



Submission to the Finance and Administration Committee

Industrial Relations Bill 2016

Introduction

The Queensland Nurses' Union (QNU) thanks the Industrial Relations Legislation Reform Reference Group for the opportunity to make a submission to the Review of Industrial Relations Laws and Tribunals in Queensland.

Nursing and midwifery is the largest occupational group in Queensland Health (QH) and one of the largest across the Queensland government. The QNU is the principal health union in Queensland covering all categories of workers that make up the nursing workforce including registered nurses (RN), registered midwives, 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 54,000 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 QNU.

The Industrial Relations Review

At the outset we acknowledge the considerable effort of Jim McGowan and the Industrial Relations Legislation Reform Reference Group (the reference group), the researchers who developed the initial discussion papers and the departmental staff who informed and drafted this essential piece of legislation. We appreciate their consultative approach with stakeholders and expertise in carrying out this complex task.

The QNU made an extensive submission to the Review of the Industrial Relations Laws and Tribunals in Queensland. This review was an opportunity to consider the composition and responsibilities of a public sector workforce operating in a global economy. Technology, climate change and international trading will have significant effects on all sectors. They will create great opportunities for this state and its public sector workforce.

The government has a unique and privileged role as both legislator and employer. No other employer has such power. The doctrine of the separation of powers accepts that the legislative, executive and judicial powers of government should operate separately and within defined areas of responsibility.

This is a fundamental function of government under the Westminster system and one that is central to the role of government as employer. Government is undertaking its executive function as employer. This important distinction should be well understood to mitigate the

risks and potential conflict of interest inherent in the dual role of government as both employer and legislator, particularly in the Public Service Commission (PSC) which has key responsibilities for workforce policy, strategy, leadership and organisational performance across the Queensland public service. Given this may present a potential conflict of interest, there is a need for absolute clarity round the role of the PSC in relation to employment matters e.g. appeal rights.

We hope the new industrial regime that this legislation foresees will produce a committed, vibrant public service, one dedicated to duty and respected by its employer and the community it serves. To that end, we welcome a co-operative relationship between the industrial relations parties.

Recommendations

The QNU recommends the following changes to the Bill.¹

Flexible working arrangements

S 27 Request for flexible working arrangements

(1) amend to include a new sub-section

An employee may ask the employee's employer for a change in the way the employee works, including –

(a) the employee's ordinary hours of work; and

(b) the employee's pattern of work;

~~(b)~~ (c) the place where the employee works; and

~~(c)~~ (d) a change to the way the employee works, for example, the use of different equipment as a result of a disability, illness or injury.

For example: An employee returning to work after parental leave may need to work on specific days or shifts to cater for childcare.

In our view, the QES should give employees the right to request flexible work arrangements including working part-time and access to flexible rostering for shiftworkers, particularly when there is a need to arrange suitable childcare.

Annual leave

S 31 Entitlement

(3) delete

~~However, if an employee is entitled to additional annual leave as compensation for working on a particular public holiday, annual leave is inclusive of the particular public holiday.~~

This could be confusing given its inclusion in relevant awards. There is no such provision in the NES which state that annual leave is exclusive of public holidays – no exceptions.

(4) amend to read

Annual leave accrues from year to year. accumulates unless an applicable industrial instrument provides otherwise.

¹ Inclusions **in bold**, deletions in ~~strikethrough~~

The QNU has consistently argued that an industrial instrument should not be able to displace a superior condition in the QES.

(6) (b) amend to read

works a roster that ~~includes each of the shifts~~ **is not only for day shift Monday – Friday.**

The definition of *shift worker* used here actually applies to *continuous shift workers*. We suggest the above amendments or separate definitions of *shift worker* and *continuous shift worker* so the distinction is more apparent.

S 74 Application to work on a part-time or flexible basis

In our view, the QES should give employees returning from parental leave the right to request flexible work arrangements including working part-time and access to flexible rostering for shiftworkers.

(1) amend to read

An employee on parental leave may apply to the employer to return to work on a part-time ~~basis~~ **or flexible basis.**

S 75 Application for extension ~~or~~ part-time or flexible work arrangements work

(1) amend to read

(c) state the application is an application for extension of parental leave under section 73 or an application to return to work on a part-time **or flexible** basis under section 74, as appropriate

(d) state the dates the extension or return to work on a part-time **or flexible** basis being applied for is to start and end;

(f) for an application for extension of long parental leave or return to work on a part-time **or flexible** basis – be accompanied by a statutory declaration by the employee stating –

(ii) for an application to return to work on a part-time **or flexible** basis – that the employee is seeking to work on a part-time **or flexible** basis so the employee can continue to be responsible for the care of the child when not at work.

S 76 Employer's decision on application for extension, ~~or~~ part-time or flexible work arrangements

Amend title of section as above.

S 88 Return to work after parental leave etc

(2) amend to read

The employee is entitled to be employed **in flexible arrangements** in-

Include new sub-section

(6) An employer must provide shift work employees with flexible rostering practices

Public Holidays

S 117 Payment for public holiday

The QES have been premised on their being as beneficial as the NES. Section 117(1) needs to be very clear about the application of payment for public holidays and days worked. This has been an ongoing source of contention amongst our membership.

Amend to include -

In this section, "day" is from a midnight until the following midnight and includes part of a day.

This section does not apply to a casual employee.

(1) amend to read

Subsection (2) applies if –

(a) under this part, an employee is absent from employment on a day, ~~or part of a day,~~ that is a public holiday; however

(b) had the day not been a public holiday, and had the employee worked on the day, such work would not be overtime for which the employee was entitled to be paid at a rate of time-and-half or greater. ~~the employee would ordinarily have been required to work on the day or the part of the day.~~

(2) The employer must pay the employee at the employee's base rate of pay for the employee's **average** ordinary hours of work on ~~the days~~ **worked in the previous 12 months** ~~or the part of the day.~~

S 147 Commission's power to make or vary modern awards

We recommend the Queensland Industrial Relations Commission (QIRC) does not exercise this power on its own initiative but rather the commission should only be able to make or vary awards on application by the parties.

Delete s 147 (2)(a)

Delete s 147 (2)(c)

(1) The commission may do either of the following to provide for fair and just employment conditions—

(a) make a modern award;

(b) make an order varying a modern award.

(2) The commission may exercise a power under this section—

~~(a) on its own initiative; or~~

(b) on the application of any of the following persons—

(i) the Minister;

(ii) an organisation;

(iii) an employer; **or**

(iv) an employee; ~~or~~

~~(c) on a review of a modern award under part 5.~~

S 156 Commission's power to review modern awards

Delete 156(1)(a)

Again, we believe the commission should only be able to make or vary awards on application by the parties.

(1) The commission may review a modern award –

~~(a) on its own initiative; or~~

(b) on the application of –

(i) a person to whom the award applies; or

(ii) an employee organisation that represents a person mentioned in subparagraph (i).

S 295 Discrimination

Amend to read -

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's sex, relationship status, pregnancy, parental status, breastfeeding, age, race, impairment, religious belief or religious activity, political belief or activity, trade union activity, lawful sexual activity, gender identity, sexuality, family responsibilities, **national extraction or social origin**, or association with, or in relation to, a person identified on the basis of any of these attributes.

Including these factors will make this section consistent with s 351 of the *Fair Work Act 2009*.

S 348 Right of entry

Delete 348 (5).

~~(5) If the authorised officer does not comply with subsection (2), the officer may be treated as a trespasser.~~

This is a common law matter and unnecessary in this legislation. Historically it has not been in the state legislation and is not included in the *Fair Work Act 2009*.

S 349 Definitions for subdivision

Amend definition

time and wages record means –

~~time and wages record~~ **any record or document in relation to the suspected contravention including those** required to be kept under section 339 or 340.

All document related to a suspected contravention should be available to inspection.

S 350 Right to inspect particular records

Delete s 350 (5)

~~(5) If the employer keeps particulars other than those mentioned in section 339 in an applicable record, the employer need not make the other particulars available for inspection under subsection (2).~~

Insert s 482 of the *Fair Work Act 2009* (below) in which the employer is required to make available all documentation relevant to the suspected breach.

- (1) While on the premises, the permit holder may do the following:
- (a) inspect any work, process or object relevant to the suspected contravention;
 - (b) interview any person about the suspected contravention:
 - (i) who agrees to be interviewed; and
 - (ii) whose industrial interests the permit holder's organisation is entitled to represent;
 - (c) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, any record or document (other than a non-member record or document) that is directly relevant to the suspected contravention and that:
 - (i) is kept on the premises; or
 - (ii) is accessible from a computer that is kept on the premises.

S 351 Written direction that records not be available for inspection

(1) amend as per s 483AA of the *Fair Work Act 2009* below -

A member employee, or a person eligible to be a member employee, may give an employer a written direction that a time and wages record for the employee not be available for inspection or electronic access by—

- (a) an authorised officer; or
- (b) a particular authorised officer.

(2) A person must not threaten or intimidate another person to persuade, or attempt to persuade, the person to give, or refuse to give, a written direction under subsection (1).

Section 483AA of the *Fair Work Act 2009* (below) enables a permit holder to apply for access to non-member records. We recommend a similar provision be included in the bill.

S 483AA Fair Work Act 2009

Application to FWA for access to non-member records

- (1) The permit holder may apply to FWA for an order allowing the permit holder to do either or both of the following:
 - (a) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, specified non-member records or documents (or parts of such records or documents) under paragraph 482(1)(c);
 - (b) require an affected employer to produce, or provide access to, specified non-member records or documents (or parts of such records or documents) under subsection 483(1).
- (2) FWA may make the order if it is satisfied that the order is necessary to investigate the suspected contravention. Before doing so, FWA must have regard to any conditions imposed on the permit holder's entry permit.
- (3) If FWA makes the order, this Subdivision has effect accordingly.
- (4) An application for an order under this section:
 - (a) must be in accordance with the regulations; and
 - (b) must set out the reason for the application.

S 352 Discussing matters with employer or employee

Amend s 352 (1) to be clear that it applies following entry while 352 (2) may occur at other times.

- (1) **After entering a workplace under s 13, an A** authorised officer may discuss matters under this Act with the following persons during working or non-working time—
 - (a) an employer;
 - (b) a member employee, or a person eligible to become a member employee.
- (2) The officer may discuss any other matter with a member employee, or an employee who is eligible to become a member of the officer's organisation, during non-working time.
- (3) A person must not obstruct the officer exercising a power under this section.

S Recovery of health employment overpayments

Delete all

S 949 Recovery of health employment transition loans

Delete all

S 950 Recovery of health employment overpayments on ceasing employment

Delete all

S 951 When employee ceases to be a health employee

Delete all

S 952 Review of part

Delete all

In 2012 when the previous LNP government introduced the *Penalties and Sentences and Other Legislation Amendment Bill 2012* to amend the *Industrial Relations Act 1999*² that enabled Queensland Health to recover overpayments and transition loans from its workforce as a result of the payroll system implementation failure, the QNU's submission to the Legal Affairs and Community Safety Committee's inquiry (QNU, 2012) strongly opposed these changes.

We continue to oppose a set of inferior legislative provisions for one part of the public sector workforce.

We have included some sections of our original submission to inform this Committee why we hold these concerns and seek deletion of all sections related to recovery of overpayments of health employees.

We state our extreme concern and disappointment with both the new provisions to the Bill and the manner in which this government introduced them into the Parliament. We acknowledge that this government did not cause the payroll

² Section 396A -- Recovery of Health Employment Overpayments
Section 396B – Recovery of Health employment transition loans

failure. Nor did the QNU. However, the people of Queensland elected the Liberal National Party (LNP) on a platform of change and stability, and to that end, the LNP must accept its responsibility in government for ensuring that Queensland Health pays its workers on time and in full.

For the past two years, the QNU has expended significant resources working co-operatively with Queensland Health to rectify the payroll system failure. Through strong and determined leadership the QNU has coped with the intense distress Queensland Health's incompetence has caused our members while resisting calls for more extreme action. We have withstood these pressures in a spirit of collaboration with Queensland Health because we share common ground in seeking to resolve this crisis. Yet at the first opportunity, and without consultation or notice, the Attorney-General and Minister for Justice, Hon Jarrod Bleijie, introduced a Bill to the Parliament to change an administrative process through legislation.

These actions set a dangerous precedent for Queenslanders. The payroll system failure occurred through administrative incompetence and the introduction of ineffectual technology by the executive arm of government. The mechanisms for addressing this failure lie with the executive and the consultative processes enabled by industrial awards and agreements. They do not and should not lie with the legislature.

This government's use of legislation to fix errors of process are indicative of an unfettered exercise of political power. Queensland Health should operate within the apparatus of the executive arm of government to address administrative matters such as those associated with the payroll system.

Not only is the legislation unfounded, in essence it discriminates against one section of the workforce, the very workers who have continued to keep the health system running in the face of enormous frustration and despair.

We recognise this part of the bill has made some advances, for example, s950 permits recovery of overpayments by agreement with the employer and employee and s952 enables the Minister to review the operation of the part to determine if the provisions of the part remain appropriate. However, our original concerns about legislation that provides lesser conditions for health workers remain valid.

S 530 Legal representation.

The Bill gives broad discretion to the QIRC to allow legal representation in any matters other than a full Bench ‘bargaining’ arbitration under Chapter 4, Part 3, Division 2.

This conflicts with the Reference Group’s recommendation to provide access to limited legal representation consistent with the representation by lawyers as found in the *Fair Work Act 2009* (e.g. employees or officers of the parties’ business and an organisation such as a union or an employer association). This, in turn, could create a more cost efficient system with the skills of in-house advocates and lawyers being relied on at first instance (Industrial Relations Reference Group, 2015, p. 144)

Further, the Reference Group recommended the current provisions which enable legal representation by leave of the QIRC should be extended to matters before a full bench of the QIRC (other than before a full bench established for arbitration arising out of the inability of parties to reach agreement during bargaining, where only the unresolved issues are to be considered at arbitration).

In these circumstances, the current restrictions on external legal representation should continue as it is unlikely that complex legal issues would arise (Industrial Relations Reference Group, 2015, p. 144).

The QNU reiterates our view that the QIRC must remain a lay tribunal where legal representation is subject to the consent of all parties in limited matters or the QIRC grants leave in particular circumstances as currently exists.

Schedule 5 Dictionary

‘Ordinary rate’

It is our experience that understandings of ‘ordinary rate’ and ‘base rate’ may vary between the industrial parties.

Section 117(5) – Payment for public holidays - defines ‘base rate’ of pay as -

the rate of pay payable to the employee for the employee’s ordinary hours of work, but not including any of the following—

- (a) incentive-based payments and bonuses;
- (b) loadings;
- (c) monetary allowances;
- (d) overtime or penalty rates;

(e) any other separately identifiable amounts.

We therefore recommend amending the definition in Schedule 5 to read -

ordinary rate means **the ‘base rate’ of pay plus any amounts payable for work in ordinary time such as skills-based allowances, and shift and weekend penalty rates.** ~~For an employee under an industrial instrument, federal award or federal agreement —~~

~~(a) for sections 35(2)(a) and 98(1)(b), if the employee is a public service employee — the rate the instrument, award or agreement states is payable for ordinary time in relation to the employee’s substantive position; or~~
~~(b) otherwise — the rate the instrument, award or agreement states is payable for ordinary time.~~

‘Organisation’

We ask the committee to consider this section in conjunction with chapter 12 – Industrial Organisations and Associated Entities - of the Queensland Teachers’ Union (QTU) submission. The QTU and the QNU have similar registration circumstances that will require changes to definitions for ‘organisation’ and ‘branch’.

Schedule 5 defines ‘organisation’ as a body registered under chapter 12 as an organisation. This would mean state registered unions.

Schedule 5 defines a ‘branch’ of an organisation as a constituent part of the organisation, however called, that has a management committee or officers.

Thus, a branch refers only to the branch of a state union.

This appears to be inconsistent with s 597 (1) of the bill which refers to a ‘branch or part of a federal organisation’.

To resolve this conflict, we recommend the definition of ‘branch’ should be -

branch, of an organisation, means a constituent part of the organisation **or federal organisation**, however called, that has a management committee or officers **who**:

- **Have autonomy of decision-making and action within the organisation;**
- **Allocate significant resources at its disposal which are allocated according to its decisions;**
- **Operate a separate accounting and membership system as part of the organisation.**

Further, we recommend the following amendments to the Bill which are also outlined in chapter 12 – Industrial Organisations and Associated Entities - of the Queensland Teachers' Union submission:

- Publication of the financial reports should be allowed on a Union website, including in a members-only section of the website (s781);
- Section 784 only appears to envisage consideration of the financial reports by a general meeting as opposed to a meeting of the committee of management of the organisation provided elsewhere in the Bill;
- There is an apparent inconsistency in the timeframe for consideration of the financial reports between sections 780 and 782;
- Section 801 provides that the costs of an examination by the registrar's auditor should be paid by the state rather than by the organisation;
- There appears to be no basis or reason for section 824 (2)(e)(iii) which should be deleted.

Other Matters

Protected Industrial Action

The right to strike is not explicitly contained in any International Labour Organisation (ILO) conventions, but rather arises through the *Freedom of Association and Protection of the Right to Organise Convention 1948* and the *Right to Organise and Collective Bargaining Convention 1949*. The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has interpreted these two conventions expansively, stating that the right to strike is an 'intrinsic corollary' of the rights contained in the two ILO conventions (Dalton & Groom, 2000).

Underlying these ILO conventions is the premise that the right to organise is a right that enables workers to further and defend their economic and social interests. The Committee on Freedom of Association (CFA) has described the obligation to protect the right to strike as an essential requirement of the *Freedom of Association Convention*. Both the CEACR and the CFA have consistently reaffirmed the right to strike.

While Australia has undertaken the obligation to protect the right to strike in international law, there is no entrenched right to strike in Australian law. Workers and their representatives are entirely reliant upon the state and federal parliaments to recognise this right and protect them from liability under the common law (McCrystal, 2010).

The protection of the interests of workers should not be confined to industrial action aimed at securing the terms of a collective bargain. Instead, we believe workers should be able to

take protected industrial action in pursuit of matters arising from the employment relationship. For nurses and midwives this would include excessive workloads, changes to career and classification structures and rostering practices.

The QNU seeks recognition in the bill of the right to take protected industrial action outside a bargaining period.

Casual Conversion

We note the proposed new section 149A of the *Public Service Act 2008* requires the Commission chief executive to make directives about casual employees. This proposed amendment is to give effect to recommendation 14 of the Reference Group's Report (2015) that reads:

That the Public Service Commission develop a mechanism to enable casuals who have been employed on a long-term or systematic basis to be converted to permanent employment on a similar basis to that provided for in relation to long-term temporary employees.

We support these provisions, however, in our view the conversion should occur after six months. Beyond this time it is questionable if the engagement is casual.

The QNU recommends deleting '2 years' and replacing it with '6 months' in section 149A (6) (a) of the *Public Service Act 2008*.

References

Dalton, R. & Groom, R. (2000) 'The Right to Strike in Australia: International Treaty Obligations and the External Affairs Power', *Melbourne Journal of International Law*, vol 1, no. 1, pp. 162-168.

Industrial Relations Legislative Reform Reference Group (2015) *A Review of the Industrial Relations Framework in Queensland*.

McCrystal, S. (2010) *The Right to Strike in Australia*, Federation Press.

Queensland Parliament (2012) *Record of Proceedings* 11 July.

Submission to the Queensland Parliament Legal Affairs and Community Safety Committee (2012) *Penalties and Sentences and Other Legislation Amendment Bill 2012*.