Australian Nursing & Midwifery Federation

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ANMF letter in response to the Senate Education and Employment Committee into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

Dear Senators,

The Australian Nursing and Midwifery Federation (ANMF) welcomes the opportunity to provide a response to the above Senate Inquiry.

About the ANMF

The ANMF is Australia's largest national union and professional nursing and midwifery organisation. In collaboration with the ANMF's eight state and territory branches, we represent the professional, industrial, and political interests of more than 300,000 nurses, midwives, and personal care workers (PCWs) across the country. Approximately 89% of the ANMF's membership are women.

Our members work in the public and private health, aged care, and disability sectors across a wide variety of urban, rural, and remote locations. We work with them to improve their ability to deliver safe and best practice care in each and every one of these settings, to fulfil their professional goals, and achieve a healthy work/life balance.

Our strong and growing membership and integrated role as both a trade union and professional organisation provide us with a complete understanding of all aspects of the nursing and midwifery professions and see us uniquely placed to defend and advance our professions.

Through our work with members we aim to strengthen the contribution of nursing and midwifery to improving Australia's health and aged care systems, and the health of our national and global communities.

The Bill

The ANMF supports the submission of the ACTU in relation to this Bill and wishes to express its strong support for the analysis and recommendations contained therein. The Secure Jobs Better Pay Bill 2022 presents a broad package of sensible reforms that will update Australia's Industrial Relations system to make a substantial contribution to getting wages moving and improving the lives of working Australians.

In addition to the recommendations made by the ACTU, the ANMF seeks to draw the attention of the Committee to the following recommendations. These recommendations are aimed at strengthening the operation of the Bill to deliver on the objectives of wage growth, gender equality and women's workforce participation.

1. *Flexible Working Arrangements*

It is well established that informal care responsibilities continue to fall primarily to women.[1] In 2020, according to the National Health Work Dataset, there was a total of 384,776 nurses and midwives in the workforce, of which 88.4% were women.[2] The implications of a highly feminised workforce mean our members are more likely to experience the impacts of combining care and work, that will often require a flexible working arrangement at some point during their working lives.

Access to these arrangements can be determinative as to whether our members remain in the workforce and/or face underemployment or insecure work arrangements. The provisions within the Fair Work Act (2009) (*FW Act*) are therefore critically important when examining barriers to workforce participation and gender equality for our members and working women more generally.

1.1 Reasonable Business Grounds S65A(5)

The operation of s65A(5) of the FW Act has proven problematic and obstructive for our members in obtaining flexible working arrangements since its inception.

In industries such as healthcare and emergency services, employer's regularly rely on reasonable business grounds under s65A(5) to refuse requests, specifically claiming that requests for flexible working arrangements will have a significant negative impact on service delivery.

Where an enterprise agreement has provided the right to challenge a refusal of flexible working arrangement by way of arbitration before the Fair Work Commission (*the Commission*), our experience has been that members of the Commission are reluctant to overturn refusals of requests that cite impact to service delivery as the grounds upon which the refusal is made.

[1] A recent report produced by Deloitte Access Economics suggested that across all age brackets, 72% of all primary caregivers are women. Deloitte Access Economics: *The Value of Informal Care in 2020.* deloitte-au-dae-value-of-informal-care-310820.pdf

[2] http://data.hwa.gov.au/ * This number includes those employed; those on extended leave; those employed outside the profession and looking for work in nursing or midwifery and those not employed and looking for work in nursing or midwifery.

The retention of s65A(5) under the bill therefore poses significant risks in undermining the intent of the provision, namely, to retain workers and increase workforce participation rates amongst those with protected attributes or circumstances.

Recommendation 1

The ANMF considers the test for refusal of flexible working arrangement requests should be narrowed and the Commission should be able to apply an objective test. For example, the provisions could be brought into alignment with the concept in anti-discrimination law, and only allow employers to reject requests for flexible working arrangements on reasonable business grounds if it was to cause them 'unjustifiable hardship'. This is an objective and more rigorous test which is well understood, and will not allow employers to exaggerate inconvenience as a reasonable business ground and hence a reason to reject requests for flexible working arrangements. The introduction of an objective test was a recommendation of the Interim Report from the Senate Inquiry into Work and Care.

Alternatively, in the event s65A(5) is retained, amendments should be made to improve the operation of the provision. Employers should be required under s65A(2) to provide a detailed explanation as to how the grounds they seek to rely upon apply to the request in the context of the applicable industry and/or organisation to better guide the Commission in their assessment of the reasonableness of the refusal. Furthermore, the threshold for s65A(5) should be clarified by way of an explanatory note explaining that inconvenience arising from a request will not meet the test of reasonable business grounds for refusal.

1.2 Expansion of circumstances under s65(1A) to include reproductive health concerns

Many workers, disproportionately women, require changes to working arrangements for reasons related to their reproductive health.

For example, 20% of women experiencing menopause have severe symptoms that can range from extreme fatigue, recurrent migraines, anxiety, and other physical and mental health concerns which significantly affect them at work.[3] Menopausal workers are generally highly skilled and experienced, but many feel forced to leave work because of menopausal symptoms despite the fact many symptoms can be managed effectively through the making of reasonable adjustments and access to flexible working arrangements.

In 2020, the average age for all nurses and midwives was 43.3 years of age. Almost 47% of the nursing workforce is aged 45 years and over. This represents a sizeable portion of the nursing and midwifery workforce likely to experiencing menopausal symptoms. The availability of flexible working arrangements would significantly aide in the retention of workers in this age cohort, who are likely to be those with the most experience, specialist qualifications or expertise.[4]

[3] Symptoms of menopause | Jean Hailes

[4] Australian Department of Health, *National Health Work Dataset,* http://data.hwa.gov.au/

Whilst it is possible that some aspects of these could be covered by the circumstance of "disability", given how these issues disproportionately affect women and their participation in work, the inclusion of reproductive health as a standalone circumstance is justified and has the potential to significantly improve nurses and midwives workforce participation.

Recommendation 2

The circumstances in which an employee can make a request for flexible working arrangements should be expanded to include employees experiencing reproductive health concerns.

1.3 Drafting implications of s65C(1)(c) and (d)

Section 459 of the Bill relating to S65C(1)(c) and (d) allows the Commission to order an employer to provide a written response in accordance with s65A or further details supporting the reasonable business grounds used to make a refusal. The inclusion of these subsections render the 21-day requirement useless and are contrary to the decision of the Full Bench decision of Victoria Police v The Police Federation of Australia (Victoria Police Branch) T/A The Police Association of Victoria [2019] FWCFB 305 (4 January 2019) (austlii.edu.au), see paragraphs [31]-[33].

Applicants who require these arrangements deserve to know the outcome in a timely manner so as to allow them to address their personal circumstances e.g. caring responsibilities. Allowing an employer the opportunity to revisit their decision and potentially obtain legal advice to construct reasoning to support a refusal after the fact will only draw out proceedings, and renders the 21 day requirement impotent.

Recommendation 3

Removal of offending sections under s459 of the Bill.

2. Prohibiting Sexual Harassment

The ANMF welcomes the changes made under the bill insofar as they relate to extending prohibitions pertaining to sexual harassment.

Nurses and midwives are significantly overrepresented when it comes to exposure to gendered violence and sexual harassment in the workplace, particularly at the hands of third parties such as patients, residents, relatives and visitors.

In 2018, our NSW branch collaborated with Dr Jacqui Pich of the University of Technology Sydney, to examine exposure to patient-related violence and aggression including sexual harassment for nurses and midwives. [5]

[5] University of Technology Sydney & NSWNMA; *Violence in Nursing and Midwifery in NSW: Study Report*, , Dr Jacqui Pich PhD BNurs (Hons I) BSc, (2018).

Of those surveyed, who experienced inappropriate sexual conduct and sexual assault only 33% of participants reported all conduct. The reasons for not reporting included the belief that it was an accepted/expected part of the job. This perception is quite specific to those working in health – many do not report because they perceive the perpetrator as not responsible for their actions due to their clinical or personal circumstances.

Of those who had experienced inappropriate sexual conduct, many reported they had suffered a physical or psychological injury resulting in time off work ranging from the remainder of a shift to over a year. Some ended up resigning, were forced into retirement or took random days off when too distressed to work.

The importance of delivering workplaces free from sexual harassment, particularly at the hands of third parties, is therefore critical in the context of nursing and midwifery.

2.1 Conduct of 3rd parties

Section 527D of the Bill does not explicitly cover behaviour of third parties and S527E does not appear to cover actions of 3rd parties (customers, patients, residents etc.) in the context of vicarious liability. These omissions will have significant consequences for industries like nursing and midwifery, that are predominantly made up of women who experience high rates of 3rd party sexual harassment.

Recommendation

Sections 527D and 527E of the Bill Act should be amended to clarify that vicarious liability provisions extend to instances where the conduct is perpetrated by third parties and the employer has not taken all reasonable steps to prevent the harm occurring.

This is consistent with the amendments currently under consideration by parliament in relation to the Sex Discrimination Respect at Work legislation.

3. Intractable Bargaining Declarations

The ANMF notes the recent amendments to the Bill that seek to amend s235 to require that a minimum bargaining period has elapsed before an intractable bargaining declaration can be made. The end of the minimum bargaining period is now defined as:

> *(i) the day that is 6 months after the nominal expiry date for that existing agreement, or the latest nominal expiry date for those existing agreements;*
>
> *(ii) the day that is 3 months after the first application was made under section 240 for the FWC to deal with a dispute in relation to the proposed agreement; or*
>
> *(b) the day that is 3 months after the first application was made under section 240 for the FWC to deal with a dispute in relation to the proposed agreement.*[6]

[6] ParlInfo - Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (aph.gov.au)

The ANMF has concerns that even with a minimum bargaining period requirement, intractable bargaining declarations may be sought as a means to terminate protected industrial action.

It is often the case, particularly in the context of large public sector agreements, that industrial action is not contemplated until 6 months or more have passed since the expiry of the existing agreement.

In those instances, it is therefore open to the Commission to issue an intractable bargaining declaration prior to the taking of industrial action or during a period of industrial action, which significantly curtails the ability of employees to effectively bargain.

Recommendation

In order to protect the rights enshrined under the Act to protected industrial action,

the ANMF would recommend that an intractable bargaining declaration can only be issued in circumstances where the minimum bargaining period has elapsed and employees are not currently engaged in a period of protected industrial action.

Conclusion

The ANMF supports the recommendations made by the ACTU in their submission regarding this Bill. We alsourge the Senate Committee to adopt the recommendations we have made regarding flexible working arrangements, prohibiting sexual harassment and intractable bargaining declarations.

Yours Sincerely

Annie Butler Federal
Secretary