



# ***Industrial Relations (Restoring Fairness) and Other Legislation Amendment Bill 2015***

Submission to the  
Finance and Administration Committee

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## **Introduction**

The Queensland Nurses' Union (QNU) thanks the Finance and Administration Committee (the Committee) for providing this opportunity to comment on the *Industrial Relations (Restoring Fairness) and Other Legislation Amendment Bill 2015* (the bill).

The QNU - the union for nurses and midwives - is the principal health union in Queensland. Nurses and midwives are the largest occupational group in Queensland Health and one of the largest across the Queensland government. The QNU covers all categories of workers that make up the nursing workforce in Queensland including registered nurses, registered midwives, enrolled nurses and assistants in nursing who are employed in the public, private and not-for-profit health sectors including aged care.

Our more than 52,000 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 QNU represents the industrial and professional interests of our members through our education programs, research, representations and other activities. Thus, as always, our concerns go to the possible impact that this legislation will have on the ability of Queensland's nurses and midwives to ensure that Queenslanders receive the safe, quality public health care they deserve.

## **The Introduction of the Bill**

We note the limited timeframe in which to contemplate the bill, and as such our comments relate to key areas that are of importance to nurses and midwives. The QNU recognises the urgency behind this bill and the need to rectify quickly the adverse effects of amending legislation introduced by the previous government. We also welcome the bill's intent to restore Queensland government workers' rights, the ability of industrial organisations and to access their members.

At every turn under the previous LNP administration, the QNU opposed any moves that undermined the rights and entitlements of nurses and midwives in this state. The previous Legal Affairs and Community Safety Committee was well aware of our strong resistance to the barrage of amendments to the *Industrial Relations Act 1999* and other legislation that impacted so heavily on the working lives of our members. Despite these repeated attacks

we remain confident that this bill will work towards restoring balance in the employment relationship. We are therefore pleased to see that 'fairness' has returned to the industrial relations lexicon and we will continue to pursue this concept in our future dealings with the new Labor government. It is certainly an expectation that this bill will address some of the existing unfair and unnecessary provisions that have served to alienate and demoralise the public sector nursing and midwifery workforce.

## Summary of Recommendations

The QNU recommends the bill be passed into legislation by the parliament with the following amendments:

Section 851 of the bill be amended to remove the requirement for any award that has not been modernised to be modernised.

In the alternative, that the *Queensland Health Nurses and Midwives Award - State 2012* be deemed 'modern' and thus exempt from the requirement to be modernised in accordance with the amended Act.

Further, the QNU seeks the following amendments to the *Industrial Relations Act 1999* to be included in the bill:

- removal of section 143(3A);
- removal of Chapter 6A - Arrangements for High-income Senior Employees from the Act
- removal of sections 396A, 396B, 396C and 396D with consequent amendment to section 12 of the *Industrial Relations Regulations 1999*.

In addition, the QNU seeks:

- removal of s51A(2)(e) of the *Hospital and Health Boards Act 2011*.

## **Objects of the Bill**

The QNU supports the reintroduction of Section 3, *Principle Object of this Act* sections 3(j) and (o) of the *Industrial Relations Act 1999* (the Act):-

- (j) promoting and facilitating the regulation of employment by awards and agreements;
- (o) promoting collective bargaining and establishing the primacy of collective agreements over individual agreement;

These two objects give life to the object 3(n):-

assisting in giving effect to Australia's international obligations in relation to labour standards.

The International Labour Standard – *Right to Organise and Collective Bargaining Convention 1949 (No. 98)* which Australia has ratified states at Article No. 4:-

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

We also welcome the removal of 3(p)

ensuring that, when wages and employment conditions are determined by arbitration, the following are taken into account -

- (i) for a matter involving the public sector—the financial position of the State and the relevant public sector entity, and the State's fiscal strategy;
- (ii) for another matter—the employer's financial position.

## **Additional Matters**

### **Award Modernisation**

We note the bill removes the 'non-allowable content' provisions of Chapter 2A, part 3, Division 4. These provisions not only prohibited the parties to modern industrial instruments to include matters relevant to the employment relationship, they also restricted the regulatory scope of the QIRC.

Clause 33 of the bill also inserts a new chapter 20, part 20 - Transitional provisions for *Industrial Relations (Restoring Fairness) and Other Legislation amendment Act 2015*. Section 851 - What happens to incomplete award modernisation process - states at

(2)(a) the Commission must continue to modernise the pre-modernisation award under the amended Act; and

(2) (b) any reference of the matter to the full bench ends on the commencement.

This presents a difficult situation for the QNU in respect to the *Queensland Health Nurses and Midwives Award - State 2012*. We commenced the very difficult and time-consuming process of modernising this award in 2013 in accordance with the requirements of s140B of the Act and with the assistance of the Queensland Industrial Relations Commission (QIRC). This was despite the fact that the QIRC had only just made the award in 2012 by consent of the parties and following extensive negotiations and hearings.

Award modernisation also impacts on enterprise bargaining because the Act creates a situation whereby workers currently covered by a certified agreement must finalise the modernisation of their award consistent with the terms of the Act before they can commence bargaining.

An existing certified agreement becomes a 'continuing agreement' if the agreement reaches its nominal expiry date and the relevant pre-modernisation award for the agreement has not been modernised under the relevant provisions of the Act (s140B). A continuing agreement (as defined under s824(2) of the Act) will be extended by up to one year beyond its nominal expiry date. The government may then provide a wage increase to employees covered by the 'continuing agreement' by regulation.

The parties cannot commence bargaining for a replacement agreement more than 60 days before the nominal expiry date of the current agreement and must not seek to take any protected industrial action that may offend the extremely narrow 'relevant industrial action' provisions of the Act [s148(3)].<sup>1</sup> If this group of workers do offend such provisions they will be subject to a conciliation period that extends for 14 days before being referred to arbitration if the conciliation fails. The arbitration period for a matter is then limited to 90 days.

These arrangements do not recognise the 'no fault' situation of a group of workers covered by a certified agreement being converted to the status of a 'continuing agreement' because it was not possible to conclude the award modernisation process in the time available. This denies the affected employees their entitlement to collective bargaining for a replacement

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<sup>1</sup> See our recommendation in respect to s143(3A).

agreement through no fault of their own and subjects them to an automatic extension and an associated wage increase by regulation.

Nurses and midwives will be particularly disadvantaged by any further 'modernisation' of the *Queensland Health Nurses and Midwives Award - State 2012*.

In a political manoeuvre designed to ensure nurses and midwives were not negotiating their certified agreement at the time of the state election as happened in 2012, the previous Attorney-General at the request of the then Health Minister and without consultation with the QNU rescheduled finalisation of the *Queensland Health Nurses and Midwives Award - State 2012* to phase 3 of the award modernisation process which runs in the second half of 2015.

Through the convoluted process in the current Act that precludes the making of a modern certified agreement in the absence of a modernised award, nurses and midwives now find themselves without a 'modern' award and unable to commence bargaining until the end of 2015.

As we have consistently argued, the timeframes and constraints placed upon workers through the award modernisation process are unnecessary, unreasonable and unworkable.

For these reasons, the QNU seeks the immediate cessation of the award modernisation process in relation to the *Queensland Health Nurses and Midwives Award - State 2012*. We can see no benefit to continue undertaking such a flawed and unnecessary process.

The QNU recommends s851 of the bill be amended to remove the requirement for any award that has not been modernised to be modernised.

In the alternative, that the *Queensland Health Nurses and Midwives Award - State 2012* be deemed 'modern' and thus exempt from the requirement to be modernised in accordance with the amended Act.

## **Making Agreements**

Section 143 of the Act introduced by the former government sets out the action 'the proposer' of a certified agreement must take when they intend to begin negotiations for the agreement. Section 143(3A) states

If there is an existing certified agreement or a determination under subdivision 3 between the parties, the proposer must not, despite anything to the contrary in the agreement or determination, give the notice of intention more than 60 days before the nominal expiry date.

The QNU contends that this provision is restrictive and unnecessary.

Clause 9 of the current *Nurses and Midwives (Queensland Health) Certified Agreement (EB8) 2012*, provides that 'negotiations for a replacement agreement will commence at least 6 months prior to the expiry of this agreement'. Limiting the proposer of a Notice to Commence Bargaining for a replacement agreement to not more than 60 days before the nominal expiry date of the existing agreement section 143 puts artificial constraints around the bargaining process.

Given the size and complexity of the Queensland Health nursing and midwifery workforce, it is difficult to comprehend any possible justification for legislating a necessary period to commence negotiations for a replacement agreement. It is the experience of the QNU that the parties require at least six months to appropriately negotiate a replacement agreement. Two months is vastly inadequate.

The QNU is due to commence enterprise bargaining with Queensland Health in the near future and we would like to see section 143 removed entirely from the Act.

The QNU seeks removal of section 143(3A) from the Act.
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## **Matters Affecting Health Employees only**

### **Consistency Provisions**

Of significance to nurses and midwives is Professional Development Leave, an industrial entitlement that nurses and midwives pursued for many decades and finally achieved in the sixth round of enterprise bargaining negotiations in 2006. The LNP government inserted a new part 3 Division 2A into the *Hospital and Health Boards Act 2011*. Under Division 2A, the Chief Executive may issue health employment directives about the conditions of employment for health service employees. This includes 'the professional development and training of health service employees in accordance with the conditions of their employment' set out under s51A(2)(e).

S51C(1) provides that

if a health employment directive is inconsistent with an industrial instrument, the health employment directive prevails over the industrial instrument, unless a regulation provides otherwise.

Taken together, these two provisions leave nurses and midwives subject to a unilateral decision in a health employment directive to withdraw or amend professional development leave. This contradicts the consistency arrangements set out in s71CB of the Act that state

(1) This section applies if a directive is inconsistent with a provision of the Queensland Employment Standards (a QES provision).

(2) For an inconsistency provision, the directive is taken not to be inconsistent with the QES provision to the extent that the effect of the directive is more favourable to an employee than the QES provision.

(3) In this section directive means—

(a) a directive under the Public Service Act 2008 made by the chief executive of the Public Service Commission that is the subject of a regulation under section 52(2) of that Act; or

(b) a directive under the Public Service Act 2008 made by the Minister administering this Act; or

(c) a health employment directive under the Hospital and Health Boards Act 2011.

inconsistency provision means—

(a) the Public Service Act 2008, section 51; or

(b) the Hospital and Health Boards Act 2011, section 51B.

We previously raised this matter in our submission to the Legal Affairs and Community Safety Committee's inquiry into the *Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013* and it does not appear the bill addresses these anomalies.

The QNU seeks removal of s51A(2)(e) of the *Hospital and Health Boards Act 2011*.



## **Individual employment contracts for senior staff**

Chapter 6A - Arrangements for High-income Senior Employees - introduced individual contracts for employees earning remuneration in excess of \$129,300. The definition of 'remuneration' includes the annual superannuation contribution made by the employer, amongst other items. This level of remuneration excludes all Assistant Directors of Nursing, Nursing Directors, and Directors of Nursing, i.e. Nurse Grade 9 and above, from award and certified agreement coverage.

The career progression for nurses and midwives below these senior levels is from the Nurse Unit Manager/Clinical Nurse Consultant (NUM/CNC) classification of Grade 7. The Nurse Grade 8 classification is the Nurse Practitioner classification which is a specialist clinical role. Most commonly nurses would move from the NUM/CNC position to the more senior ADON/DON positions and would normally 'act up' into these positions from time to time.

With the creation of individual contracts for these senior positions it is unclear how nurses and midwives covered by a certified agreement are able to act in higher positions. This in itself creates an impediment to many NUMs/CNCs progressing to higher levels because of the associated loss of industrial protection and tenure through individual contracts.

The Act clearly specifies that an engagement under s194, the so-called 'high income guarantee contract' excludes individuals from accessing unfair dismissal and dispute settling procedures of the QIRC. This loss of job security in itself is further exacerbated by the uncertainty around entitlements once a nurse or midwife moves beyond the industrial instrument classifications.

The QNU seeks removal of Chapter 6A - Arrangements for High-income Senior Employees from the Act.

## **Health Employee Payroll Provisions**

In 2012, the then Health Minister introduced changes to the Act to accommodate overpayment and recovery provisions caused by the introduction of the new payroll system. A new Part 2, Division 3, 390A and sections 396A, 396B, 396C and 396D and associated regulations were inserted into the Act to apply specifically to the recovery of overpayments made to 'health employees'. The Act does not include any sunset provision that limits the ongoing applications of these inferior provisions.

### Section 396A -- Recovery of Health Employment Overpayments

Any provision that allows an automatic recovery from an employee's wages reverses the onus of responsibility for the employer to correctly pay an employee. The legislation creates an onus on individual employees to establish that they have not been overpaid prior to the employer exercising their unilateral right to withhold monies from an employee's pay.

Employers have not had the ability to unilaterally take monies from an employee's pay under Queensland industrial law for the very reason that such a power is open to abuse. The linkage of this unilateral right to the Queensland Health payroll debacle is unfair and unreasonable on Queensland Health employees.

### Absence related overpayments

Section 396 of the Act and Section 12 of the Regulation provide that Queensland Health can deduct up to 25% of an employee's wages to recover monies which the employee was overpaid because of an absence related overpayment.

The QNU has been aware of absence related overpayments occurring since the early period of the payroll debacle commencing in 2010 and has proposed to Queensland Health on a number of occasions to establish a process consistent with the current provisions of the Act, to recover such overpayments in the following pay fortnights.

For reasons unknown to the QNU Queensland Health consistently declined to establish such a process that would have negated this provision in the Act.

### Other types of overpayments

The remaining errors in an employee's pay are related to the system or processing. These errors are beyond the control of employees and not always obvious due to the poorly designed payslips and the fact that the majority of nurses are shift workers whose pay changes each fortnight. These errors are also often not immediately obvious to Queensland Health. It would not be unusual for Queensland Health payroll staff to discover such system or process errors in an employees' pay some time after the error, or errors, have occurred.

In the QNU's view it was heavy handed to effect legislative change of a longstanding employee protection to deal with the small number of overpayments that are not absence related.

### 25% recovery amount

The Act gives Queensland Health the right to automatically recover “an amount otherwise payable at the time” to an employee. This is not fair or reasonable as the error is totally beyond the control of the employee affected. Regulation 12A prescribes the amount for section 396A(5) as ‘ $\frac{3}{4}$  of the amount that would otherwise be paid to the health employee on the single occasion, disregarding any deductions for any purpose’. This entitles Queensland Health to automatically recover 25% of a health employee’s pay.

As an example of the unfairness of an automatic recovery from wages we highlight the case of a nurse or midwife about to commence six weeks recreation leave (this being the annual entitlement to such leave for a nurse or midwife working continuous shift work).

In this situation, “the amount that otherwise would be paid” could be reasonably interpreted as the full holiday pay, including leave loading. Clearly, Queensland Health could significantly disadvantage and financially embarrass such an employee by automatically withholding up to 25% of the employee’s holiday pay. The employee would most likely not be unaware that such a deduction had occurred until they had commenced their leave and tried to access funds.

### Section 396B – Recovery of Health employment transition loans

This provision would be obsolete if the current payroll system functioned as effectively as the system it replaced. As the pay date arrangements existed for over 15 years under the previous payroll system it would surely be reasonable to expect any new pay system to accommodate such pay date arrangements.

The QNU seeks removal of sections 396A, 396B, 396C and 396D with consequent amendment to section 12 of the <i>Industrial Relations Regulations 1999</i> .
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## **Conclusion**

The QNU continues to pursue a fair industrial relations system for our public sector nurses and midwives in Queensland. They have lived through three years of an LNP government that launched unprecedented attacks on their career and governance structures, workload management systems, shift rostering arrangements and workplace rights. We ask the Committee to recommend the passage of this bill including associated amendments through the parliament to restore these rights.