family and domestic violence during that period. This enables such a

casual employee to exercise, or propose to exercise, their workplace right to take paid family and domestic violence leave and be protected from unlawful adverse action.

Availability of leave from commencement and payment of leave

34. Providing paid family and domestic violence leave is intended to reduce financial impacts for those experiencing family and domestic violence. Evidence submitted to the Full Bench demonstrates that the income security provided by paid leave is critical to allow employees experiencing family and domestic violence to leave violent relationships.¹³
35. The approach adopted in the Bill of providing the leave entitlement upfront, and at the full rate of pay, will provide financial support and employment security to employees experiencing family and domestic violence, assisting them to leave dangerous situations safely and rebuild their lives.
36. The full 10 days leave will be accessible from commencement, which may be the day an employee commences employment, or the relevant commencement date of the legislation for existing employees. This is consistent with operation of the existing unpaid entitlement.
37. The Bill provides that employees taking a day of paid family and domestic violence leave will receive the same remuneration for the day as they would have received but for taking leave.
38. While payment at the base rate of pay is the minimum standard for some leave entitlements under the NES (with some exceptions such as for payment in lieu of notice of termination), a different approach is applied for the paid family and domestic violence leave so that taking leave does not result in the employee losing pay.
39. 'Full rate of pay' is defined in section 18 of the *Fair Work Act 2009* as the rate of pay payable to the employee, including incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and any other separately identifiable amounts.
40. Employers would be required to pay employees in relation to a period of paid family and domestic violence leave amounts the employee would otherwise have earned, provided those amounts can be identified and calculated with a reasonable degree of certainty. It is not intended that an employer would be liable to pay an employee for entitlements that cannot be calculated with certainty, such as irregular payments or amounts contingent upon certain events that may or may not have happened during the employee's rostered hours.
41. For example, an employee would be entitled to be paid overtime rates where they were rostered in advance to work overtime on the day they take paid family and domestic violence leave. Conversely, if the calculation of a motor vehicle allowance was based on the distance travelled between the employer's depot and the job site, and the employee was not allocated a job site in

¹³ K Seymour, S Wendt, K Natalier and R Hirsh, 'Family and Domestic Violence Leave Entitlement in Australia: A Systemic Review', Social Work Innovation Research Living Space, Flinders University, 3 November 2021, p 5.

advance, an employee would not be entitled to be paid that allowance in relation to a period of paid family and domestic violence leave.

Closing gaps in the definition of family and domestic violence

42. The Bill expands the definition of family and domestic violence for the purpose of this legislation, to include violent, threatening, or other abusive behaviour by a current or former intimate partner of an employee, or a member of the employee's household, in addition to a close relative.
43. This will ensure an employee can access paid family and domestic violence leave if they are subjected to violence, or other threatening or abusive behaviour, from an intimate partner who does not meet the definition of de facto partner under the *Fair Work Act 2009*, for example, because the employee does not live with the person on a genuine domestic basis. An intimate partner relationship would include, for example, an ongoing sexual relationship, regardless of whether the employee is co-habiting with the violent person.
44. Australians increasingly live separately to their intimate partners. The Families in Australia Survey reported 60 per cent of respondents living full-time with their spouse or partner, while another 6 per cent had a spouse or partner they lived apart from some or all the time.¹⁴
45. A member of an employee's household would include any person living in the same residence as the employee, such as extended family members or a housemate the employee is not related to. These amendments recognise that Australians are increasingly living in a more diverse range of non-traditional living situations. This includes first nations families and culturally and linguistically diverse communities, who have familial responsibilities, households, and relationships that must be captured.
46. The Full Bench accepted that several other legislative provisions have broader definitions of family and domestic violence and that some encompass violence perpetrated by a household member who is not related to or in a relationship with the employee experiencing family and domestic violence.¹⁵
47. However, the Full Bench's provisional decision was constrained by the existing definition contained in the NES, and the ramifications of adopting a different definition of family and domestic violence in modern awards to that in the NES which would be confusing and increase the overall complexity of the safety net.¹⁶

¹⁴ J Baxter and D Warren, 'Families in Australia Survey 3, Report no. 2, Relationships within the family' Australian Institute of Family Studies, Melbourne, 2021, accessed 12 August 2022.

¹⁵ [2022] FWCFB 2001: 826.

¹⁶ [2022] FWCFB 2001: 827.

48. By closing the gaps in the definition of family and domestic violence, and including this definition in the NES, the Bill will better achieve its objective of assisting those experiencing family and domestic violence, regardless of their household situation.

Estimated economic cost

49. It is estimated that in 2015-16, the cost of violence against women and their children in Australia was \$26 billion per year, which includes costs relating to health services, criminal justice processes and lost productivity.¹⁷

50. Flinders University estimates that the impact of family and domestic violence costs employers up to \$2 billion per year.¹⁸

51. The Full Bench accepted the introduction of paid family and domestic violence leave would be of some benefit to employers, although the evidence was insufficient to conclude with confidence the benefits would offset the cost of the leave.¹⁹ This benefit includes the reduced costs of absenteeism, or lost productivity from employees experiencing violence.²⁰

52. The assessments of utilisation of paid leave entitlements submitted by Dr Stanford²¹ and Professor Duncan,²² as well as evidence provided by the Victorian Government²³, which provides paid leave in 3 of their largest departments (with over 20,000 employees), and from a survey of 6 employers (with 18,800 employees) covered by the New Zealand paid family and domestic violence scheme²⁴, all estimated that less than one per cent of employees would access a paid family and domestic violence leave entitlement.

53. The Full Bench heard evidence about the estimated cost of the ACTU proposal. This proposal shared some key features with the current Bill, such as including casual employees, payment at the full rate of pay, and extending the definition of family and domestic violence.

¹⁷ KPMG (2016), The cost of violence against women and their children in Australia.

¹⁸ K Seymour, S Wendt, K Natalier and R Hirsh, 'Family and Domestic Violence Leave Entitlement in Australia: A Systemic Review', Social Work Innovation Research Living Space, Flinders University, 3 November 2021, p 5, citing ANROWS, *Paid Domestic and Family Violence (DVF) Leave: Summary of the Evidence* (Report, March 2019).

¹⁹ [2022] FWCFB 2001: 510.

²⁰ A Duncan, 'Family and Domestic Violence Leave Review - Report prepared by Bankwest Curtin Economics Centre for the Australian Council of Trade Unions', 30 July 2021, accessed 12 August 2022.

²⁰ Victorian Government, 'AM2021-55 Family and Domestic Violence Leave Review - Victorian Government Submission', 28 July 2021, accessed 12 August 2022.

²¹ J Stanford 'Expert Report of Dr. James Stanford - Fair Work Commission Family & Domestic Violence Leave Review (AM2021/55)', 30 July 2021, accessed 12 August 2022.

²² A Duncan, 'Family and Domestic Violence Leave Review - Report prepared by Bankwest Curtin Economics Centre for the Australian Council of Trade Unions', 30 July 2021, accessed 12 August 2022.

²³ Victorian Government, 'AM2021-55 Family and Domestic Violence Leave Review - Victorian Government Submission', 28 July 2021, accessed 12 August.

²⁴ Fair Work Commission, 'Research Reference List - Material to assist AM2021/55—Family & domestic violence leave review 2021', 4 April 2022, accessed 12 August 2022.

54. The expert report from Professor Duncan estimated that the total annual cost to employers of providing 10 days paid family and domestic leave to award-covered employees would be between \$13.1 million and \$34.3 million per annum.²⁵
55. The expert report from Dr Stanford estimated the cost across the entire Australian workforce would be less than \$100 million per year across the whole economy, with a high-end utilisation rate of less than \$200 million.²⁶
56. No contradictory economic evidence was produced by other parties in the Fair Work Commission review.²⁷
57. Regarding the estimated cost of the entitlement, the Full Bench noted it is unrealistic to expect a precise estimate but considered upper range estimates in the expert reports tabled by Dr Stanford and Professor Duncan were sufficient to conclude paid family and domestic violence leave would not result in significant cost imposed on employers or the economy.²⁸

²⁵ A Duncan, '[Family and Domestic Violence Leave Review - Report prepared by Bankwest Curtin Economics Centre for the Australian Council of Trade Unions](#)', 30 July 2021, accessed 12 August 2022, p 4.

²⁶ J Stanford '[Expert Report of Dr. James Stanford - Fair Work Commission Family & Domestic Violence Leave Review \(AM2021/55\)](#)', 30 July 2021, accessed 12 August 2022, pp 26-30.

²⁷ [2022] FWCFB 2001: 621.

²⁸ [2022] FWCFB 2001: 612.