

Submission by the Australian Nursing and Midwifery Federation

**Response to the Senate Legal and
Constitutional Affairs Committee
into the Anti-Discrimination and Human
Rights Legislation Amendment
(Respect at Work) Bill 2022**

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Australian
Nursing &
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Federation



Australian Nursing and Midwifery Federation / Senate Legal and Constitutional Affairs Committee into Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022

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Introduction

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

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 ANMF believes all nurses, midwives and carers have the right to work in a safe and healthy workplace environment and to perform their work without risks to their physical and psychological health and safety.

The ANMF considers it is vital that every possible measure be taken to eliminate the risks of sexual harassment, gendered violence and discrimination in the workplace. To achieve elimination of sexual harassment, gendered violence and discrimination there must be systemic change to workplace structures that perpetuate gender inequality and cultural attitudes that condone unacceptable behaviour. These changes must be encouraged and supported by legislative, regulatory and policy reform.



The Bill

The ANMF supports the submission made by the ACTU in relation to this Bill and wishes to express its strong support for the analysis and recommendations made therein.

The following recommendations warrant emphasis and attention;

1. *Amending the heading above s47C(4) to include the underlined words “Other conduct towards employers and workers, including conduct by third parties.”*

s47C(4) as currently drafted does not explicitly refer to third parties. The ANMF considers there is a risk that duty holders will not understand that the subsection is directed at the conduct of third parties, and that employers have an obligation to prevent unlawful third party conduct.

The inclusion of a note under s47C(4) to explain that this section includes conduct by third parties, (e.g. customers, residents, patrons, clients, service users, patients, visitors, suppliers, students and parents) would inform the intended operation of the provision and avoid unnecessary uncertainty/ambiguity.

2. *S47C (6) be amended to expand on the matters to be taken into account in determining whether a duty holder has complied with the positive duty.*

The factors to be taken into account when determining whether a duty holder has complied with the positive duty are currently limited to considerations of the duty holder’s circumstances, and do not include any considerations from an employee or worker perspective.

S47C(6) should be amended to ensure that when determining whether the duty has been met, duty holders are required to give consideration to the industry-specific drivers of sexual harassment and discrimination in the workplace (e.g. work design, workforce profile, gender balance, risk of third party harassment/gendered violence), and the severe consequences for workers of those risks not being addressed.



Failure to make the abovementioned considerations in an assessment under s47C(6) would be contrary to the central objective of the positive duty, namely, to shift the burden from individuals making complaints to employers taking proactive and preventative action to provide safe workplaces.

3. Industry specific guidance and resources be developed by the Australian Human Rights Commission in consultation with the Respect@Work Council, unions and industry on how to prevent and respond to third party harassment.

The provision of guidance materials, that are industry specific, will be crucial to the effective implementation of this legislation. Nursing is a profession that is overrepresented when it comes to instances of occupational violence and sexual harassment perpetrated by third parties (e.g. residents, patients, families/friends of patients).

The ANMF has been responsible for the production of industry-specific materials that instruct workplaces how they can best prevent and respond to occupational violence and sexual harassment perpetrated by third parties. For example, the ***'10-point plan to Prevent Gendered Violence and Aggression'*** developed by the ANMF Vic Branch has been adopted by the Victorian Government and incorporated under the Nurses and Midwives (Victorian Public Sector) (Single Interest Employers) Enterprise Agreement 2020-2024.

The ANMF should be involved in the development of guidance materials and resources to ensure they adequately address the industry-specific risks faced by our members.

4. Guidelines published by the Commission pursuant to s35A should be enforceable and taken into account when considering whether a duty holder has complied with the positive duty

Section 35A of the Bill provides the Commission with functions in relation to the positive duty. Those duties include the preparation and publishing of guidelines for complying with the positive duty, however the guidelines themselves are not enforceable.

The ANMF considers that unless these guidelines are enforceable, there will be uncertainty in relation to what constitutes compliance with the positive duty. The ANMF echoes the recommendations of the ACTU to prescribe the guidelines by regulation and ensure they are subject to regular review and update to ensure they remain relevant and responsive to current issues and circumstances.



5. An Equal Access Model of costs be inserted into the AHRC Act

The Bill does not follow Recommendation 25 of the Respect@Work Report to implement a 'no costs model'. Instead, the Bill provides for a 'cost neutrality' model pursuant to s46PSA. Under this model, the general rule is that the parties will bear their own legal costs (s46PSA(1)), unless the court considers that there are circumstances that justify making an order as to costs (s46PSA(2)).

Whilst the costs neutrality model is an improvement on the current costs model in the AHRC Act, and arguably addresses some of the shortfalls of the no-costs model, it still gives courts a very wide discretion to order costs against a party. The application of this model may sometimes result in applicants recouping their legal costs, but it may equally result in applicants being liable for the costs of the Respondent. There is therefore still a large degree of uncertainty for applicants in this model.

The ANMF supports the model put forward by the ACTU – namely, the equal access model (also known as vertical costs shifting or qualified one-way costs shifting).

Under this model, the following general rules would apply:

- Where an applicant is unsuccessful, each party will bear their own costs, unless the unreasonable behaviour of the respondent has caused the applicant to incur additional costs
- An unsuccessful applicant is only liable to pay the costs of the respondent if they made vexatious claims or their unreasonable behaviour in the course of proceedings caused the respondent to incur costs
- Where an applicant is successful and the court has found a respondent has engaged in unlawful conduct in breach of the relevant act, the respondent will be liable to pay the applicant's costs because respondents should not be excused from paying costs where they have been found by a court to have breached anti-discrimination law.

The model is consistent with the concerns raised in the Respect@Work Report about the negative impact of cost models on access to justice, especially for vulnerable members of the community.



In addition to the recommendations highlighted by the ACTU and those echoed in our correspondence, the ANMF would like to take this opportunity to comment and make recommendations regarding the issue of enforcement.

6. Inquiries made by the AHRC into compliance with the positive duty should occur where complaints have been made by unions on behalf of employees/workers at a workplace

S35B(1) of the Bill provides that the Commission may inquire into a person's compliance with the positive duty in relation to sex discrimination if the Commission reasonably suspects that the person is not complying.

The ANMF asserts that this section creates uncertainty and ambiguity in terms of when an investigation will take place. Additionally, it fails to address whether a union would be in a position to make a complaint on behalf of members that would prompt an investigation.

The ANMF recommends the section be amended to ensure that where a complaint is made by a union on behalf of employees/workers, the AHRC is obliged to inquire into a person's compliance with the positive duty. In the absence of such an amendment a note should be inserted in the section clarifying that where a complaint has been made by a union/employee representative, the Commission would have sufficient grounds to suspect non-compliance with the duty.

7. Power to seek enforcement of compliance notices should be extended to unions/employee representatives

S35J of the Bill empowers the AHRC to make an application to the Federal Courts to seek enforcement of compliance notices. The power to seek compliance with these orders does not extend to unions or employee representatives who would be directly impacted by the issue of non-compliance.

The ANMF considers this to be a crucial amendment that must be made to the Bill to ensure that workers and their representatives are empowered to create safe workplaces and prevent sexual harassment and sex-based discrimination.

In the absence of such a provision, workers are at the mercy of the resources and inclination of the AHRC to pursue compliance on their behalf. The ANMF considers this as counterproductive to the goal of create safe workplaces free from sexual harassment and discrimination.



8. *Enforcement bodies must be adequately funded to perform statutory functions*

The AHRC has been empowered to perform enforcement functions by the Bill, specifically;

- The power to inquire into suspected systemic unlawful discrimination and compliance with the positive duty;
- The power to issue compliance notices; and
- The power to make applications to the Federal Court to enforce compliance notices associated with the positive duty.

The ANMF would take this opportunity to highlight that the powers conferred on the AHRC, whilst welcome, will provide little widespread utility in the absence of adequate funding for the AHRC to undertake these investigations and pursue enforcement of compliance notices.

Compliance with the legislation will be significantly undermined without an adequately resourced enforcement body, equipped to adequately investigate and deal with breaches.

Conclusion

The ANMF supports the recommendations made by the ACTU in their submission regarding this Bill.

We also urge the Senate Committee to adopt the recommendations we have made regarding accessibility to enforcement mechanisms under the Act, specifically those that would empower our members and workers across the country to actively prevent and eliminate sexual harassment and discrimination in their workplaces.