Submission of the New South Wales Nurses and Midwives' Association

to the

Senate Education, Employment and Workplace Relations Committees Re the conditions of employment of state public sector employees and the adequacy of protection of their rights at work as compared with other employees

February 2013

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Introduction

The New South Wales Nurses and Midwives' Association (the Association) is a union which represents nurses, midwives and nursing assistants in both the public and private sectors across New South Wales. Currently we have approximately 56,000 members. The Association represents both the industrial and professional interests of its members.

The Association is deeply concerned by what appears to be a concerted attack by the New South Wales O'Farrell Government on the rights at work of public sector employees. The Association would welcome any attempt by the current Federal Government to enact further protections for these workers.

The O'Farrell Government's Attack on Rights at Work

The Association believes that since the O'Farrell Government was elected in New South Wales in March 2011, it has engaged in a deliberate attack on the rights at work of public sector workers. In many respects this attack has been worse than that waged by the federal Howard Government through Work Choices.

Attacking collective bargaining and the Industrial Relations Commission of New South Wales

Within a few months of being elected the O'Farrell Government passed the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 No 13* inserting the following provision into the *Industrial Relations Act 1996* (NSW)

> ***146C Commission to give effect to certain aspects of government policy on public sector employment***
>
> *(1) The Commission must, when making or varying any award or order, give effect to any policy on conditions of employment of public sector employees:*
> *(a) that is declared by the regulations to be an aspect of government policy that is required to be given effect to by the Commission, and*
> *(b) that applies to the matter to which the award or order relates.*
>
> *(2) Any such regulation may declare a policy by setting out the policy in the regulation or by adopting a policy set out in a relevant document referred to in the regulation.*
>
> *(3) An award or order of the Commission does not have effect to the extent that it is inconsistent with the obligation of the Commission under this section.*
>
> *(4) This section extends to appeals or references to the Full Bench of the Commission.*
>
> *(5) This section does not apply to the Commission in Court Session.*

(6) *This section extends to proceedings that are pending in the Commission on the commencement of this section. A regulation made under this section extends to proceedings that are pending in the Commission on the commencement of the regulation, unless the regulation otherwise provides.*

(7) *This section has effect despite section 10 or 146 or any other provision of this or any other Act.*

(8) *In this section:*

***award or order** includes:*

(a) an award (as defined in the Dictionary) or an exemption from an award, and

(b) a decision to approve an enterprise agreement under Part 2 of Chapter 2, and

(c) the adoption under section 50 of the principles or provisions of a National decision or the making of a State decision under section 51, and

(d) anything done in arbitration proceedings or proceedings for a dispute order under Chapter 3.

***conditions of employment**—see Dictionary.*

***public sector employee** means a person who is employed in any capacity in:*

(a) the Government Service, the Teaching Service, the NSW Police Force, the NSW Health Service, the service of Parliament or any other service of the Crown, or

(b) the service of any body (other than a council or other local authority) that is constituted by an Act and that is prescribed by the regulations for the purposes of this section.

Thereafter the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* came into effect. Regulation 6 of these regulations states;

6 Other policies

(1) *The following policies are also declared, but are subject to compliance with the declared paramount policies:*

(a) Public sector employees may be awarded increases in remuneration or other conditions of employment that do not increase employee-related costs by more than 2.5% per annum.

(b) Increases in remuneration or other conditions of employment that increase employee-related costs by more than 2.5% per annum can be awarded, but only if sufficient employee-related cost savings

have been achieved to fully offset the increased employee-related costs. For this purpose:

(i) whether relevant savings have been achieved is to be determined by agreement of the relevant parties or, in the absence of agreement, by the Commission, and

(ii) increases may be awarded before the relevant savings have been achieved, but are not payable until they are achieved, and

(iii) the full savings are not required to be awarded as increases in remuneration or other conditions of employment.

(c) For the purposes of achieving employee-related cost savings, existing conditions of employment of the kind but in excess of the guaranteed minimum conditions of employment may only be reduced with the agreement of the relevant parties in the proceedings.

(d) Awards and orders are to resolve all issues the subject of the proceedings (and not reserve leave for a matter to be dealt with at a later time or allow extra claims to be made during the term of the award or order). However, this does not prevent variations made with the agreement of the relevant parties.

(e) Changes to remuneration or other conditions of employment may only operate on or after the date the relevant parties finally agreed to the change (if the award or order is made or varied by consent) or the date of the Commission's decision (if the award or order is made or varied in arbitration proceedings).

(f) Policies regarding the management of excess public sector employees are not to be incorporated into industrial instruments.

(2) Subclause (1) (e) does not apply if the relevant parties otherwise agree or there are exceptional circumstances.

*(3) The **relevant parties** in relation to a matter requiring agreement under this clause are the employer and any other party to the proceedings that is an industrial organisation of employees with one or more members whose interests are directly affected by the matter.*

Regulations 8 and 9 define employee-related costs and employee-related cost savings as follows;

8 Meaning of employee-related costs

*For the purposes of this Regulation, **employee-related costs** are the costs to the employer of the employment of public sector employees, being costs related to the salary, wages, allowances and other remuneration payable to the*

employees and the superannuation and other personal employment benefits payable to or in respect of the employees.

9 Meaning of employee-related cost savings

*(1) For the purposes of this Regulation, **employee-related cost savings** are savings:*

(a) that are identified in the award or order of the Commission that relies on those savings, and

(b) that involve a significant contribution from public sector employees and generally involve direct changes to a relevant industrial instrument, work practices or other conditions of employment, and

(c) that are not existing savings (as defined in subclause (2)), and

(d) that are additional to whole of Government savings measures (such as efficiency dividends), and

(e) that are not achieved by a reduction in guaranteed minimum conditions of employment below the minimum level.

*(2) Savings are **existing savings** if they are identified in a relevant industrial instrument made before the commencement of this Regulation (or in an agreement contemplated by such an industrial instrument) and are relied on by that industrial instrument, whether or not the savings have been achieved and whether or not they were or are achieved during the term of that industrial instrument.*

Through this legislation the O'Farrell Government has given its own Public Sector Wages Policy legislative force and made the wages and conditions of public sector workers vulnerable to derogation or abolition by regulation. In our view this is an extraordinary overreach which abuses the Government's dual role as employer and legislator. As a result, public sector workers in New South Wales now have very limited capacity to bargain with their employer and the independence of the Industrial Relations Commission of New South Wales has been unacceptably encroached upon.

Attacking the right to strike

The O'Farrell Government has introduced the *Industrial Relations Amendment (Dispute Orders) Bill 2012* which seeks to impose the most draconian penalties for industrial action in Australia. If passed, it will mean that where industrial action occurs in contravention of an order of the Industrial Relations Commission of New South Wales, the union can be fined up to;

- $110,000 for the first day of a first offence and $55,000 for each subsequent day, or
- $210,000 for the first day of subsequent offences and $110,000 for each subsequent day.

Whilst the New South Wales Premier has pointed out that penalties in Queensland are up to $100,000, he fails to mention that the size of this penalty is radically out of step with other jurisdictions. Below is a table setting out the maximum penalties for the failure of unions to comply with orders to cease industrial action throughout Australia;

State/Territory	**Penalty**	**Legislation**
Currently New South Wales penalties	$10,000 for the first day of a first offence and $5,000 for each subsequent day $20,000 for the first day of subsequent offences and $10,000 for each subsequent day	s139 *Industrial Relations Act 1996* (NSW)
Proposed New South	$110,000 for the first day	*Industrial Relations*

Wales penalties	of a first offence and $55,000 for each subsequent day $210,000 for the first day of subsequent offences and $110,000 for each subsequent day	*Amendment (Dispute Orders) Bill 2012* (NSW)
Queensland	$100,000	s234 *Industrial Relations Act 1999* (Qld)
South Australia	$2,500	s177 *Fair Work Act 1994* (SA)
Western Australia	$2,000	s83 *Industrial Relations Act 1979* (WA)
Tasmania	$6,500 (50 penalty units)	s31 *Industrial Relations Act 1984* (Tas)
Commonwealth of Australia	$6,600 (60 penalty units) for individuals and $33,000 (300 penalty units) for bodies corporate	ss539 & 546 *Fair Work Act 2009* (Cth)
Australian Capital Territory	$6,600 (60 penalty units) for individuals and $33,000 (300 penalty units) for bodies corporate	ss539 & 546 *Fair Work Act 2009* (Cth)
Northern Territory	$6,600 (60 penalty units) for individuals and $33,000 (300 penalty units) for bodies corporate	ss539 & 546 *Fair Work Act 2009* (Cth)
Victoria	$6,600 (60 penalty units) for individuals and $33,000 (300 penalty units) for bodies corporate	ss539 & 546 *Fair Work Act 2009* (Cth)

Clearly, severe penalties of the kind proposed by the O'Farrell Government are the exception, not the norm.

The Bill also removes the prohibition on the awarding of costs in proceedings for the contravention of a dispute order[1]. In effect, this would act as an additional quasi penalty on unions which could easily rival the size of the civil penalty itself.

The unfairness of the Bill is exacerbated by the fact that there is no clear right to strike in New South Wales. In other jurisdictions, such as Queensland and federally, industrial legislation facilitates 'protected action' whereby workers can take industrial action free from the threat of civil penalty or damages. Such a right does not exist in New South Wales.

Attacking nurse to patients ratios

On 24 January 2012, the O'Farrell Government released the *NSW Commission of Audit Interim Report Public Sector Management.* This report included a number of alarming recommendations. In particular, Recommendation 22 stated;

> *22. The Department of Premier and Cabinet should amend the NSW Public Sector Wages Policy 2011 to include a provision that workforce management policies (such as staff ratios) should not be included in industrial instruments.*

This recommendation is specifically aimed at clause 53 of the *Public Health System Nurses' and Midwives' (State) Award* which provides for mandated nurse to patient ratios across much of the public health system. In our view and experience, safe patient care is compromised where nurse to patient ratios are not in force. The

[1] Schedule 1, item [3], *Industrial Relations Amendment (Dispute Orders) Bill 2012.*

Association is deeply concerned that the O'Farrell Government intends to use its Public Sector Wages Policy and section 146C of the *Industrial Relations Act 1996* (NSW) to abolish nurse to patient ratios in the New South Wales public health system.

Attacking Crown employees

On 6 June 2012 the O'Farrell Government filed an application in the Industrial Relations Commission of New South Wales seeking a new *Crown Employees (Public Service Conditions of Employment) Award*. This application sought to diminish or abolish many of the entitlements of workers covered by that award. Among other changes, it sought to;

- abolish Family and Community Services leave,
- remove the capacity for employees to use their sick leave to 'top up' their workers compensation payments,
- abolish annual leave loading,
- reduce shift penalties, and
- abolish any allowances or provisions for extra leave for employees in remote areas.

Attacking injured workers

On 23 April 2012, the O'Farrell Government released an Issues Paper advocating a series of changes to the New South Wales workers compensation scheme. These proposed changes were overwhelmingly detrimental to injured workers. On 1 May 2012, a Joint Select Committee was established to inquire into the scheme. This Committee issued its report on 13 June 2012 and by 22 June 2012 the New South Wales Parliament had enacted one of the most drastic overhauls of the workers compensation scheme in recent history.

The *Workers Compensation Legislation Amendment Act 2012* severely curtailed the workers compensation rights of injured workers in New South Wales. Some of the major changes introduced were as follows;

- Most weekly workers' compensation payments now cease after 2.5 years, unless there is total incapacity for work. Payments cease for those with total incapacity after 5 years, unless there is a 20% whole of person impairment. Previously, payments continued until a worker could return to work or until retirement.
- Partially incapacitated workers can now have their weekly benefits reduced by an amount representing their ability to work regardless of the availability of suitable employment.

- Insurers have been given extensive powers to determine a worker's right to weekly benefits. Injured workers have only limited rights to review these decisions.
- Limitations have been placed on the ability of workers to claim for injuries suffered on the way to or from work. Workers injured when travelling are now only covered if there is a real and substantial connection between the employment and the incident out of which the personal injury arose.
- Medical and other expenses are now only paid for a maximum of one year from the date a claim is made or weekly payments cease.
- Compensation for permanent injuries is now only available if a worker suffers a 10% whole of person impairment.
- Compensation can no longer be obtained for pain and suffering.
- Only one claim can now be made for permanent impairment. Hence, compensation will not be recoverable if a worker's condition deteriorates thereafter.
- Heart attacks or strokes are now not covered unless the nature of employment gave rise to a significantly greater risk of such injuries.
- Relatives of workers who die in the workplace are now unable to claim for compensation for any nervous shock suffered.

Whether the current state government industrial relations legislation provides state public sector workers with less protection and entitlements than workers to whom the *Fair Work Act 2009* (the Act) applies

Public sector workers in New South Wales are subject to the *Industrial Relations Act 1996* (NSW). Whilst the Association is broadly supportive of the *Industrial Relations Act 1996* (NSW) (particularly as it existed prior to *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 No 13*), there are aspects of the *Fair Work Act 2009* (Cth) which provide more beneficial protections and entitlements to workers.

Vulnerability of State award conditions

The *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 No 13* and *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* impose significant restrictions on the award making power of the Industrial Relations Commission of New South Wales. The Association believes the independence of the Commission is severely compromised by being compelled by legislation to adopt government policy as decreed by regulation.

The *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 No 13* also means that award conditions in New South Wales are extremely vulnerable. Almost with the stroke of a pen the O'Farrell Government is now able to reduce the wages and conditions of New South Wales public sector workers. This vulnerability is neatly illustrated by the proposal within the *NSW Commission of Audit*

Interim Report Public Sector Management to abolish nurse to patient ratios by amending the Public Sector Wages Policy.

By comparison, the protections and entitlements provided under the *Fair Work Act 2009* (Cth) are generally not vulnerable to derogation through regulation. Indeed, the National Employment Standards themselves enshrine in legislation a set of basic rights at work. Similar entitlements are left to the operation of awards by the *Industrial Relations Act 1996* (NSW).

The Association believes the introduction of the National Employment Standards as an almost universal legislated minimum operating in conjunction with awards and agreements, has been extremely positive for the federal industrial system. In our opinion and experience, the National Employment Standards;

- create certainty for both employers and employees,
- create an environment whereby rights at work are more likely to become common knowledge,
- help to avoid industrial disputes, and
- provide optimal legal protection for rights at work.

To be clear, the Association did not have the same view with respect to the Australian Fair Pay and Conditions Standard set out in Part 7 of the previous *Workplace Relations*

Act 1996 (Cth) (Work Choices). The Australian Fair Pay and Conditions Standard was a vastly inferior form of legislative protection for the following reasons;

- In the Association's view, the Australian Fair Pay and Conditions Standard was written in a manner designed to deprive employees of entitlements. By contrast, the National Employment Standards is drafted in a manner which is beneficial to employees.
- The Australian Fair Pay and Conditions Standard was enacted against the backdrop of award modernisation and rationalisation introduced under Work Choices. In the Association's view, the intent of the then Federal Government was to move toward a situation where the Australian Fair Pay and Conditions Standard along with Australian Workplace Agreements were the touchstones of our federal industrial system. By contrast, the National Employment Standards under the *Fair Work Act 2009* (Cth) are intended to operate in conjunction with and be built upon by modern awards and collective agreements.

By comparison to the O'Farrell Government's capacity to reduce wages and conditions by regulation through section 146C of the *Industrial Relations Act 1996* (NSW), the National Employment Standards provide significant protection to workers.

General Protections

The Association believes the General Protections provisions under Part 3-1 of Chapter 3 of the *Fair Work Act 2009* (Cth) provide considerable protection for workers. Comparable protections are provided under section 210 of the *Industrial Relations Act 1996* (NSW) which prohibits the victimisation of employees on various grounds. However, in our view the General Protections provisions constitute a more comprehensive set of protections for employees. For example, the protection against adverse action relating to workplace rights[2] is arguably more comprehensive than the comparable protections under section 210 of the *Industrial Relations Act 1996* (NSW)[3].

Protected Industrial Action

The *Industrial Relations Act 1996* (Cth) does not contain provisions akin to those within Part 3-3 of Chapter 3 of the *Fair Work Act 2009* (Cth) regarding protected industrial action. It is true that section 141 of the *Industrial Relations Act 1996* (NSW) prohibits an action in tort whilst an industrial dispute to which action relates is the subject of conciliation before the Commission. However, the *Industrial Relations Act 1996* (NSW) does not specifically accommodate protected industrial action as a legitimate step in any bargaining process.

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[2] Chapter 3, Part 3-1, Division 3, *Fair Work Act 2009* (Cth).
[3] Subsections 210(1)(e), (f) and (i)-(k), *Industrial Relations Act 1996* (NSW).

As a result, the ability of public sector workers in New South Wales to bargain effectively is limited. Where industrial action does occur it is the Association's experience that the Industrial Relations Commission of New South Wales is very reluctant to allow it to continue. Coupled with the absence of any obligation to bargain in good faith, this means the Government is able to do as it pleases, comfortable in the knowledge that the Commission will probably order any industrial action to stop.

It is within this environment that the O'Farrell Government plans to impose draconian penalties on unions where industrial action occurs in contravention of a dispute order. The Association believes it is profoundly unfair to impose such penalties within an industrial system which does not accommodate the right to strike.

Whether the removal of components of the long-held principles relating to termination, change and redundancy from state legislation is a breach of obligations under the International Labour Organization (ILO) conventions ratified by Australia

Pursuant to regulation 6(1)(f) of the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011*, policies regarding the management of excess public sector employees are not to be incorporated into industrial instruments. Policies of this kind deal with termination, change and redundancy in the public sector. In the health industry the relevant policy is the New South Wales Ministry of Health's Policy Directive PD2012_021 *Managing Excess Staff of the NSW Health Service*. This policy, along with the *Employment Protection Act 1982* (NSW), is the mechanism through which

public health system employees are entitled to consultation[4], notice and severance or redundancy payments[5].

The Association is concerned that by virtue of regulation 6(1)(f) there would be little recourse should the O'Farrell Government amend PD2012_021 *Managing Excess Staff of the NSW Health Service* to the disadvantage of public sector employees.

In our view, this is inconsistent with Article 1 of the International Labour Organization *Termination of Employment Convention, 1982 (No.158)* which states;

> ***"Article 1***
> *The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations."*

Whether the current state government industrial relations frameworks provide protection to workers as required under the ILO conventions ratified by Australia

It is the Association's view that the operation of the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 No 13* and *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* is inconsistent with the International Labour Organization *Right to Organise and Collective Bargaining Convention, 1949 (No.98).* In particular, we believe it is inconsistent with Article 4 which states;

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[4] See part 3.1 of PD2012_021 *Managing Excess Staff of the NSW Health Service.*
[5] See parts 5.2 and 7.1 of PD2012_021 *Managing Excess Staff of the NSW Health Service*

*"**Article 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."

Similarly, we believe it is inconsistent with Article 2 of the International Labour Organization *Minimum Wage Fixing Convention, 1970 (No.131)* which states;

*"**Article 2***
1. Minimum wages shall have the force of law and shall not be subject to abatement, and failure to apply them shall make the person or persons concerned liable to appropriate penal or other sanctions.
2. Subject to the provisions of paragraph 1 of this Article, the freedom of collective bargaining shall be fully respected."

Whether state public sector workers face particular difficulties in bargaining under state or federal legislation

Public sector workers in New South Wales do face particular difficulties in bargaining under the current *Industrial Relations Act 1996* (NSW). In this regard see the sections headed "*Attacking collective bargaining and the Industrial Relations Commission of New South Wales"* and "*Attacking the right to strike"* above.

Whether the Act provides the same protections to state public sector workers as it does to other workers to the extent possible, within the scope of the Commonwealth's legislative powers

In our view, the Commonwealth should extend the application of more parts of the National Employment Standards and the General Protections provisions in the *Fair Work Act 2009* (Cth) to public sector workers.

With respect to the National Employment Standards, in our view the application of Subdivision B of Division 11 of Part 2-2 of Chapter 2 of the *Fair Work Act 2009* (Cth) relating to redundancy pay can and should be extended pursuant to Article 12 of the International Labour Organization *Termination of Employment Convention, 1982 (No.158)* which states;

> *"**Article 12***
> *1. A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to-*
> *(a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or*
> *(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or*
> *(c) a combination of such allowance and benefits.*
> *2. A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a), of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b).*
> *3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits*

referred to in paragraph 1, subparagraph (a), of this Article in the event of termination for serious misconduct."

With respect to the General Protections provisions under Part 3-1 of Chapter 3 of the *Fair Work Act 2009* (Cth), the application of these provisions can and should be extended by virtue of the following International Labour Organization conventions which have been ratified by Australia;

- The *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87)* in particular Articles 1 and 11 as follows;

  *"**Article 2***
  Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."

  *"**Article 11***
  Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise."

- The *Right to Organise and Collective Bargaining Convention, 1949 (No.98)* in particular Articles 1 and 2 as follows;

  *"**Article 1***
  1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
  2. Such protection shall apply more particularly in respect of acts calculated to--
  (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;

(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours."

*"**Article 2***
1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.
2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article."

- The *Discrimination (Employment and Occupation) Convention, 1958 (No.111)* in particular Articles 1, 2 and 3 as follows;

*"**Article 1***
1. For the purpose of this Convention the term discrimination includes--
(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.
2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.
3. For the purpose of this Convention the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment."

*"**Article 2***
Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."

*"**Article 3***
Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice--
(a) to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy;
(b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;
(c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
(d) to pursue the policy in respect of employment under the direct control of a national authority;
(e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;
(f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action."

- The *Workers' Representative Convention, 1971 (No.135)* in particular Articles 1, 2 and 3 as follows;

*"**Article 1***
Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements."

*"**Article 2***
1. Such facilities in the undertaking shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently.
2. In this connection account shall be taken of the characteristics of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned.
3. The granting of such facilities shall not impair the efficient operation of the undertaking concerned."

*"**Article 3***

For the purpose of this Convention the term workers' representatives means persons who are recognised as such under national law or practice, whether they are--
(a) trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; or
(b) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned."

- The *Workers with Family Responsibilities Convention, 1981 (No.156)* in particular Articles 3, 4 and 8 as follows;

*"**Article 3***
1. With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.
2. For the purposes of paragraph 1 of this Article, the term discrimination means discrimination in employment and occupation as defined by Articles 1 and 5 of the Discrimination (Employment and Occupation) Convention, 1958."

*"**Article 4***
With a view to creating effective equality of opportunity and treatment for men and women workers, all measures compatible with national conditions and possibilities shall be taken--
(a) to enable workers with family responsibilities to exercise their right to free choice of employment; and
(b) to take account of their needs in terms and conditions of employment and in social security."

*"**Article 8***
Family responsibilities shall not, as such, constitute a valid reason for termination of employment."

- The *Termination of Employment Convention, 1982 (No. 158)* in particular Articles 4 and 5 as follows;

> *"**Article 4***
> *The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."*
>
> *"**Article 5***
> *The following, inter alia, shall not constitute valid reasons for termination:*
> *(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;*
> *(b) seeking office as, or acting or having acted in the capacity of, a workers' representative;*
> *(c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;*
> *(d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;*
> *(e) absence from work during maternity leave."*

- The *Part-Time Work Convention, 1994 (No.175)* in particular Article 4 as follows;

> *"**Article 4***
> *Measures shall be taken to ensure that part-time workers receive the same protection as that accorded to comparable full-time workers in respect of:*
> *(a) the right to organize, the right to bargain collectively and the right to act as workers' representatives;*
> *(b) occupational safety and health;*
> *(c) discrimination in employment and occupation."*

Noting the scope of states' referrals of power to support the Act, what legislative or regulatory options are available to the Commonwealth to ensure that all Australian workers, including those in state public sectors, have adequate and equal protection of their rights at work

In addition to the proposals previously outlined, the Association believes the Commonwealth should consider ratifying more International Labour Organization conventions.

The *Collective Bargaining Convention, 1981* and the *Labour Relations (Public Service) Convention, 1978*

The Commonwealth may be able to legislate to protect the rights at work of state public sector workers by first ratifying the following International Labour Organization conventions;

- *Collective Bargaining Convention, 1981 (No.154)*
- *Labour Relations (Public Service) Convention, 1978 (No.151)*

In particular, we draw Committee's attention to Articles 4 and 5 of the *Collective Bargaining Convention, 1981 (No.154)* as follows;

> *"**Article 4***
> *The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or in such other*

manner as may be consistent with national practice, be given effect by national laws or regulations.

Article 5

1. Measures adapted to national conditions shall be taken to promote collective bargaining.

2. The aims of the measures referred to in paragraph 1 of this Article shall be the following:

(a) collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention;

(b) collective bargaining should be progressively extended to all matters covered by subparagraphs (a), (b) and (c) of Article 2 of this Convention;

(c) the establishment of rules of procedure agreed between employers' and workers' organisations should be encouraged;

(d) collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules;

(e) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining."

Article 2(a), (b) and (c) as referred to above are as follows;

"(a) determining working conditions and terms of employment; and/or

(b) regulating relations between employers and workers; and/or

(c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations."

In addition, we draw the Committee's attention to Articles 7 and 8 of the *Labour Relations (Public Service) Convention, 1978 (No.151)* as follows;

*"**Article 7***

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, or of such other methods as will

allow representatives of public employees to participate in the determination of these matters.

Article 8
The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved."

The Association urges the Committee to recommend that these conventions be ratified so that federal legislation can be passed to;

- prevent the operation of the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 No 13* and *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011,*
- prevent the operation of the *Industrial Relations Amendment (Dispute Orders) Bill 2012,* if passed, and
- provide state public sector workers with a right to take protected industrial action.

If legislation of this kind were passed, it would help to ensure that state public sector workers have adequate and equal protection of their rights at work.

The *Nursing Personnel Convention, 1977*

The Association also urges the Commonwealth to ratify the International Labour Organization *Nursing Personnel Convention 1997 (No.149)*. Articles 2, 5 and 8 of this convention state;

*"**Article 2***
1. Each Member which ratifies this Convention shall adopt and apply, in a manner appropriate to national conditions, a policy concerning nursing services and nursing personnel designed, within the framework of a general health programme, where such a programme exists, and within the resources available for health care as a whole, to provide the quantity and quality of nursing care necessary for attaining the highest possible level of health for the population.
2. In particular, it shall take the necessary measures to provide nursing personnel with--
(a) education and training appropriate to the exercise of their functions; and
(b) employment and working conditions, including career prospects and remuneration,
which are likely to attract persons to the profession and retain them in it.
3. The policy mentioned in paragraph 1 of this Article shall be formulated in consultation with the employers' and workers' organisations concerned, where such organisations exist.
4. This policy shall be co-ordinated with policies relating to other aspects of health care and to other workers in the field of health, in consultation with the employers' and workers' organisations concerned."

*"**Article 5***
1. Measures shall be taken to promote the participation of nursing personnel in the planning of nursing services and consultation with such personnel on decisions concerning them, in a manner appropriate to national conditions.
2. The determination of conditions of employment and work shall preferably be made by negotiation between employers' and workers' organisations concerned.
3. The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought through negotiations between the parties or, in such a manner as to ensure the confidence of the parties involved, through independent and impartial machinery such as mediation, conciliation and voluntary arbitration."

*"**Article 8***
The provisions of this Convention, in so far as they are not otherwise made effective by means of collective agreements, works rules, arbitration awards, court decisions, or in such other manner consistent with national practice as may be appropriate under national conditions, shall be given effect by national laws or regulations."

The Association urges the Committee to recommend that this convention be ratified so that federal legislation can be passed to;

- prevent the operation of the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 No 13* and *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* with respect to nurses, midwives and nursing assistants, and
- prevent the O'Farrell Government from abolishing nurse to patient ratios.

Recommendations

The Association makes the following recommendations;

- That the Commonwealth ratify the following International Labour Organization conventions;
  - *Collective Bargaining Convention, 1981 (No.154)*
  - *Labour Relations (Public Service) Convention, 1978 (No.151)*
  - *Nursing Personnel Convention, 1997 (No.149)*

- That the Commonwealth legislate to prevent the operation of the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 No 13* and *Industrial Relations (Public Sector Conditions of Employment) Regulation 2011* by relying upon the following International Labour Organization conventions;

- *Right to Organise and Collective Bargaining Convention, 1949 (No.98)*
- *Minimum Wage Fixing Convention, 1970 (No.131)*
- *Collective Bargaining Convention, 1981 (No.154)* (yet to be ratified)
- *Labour Relations (Public Service) Convention, 1978 (No.151)* (yet to be ratified)
- *Nursing Personnel Convention, 1997 (No.149)* (yet to be ratified)

- That the Commonwealth extend the application of Subdivision B of Division 11 of Part 2-2 of Chapter 2 of the *Fair Work Act 2009* (Cth) relating to redundancy pay to public sector workers by relying upon the International Labour Organization *Termination of Employment Convention, 1982 (No.158).*

- That the Commonwealth extend the application of the General Protections provisions under Part 3-1 of Chapter 3 of the *Fair Work Act 2009* (Cth) by relying upon the following International Labour Organization conventions;
  - *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87)*
  - *Right to Organise and Collective Bargaining Convention, 1949 (No.98)*
  - *Discrimination (Employment and Occupation) Convention, 1958 (No.111)*
  - *Workers' Representative Convention, 1971 (No.135)*
  - *Workers with Family Responsibilities Convention, 1981 (No.156)*
  - *Termination of Employment Convention, 1982 (No. 158)*
  - *Part-Time Work Convention, 1994 (No.175)*

- That the Commonwealth legislate to prevent the operation of the *Industrial Relations Amendment (Dispute Orders) Bill 2012* by relying upon the following International Labour Organization conventions;
  - *Labour Relations (Public Service) Convention, 1978 (No.151)* (yet to be ratified)
  - *Collective Bargaining Convention, 1981 (No.154)* (yet to be ratified)

- That the Commonwealth legislate to provide state public sector workers with a right to take protected industrial action by relying upon the following International Labour Organization convention;
  - *Labour Relations (Public Service) Convention, 1978 (No.151)* (yet to be ratified)
  - *Collective Bargaining Convention, 1981 (No.154)* (yet to be ratified)

- That the Commonwealth legislate to prevent the O'Farrell Government from abolishing nurse to patient ratios by relying upon the International Labour Organization *Nursing Personnel Convention, 1997 (No.149)* (yet to be ratified).

Brett Holmes
General Secretary