

Paid Family and Domestic Violence Leave Bill 2022

Australian Council of Trade Unions submission to the Senate Employment Committee inquiry into the Fair Work Amendment (Paid Family and Domestic Violence) Bill 2022

ACTU Submission, 19 August 2022

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Introduction

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. It has played the leading role in advocating for, and winning the improvement of working conditions, including on almost every Commonwealth legislative measure concerning employment conditions and trade union regulation. The ACTU has also appeared regularly before the Fair Work Commission and its statutory predecessors, in numerous high-profile test cases, as well as annual national minimum and award wage reviews.

The ACTU is Australia's sole peak body of trade unions, consisting of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates who together have over 1.7 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

The Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022

The Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Paid FDV Leave Bill) was introduced to the Parliament on 28 July 2022. It is now the subject of inquiry by the Senate Education and Employment Legislation Committee. The ACTU makes this submission to that inquiry.

A staggering 2.2 million Australians have experienced violence from a partner since the age of 15 and 1.2 million Australians have experienced violence from another family member.¹ The statistics are even more alarming for women – 1 in 4 women have experienced violence from a partner since the age of 15 and on average one woman a week is killed by a current or former partner.² Family and domestic violence is estimated to cost the national economy \$20 billion per annum or around 1% of GDP.³

For over a decade unions have campaigned for, and won, the right to take paid family and domestic violence leave in workplaces across the country. As a result, over six thousand employers, including all State and Territory Governments, provide the right to some 1.2 million workers through union won collective agreements. But too many workers are still not able to access this critical leave entitlement.

Passing this Bill would effectively ensure every employee in Australia - over 11 million of them – would have the right to take up to ten days of paid family and domestic violence leave. It will mean that workers impacted by family and domestic violence, including those escaping a violent relationship – nearly always women - don't have to choose between their safety and their livelihood. This law will save lives.

The ACTU encourages the Committee to:

¹ Australian Institute of Health and Welfare, 7 July 2022, *Family, domestic and sexual violence*, (webpage, accessed 19 August 2022) <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-and-sexual-violence#common>>

² Fair Work Commission, 5 April 2022, Information note - Initiatives to reduce family and domestic violence in Budget 2022–23 <<https://www.fwc.gov.au/documents/sites/family-domestic-violence-leave/research/am202155-info-note-budget-050422.pdf>>

³ *Expert Report of Dr. James Stanford*, Annexure JS-3 (from p47) to the Witness Statement of Dr James Stanford, filed in *Family and domestic violence leave review 2021* (AM2021/55) <<https://www.fwc.gov.au/documents/sites/family-domestic-violence-leave/submissions/am202155-sub-ws-js-actu-300721.pdf>> (Stanford Report)

1. Support the passing of the Paid FDV Leave Bill.
2. To recommend that the Commonwealth Government fund an education and awareness raising campaign developed and rolled out in partnership with employer organisations and unions, to ensure effective implementation of the entitlement.

Paid FDV Leave

Union members have been campaigning for paid FDV Leave for over a decade. The first enterprise agreement clauses conferring an entitlement appeared in 2010.⁴ It was negotiated by the Australian Services Union for an enterprise agreement covering workers at the Surf Coast Shire council.⁵ Since then, union members have campaigned for and won paid FDV leave in their workplaces. It is through the success of these efforts that around 1.2 million Australian workers now have access to FDV leave.⁶ However, while bargaining has been successful for many workers in unionised workplaces, it has not delivered change in all workplaces.

The union movement has also pursued the introduction of an industrial entitlement to 10 days' paid FDV leave across two Fair Work Commission (FWC) award variation cases.⁷ Following the first of these, the FWC determined in 2017 to vary modern awards to include an entitlement to 5 days' unpaid FDV Leave, on the grounds that the entitlement was still largely untested but committed to reviewing this decision within four years.⁸ Shortly thereafter, the *Fair Work Act 2009 (Cth)* was amended to incorporate an entitlement to unpaid FDV Leave in the National Employment Standards (NES).⁹

⁴ Baird et. al. in *Report prepared by Bankwest Curtin Economics Centre for the Australian Council of Trade Unions*, Annexure AD-3 (from p25) to the witness statement of Professor Alan Duncan, filed in *the Family and domestic violence leave review 2021* (AM2021/55) <<https://www.fwc.gov.au/documents/sites/family-domestic-violence-leave/submissions/am202155-sub-ws-ad-actu-300721.pdf>> (Duncan Report) at [3]

⁵ ASU-Victorian Authorities & Services Branch, 15 October 2010, *ASU to launch and celebrate Australian-first Family Violence clause at Surf Coast Shire*, http://www.asu.asn.au/documents/doc_download/389-asunews-archive-asu-to-launch-and-celebrate-australian-first-family-violence-clause-at-surf-coast-shire-15-october-2010

⁶ Stanford Report (above n 3) at [45]

⁷ [2018] FWCFB 1691; [2022] FWCFB 2001

⁸ [2018] FWCFB 1691 at [309]

⁹ Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018

In 2021 the ACTU wrote to the FWC to seek the initiation of a review of the unpaid FDV leave entitlement.¹⁰ In this case the ACTU called for and provided evidence to support the introduction of 10 days paid leave. This ultimately led to the FWC determining that there was merit in including an entitlement to 10 days' paid FDV leave.¹¹ That decision would provide leave to around 2 million employees.

The Paid FDV Leave Bill will extend that entitlement to:

- Non-national-system employers and employees who aren't covered by modern awards and casual employees, to make this a truly universal entitlement.
- Payment will be made at a workers' full rate of pay;
- Leave will be available in full from commencement and each anniversary of employment thereafter (instead of accruing);
- It will cover situations involving a household member or former intimate partner.

The FDV Leave Bill reflects the much broader mandate of parliament to implement more far-reaching solutions in terms of paid FDV leave by comparison to what is available within the FWC's statutory constraints. It represents a sensible and appropriate legislative effort. For example, the Bill's application of paid FDV leave to workers outside of the "national system" (on ratification of the relevant international treaty) will mean that a broader range of workers have access to this important entitlement. It will become a universal entitlement for employees.

Ensuring the entitlement is available to casual workers is especially welcome. With no other paid leave entitlements, little certainty or security over their hours or employment, and far less income than permanent employees, they are particularly vulnerable. They are also more likely to be women.

¹⁰ Letter from ACTU Secretary Sally McManus to FWC President Justice Ross, 12 April 2021
<<https://www.fwc.gov.au/documents/sites/family-domestic-violence-leave/application/am2021-55-actu-request-2021-04-12.pdf>>

¹¹ [2022] FWCFB 2001

In light of the introduction of the Paid FDV Leave Bill, the FWC has determined that it will not take further steps in relation to implementing its decision to include paid FDV leave in modern awards.¹²

Why Paid FDV Leave is needed

Addressing family and domestic violence requires complementary action across a range of policy areas from health, housing and criminal and family law to employment.¹³ Positive interdependence and mutual reinforcement can be achieved through complementary measures in each policy portfolio area. For example, an employment measure – such as the FDV Leave Bill – can encourage other positive complimentary measures and changes in culture and attitudes in workplaces which in turn shift broader societal norms.¹⁴

The comments of the FWC Full Bench that most recently considered paid FDV Leave remain apposite¹⁵:

...the introduction of paid FDV leave is not a panacea for the devastating effects of FDV; but it will provide a critical mechanism for employees to maintain their employment and financial security, while dealing with the effects of FDV.

Identifying the workplace dimensions of family and domestic violence, - as the Paid FDV Leave Bill will help to do, - is an important precursor to creating supportive working environments to assist those who are experiencing family and domestic violence.¹⁶

Economic studies of family and domestic violence have shown that women with greater access to resources and better access to external options are more likely to be able to leave violent family and domestic situations.¹⁷ There is clear evidence that paid leave to support employees helps

¹² [2022] FWCFB 152

¹³ Chappell, L., & Curtin, J. (2013). Does Federalism Matter? Evaluating State Architecture and Family and Domestic Violence Policy in Australia and New Zealand. *Publius*, 43(1), 24–43, 25

¹⁴ Duncan Report at [12]

¹⁵ [2022] FWCFB 2001 at [999]

¹⁶ See Elizabeth Broderick, Sex Discrimination Commissioner, Australian Human Rights Commission (Speech), 24 October 2011, *Vincent Fairfax Speaker Series*, Melbourne Business School, University of Melbourne, <<https://humanrights.gov.au/about/news/speeches/hidden-business-problem-domestic-violence>>

¹⁷ Amin, M., Islam, A.M. and Lopez-Claros, A. (2021) 'Absent Laws and Missing Women: Can Domestic Violence Legislation Reduce Female Mortality?', *Review of Development Economics*, 25(4), pp. 2113–2132

reduce the recurrence of family and domestic violence.¹⁸ Economic and financial independence can increase the security of individuals who are affected by family and domestic violence, or allow those individuals to avoid perpetrators and therefore reduce future incidences.¹⁹

In reaching its decision in favour of including paid FDV in modern award, the FWC found as follows:²⁰

In summary, the evidence demonstrates that employees experiencing FDV face acute financial circumstances at the time they seek to leave violent relationships or otherwise deal with the consequences of FDV. Income security is necessary for employees experiencing FDV to bear the cost of relocating and to spend time seeking legal advice and attending court proceedings and accessing medical treatment and other forms of support. The absence of such income security may mean employees experiencing FDV do not leave violent relationships. On the basis of this evidence, we are satisfied that the current NES and award minimum safety net is not fair and relevant from the perspective of employees experiencing FDV, particularly those who are low-paid, because it does not address this necessity for income security.

We can't afford not to pass the FDV Leave Bill. The true cost of family and domestic violence is felt beyond the affected individuals and their workplace and is distributed (both directly and indirectly) across society.²¹ This includes the social cost to the community, particularly the increased demand for social, health and emergency services. Family and Domestic Violence contributes negatively to workplaces through decreased productivity and attendance and increased turnover (and associated costs such as recruitment and training).²² The present cost to Australian businesses of absenteeism alone from family and domestic violence is estimated at

¹⁸ Stanford Report (above n 3) [17]

¹⁹ Duncan Report (above n 4) at [11]

²⁰ [2022] FWCFB 2001 at [678]

²¹ Stanford Report (above n 3) at [13]

²² Duncan Report at [14] – [15]

over \$14 million *per annum*.²³ This is less than the estimated cost of providing an entitlement to 10 days paid FDV leave to workers.²⁴

A response to possible concerns

This section addresses some potential concerns others might raise through this inquiry below, many of which were also dealt with during the FWC review.

Employers won't hire women

The first, and perhaps most unreasonable of these is the suggestion that faced with the prospect of having to provide paid FDV leave, employers might stop hiring women. This argument has been put by a range of parties from the then Minister for Women Senator the Hon Michaelia Cash to some employer groups in the recent FWC proceedings.²⁵ On the contrary, there is a strong correlation between improved workplace rights for women and improved levels of their workforce participation, as the follow graph from the FWC review decision shows:²⁶

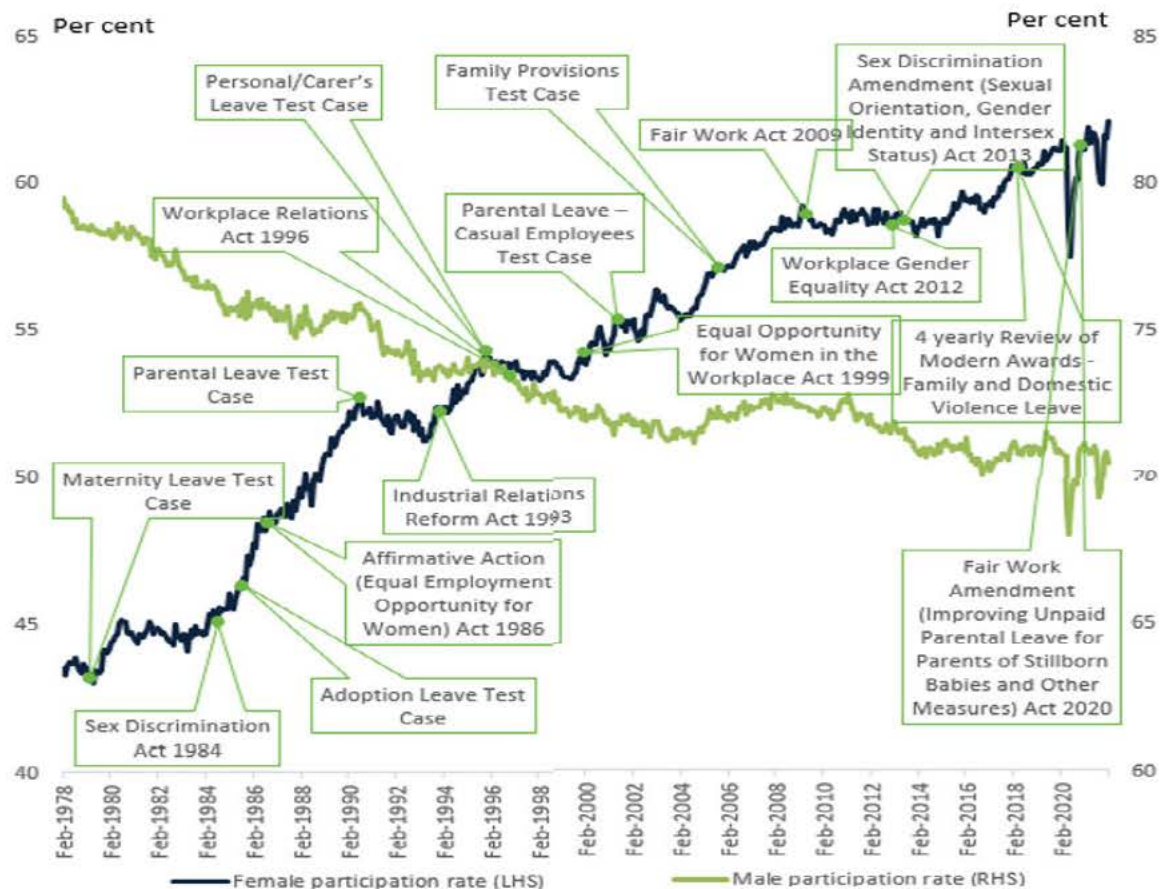
²³ Duncan Report at [51]

²⁴ Duncan Report at [39], [59] – [61]

²⁵ Noel Towell, 27 May 2016, *Canberra Times* (online) <<https://www.canberratimes.com.au/story/6048793/domestic-violence-leave-would-mean-fewer-jobs-for-women-cash/>> ; [2022] FWCFB 2001 at [920] – [924]

²⁶ [2022] FWCFB 2001 at [919]

Chart 9: Female workforce participation following various key arbitral and legislative changes relating to leave, gender equality and equal pay



Employers shouldn't have to bear the cost

Some have said that it isn't fair to make employers "bear the cost" of family and domestic violence.²⁷

The cost to business from family and domestic violence leave through existing absenteeism alone is already greater than the cost of providing paid FDV leave. As discussed above, the existing cost to business is magnified when considering the costs associated with family and domestic violence related turnover that could be avoided by employees maintaining contact with the workplace through paid FDV leave. Let alone the increased costs of absenteeism if a person is forced to remain in an abusive relationship as a result of economic necessity.

²⁷ See for example [2022] FWCFB 2001 at [224] [236] [770]

Family and domestic violence leave would only be utilised by a small proportion of the workforce (to whom it would make a big difference) and would represent a small cost to employers which would be offset by productivity gains.²⁸

Finally, putting aside the question of cost, such an objection ignores the obligation on everyone to make a contribute to tackling FDV - as a wide range of employers acknowledge and are already doing - and fails to acknowledge the important attitudinal and cultural shift that this leave contributes to.

Small Business

Some have argued that small businesses in particular cannot afford to support their workers when they are experiencing family and domestic violence.²⁹ In addition to the reasons above (as to the existing cost of family and domestic violence) there are specific reasons that small business employees should not be treated differently to other employees with respect to paid FDV leave:

1. A person's experience of family and domestic violence, its severity and its impact will not be determined by whether their employer hires 14 or 16 people. Their access to paid leave should not depend on this either.
2. The recent FWC decision also considered whether or not the entitlement should apply to small business.³⁰ Under that decision, no distinction was drawn (despite invitations to do so) between small and larger businesses and their employees – the leave which would have been brought about by that decision would have flowed to all of those employees equally.
3. Small businesses are in fact more likely to represent more tightly-knit workplace communities in which there is greater connection between the owners of business and their workplaces. This is more likely to lead to supportive working environments in which these small business employers are attuned to incidences of family and domestic violence and see the value in providing paid FDV leave.

²⁸ Fiona Smith, Domestic violence leave a small cost to employers but priceless to victims, *Guardian* (online, 9 February 2017) <<https://www.theguardian.com/sustainable-business/2017/feb/09/domestic-violence-leave-a-small-cost-to-employers-but-priceless-to-victims>>

²⁹ See e.g. [2022] FWCFB 2001 at [210], [241]

³⁰ [2022] FWCFB 2001

4. As evidence of this, a wide range of small businesses already offer their staff this entitlement. A comprehensive review of all active enterprise bargaining agreements for the FWC review showed that more than 1 in 3 agreements (34.7%) with the entitlement cover a business with 15 employees or less.³¹
5. Whereas the FWC's decision may have proportionately affected more small to medium-sized businesses, on the basis that they are more likely to set wages and conditions according to the award, the across-the-board statutory solution presented by the Paid FDV Leave Bill provides a fair and level playing field.³²

Finally, we note that the Government is providing two ways to support small businesses with the implementation of this entitlement. Firstly, they will be given an additional six months before the changes come into effect on 1 August 2023. Secondly, the Minister for Workplace Relations Tony Burke, said when introducing this Bill that: "We will also be consulting on a package of implementation support measures for small business to assist with rolling out this entitlement".³³

Privacy

Another concern raised about the provision of paid FDV leave is that it could compromise the privacy of the person applying for the leave.

To address this fair and reasonable concern, the *Fair Work Act* provides that any information or evidence provided by an employee to an employer to take FDV leave must be treated confidentially by the employer (at s.106C(1)). This is in addition to existing protections of information in employee records.

Employers providing this entitlement to their employees typically ensure that the leave is described in ways on pay slips that respects the employees' privacy. To ensure the all employers follow good practice, the Government has a phased commencement to give employers time to adjust, and to a program of support to ensure employers are "equipped to have a sensitive

³¹ Flinders University Research for the FDV leave case

³² See Duncan Report at [44] – [44]

³³ Tony Burke, Minister for Workplace Relations, 28 July 2022, Second Reading Speech, Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022
<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F25919%2F0014%22>

conversation with their employee, understand their obligations, and have appropriate mechanisms and payroll practices in place to sensitively manage leave information”.³⁴

In addition, for any change to workplace laws to be implemented in an effective manner, requires an education and awareness raising campaign aimed at both employers and employees. In this case thousands of employers and their employees and unions now have experience with implementing this entitlement in a respectful, sensitive and confidential manner. The ACTU recommends that the Commonwealth Government fund an appropriately resourced education and awareness with employer and union organisations to support employers and employees on understanding the new entitlement and how to effectively utilise it.

Workers who access paid FDV leave will do so knowing that they may be required to provide reasonable information in support of their doing so. This sort of transaction occurs routinely for other forms of leave that may be confidential or sensitive from personal (i.e. sick or carer’s) leave to compassionate leave and even periods of accident compensation. The systems and processes that employers will need to develop in relation to the information that is provided to them can easily be adapted from existing processes applied in respect of current forms of leave. Implementing such practises is not unduly burdensome.

³⁴ Burke, Ibid.

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