

Submission by the Australian Nursing and Midwifery Federation

Response to the Inquiry into Australia's Human Rights Framework

June 2023



**Australian
Nursing &
Midwifery
Federation**



Annie Butler
Federal Secretary

Lori-Anne Sharp
Federal Assistant Secretary

Australian Nursing and Midwifery Federation
Level 1, 365 Queen Street, Melbourne VIC 3000
E: anmffederal@anmf.org.au
W: www.anmf.org.au



Introduction

1. 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 320,000 nurses, midwives, and personal care workers (PCWs) across the country. Approximately 89% of the ANMF's membership are women.
2. 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.
3. 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.
4. 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.
5. The ANMF welcomes the opportunity to contribute to the Inquiry into Australia's National Human Rights Framework.
6. This submission has been provided with a view to;
 - a. Express support for the re-establishment of the Human Rights Framework and Action Plan
 - b. Express support for the development of a Human Rights Act
 - c. Provide specific feedback and support for a review of Australia's anti-discrimination laws with an ultimate goal of harmonisation
 - d. Provide specific feedback on the importance of incorporating human rights protections for Australia's skilled migration system.



Australia's Human Rights Framework 2010

7. In April 2010, the Rudd Government introduced Australia's Human Rights Framework. The Framework was developed in response to the 2009 report of the National Human Rights Consultation Committee that recommended that Government develop a framework for ensuring human rights were better integrated into public sector policy, legislative development, decision making and service delivery.¹
8. The Framework was accompanied by a National Action Plan that set specific objectives for the promotion and protection of human rights of the general community as well as specific objectives to enhance human rights protections for specific groups such as women, carers, First Nation peoples, those with disability, older Australians, children, the homeless and refugees, asylum seekers, migrants and people from culturally and linguistically diverse backgrounds.²
9. In its 2010 election policy, the Coalition parties pledged to discontinue the Australian Human Rights Framework as a cost-cutting measure.³ After winning the 2013 election, the Coalition government subsequently abandoned the Framework and the National Action Plan.
10. The abandonment of the 2010 Framework has not been addressed by subsequent governments. Consequently, Australia has suffered, for over a decade, from an absence of;
 - a. Adequate processes for national priority setting on human rights issues;
 - b. Systems and processes to consider reforms required to better protect human rights such as through the consolidation of discrimination laws and an audit of existing laws;
 - c. Accountability mechanisms to track progress on the protection of human rights for example, National Action plans with reporting requirements;
 - d. Education campaigns to build human rights awareness across communities and within the public service; and
 - e. Systems to allow for public engagement from affected groups, and the community more broadly, on human rights issues.

¹ Frank Brennan et al, Attorney General's Department, National Human Rights Consultation Committee Report (September 2009) Recommendation xiii.

² Attorney General's Department, Australia's National Human Rights Action Plan, 2012.

³ Coalition Election Policy (August 2010)



11. The absence of these processes, systems and campaigns has led to regression in Australia's implementation of, and adherence to, human rights standards at a federal level.
12. The ANMF supports the re-establishment of a Human Rights Framework, alongside a National Action Plan, in accordance with the proposals put forward by the Australian Human Rights Commission. Aspects of that proposed framework warrant specific emphasis when viewed in the context of our membership.

A Human Rights Act

13. Australia continues to be the only liberal democracy in the world without a Human Rights Act or a Constitutional Charter of Rights. Human Rights Acts have been passed in Victoria, the Australian Capital Territory and Queensland, but no such equivalent exists at a federal level.
14. While federal scrutiny measures, such as statements of compatibility, enable some consideration of human rights during the law-making process, no measures exist to hold government accountable in terms of actively considering human rights in their policy or decision making. Additionally, decision-makers in the public service are not required to consider human rights when developing policy or making determinations that will impact individuals.
15. The consequences of a failure to make human-rights based decisions at a federal level has been exposed in a number of settings over the past few years. Schemes such as Robodebt, implemented by federal Ministers, demonstrated the far-reaching, and in some cases, devastating consequences of developing policy without taking a human-rights based approach.⁴
16. The ANMF considers a human-rights based approach to developing legislation, regulations and policy as essential to reforming key areas our members work in, such as aged care.
17. The national system governing Aged Care was established with the *Aged Care Act* (1997). Since that time, significant transformation has occurred in terms of the types of aged care providers involved, policy priorities, and community expectations of the sector.

⁴ <https://www.abc.net.au/news/2023-03-11/robodebt-scheme-government-royal-commission-fraud/102074840>



18. The final report of the Royal Commission into Aged Care Quality and Safety⁵ (*Royal Commission*), noted that efforts to keep up with changes in community expectations and models of care in aged care, including the introduction of a Charter of Aged Care Rights and the establishment of the Aged Care Quality and Safety Commission, had ultimately not gone far enough to ensure the delivery of quality, person-centred care. The Royal Commission commented that despite adjustments to the legislative and regulatory framework, the broad architecture of the system remains as it was in 1997.
19. The Royal Commission consequently recommended replacement of the Aged Care Act 1997 with a new human rights-based Act, as well as numerous other amendments to the existing regulatory framework to place a human-rights, person-centred approach at the centre of decision making when caring for older Australians. These recommendations go further than existing measures, such as the Charter of Aged Care Rights, by protecting and advancing the rights of older Australians through an aged care system which recognises a universal right to high quality, safe and timely care and support.⁶
20. Whilst this piece of legislation is yet to be produced, the recommendations would require the development of legislation and regulations that actively consider and promote the many international instruments that Australia is a party to. These instruments recognise a universal right to high quality, safe and timely care and support as well as core human rights described in the International Covenant on Economic, Social and Cultural Rights including the right 'of everyone to enjoyment of the highest attainable standard of physical and mental health'.⁷
21. The ANMF has been at the centre of advocacy efforts around the aged care crisis currently facing Australians. The ANMF has consistently pushed for a person-centred approach to aged care that involves:
 - a. mandated care minutes,
 - b. a requirement for registered nurses on-site 24/7 at residential aged care facilities

⁵ https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-1_0.pdf

⁶ Ibid at p205: Recommendation 1.3.

⁷ ICESCR



- c. An investment in the wages, conditions and professional structures attached to aged care workforce to retain and attract quality carers to the industry; and
 - d. Greater transparency around the allocation of aged care funding to ensure better care outcomes
- 22. The ANMF supports an aged care framework that is informed by a human-rights based approach to legislation, policy and regulations. The introduction of a Human Rights Act would provide a necessary and important overarching focus to the development of new Aged Care legislation, policy and regulations.
- 23. The introduction of a Human Rights Act would mean that recommendations of the Royal Commission to create a new aged care legislation and regulations in accordance with a human-rights based approach would be required as opposed to being limited to a discretionary course of action for Government to adopt. Many of those recommendations centre on investing in our aged care system and the workers who deliver it.
- 24. Furthermore, a Human Rights Act as proposed by the AHRC would also require consultation with the people who would be directly or disproportionately affected by policies or laws, in this case, older Australians, aged care workers, and carers. The ANMF considers an approach to aged care legislation that incorporates broad and meaningful consultation with impacted parties, such as the work force delivering care, is key to addressing the many challenges that exist in ensuring the provision of quality, sustainable care to older Australians.
- 25. If a Human Rights Act were to be enacted in a form consistent with that proposed by the AHRC, this would also ensure that individuals who consider that their human rights have been breached in the context of aged care (or elsewhere) would have the option of making a complaint to the Australian Human Rights Commission and potentially the federal court. This would build in a significant degree of accountability not previously present in systems such as aged care.
- 26. The ANMF therefore considers the introduction of a Human Rights Act as essential to ensuring any reform in the aged care space is consistent with a human-rights based approach and fulfils the recommendations of the Royal Commission.



Review and Harmonisation of Australia's anti-discrimination laws

27. A pillar of the 2010 Human Rights Framework was a commitment to review and harmonise Australia's anti-discrimination laws. Harmonisation was considered necessary to remove unnecessary regulatory overlap, address inconsistencies across laws, strengthen mechanisms that protect human rights, whilst making the system more user-friendly.⁸
28. Since the abandonment of the Human Rights Framework, no effort has been made by governments to engage in a harmonisation process of anti-discrimination laws. This has created a set of anti-discrimination laws that have not kept pace with international standards and have led to gaps in the protection of individuals and groups in Australian workplaces and Australian society more broadly. Federal anti-discrimination law has remained complex, inconsistent and full of duplication with state anti-discrimination legislation and federal industrial law.
29. The recent changes to the Sex Discrimination Act⁹, following recommendations from the Respect at Work National Inquiry Report¹⁰, represent the first wholesale review of a piece of anti-discrimination legislation couched in a human-rights based approach. The resulting amendments have led to significant enhancements in protections for women in the workplace, most notably through the introduction of a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.
30. The introduction of a positive duty under the Sex Discrimination Act represents a significant and qualitative shift away from a complaint-based system where the onus has been on an individual to hold their employer to account in failing to provide a safe workplace, to one where an organisation must proactively prevent its employees, workers, agents, and the organisation itself, from engaging in discriminatory/harassing conduct.
31. Importantly for ANMF members, an organisation is now also responsible for protecting its employees and workers from being subject to discriminatory/harassing conduct by third parties, such as patients, residents and their families.

⁸ 2010 HR Framework at p9.g

⁹ Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022.

¹⁰ <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>



32. The ANMF considers a harmonisation process as capable of delivering similar reform in the context of other types of discrimination. The introduction of a positive duty and consequential shift away from the onus being on an individual in discrimination matters, would be a significant step forward in bringing Australian anti-discrimination laws in line with international law and human rights.
33. There are a number of other issues that could be addressed during a harmonisation process to ensure our anti-discrimination laws reflect our international human rights obligations, expand the protections offered, and increase access to remedies. These could include:
- a. Amendments to Costs Provisions - A significant barrier to accessing remedies in the context of discrimination and sexual harassment to date has been the nature in which costs are awarded in these matters. Applicants face the risk of having to pay the legal costs of the perpetrator or the perpetrator's employer should they lose. Equally, there is risk that the applicant may not be able to recover their own legal costs if they win to ensure that they are not left out of pocket. A harmonisation process could see a new approach to costs introduced that could cut across all types of discrimination matters. The ANMF is a strong supporter of the Equal Access costs model for all discrimination matters. This model would allow people who experience discrimination and sexual harassment to recover their legal costs if successful. If unsuccessful, they would not be required to pay the other side's costs, with some limited exceptions such as for vexatious litigation. This model is similar to costs protections already available in whistleblowing law.
 - b. Expansion of protected attributes - The harmonisation process could enable a review and subsequent inclusion of other protected attributes to address gaps in discrimination law that may otherwise address gender equity considerations. These could include reproductive health concerns/conditions and domestic violence.
 - c. Recognition of the impacts around intersectionality – the current anti-discrimination law framework fails to recognise or address the concept of intersectionality and how a combination of different protected attributes can expose people to greater risk of discrimination and marginalisation. Harmonisation of anti-discrimination laws provides an opportunity to ensure our anti-discrimination laws are structured in such a way, so as to ensure an intersectional claim can be brought without complicated legal proceedings that require differing burdens of proof and contrasting tests for different attributes.



Consideration of protections for migrant workers, refugees and asylum seekers

Migrant workers

34. The Commonwealth Government is currently undertaking significant review and reform of Australia's migration programⁱ. As with, the comments made above with respect to reform of the aged care sector, reform of Australia's migration program also requires recognition of human rights as core to all aspects of legislative reform, policy and practice. The adoption of the Human Rights Framework will assist in embedding human rights in this reform process.
35. A human rights framework will encourage and ensure consideration of the rights of migrant workers as they elect to leave their country of origin, and come to Australia for work, education and living in the community.
36. The ANMF highlights the following with respect to a human rights approach to migration reform. Australia must consider its role as a country seeking to attract skilled migrants, in particular, nurses and midwives. The impact on source countries, particularly low and middle income countries, where the loss of trained health professionals from local health systems can have significant detrimental effect on quality and access to health services, must be given primary consideration in migration reform. Australia must consider itself as part of a global human rights framework and reflect this in its domestic framework.
37. The ANMF submits, migrant workers must be given the same workplace rights and protections as domestic workers. This includes receiving industry standard wages and conditions and guarantees that wages and conditions will not be less than those received by local workers. Policies and visa conditions that restrict labour mobility for migrant workers are fundamentally contradictory to the right to freedom of movement and can perpetuate the risk of exploitation. It is essential that migrant workers be protected from exploitation and be able to pursue complaints in relation to any exploitation, or other workplace right without threat of visa cancellation. The ability to pursue legal remedies on the same footing as permanent residents is an essential feature of ensuring systemic exploitation, such as wage theft, against migrant workers is eradicated.

Universal access to health care

38. Access to health care must be extended to all migrants, refugees and asylum seekers, on an equal footing. For instance, international students and some refugees and asylum seekers do not have access to Medicare benefits, making health care unaffordableⁱⁱ.



In cases of detained asylum seekers, health care is simply inaccessible, and is sometimes unreasonably denied. Health care must be universally available, regardless of visa status.ⁱⁱⁱ Cultural and language barriers also limit access to health care services.

39. A Human Rights Act and Charter of Human Rights will underpin a human rights based approach to ensuring migrant workers, refugees and asylum seekers have access to appropriate justice, health care, education and workplace rights in Australia.

Conclusion

40. The ANMF offers strong support for the re-establishment of the Human Rights Framework and Action Plan. The link between a human rights-based approach to health care, aged care, workers protections and migration, and attaining the best possible health outcomes for all members of Australia's population, is fundamental and undeniable. Nurses, midwives and carers, who are engaged in delivering health, care and aged care will be supported in that work by an underpinning human rights framework. In addition, their rights as workers will also be strengthened.

41. The ANMF supports the following recommendations:

RECOMMENDATION 1

Prioritise the re-establishment of the Human Rights Framework and Action Plan

RECOMMENDATION 2

Develop a Human Rights act consistent with AHRC submissions

RECOMMENDATION 3

As part of the Human Rights Framework and Action Plan review Australia's anti-discrimination laws with a view to harmonisation.

RECOMMENDATION 4

Ensure the Human Rights Framework and Action plan considers the experiences of migrant workers and offers suitable protections.

ⁱ Commonwealth of Australia 2023, Review of the Migration System 2023

ⁱⁱ [Healthcare issues facing migrants and refugees in Australia | SBS News](#)

ⁱⁱⁱ [Healthcare issues facing migrants and refugees in Australia | SBS News](#)