

***Inquiry into the provisions of
the Fair Work Amendment
(Family and Domestic Violence
Leave) Bill 2018***

Submission by the Australian Council of Trade Unions to the
Senate Education and Employment Legislation Committee

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Introduction

The Australian Union movement has played a leading role in the global campaign to ensure that working people subjected to family and domestic violence have access to appropriate support at work, including a minimum of 10 days paid leave.

Family and domestic violence is a crime and a pervasive social harm. The evidence and research showing the prevalence and seriousness of family and domestic violence across the Australian community is overwhelming and incontrovertible. Family and domestic violence affects people from all walks of life. Approximately one in four Australian women (23% or 2.2 million) and one in thirteen men (7.8% or 703,700) have experienced violence by an intimate partner since the age of 15.¹ Research suggests that family and domestic violence is the leading contributor to death, disability and ill-health among women aged between 15 and 44.² Aboriginal and Torres Strait women, people with disabilities, LGBTIQ and culturally diverse communities face particular challenges.³ Violence against women costs the Australian economy almost \$22 billion per year, including \$1.3 billion in lost productivity, absenteeism, and the cost of replacing employees who have left the workforce, either through injury or death.⁴

Working people seeking to recover from and leave violent relationships need protection and safety. The evidence shows that their ability to realise this is determined primarily by their access to economic resources. Therefore, minimum employment standards that provide both job *and* financial security for workers is a critical part of an effective whole of community response to family and domestic violence.

On 13 September, the *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018 (the Bill)* was referred to this Committee for inquiry and report. The government's acknowledgement, through this Bill, that family and domestic violence is a workplace issue, and that current entitlements are not sufficient to support people experiencing family and domestic violence, is a step forward. However, for the reasons set out in this submission, the provision of only 5 days unpaid leave falls well short of what is required.

Modern Award test case

¹ Australian Bureau of Statistics (ABS) 2017. Personal Safety, Australia, 2016, ABS cat. no. 4906.0. Canberra: ABS

² Victorian Health Promotion Foundation (VicHealth), *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence*, 2004

³ *Victorian Royal Commission into Family Violence*, Volume 5, Chapter 26 - Family Violence and Diversity

⁴ Price Waterhouse Coopers (PWC), *A High Price to Pay: The Economic Case for Preventing Violence Against Women*, November 2015; KMPG, *The Cost of Violence Against Women and their Children*, 2009; KPMG, *The Cost of Violence Against Women and their Children in Australia*, 2016.

On 26 March 2018, the Fair Work Commission (**the Commission**) decided that it would vary all modern awards to include a new entitlement to 5 days unpaid family and domestic violence leave. The Commission's decision followed an application by the ACTU under s 156 of the *Fair Work Act 2009* (**FW Act**) to vary all modern awards to include an entitlement to *10 days paid* family and domestic violence leave.

The ACTU's application was the subject of extensive and detailed evidence and submissions from the ACTU and two principal employer parties, the Australian Industry Group and the Australian Chamber of Commerce and Industry, before the Commission over five hearing days. The ACTU called evidence from six expert witnesses and 18 lay witnesses, including community sector workers and survivors of family and domestic violence, to explain the workplace impact of family and domestic violence and the crucial importance of paid leave. The Commission also heard evidence and submissions from Price Waterhouse Coopers and the Victorian Government about their experiences of providing paid family and domestic violence leave to their staff. After hearing all the evidence, the Commission found that:

- (a) Family and domestic violence is a significant problem which has a significant impact on affected individuals and the community, and which has a real and tangible impact on employees and employers in the workplace.⁵
- (b) The evidence established that circumstances faced by employees who experience family and domestic violence, by contrast with other forms of interpersonal crime or hardship, requires a special response.⁶
- (c) Existing entitlements, such as the right to request a flexible working arrangement, personal leave, and annual leave, do not meet the needs of employees subjected to family and domestic violence.⁷

The Commission also said:

We accept the evidence that the provision of paid leave would assist employees who experience family and domestic violence. It would obviously reduce the financial impact of the consequences of the violence. We accept the evidence that employees who experience family and domestic violence face financial difficulties as a result of the family and domestic violence such as relocation costs or becoming a sole parent. Having to lose pay at the same time because of the need to attend to the consequences of family and domestic violence

⁵ [4 Yearly Review of Modern Awards – Family and Domestic Violence Leave Clause \[2017\] FWCFB 3494](#) (Majority Decision) [49], [56], [116].

⁶ Majority Decision, [51].

⁷ Majority Decision, [42]–[46], [55].

would add to the financial burden faced by these employees. We therefore, would have no difficulty in concluding that the provision of paid leave would be a desirable outcome. ⁸

However, because the FW Act requires a party to show that an award variation is not only desirable and supported by probative evidence, but also ‘necessary’⁹, the Commission was not able to grant the ACTU’s application for 10 days paid leave. Instead, it decided to grant a period of unpaid leave.¹⁰ The outcome of this case shows that our rules make it too difficult for employees to win important improvements to working conditions, even when they are overwhelmingly supported by the evidence.

Why family and domestic violence leave must be paid

The workplace has a crucial role to play in a whole-of-community response to family and domestic violence. Economic security is the primary factor determining whether a person subjected to domestic violence remains in, escapes from or returns to a dangerous relationship.

Family and domestic violence impacts many aspects of a person’s life, including in the areas of health, children, access to legal and financial resources, and accommodation. There are many urgent tasks that must be attended to in order to recover from violence and/or to leave an abusive relationship. Aside from the obvious trauma associated with violence and abuse, the sheer logistical challenge of dealing with the effects of family and domestic violence is significant. Members of the Australian Services Union in New South Wales who are frontline workers in the family and domestic violence sector have recently estimated that leaving an abusive relationship and finding a new, safe place to live can cost on average \$18,250 and take 141 hours.

Many services, including courts, banks, counsellors, schools, and refuges, only operate during business hours. Further, the nature of family and domestic violence means that accessing support services is rarely something that can be done in an orderly and predictable manner. Paid leave allows an employee subjected to family and domestic violence to take an absence from work to attend necessary appointments, or to make arrangements to relocate or ensure their children’s protection, without suffering financial disadvantage. This not only supports people subjected to current violence, but also facilitates safe escape from dangerous situations, helping to reduce or eliminate future violence.

Without economic resources, leaving a violent relationship is extremely difficult. Research confirms that economic disadvantage is “*a barrier to achieving safety, security, independence, and wellbeing following violence*”, and, conversely that economic security gives women “*alternatives to abusive*

⁸ Majority Decision, [60]

⁹ FW Act, s 138

¹⁰ Majority Decision, [99].

relationships, and the means to avoid and leave abusive partners".¹¹ Following extensive consultation, hearings, and research, the Victorian *Royal Commission into Family and Domestic Violence* Report found that people subjected to family and domestic violence "are more likely than other women to experience financial difficulty and many women experience poverty as a result of family violence, regardless of their prior economic circumstances." The Commission heard evidence that "financial security is a significant protective factor in victims gaining freedom from abusive partners".¹²

This investment in women's safety pays off; research conducted in New Zealand shows that for every woman whose experience of violence was prevented as a result of the workplace protections in a particular year, an average of \$3,371 (a conservative estimate) in production-related costs are avoided.¹³ In July 2018, New Zealand passed legislation providing for 10 days paid family and domestic violence leave.¹⁴

A number of inquiries and reviews have highlighted the significance of the workplace in responding to family and domestic violence, and the importance of paid leave specifically.¹⁵ In addition, the Governments of Victoria, South Australia, Queensland, Western Australia and the Australian Capital Territory now provide access to paid family and domestic violence leave.

During the Modern Award test case, the Commission heard significant evidence about the connection between financial and economic security and recovery from family and domestic violence. For example, Marilyn Beaumont, a public health specialist and workplace consultant, gave evidence that while poor socio-economic wellbeing can result from family and domestic violence, adverse impacts on health and wellbeing can be minimised by a supportive workplace, which can be encouraged by the provision of paid leave.¹⁶ A survivor of family and domestic violence gave evidence that she utilised paid leave provided by her employer to attend meetings with her solicitor and to attend court,

¹¹ Cortis N & Bullen J (2015), *Building effective policies and services to promote women's economic security following domestic violence: state of knowledge paper*, Australia's National Research Organisation for Women's Safety, Landscapes, Issue 07, August at pp 2 and 8

¹² Victorian Royal Commission into Family Violence Report, Volume IV, Chapter 21 'Financial Security', 93

¹³ Kahui S, Ku B, Snively S, *Productivity Gains from Workplace Protection of Victims of Domestic Violence* (commissioned by the New Zealand Public Service Association), March 2014

¹⁴ <https://www.sbs.com.au/news/new-zealand-brings-in-paid-domestic-violence-leave>

¹⁵ Commonwealth of Australia, *National Plan to Reduce Violence against Women and their Children 2010–2022*; Commonwealth of Australia, *Domestic Violence in Australia, Senate Inquiry*, August 2015 (**Senate Inquiry Report**); Australian Law Reform Commission, *Final Report Family Violence and Commonwealth Laws—Improving Legal Frameworks* (ALRC Report 117), February 2012; New South Wales, *Stop the Violence, End the Silence*, NSW Government, June 2010: <http://arp.nsw.gov.au/c2011-08-support-employees-experiencing-domestic-violence>; South Australia, *Taking a Stand: Responding to Domestic Violence*, October 2014; Queensland, *Not Now, Not Ever*, Queensland Government Special Taskforce, February 2015; Victoria, *Victorian Royal Commission into Family Violence*, March 2016

¹⁶ [Witness statement of Marilyn Beaumont](#) (tendered and marked as **Exhibit B7**) at [22], [28]–[41], [48]–[50]; and see [Transcript, Tuesday 15 November 2016](#), PN 1304.

and that the paid entitlement assisted her to meet legal costs arising from the violence of over \$6,000.¹⁷

A minimum standard of 10 days paid family and domestic violence leave has developed over a number of years as a consequence of the input of experts in the field and negotiations at the workplace level between employers and employees. Evidence provided to the Commission during the Modern Award test case shows that 10 days is an industrial norm among the many workplaces which already provide access to paid family and domestic violence leave. For example, the evidence of Debra Eckersley of Price Waterhouse Coopers was that their decision to provide 10 days leave was informed by their own research which had revealed a ‘common standard’ of 10 days, as well as the advice of experts in the field of family and domestic violence.¹⁸

The evidence presents a clear picture of the central importance of employment and financial security to recovery and escape from family and domestic violence. Conversely, lack of financial security can have a profoundly negative impact on a person’s ability to recover from or escape violent situations. As Julie Kun, CEO of WIRE Women’s Services, explained in evidence, women without paid leave entitlements have to choose between being safe and being poor.¹⁹ This is not a choice any worker should have to make in modern Australia.

Impact of family and domestic violence on women

The absence of paid family and domestic violence leave indirectly discriminates against women.²⁰ The evidence shows that women are more likely than men to be subjected to family and domestic violence,²¹ and to experience the impact of such violence more severely, including being subjected to frequent, prolonged and extreme violence, and sexual assault.²² While men can and do experience family and domestic violence and should be able to access leave to deal with it when needed, ‘family violence among adults is overwhelmingly a crime against women’.²³

This is compounded by the fact that women are over-represented among the award reliant, casual and low paid workforce²⁴ and remain disproportionately responsible for caring for children and others. Women are already more likely to have to use leave entitlements to attend to caring

¹⁷ Statement of Confidential Witness 1 (tendered and marked as **Exhibit B23**)

¹⁸ [Transcript, 17 November 2016](#), PN 1890 and PN 1893.

¹⁹ [Witness Statement of Julie Kun](#), (tendered and marked as **Exhibit B12**) at [22], [46]–[58].

²⁰ Indirect discrimination on the basis of sex is prohibited by s. 5 of the *Sex Discrimination Act 1984* (Cth). In *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78 at [97], Sackville J described indirect discrimination as “conduct which, although ‘facially neutral’, has a disparate impact on men and women”.

²¹ [Dr Michael Flood, Expert Witness Statement](#), 26 May 2016 (**Flood Report**) at [3.9]

²² Flood Report at [3.20]

²³ Flood Report at [3.6]

²⁴ *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [576].

responsibilities, and less likely to have access to them. For women who do have paid leave entitlements, the requirement that they use their annual and personal leave to, for example, attend multiple court hearings or move into emergency housing, means they will have less access to leave for illness and leisure than their male counterparts. Women employed as casuals with no paid leave entitlements have no option but to make the unacceptable choice between their employment and their safety.

The cost of providing 10 days paid leave

The impact of a new minimum entitlement to 10 days paid family and domestic violence leave on employers is likely to be minimal. The available evidence suggests that only relatively small numbers of employees seek to access the leave. Employers who already provide paid family and domestic violence leave to their employees confirm that implementation costs are manageable.²⁵

A 2016 Australia Institute Report has calculated that (based on ABS data and other sources) the overall costs to Australian employers of providing paid family and domestic violence leave to all workers would be in the range of about \$85 to \$120 million a year – “so small it would be difficult to measure: we estimate that incremental payments to workers taking the leave would amount to one-fiftieth of one percent (0.02%) of current payrolls.”²⁶

Recent figures from the Victorian and Western Government confirm that while employees are seeking to access paid leave entitlements (vindicating the need for it), take-up rates are manageable. In Victoria, about 216,000 public sector employees have had access to 20 days paid family and domestic violence leave since mid-2016. In the one year since the introduction of the measure, 58 leave claims have been made, which equates to 0.02% of the employee population. On average, employees took 5.1 days of family violence leave per claim, totalling 295.5 days.²⁷ Public sector employees in Western Australia have had access to 10 days paid family and domestic violence leave since August 2017. Recent figures show that 80 full days and 480 hours in part days were accessed by employees between 18 August 2017 and 17 February 2018, totalling about 150 days.²⁸

The provisions of the Bill

In most respects, the provisions of the Bill closely mirror the terms of the Award clause drafted by the Commission. Setting aside the failure of the Award clause to provide access to 10 days paid leave,

²⁵ *Implementation of Domestic Violence Clauses – An Employer’s Perspective*, Gendered Violence Research Network, University of NSW, Sydney, November 2015.

²⁶ [Stanford, J. *Economic Aspects of Paid Domestic Violence Leave Provisions*, Centre for Future Work at the Australia Institute, 2016](#)

²⁷ <https://www.theguardian.com/society/2017/jun/09/more-than-50-public-sector-workers-claim-family-violence-leave-in-victoria>

²⁸ <http://www.abc.net.au/news/2018-08-21/wa-public-servants-have-used-150-days-of-domestic-violence-leave/10144296>

the ACTU does not object to the wording of the provision. Similarly, other than the failure of the Bill to provide access to 10 days paid leave, to the extent that the Bill replicates the provisions of the Award clause, the ACTU has no objection to them. However, there are three areas which raise potential difficulties.

Definition of 'close relative'

The ACTU is concerned that the definition of 'close relative' in the Bill could potentially exclude employees experiencing violence or abuse at the hands of *non-resident current* defacto partners or spouses. This is because of the way in which the Bill links to the definition of 'immediate family' in s 12 of the FW Act.

In s 12, 'immediate family' of a national system employee means:

- (a) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or*
- (b) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee.*

A 'defacto partner' is:

- (a) a person who, although not legally married to the employee, lives with the employee in a relationship as a couple on a genuine domestic basis (whether the employee and the person are of the same sex or different sexes); and*
- (b) includes a former de facto partner of the employee.*

A 'spouse' includes a former spouse.

When read in conjunction with the provisions of the Bill, these definitions would potentially operate to exclude someone who has not yet finally separated from their partner, but who has moved to a different residence in order to escape from their partner's violence. It is clear that the definition of defacto partner would exclude a current partner who no longer lives or who has never lived with the employee. While a non-resident current spouse is not expressly excluded by the definition of 'spouse' in s 12, there is some doubt as to whether they would be covered. The possible exclusion of non-resident, current defacto partners or spouses would constitute a very problematic omission, as the evidence suggests that *intended* separation presents a heightened risk of violence and is a factor in almost 20% of cases in which males kill a female intimate partner.²⁹ Some of the people most in

²⁹ See [Australian Domestic and Family Violence Death Review Network - Data Report 2018](#), pp 12-13

need of the leave may not be able to access it under the provisions of the Bill unless the definition of 'close relative' is reviewed and amended to address this gap.

Confidentiality obligation

The confidentiality obligation in the Bill is the same as the Award clause, except that it omits the explanatory note from the Award clause, which states that:

Information concerning an employee's experience of family and domestic violence is sensitive and if mishandled can have adverse consequences for the employee. Employers should consult with such employees regarding the handling of this information.

The confidentiality obligation associated with family and domestic violence leave was the subject of considerable argument and evidence during the proceedings before the Fair Work Commission. The ACTU's witnesses explained that confidentiality is essential to the effective operation of the entitlement, not only to protect the privacy of employees and ensure that they feel confident to access leave when needed, but also to ensure their physical safety. Concerns were raised about the capacity of employers, particularly those with limited HR resources, to understand and comply with the obligation. The explanatory note was included in the Award clause to provide important and much needed guidance and clarity to employers on the reasons that confidentiality is important; and offer practical advice on steps that can be taken to minimise the adverse consequences of mishandling information, namely consultation with the employee.

The Bill should be amended to include the explanatory note.

Resolving uncertainties and difficulties

The ACTU is concerned that proposed s 40 is unnecessary and may have unintended consequences.

A number of enterprise agreements already provide access to family and domestic violence leave. These agreements may include broader, more inclusive definitions of key terms, less onerous (or no) notice and evidence requirements, and access to paid leave, and/or longer periods of unpaid leave. It is not clear what resolving an 'uncertainty or difficulty' or making the agreement 'operate effectively' would require the Commission to do in these circumstances. The ACTU is concerned that proposed s 40 could lead to amendments to enterprise agreements (without the involvement of employees or employee organisations) which result in less beneficial entitlements to paid or unpaid family and domestic violence leave.

In addition, it is not clear why further regulation is required. Section 55 already sets out detailed rules relating to the interaction between the National Employment Standards (NES) and an enterprise agreement. To the extent that the entitlement in the agreement is 'the same as the NES', s 55(6) operates to ensure that the employee gets at least the minimum standard in the NES, but not a

double benefit. To the extent that the agreement term supplements the NES, it is permitted by s 55(4). To the extent that it is less beneficial than the NES, it has no effect in accordance with s 56. In the event that an ambiguity or uncertainty does arise, s 217 of the FW Act already authorises the Commission to vary an enterprise agreement to remove the ambiguity or uncertainty.

Proposed s 40 is unnecessary and may have unintended consequences. It should be deleted.

Conclusion

The ACTU acknowledges that the inclusion of unpaid family and domestic violence leave in the NES is a step forward. However, for the reasons outlined above, 5 days unpaid leave manifestly fails to provide sufficient time or financial support to effectively assist employees to escape and recover from dangerous situations.

Until 10 days paid family and domestic violence leave is a universal minimum employment standard, vulnerable employees will still be forced to make an unacceptable choice between their safety and their pay check.

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