

**Submission to the Senate
Education and Employment
Legislation Committee's Fair
Work Amendment (Paid Family
and Domestic Violence Leave)
Bill 2022**

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percapita
FIGHTING INEQUALITY IN AUSTRALIA

*'Family violence happens to everybody no matter how nice your house is, no matter how intelligent you are. It happens to anyone and everyone.'*¹

- Rosie Batty, February 2013

Per Capita welcomes the opportunity to provide this submission to the Senate Education and Employment Legislation Committee's Inquiry into the Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) ('the Bill').

Per Capita is an independent think tank, dedicated to fighting inequality in Australia. We work to build a new vision for Australia based on fairness, shared prosperity, community and social justice.

Per Capita acknowledges the Australian union movement's important role in leading the campaign to provide all working people access to paid family and domestic violence ('FDV') leave.

Per Capita has considered the Bill and is supportive of its aims. Its expanded scope is necessary and commendable, in that it acknowledges that FDV does not respect gender, postcode or age: it can happen to anyone. The broad provisions of the Bill are essential to ensure that the most vulnerable workers in our community are protected.

In particular, Per Capita supports paid entitlement for all employees, including casual employees, and the calculation of this entitlement at their full rate of pay.² The rationale for a full rate of pay calculation for casual employees is clear: their base rate of pay would not include any casual loading.³ Our submission provides further rationale for the application of this entitlement to both casual and non-casual employees.⁴

Additionally, Per Capita makes several suggestions as to the drafting of the Bill, which will provide clarity on the entitlements and better achieve what we understand is the primary aim of the Bill: to ensure that 'no employee in Australia will ever again be forced to make a choice between earning a wage and protecting the safety of themselves and their families'.⁵

The importance of PAID family and domestic violence leave

'Family and domestic violence affects people from all walks of life, in every community, in every city, and in every region across this country.'⁶ FDV carries health, welfare, social, and economic consequences, which reach into every aspect of a victim's life. It involves physical, sexual and/or emotional violence, and can affect anyone no matter their gender, size or age. However, it affects women most severely.⁷ This is particularly true for First Nations women, queer women, transgender women, women with a disability, and those women living in remote and regional areas.⁸

¹ 'Rosemary Batty' *State Government of Victoria* (Web Page, 26 Mar 2022) <<https://www.vic.gov.au/rosemary-batty>>.

² Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) sch 1 item 19, inserting *Fair Work Act 2009* (Cth) s 106BA.

³ Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 6 of 2022-23, 4 August 2022) 14.

⁴ Explanatory Memorandum, Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) 8.

⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 July 2022, 4 (Tony Burke, Minister for Employment and Workplace Relations).

⁶ *Ibid.*

⁷ More than a quarter of homicides nationally in 2021 were FDV related; majority of the victims were women: Australian Bureau of Statistics, *Recorded Crime - Victims*, 2021, (Catalogue No 4510.0, 28 July 2022).

⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 July 2022, 1; Monica Campo and Sarah Tayton, 'Intimate Partner Violence in Lesbian, gay, bisexual, trans, intersex and queer communities' (Practice Guide, Child Family Community

Experiences of family and domestic violence

Drawing on data from the Australian Bureau of Statistics Personal Safety Survey ('PSS'), the Australian Institute of Health and Welfare estimated that:

- one in five Australian adults have experienced physical and/or sexual violence from an intimate partner or another family member; and
- almost one in six men, and one in four women, have experience emotional abuse from a current and/or former partner.⁹

The COVID-19 pandemic exacerbated the prevalence of FDV in Australia. Findings from a survey of over 10,000 adult women found that in the twelve months from February 2020, women who had previously experienced partner violence said the frequency or severity of violence had significantly increased. Of those:

- 42% said physical violence had increased;
- 43% said sexual violence had increased; and
- 40% said emotional abusive, harassing or controlling behavior had increased.¹⁰

The financial cost of family and domestic violence

There is a high economic cost of FDV in our community and a number of studies have sought to assess its cost.¹¹ A report by PwC in 2015 found that over one million women had experienced physical, sexual and/or emotional violence in 2014-15, and estimated it to have cost the Australian economy \$21.7 billion.¹² For women experiencing partner violence the estimated cost was \$12.6 billion, and the estimated cost to businesses in lost productivity was estimated at \$2.1 billion.¹³ This study excluded male victims; the actual cost is likely much higher.

The individual costs of fleeing a violent relationship can be extremely high. In 2017 the Australian Council of Trade Unions estimated that it costs approximately \$18,000 and takes 141 hours to escape FDV. Many of the services needed to support those fleeing these situations are only available during business hours.¹⁴

Australia, Australian Institute of Family Studies, December 2015); Australian Bureau of Statistics, *Disability and Violence - In Focus: Crime and Justice Statistics*, (Catalogue No 4524.0, 13 April 2021).

⁹ Australian Institute of Health and Welfare, *Family and Domestic Violence Data Australia* (Web Report, version 8.0, 8 July 2022); Australian Bureau of Statistics, *Personal Safety, Australia*, (Catalogue No 4906.0, 8 November 2017).

¹⁰ Hayley Boxall and Anthony Morgan, 'Intimate partner Violence During the Covid-19 Pandemic: A Survey of Women in Australia' (Research Report, No 03/2021, Australian National Research Organisation for Women's Safety, October 2021)

¹¹ See, *Family and Domestic Violence Leave Review 2021 [2022]* FWCFB 2001, [423]-[435].

¹² PricewaterhouseCoopers Australia, 'A High Price to Pay: The Economic Case for Preventing Violence Against Women' (Report, November 2015) 11.

¹³ Ibid 11-12.

¹⁴ Australian Council of Trade Unions, 'ACTU Demands Turnbull Back 10 Days Paid Domestic Violence Leave' (Media Release, 28 November 2017).

A workplace entitlement that will save lives

These are just some of the alarming statistics of which the committee is likely already well aware. However, they warrant repeating in making the point that FDV affects everyone. These are not just numbers: these statistics represent individual human beings. They are our neighbors, friends, parents, and children. Often unknowingly, they are also our colleagues.

All employees should have access to this provision; they should not have to choose between their safety and their financial and employment security. Any suggestion that this leave should only apply to some people, depending on how they are employed, or because it might cause payroll issues,¹⁵ should be soundly rejected by the Committee.

The impact of the Australian union movement

The Australian union movement has led the way campaigning to make paid FDV leave accessible to all working people.

The first paid domestic violence leave clause in a registered agreement was secured by members of the Australian Services Union in 2010.¹⁶ Ten years later, of the agreements certified by the Fair Work Commission in the year 2020, 74% contained provisions for paid or unpaid FDV leave.¹⁷ Of those, more than a third (35%) contained ten or more days of paid leave.¹⁸ 98.5% of those containing ten or more days paid leave were union agreements, highlighting the necessary and critical role unions play in our industrial relations system.¹⁹

According to the 2020-2021 'Workplace Gender Equality Agency Scorecard', 70% of all organisations now have a formal policy and/or strategy to support employees who are experiencing FDV. This has more than doubled over the last eight years. Today, one in two organisations provides some access to paid FDV leave, up from one in eight in 2015-2017.²⁰ These are significant improvements for working people in Australia. It shows that the devastating effects of FDV are understood by employers and employees alike.

However, to ensure that all workers, in particular the most vulnerable, are protected, Per Capita strongly supports the inclusion of ten days paid leave in the National Employment Standards ('NES').²¹

¹⁵ See, Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 6 of 2022-23, 4 August 2022) 15.

¹⁶ Ben Schneiders, 'Leave Deal for Victims of Domestic Violence', *The Sydney Morning Herald* (online, 24 September 2010) <<https://www.smh.com.au/national/leave-deal-for-victims-of-domestic-violence-20100923-15ot9.html>>.

¹⁷ This data is from the Workplace Agreements Database (WAD) maintained by the Department of Jobs and Small Business, obtained in August 2022.

¹⁸ *Ibid.* A further 45 agreements certified in 2020 had paid leave entitlements which had provisions that were 'varied or unclear' and are not counted in this calculation.

¹⁹ *Ibid.*

²⁰ Workplace Gender Equality Agency, 'Australia's Gender Equality Scorecard: Key Results from the Workplace Gender Equality Agency's 2020-21 Employer Census' (Scorecard Report, Australian Government, February 2022).

²¹ *Fair Work Act 2009* (Cth) pt 2.2 ('FW Act').

Casual employment

Extending paid FDV leave to casual employees, as this Bill does, is essential. The casual loading does not, nor should it, exist to offset this type of leave. In 2021, 22.5% of all employees were casually employed (24.2% of all women, and 20.9 % of all men).²² Removing this provision would fundamentally change the purpose of the Bill. That is, to help all employees experiencing FDV maintain their financial security, keep their jobs, and access relevant services.²³

Per Capita submits that any suggestion to remove this entitlement from Australia's 2.6 million casual employees should be soundly rejected.

Calculation of the rate of pay

The Bill provides for the rate of pay for FDV leave, to be calculated at an employee's full rate of pay, rather than the base rate of pay.²⁴ It is immediately clear that the rationale for using the full rate of pay for casual employees is that their base rate of pay would not include any casual loading. This loading makes up a substantial proportion of a casual employee's take home pay.²⁵ However, Per Capita submits that there is an additional rationale that applies to casual and non-casual employees, not immediately clear in the Bill.

Financial abuse is common in relationships where there is emotional abuse. In the 2016 PSS survey, of those who reported experiencing emotional abuse from their most recent abusive partner, almost one in two women²⁶ and one in three men²⁷ also reported experiencing financial abuse.²⁸

Financial abuse can be understood as 'a pattern of control, exploitation or sabotage of money and finances affecting an individual's capacity to acquire, use and maintain financial resources thus threatening their financial security and self-sufficiency'.²⁹ In FDV, perpetrators may have access to, and monitor, their victim's bank account. It is reasonable to suppose that unexpected changes may cause suspicion, and that fear of this suspicion may prevent an employee accessing this crucial leave.

Many non-casual employees have an actual rate of pay which is higher than their base rate of pay. Working regularly outside ordinary hours is common in many industries. In May 2021, the average total weekly hours paid for full time non managerial employees was 39.3 hours³⁰ - an hour and 18 minutes more than the maximum weekly hours in the NES.³¹

²² Australian Bureau of Statistics, *Working Arrangements*, (Catalogue No 6336.0, 14 December 2021).

²³ Explanatory Memorandum, Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) 1.

²⁴ Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) sch 1 item 19, inserting FW Act (n 21) s 106BA.

²⁵ Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 6 of 2022-23, 4 August 2022) 14.

²⁶ 48% or 812,000.

²⁷ 35% or 364,000.

²⁸ Gendered Violence Research Network, 'Understanding Economic and Financial Abuse in Intimate Partner Relationships' (Research report, University of New South Wales Sydney, October 2020) 10.

²⁹ *Ibid*, 13.

³⁰ Australian Bureau of Statistics, *Employee Earnings and Hours, Australia*, (Catalogue No 6306.0, 19 January 2022)

³¹ Fair Work Act 2009 (Cth) pt 2.2 div 3.

Using the full rate of pay, for all employees, helps reach a key aim of this Bill. It is not just about ensuring that employees keep their jobs, it is to prevent employees having to choose between their safety and their financial security. It is about helping people escape FDV.³²

For these reasons, Per Capita strongly supports this provision in the Bill. Removing it would cause unintended harm.

Definition of Domestic Violence

FDV does not only occur between relatives. It can be perpetrated by current and former partners, and non-related household members. As the Minister noted in the second reading of the Bill: 'Australians are increasingly living in more diverse living situations'.³³ In this context, the Minister gave one example of FDV's severest consequences in his speech.³⁴ This is one of many.³⁵

For this reason, Per Capita supports the insertion of the words: 'a member of an employee's household, or a current or former intimate partner of an employee', into the definition of domestic violence at the *Fair Work Act 2009* (Cth) s 106B(2) ('FW Act').

In addition, Per Capita makes three drafting suggestions:

1. To amend Section 106B(2)(a) of the Fair Work Act (FWA) so that it does not refer to the intention of the perpetrator. Employers are unable to look into the mind of perpetrators to determine their intentions or objectives. This change would bring the FWA into line with the definition in the *Family Law Act 1975* (Cth) s 4AB(1), while still also acknowledging that FDV for the purpose of taking leave is about the environment just as much as the relationship.
2. To insert the word 'or' after 'and' between Sections 106B(2)(a) and 106B(2)(b) of the FWA would ensure that the violent, threatening or other abusive behaviour need not be both coercive, controlling, and also cause harm or fear, for it to be captured by this definition.
3. To clarify for both employees and employers what may constitute FDV, we suggest inserting a new subsection, 106B(4), in the FWA. This would adopt similar language used in the *Family Violence Act 1995* (NZ) s 3(4), and the *Domestic Violence – Victims' Protection Act 2010* (NZ) s 5(1). It would more accurately capture the deceptive nature of FDV.

Per Capita suggests that *FW Act* ss 106B(2),(4) should be amended to be:

(2) 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:

³² Explanatory Memorandum, Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) 1.

³³ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 July 2022, 3.

³⁴ *Ibid.*

³⁵ See, eg, Megan Palin, 'Three Housemates Charged over Bendigo Mum Hammer Murder', *News* (online, 13 February 2026) <<https://www.news.com.au/lifestyle/real-life/news-life/three-housemates-charged-over-bendigo-mum-hammer-murder/news-story/a74b7db372c86089ecb9c66e71355bd6>>; Margaret Scheikowski, 'Housemate Killer Gets More Jail Time', *The West Australian* (online, 30 April 2021) <<https://thewest.com.au/news/crime/housemate-killer-gets-more-jail-time-c-2723200>>; Kate Campbell, 'Life in Jail for Man who Killed Housemates', *The West Australian* (online, 1 October 2010) <<https://thewest.com.au/news/wa/life-in-jail-for-man-who-killed-housemates-ng-ya-196524>>.

(a) coerces or controls a member; and/or

(b) causes the employee harm or to be fearful.

.....

(4) Without limiting subsection (2)

(a) a single violent, threatening or other abusive act may amount to family and domestic violence for the purposes of that subsection:

(b) a number of violent, threatening or other abusive acts that form part of a pattern of behaviour may amount to family and domestic violence for purposes of that subsection, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

Reason for taking FDV leave

Per Capita broadly supports the substitution of Section 106B(1) of the FWA (note 1).³⁶ However, we suggest that additional words be added to clarify for employee and employer that this is not an exhaustive list.

The intention of this amendment is 'to illustrate some further non-exhaustive examples of actions taken by an employee to 'deal with' family and domestic violence',³⁷ but the word *non-exhaustive* is omitted.

We note that the *Acts Interpretation Act 1901* (Cth) ('AI Act') provides this interpretation,³⁸ but with respect, it is likely that more people have read the complete works of Marcel Proust than the AI Act. We suggest inserting the words 'Examples in this note are not exhaustive' after the words 'financial or legal professionals'.

³⁶ Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) sch 1 item 17, repealing and substituting *Fair Work Act 2009* (Cth) s 106B(1) (note 1).

³⁷ Explanatory Memorandum, Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) 7.

³⁸ *Acts Interpretation Act 1901* (Cth) s 15AD.

Conclusion

Per Capita supports this Bill. As mentioned above, most employers have already embraced FDV leave in their workplaces. However, most is not all. Where there are loopholes these will be exploited. Our drafting suggestions would provide further clarity but they do not depart from the clear intentions of the Bill.

We acknowledge the decades of campaigning by Australian working people in their workplaces, communities and unions. They have put this on the legislative agenda.

We acknowledge the Albanese Labor Government, who listened and acted, introducing this Bill into the 47th Australian Parliament during its first sitting week.

Paid family and domestic violence leave will save lives.

We thank the members of the Senate Education and Employment Committee for their consideration of this submission.