



WOMEN'S LEGAL CENTRE ACT

22/08/2022

Committee Secretary
Senate Education and Employment Committees

Via email: eec.sen@aph.gov.au

Dear Committee Members

RE: Submission – Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022

The Women's Legal Centre applauds the Federal Government on the proposed introduction of 10 days paid family and domestic violence leave in the National Employment Standards, improving on the existing entitlement of 5 days unpaid leave.

We have long advocated that workplaces can play an important role in society's response to domestic and family violence. This bill is an important recognition of that. Secure employment can bring financial independence and access to services, which are key protective factors against domestic and family violence. Supportive workplaces and managers benefit victim-survivors and their children. They also boost productivity and reduce turnover, benefiting employers and the economy.

However, whether victim-survivors use the paid leave proposed by this bill will be entirely dependent on the implementation of the entitlement and how we support positive cultural change in workplaces and inform and support individual managers and employers. Therefore, we urge the Government to accompany the introduction of this legislation with a plan to support its implementation, including properly resourced training, developed and delivered by practitioners with expertise in domestic and family violence, in consultation with human resources and employment law experts.

The Centre is part of a national network of specialist women's legal centres across the Australia. This submission has been developed by the ACT Women's Legal Centre and endorsed by the signatories below.

We would welcome the opportunity to provide more information about anything raised in this submission.

Yours sincerely,

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

About the Women's Legal Centre ACT

The Women's Legal Centre is a specialist community legal centre. Our main legal practice areas are sexual harassment, family violence, victims of crime, family law, migration law, early intervention care and protection work, employment, and discrimination.

The Centre provides legal assistance across the spectrum of need, including legal information and referral, legal advice and representation and litigation. The Centre provides legal services within a multi-disciplinary and trauma-informed practice model that incorporates social work, cultural supports, and collaborates with external services and pro bono partners to provide wrap-around support to the most vulnerable and at-risk clients.

The Centre has a specialist program for Aboriginal & Torres Strait Islander women – the Mulleun Mura Access to Justice Program. This program provides holistic and culturally safe services to promote effective engagement with the legal system with a focus on early intervention and trauma-informed support to reduce preventable legal issues from arising and escalating.

The Centre also provides community legal education and input on law and policy development to build government and community capacity to work towards deeper legal and cultural change to redress power imbalances and address violence and gender inequality.

Deep expertise in domestic and family violence as a workplace issue

Our Employment & Discrimination Practice supports women to stay connected to the paid workforce. The Centre is one of the few community legal centres with an employment practice, recognising that financial security and connection to other people and services are crucial protective factors against family violence.

We provide free legal assistance to women in low-paid and/or precarious employment who are experiencing problems at work. We help clients enforce their rights and entitlements at work, including access to family and domestic violence leave, and flexible work arrangements, and the right to be free from discrimination and harassment at work.

With the Centre's unique combination of expertise in family violence and employment law, the Centre delivers training to managers and workplaces to improve responses to family and domestic violence and support employees.

In 2019, the Centre was engaged to develop and deliver training for the ACT Government to support the introduction of the ACT Public Service Domestic and Family Violence Policy, including the entitlement of 20 days paid domestic and family violence leave every year. The Centre has trained over 500 public servants on good practice workplace responses to domestic and family violence.

Our training is informed by our everyday experiences of what these issues look like in practice. We hear, time and time again, from women trying to keep themselves and their children safe and dealing with the effects of family violence, all while attempting to keep turning up to work each day. In our experience, only employees who have a supervisor in whom they trust completely, will be willing to disclose their experience of family violence.

Sadly, too often, employees are too scared that their experience will be used against them at work – to take work or responsibilities away from them. The result is that these employees decide to quit or are subject to disciplinary processes for arriving late or distracted without explanation.

A good manager and appropriate entitlements can change this, benefiting both employee and employer.

POSITIVES OF THE BILL

The Women's Legal Centre supports the following proposed changes to the *Fair Work Act 2009* (Cth):

- **Change from unpaid to paid leave and increase from 5 to 10 days:** We have long called for family and domestic violence leave to be increased and to be paid. It is vital for victim-survivors to have time to attend to matters arising from experiencing family violence, without losing income. Many businesses and state/territory governments have already introduced an entitlement to paid leave over the last decade. For example, the ACT Government introduced 20 days of family and domestic violence leave in 2013. Every worker in Australia should have access to such crucial support, regardless of where they work.
- **Coverage of casual employees:** This is the first time the National Employment Standards have been amended to include paid leave for casuals. With many of our clients in casual and insecure employment, and living pay check to pay check, we strongly support the right of casual employees to the entitlement to paid family and domestic violence leave.
- **Calculated at the full rate of pay, rather than base rate of pay, for casual and non-casual employees:** We support the entitlement being paid at the employee's full rate of pay rather than the base rate of pay for both casual and non-casual employees. While all other forms of paid leave in the National Employment Standards make provision for leave paid at base rates only, this can be a significant difference for the employee, and may be the deciding factor for a victim-survivor in attending court, counselling, or medical support. Small business will need guidance and support in implementing this change as it will be the first time employers are required to speculate what the employee would have earned.
- **Full ten days will be available from the commencement of employment:** We support the full ten days being available on commencement of employment. From our experience, an employee must have a lot of trust in their supervisor, usually developed over a significant time, before they disclose their experience of family violence. Therefore, it is highly unlikely an employee will take the entitlement at the commencement of their employment. Nevertheless, victim survivors should

not have to wait until the leave accrues (like annual leave) and should be able to use family and domestic violence leave as soon as they need it.

- **Expanded list of example activities leave can be used for:** The bill adds to the list of example activities the leave can be used for. While this list is not exhaustive, and never has been, many employers heavily rely on this list to determine whether to grant leave. Therefore, we support the removal of the word ‘urgent’ to show an employee can use the leave for all court hearings (not just ‘urgent’ ones). We also support the explicit inclusion of ‘attending counselling, and attending appointments with medical, financial or legal professionals’. Many of our clients and their managers have been unsure what they can use the leave for and whether they need to use personal leave for medical appointments connected with the family or domestic violence.
- **Coverage of conduct of a current or former intimate partner of an employee:** We support the coverage of family violence from a current or former intimate partner (explicitly covering relationships that do not meet the definition of de facto). However, we have concerns about the lack of consistency in definitions of family and domestic violence, as discussed below.

CONCERNS ABOUT THE BILL

The Women’s Legal Centre has concerns about the following aspects of the bill:

1. *Definition of ‘family or domestic violence’ inconsistent with other legislation:*

The bill expands the definition of ‘family and domestic violence’ from the definition for the existing unpaid leave entitlement, so it will provide:

‘Family and domestic violence is violent, threatening or other abusive behaviour by a close relative of an employee, a member of an employee’s household, or a current or former intimate partner of an employee, that:

- (a) seeks to coerce or control the employee; and*
- (b) causes the employee harm or to be fearful.*

While we support expanding the definition to include violence between intimate partners, we are concerned about the differing definitions of family and domestic violence in different pieces of legislation. We note that the proposed definition of family and domestic violence is different to that in the *Family Law Act 1975* (Cth) and criminal law. This creates situations where a victim-survivor could take family and domestic violence leave under the *Fair Work Act 2009* (Cth) but could not apply for a family violence order under State/Territory legislation (for example, where the violence was perpetrated by a housemate) or the conduct may amount to family violence under the *Family Law Act 1975* (Cth) but the victim-survivor cannot take leave because the perpetrator did not *intentionally* coerce or control the employee (due to the words ‘seeks to coerce’).

Victim-survivors usually need to navigate multiple pieces of legislation and administrative procedures (the criminal justice system, family law proceedings, employment law entitlements, victims of crime support). This can be overwhelming, particularly when

definitions are inconsistent. Having differing definitions of family and domestic violence also makes it difficult for the public to better understand family and domestic violence.

The Women's Legal Centre endorses the need for consistent definitions of family and domestic violence across Federal Legislation.

2. Evidentiary requirements:

The evidentiary requirements in the previous unpaid family and domestic violence leave scheme will remain unchanged, allowing employers to require victim survivors to provide them with evidence that would satisfy a reasonable person that the leave is taken because the employee needs to do something to deal with the impact of the family and domestic violence AND it is impractical for the employee to do that thing outside the employee's ordinary hours of work.

This leaves scope for employers to make it extremely difficult for people to provide the required evidence. Victim-survivors are often already overloaded with administrative tasks.

The treatment and storage of any evidence required by employers also opens the unintended possibility of increasing risk to victim-survivors.

We suggest adding a guiding note to the effect that employers should err on the side of support when considering requests. Victim-survivors should be believed, and evidence can include the employee's verbal statement that they need to attend an appointment during work hours. If an employer does require documentation evidence of any sort, this evidence should be sighted by the employer and returned to the employee. It should not be copied or kept in any electronic or other system.

3. Delayed entitlement for employees of small businesses:

The bill states that the entitlements for small business employees will not operate for another 12 months. While we appreciate small businesses will need appropriate support and training to implement these changes, the delay of six months is sufficient for all businesses to understand their obligations, **if adequate training and support is provided**. Most of our clients work for small businesses, and heavily rely on each pay check. Waiting another whole year for this crucial entitlement is an unacceptable delay.

4. Access to additional unpaid leave required:

We recommend paid leave be accompanied by the introduction of additional unpaid leave. The effects of family and domestic violence can be long term and 10 days may not be sufficient in some situations. For example, many of the Centre's clients can be involved in lengthy family law or criminal proceedings.

5. Australian Government must ratify ILO Convention 190 as a priority

We note that due to constitutional requirements, Australia must ratify ILO Convention 190 before the employees covered by Schedule 2 are eligible for the paid leave entitlement. Therefore, we urge the Government to ensure ratification occurs as a priority. Without

this, it will be a complicated constitutional law exercise for employees to determine whether they can access the entitlements introduced by the bill.

Need for focus on implementation to support entitlements

The Women's Legal Centre believes the success of the proposed leave entitlements require careful consideration and support for their implementation in workplaces.

Whether victim-survivors choose to use paid family and violence leave will be entirely dependent on the culture of the workplace and the actions of the individual employers and supervisors.

Our experience of supporting the introduction of a paid domestic and family violence leave entitlement in the ACT Public Service showed us successful implementation includes:

1. Strong, consistent leadership and messaging about the role of workplaces in supporting people affected by domestic and family violence.
2. Training and guidance for employers to support attitudinal change, development of relevant skills and understanding of key principles, including confidentiality.
3. Clear workplace policies and entitlements (including leave), and adequate referral pathways for specialist domestic and family violence support and legal assistance for people affected by violence to complement these.
4. Systems to support policies, including consideration of payroll treatment.

The core messages in training developed and delivered by the Centre included detail on entitlements and how these are accessed, but focussed on the following messages:

- That a good response to domestic and family violence relies on relationship, trust and skill as a manager/employer, not on expertise about domestic and family violence.
- Clear workplace/business-based rationale for and definition of workplace responses to domestic and family violence that are aligned with employer and managers understanding of their role supporting employees.

Many of the managers we have trained were apprehensive about having a conversation about family violence, but these messages provided them with reassurance about what was and was not expected, specifically that Managers should not be expected to be their employees' counsellor (and we would warn against trying to do so), instead they can act as a vital connection to expert services.

Managers were also reassured by the understanding that empathy, listening skills, and respect for individual control and choice were more important than memorising phrases or phone numbers and supported by training that address how managers can foster a workplace culture in which employees are willing to ask for support when they need it, which benefits workers beyond those affected by domestic and family violence.

Given the prevalence of domestic and family violence in Australia, there will be employers and managers who have experienced domestic and family violence themselves, who have perpetrated violence against their family members, who have witnessed family violence, and those who do not believe it is a real problem, or do not believe that women are disproportionately affected, despite the existing evidence.

All these experiences may present as resistance to training provided, resistance to a culture shift in workplaces, and resistance to anyone accessing paid family and domestic violence leave. Trainers need to understand these perspectives and the best strategies to respond to them. This is not an easy exercise, and these are complex issues and dynamics. Therefore, trainers require specialised expertise in domestic and family violence. If training is not delivered with thought and expertise, it may cause resistance to grow, making workplaces hostile to people experiencing family violence.

We call on the Federal Government to accompany the bill with a corresponding investment to support the implementation. This should include resourcing for specialised family and domestic violence service providers to work with human resources and employment law experts, this partnership approach can best assist workplaces to understand how to support employees, and access the proposed entitlement to paid leave, as well as other supports and flexibility.

Benefits to industry and business

Finally, we want to reiterate the changes proposed in this benefit everyone.

In 2016, the Centre for Future Work at the Australia Institute conducted research into the economic impacts of introducing an entitlement to ten days of paid family and domestic violence leave. They found the cost to employers of wage pay outs would be modest, and likely to be almost completely offset by benefits such as improved productivity and decreased turnover.¹

¹ J. Stanford, *Economic aspects of paid domestic violence leave provisions*, Briefing paper, (Canberra: The Australia Institute, Centre for Future Work, December 2016), page 3.