



Submission to Education, Employment and Small Business Committee

Public Service and Other Legislation
Amendment Bill 2020

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submission

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Introduction

The Queensland Nurses and Midwives' Union (QNMU) thanks the Education, Employment and Small Business Committee (the Committee) for the opportunity to make a submission to the *Public Service and Other Legislation Amendment Bill 2020* (the Bill).

Nursing and midwifery is the largest occupational group in Queensland Health (QH) and one of the largest across the Queensland government. The QNMU is the principal health union in Queensland covering all classifications of workers that make up the nursing and midwifery workforce including registered nurses (RN), midwives (RM), nurse practitioners (NP) enrolled nurses (EN) and assistants in nursing (AIN) who are employed in the public, private and not-for-profit health sectors including aged care.

Our more than 63,000 members work across a variety of settings from single person operations to large health and non-health institutions, and in a full range of classifications from entry level trainees to senior management. The vast majority of nurses in Queensland are members of the QNMU.

This year, 2020 will be dedicated to celebrating the *International year of the Nurse and the Midwife*, in celebration of the 200th year anniversary of the birth of the founder of contemporary nursing, Florence Nightingale. The World Health Organisation (WHO) nominated nurses and midwives for their invaluable contribution to health care and to highlight the need for a strengthened nursing and midwifery workforce to achieve sustainable development goals (SDG) and universal health coverage. The QNMU is proud to embrace this opportunity to invest in the nursing and midwifery professions, particularly the investment into minimum safe staffing ratios and skill mix across all health sectors.

The QNMU supports the stage one public sector management reforms by amending the *Public Service Act 2008* (PS Act) and the *Industrial Relations Act 2016* (IR Act). We acknowledge that this is the first stage of implementing the important work undertaken in 2019-2020 in reviewing the Queensland public sector employment laws and we look forward to being part of further consultation on the substance of legislative proposals in the future.

The QNMU will provide general comment with a focus on a number of key areas such as secure employment, work performance, suspensions, workplace investigations, independent medical examinations and the Special Commissioner.

Recommendation

The QNMU recommends the parliament pass the Bill with these amendments:

1. Remove requirement when reviewing conversion of fixed term or casual employment to have regard to genuine operational requirements (s149A(3)(c)).
2. Suspension provision in the Act should require:
 - a) reasons for the action;
 - b) the particulars of the alleged disciplinary matter;
 - c) suspension is an action of last resort reserved for the most egregious allegations of misconduct;
 - d) appeal rights for all decisions to suspend regardless of whether the employee is remunerated or not;
 - e) prohibition on the employer from directing employees to take annual leave in order to circumvent suspension with remuneration;
 - f) a finite timeframe of one month for the suspension period with a review process prior to extension of the suspension.
3. Amend definition of 'normal remuneration' to include reference to previous rostering patterns to determine the correct payment.

General comment

The QNMU has previously provided feedback to the Queensland Government on public sector management reform including the reviews into the *Independent Review of Queensland Public Employment Laws* and the *Public Service Act Review Terms of Reference*. Some of the issues we raise in this submission have been discussed in these previous submissions.

One concern that the QNMU raised in our previous submissions, that we again want to highlight is that we believe that the PS Act is framed around the institution rather than the employees. We again stipulate that this is still the case even with this Bill. However, we note that this Bill is stage one in the public sector management reforms and we will continue to advocate that this issue be addressed in subsequent reforms.

We also wish to acknowledge the important work already undertaken by the government in abolishing the 'prescribed employer' status of some Hospital and Health Services and implementing that all non-executive health service employees be employed by the Department of Health as system manager of Queensland Health.

Secure employment

Secure employment is a key objective of the QNMU. Proposed amendments to the PS Act contained in the Bill provide for fixed term (s 148) and casual (148A) employment where “tenure is not viable or appropriate”.

The QNMU understands from statements in the explanatory notes that these provisions are intended to provide in clear language that permanent employment is the default form of public service employment.

The use of permanent employment as the default form of employment is the outcome sought by the QNMU. However, we have the following concerns regarding the effectiveness of the intended ‘clear language’ contained in the Bill:

1. Preference for permanent employment is not expressly stated with the focus of provisions at s 148 and 148A being the circumstances that make permanent employment not viable or appropriate. It is noted the *Nurses and Midwives (Queensland Health and Department of Education) Certified Agreement (EB10) 2018* more clearly articulates permanent employment as the default form of employment as follows:
 41. Permanent Employment
 - 41.1 The employer is committed to maximising permanent employment.
 - 41.2 While permanent employment is the preferred form of engagement, a temporary employee may be engaged to meet temporary circumstances such as:
 - a) long term leave including personal, long service, parental and other leave;
 - b) unplanned leave where a permanent reliever cannot be justified;
 - c) fixed term projects;
 - d) to address seasonal workload changes;
 - e) in the event of organisational change;
 - f) employees undertaking an accredited fixed term course of study;
 - g) fixed term program funding; and
 - h) without limiting access to higher duties, backfilling where a legitimate recruitment process is occurring.
2. The status of permanent employment as the ‘default’ form of employment is compromised by right of veto effectively given to ‘genuine operational requirements’ (s149A(3)(c)).

It is unclear to the QNMU what are the ‘genuine operational requirements’ not captured by the circumstances making tenure not viable or appropriate specified at s 148(3). The lived experience of many QNMU members is that ‘genuine operational requirements’ have solely been financial.

It is the experience of the QNMU that 'genuine operational requirements' is used as an automatic exclusion from the requirement to convert to permanent employment solely on the basis of budget without regard for safe patient care delivered in accordance with the Business Planning Framework (BPF).

3. The conversion process lacks rigor in its review mechanism by:

- providing no review of a decision at 12 months to not convert a fixed term or temporary employees; and
- providing that where a decision is not made, a decision to refuse conversion is deemed to have occurred. This deprives an employee of genuine consideration being given to the conversion and allows for decisions to be without scrutiny in that where a decision is deemed to have been made there is no requirement for reasons for the decision to be provided.

Work performance

We believe that performance improvement must be independent of discipline with more emphasis on discussion with employees as part of properly articulating concerns about behaviour and expectations of employee conduct.

In our previous submission to the 'Independent Review of Queensland Public Employment Laws' in 2019 we asked that:

The employer should provide:

- clear instruction that the performance improvement plan is independent and excluded from use as a disciplinary tool, outcome or measure arising from matters raised in the disciplinary process;
- middle management with adequate training to understand the difference between disciplinary processes and performance improvement processes, including the application of the relevant process in the different circumstances;
- more emphasis on discussions with the employee.

We acknowledge the work that has been undertaken in addressing these concerns in this Bill. We see this in the introduction of a new requirement for the positive performance management principles to be applied before disciplinary action is taken for a performance matter.

Suspensions

The QNMU recognises suspension provisions previously contained at ss 137 and 189 of the PS Act have been joined to reduce complexity regarding the application of each of the provisions. However, concerns still exist regarding the open ended nature of suspensions. The QNMU has become increasingly concerned suspensions under the current provisions are open ended and can drag on for many months. Invariably the letter of suspension will include a general statement on the end date of the suspension such as 'the suspension will remain in place until further inquiries can be made into the allegations'. While the letter of suspension will advise there will be regular reviews, the employee is not informed when the reviews are occurring nor do they have input into the review of suspension.

The QNMU regularly assists members who are placed on suspension for long periods of time and who receive no contact from the employer. In a recent case the member was placed on suspension under s. 189 citing serious concerns about performance and conduct only to be told 11 months later the employer was still deciding whether to progress a disciplinary matter. This abuse of process could be remedied by a requirement in the Act that an employee can only be placed on suspension for a maximum period for example three months. If a longer period is required, then a review is needed allowing the employee to make submissions and given reasons for an extension of the suspension period.

Further, the QNMU believes the suspension provision in the Act should require:

- reasons for the action;
- the particulars of the alleged disciplinary matter;
- suspension is an action of last resort reserved for the most egregious allegations of misconduct;
- appeal rights for all decisions to suspend regardless of whether the employee is remunerated or not. Whilst an employee suspended with remuneration may not be affected financially, there are many other repercussions e.g. personal distress causing health problems, loss of reputation and loss of career progression which seriously disadvantage the employee;
- prohibition on the employer from directing employees to take annual leave in order to circumvent suspension with remuneration;
- a finite timeframe for the suspension period.

The QNMU also notes the increased obligations on the chief executive now contained in the proposed s 137 to find suitable alternative employment including a temporary transfer prior to imposing a suspension. The QNMU notes suitable duties must not only be located in a geographical area the employee can travel to with no more difficulty than their substantive position but also be within an employee's scope of practice and experience so that they may practice safely.

The QNMU notes the proposed amendments continue to refer to 'normal remuneration' e.g. ss 137, 190, 191. The Act defines 'normal remuneration' as all of the remuneration and other entitlements to which the employee is or would be entitled, as prescribed under a directive. This is a complicated and often imprecise exercise for nurses and midwives who work according to a 24/7 continuous shift pattern. 'Normal remuneration' must look at previous rostering patterns to determine the correct payment.

Workplace investigations and independent medical examinations

The QNMU notes the change to the PS Act proposed in the Bill do not extend to the areas of workplace investigations and independent medical examinations. The QNMU seeks future amendments to the PS Act in these areas.

Workplace Investigations

The QNMU is concerned regarding the increased use of external investigators. The QNMU believe the PS Act should provide provisions:

- aimed at minimising any inherent conflict of interest around payment by the employer;
- requiring external reports to be objective and factual rather than reaching findings in relation to allegations prior to the allegations being provided to an employee;
- requiring the employer to consider whether there are existing investigations occurring concurrently and any findings from other investigations which may be materially relevant to the outcome of a matter;
- requiring the employer to consider whether the gravity of the matter being investigated is such that the investigation would not be procedurally fair or free from inherent bias if conducted as an internal investigation.
- an automatic right of representation by a union official.

Independent Medical Examinations (IME)

The QNMU is concerned by the use of IMEs and seeks provisions that:

- clarify the circumstances that do not warrant an IME e.g. temporary injury or illness;
- require a referral for an IME to relate to matters directly affecting the employee's absence from the workplace or performance in the workplace and not any other general injuries or illnesses;
- provide referrals as a last resort and only used in extenuating circumstances where 'reasonable belief' is able to be established on facts the injury or illness are affecting performance or absence in the workplace;

- require detailed reasons for making the referral, need to be provided, including setting out the reasonable belief for referral and actual evidence relied on to form the 'reasonable belief' of matters relating to the workplace;
- provide an appeal or review right for decisions to refer to an IME.

Further when directed to attend an IME an employee should have the following rights:

- right to privacy - only medical information relating to an injury or illness that directly impacts on the workplace should be requested. An employee should not be compelled to sign a 'general medical authority' requested by the employer which discloses the employee's full medical history;
- right to confidentiality - only medical information relating to an injury or illness that directly impacts on the immediate workplace should be shared;
- fair and independent medical examination which is based on an employee's actual duties and / or tasks carried out on a daily basis, rather than a general role description;
- disclosure of all documents provided to the Independent Medical Examiner with the referral, including any employment documents, other medical documents and the referral letter from the employer to the Independent Medical Examiner.

Special Commissioner

The QNMU supports the position and appointment of the Special Commissioner. However, we ask the Committee to reconsider the use of the word 'Special'. Given this position is to provide advice to the Minister about areas of public administration relating to the main purposes of the PS Act, which may include advice on gender pay equity and promoting a diverse workforce, we believe the title of 'Special' is unnecessary as these functions should not be viewed as 'special' but as common practice. Additionally, the term of appointment for the Commissioner should not be capped as is currently proposed in the Bill but be made permanent.