australian nursing federation

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Inquiry into the *Fair Work Amendment Bill 2013*

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Introduction

The Australian Nursing Federation welcomes the opportunity to make a submission to the inquiry of the House Standing Committee on Education and Employment into the *Fair Work Amendment Bill 2013*.

The ANF is the national union for nurses, midwives and assistants in nursing with branches in each state and territory of Australia. The ANF is also the largest professional nursing organisation in Australia. The ANF's core business is the industrial and professional representation of its members.

The ANF represents over 225,000 registered nurses, midwives and assistants in nursing nationally. They are employed in a wide range of enterprises in urban, rural and remote locations, in the public, private and aged care sectors including nursing homes, hospitals, health services, schools, universities, the armed forces, statutory authorities, local government, and off-shore territories and industries.

The *Fair Work Act 2009* (the Act) broadly applies to all nurses and midwives except those in the public sectors of New South Wales, Queensland, South Australia, Tasmania and Western Australia. Most nurses covered by the Act work in the public sectors of Victoria, Northern Territory and Australian Capital Territory and in residential aged care, with others in general practice, Commonwealth employment, and other locations.

The ANF supports the Bill, subject to the following comments. The ANF has also seen a draft ACTU submission on the bullying provisions of the Bill and supports those comments.

Schedule 1 – Family-friendly measures

The ANF supports the proposed amendment in relation to special maternity leave (contained in Part 1 of Schedule 1 of the Bill). It is appropriate that employees needing to take special maternity leave do not have their 12 months of unpaid maternity leave reduced by reason, for example, of illness during pregnancy.

The ANF supports the proposal contained in Part 2 to extend the period of parental leave that may be taken concurrently by both parents.

The ANF supports the proposal contained in Part 3 to expand the range of employees who may request

flexible working arrangements. All are types of employees who especially need to balance work and family/caring/other obligations. We also welcome the inclusion of those experiencing family violence (and those providing care or support to others who are experiencing family violence), which reflects a recommendation made by the Australian Law Reform Commission in its report *Family Violence and Commonwealth Laws – Improving Legal Frameworks)*(ALRC Report 117, November 2011).

The ANF is disappointed however that an employee still has no right to notify a dispute to the Fair Work Commission over whether an employer has reasonable business grounds to reject employee requests for flexible working arrangements and extensions of parental leave.

Except in one circumstance, employees are unable to challenge such refusals at the Fair Work Commission (FWC) or through the courts. Subsection 44(2) of the Act makes it clear that a Court cannot make any order in relation to a contravention of these provisions, while subsection 739(2) provides that FWC cannot deal with a dispute over whether an employer had reasonable business grounds unless the parties have agreed in a contract of employment or enterprise agreement that FWC can deal with the dispute. This subsection does not provide that FWC can deal with a dispute via a dispute resolution clause in an award.

The model term for dealing with disputes under enterprise agreements contained in Schedule 6.1 of the *Fair Work Regulations*, which is frequently included in enterprise agreements, does not, or does not clearly provide, FWC with the power to deal with disputes.

In these circumstances, all award-reliant employees and many agreement-covered employees are not able to challenge a refusal in FWC.

The ANF contends that FWC should have jurisdiction in all circumstances to determine whether a refusal was based on reasonable business grounds, and should not be limited to situations where a term of an enterprise agreement or other instrument has given FWC jurisdiction. A breach of these provisions should also be a civil penalty provision like other contraventions of the NES.

There is no reason why there should be no redress. On such a fundamental issue, one that has been deemed important enough to be enacted as a National Employment Standard, it makes no sense for the enforcement of the right to be referred off as a matter for bargaining, leaving those employees not able to bargain through lack of bargaining strength or through employer refusal to bargain without a remedy. It also undermines the concept of a national standard if part of that standard is unenforceable, especially if all other provisions of that Standard are enforceable.

The exclusion is unfair and is inconsistent with one of the objects of the Act (s.3(d)), ie. 'assisting employees to balance their work and family responsibilities by providing for flexible working arrangements'. Providing a 'right to request' without a means to enforce it does little to 'assist' employees.

The ANF supports the amendments in Part 4 of Schedule 1 to the Bill that would require modern awards to contain a requirement for employers to consult employees about changes to their regular roster or ordinary hours of work and allow for representation for the purposes of that consultation. We also support the proposed requirement for enterprise agreements to include a similar term, and the proposed amendment of the model consultation clause (referred to at paragraph 61 of the Explanatory Memorandum).

The ANF supports the proposed amendment contained in Part 5 to extend no safe job leave to employees who have not met the 12-month eligibility requirement for accessing parental leave.

Schedule 2 – Modern awards objective

The ANF supports the proposal to insert an additional paragraph in the modern awards objective referring to the need to provide additional remuneration for employees working overtime, weekends, shifts, etc. Most nurses and midwives work at least some (and frequently many) of their shifts outside 'regular' business hours of 9am-5pm Monday-Friday and frequently work overtime shifts. Accordingly it is essential that they receive penalty rates for working unsociable hours. This provision would go some way to making more difficult any move to remove penalty rates.

While the presence of the proposed clause in section 134(1) is welcome, the 'need to provide additional remuneration etc' would be only one of nine factors that the FWC would be required to take into account when determining the contents of modern awards. Hence the ANF considers that the requirement for additional remuneration for employees who work overtime, weekends, shifts, etc should also be included as a minimum term and condition of employment in the National Employment Standards.

Schedule 3 – Anti-bullying measure

The ANF supports the proposal to allow a worker who has been bullied at work to apply to the Fair Work Commission for an order to stop the bullying.

The proposal is consistent with recommendation 23 of *Workplace Bullying – We just want it to stop,* the report of the recent bullying inquiry conducted by the House Standing Committee on Education and Employment, which recommended that "the Commonwealth government implement arrangements that would allow an individual right of recourse for people who are targeted by workplace bullying to seek remedies through an adjudicative process".

Bullying is a common OHS hazard faced by nurses and midwives. A survey of nearly 1000 Australian nurses in 2008 found that the most common causes of work-related injuries or diseases requiring them to take time off work were, after musculoskeletal injury or disease, stress (often caused by bullying)(19.8% of those who had taken time off work) and bullying (15.1%) (Australian Safety and Compensation Council, *Occupational Exposures of Australian Nurses*, July 2008, page 13). The same report found that 60% of nurses considered that workplace stress was a high risk workplace hazard in their workplace, a higher figure than any other hazard (page 12).

The ANF considers that an individual right of recourse is not sufficient in itself to eliminate and minimise instances of bullying however it is a useful measure as part of a multi-pronged approach. An employee experiencing bullying does not currently have many options to stop the bullying occurring. While they are covered by occupational health and safety laws, the efficacy of these laws depend upon enforcement by employers and regulators. If this does not occur (for whatever reason), and it frequently does not, the only other option may be that arising from a contractual right to good faith and mutual trust and confidence in the workplace. This however is still an emerging area of law and only feasible for those employees who are well-funded. Taking contractual action is also too slow to be effective in a bullying situation, where urgent action is often necessary. In this context, the proposed bullying provisions provide an alternative, more feasible option for employees.

The right of recourse, however, should not replace preventative action by employers (for example, risk assessment) and regulators so that bullying behaviours do not occur in the first place.

The ANF welcomes the extension of the provisions to contractors and visitors to the workplace (paragraph 118 of the Explanatory Memorandum), and its extension to situations of bullying by a *group* of individuals.

The ANF notes that the FWC needs to be appropriately resourced to enable the jurisdiction to operate effectively.

Schedule 4 – Right of entry

The ANF supports the proposed replacement section 492 which would enable union interviews and discussions with employees (members and/or non-members) to take place in meal rooms when agreement cannot otherwise be reached with the occupier of the premises.

The ANF has concerns with the *existing* section 492 which provides that a permit holder must comply with any reasonable request by the occupier of the premises to hold discussions in a particular room or area of the premises.

In the ANF's instance, we have had examples where we have been restricted to holding discussions in *public* cafeterias in hospitals (as contrasted with employee lunchrooms).

The Bill's proposal would be more in tune with one of the objects of the Act (section 3(e)) which refer to the enabling of fairness and representation at work and the recognition of the right to freedom of association and the right to be represented. It would also align better with the objectives of Part 3-4 (outlined in section 480) which refer to the right of organisations to represent their members in the workplace and hold discussions with potential members, and for the right of employees to receive, at work, information and representation from officials of organisations.

Several decisions of FWA have prevented unions from meeting employees in lunchrooms or other common areas. Employer requests to meet in other rooms/areas have been found to be reasonable. These provisions and decisions have had the effect of not allowing unions to adequately represent members and to speak to and recruit non-members.

Right of entry is about the right of unions to organise and to speak to workers (whether they request it or not) and not about the right of protection for non-union members from being spoken to: *Australian Workers' Union* v *Rio Tinto Aluminium (Bell Bay) Limited* per Commissioner Lewin [2011] FWA 3878 see paras 59-65.

The fact that non-union members may be present or do not wish to participate in discussions does not mean that discussions should not be held in a crib or meal room.

Accordingly the ANF supports the proposed new section 492.