



Submission to the Senate Economics Legislation Committee

*Treasury Laws Amendment (Enhancing
Whistleblower Protections) Bill 2017*

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submission

Introduction

The Queensland Nurses and Midwives' Union (QNMU) thanks the Senate Economics Legislation Committee (the Committee) for the opportunity to provide feedback on the Inquiry into the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (the bill).

Nursing and midwifery is the largest occupational group in Queensland Health and one of the largest across the Queensland government. The QNMU is the principal health union in Queensland covering all classifications of workers that make up the nursing workforce 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 57,000 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 and midwives in Queensland are members of the QNMU.

It is the position of the QNMU that nurses and midwives should be free to speak out against poor professional practice, misconduct or corruption identified during the course of their employment without reprisal. Nursing and midwifery, like many other professions have high levels of employment mobility. For that reason, consistent disclosure protections should exist in the public, private and not-for-profit sectors and across state and federal jurisdictions.

While we welcome the introduction of strengthened whistleblower protections for the corporate, financial and credit sectors, our submission relates only to the proposed amendments to the *Corporations Act 2001*.

Recommendations

The QNMU recommends:

- The proposed amendments to the *Corporations Act 2001* should also apply to large charities and non-for-profit organisations covered by the *Australian Charities and Not-for-Profits Commission Act 2012*.
- The parliament passes the bill with the following amendments -

Schedule 1 Part 1 s1317AA to include an additional sub-clause viz:

Disclosure to trade union

A disclosure of information by an individual qualifies for protection under this Part if the disclosure is made to a trade union for the purpose of obtaining advice or representation in relation to the operation of this Part.

Schedule 1 part 1 s1317AS (5) to include an additional requirement viz -

The timeframes within which the company will take action and respond.

Nursing and Midwifery Regulation

Although there may be a broad understanding of the term ‘whistleblowing’, there remains fundamental ambiguity and confusion about who can make a disclosure, the type of matter being disclosed, where the individual can make a disclosure, to whom it can be made and the circumstances in which they can access protections. These factors are exacerbated in the health sector where a raft of legislation, codes of practice, standards and regulations govern clinical practice.

Nurses and midwives must be registered with the Nursing and Midwifery Board of Australia (NMBA), and meet the NMBA's professional standards in order to practice in Australia. Professional standards define the practice and behaviour of nurses and midwives and include:

- codes of conduct;
- codes of ethics;
- guides to professional boundaries, and
- standards for practice/competency standards.

The *Code of Professional Conduct for Nurses in Australia* and the *Code of Professional Conduct for Midwives in Australia*¹ outline the professions’ commitment to respect, promote, protect and uphold the fundamental rights of people who are both the recipients and providers of nursing, midwifery and health care.

They are supported by, and should be read in conjunction with the:

¹ New codes of conduct come into effect from 1 March, 2018.

- *Code of Ethics for Midwifery in Australia;*
- *Code of Ethics for Nursing in Australia;*
- *National Competency Standards for the Registered Nurse;*
- *National competency standards for the Midwife;*
- *National Competency Standards for the Enrolled Nurse; and*
- *National Competency Standards for the Nurse Practitioner.*

Under the *Code of Ethics for Nursing* (NMBA, 2013a, p. 2) quality nursing involves nurses accepting accountability for the standard of nursing they provide, helping to raise the standard of nursing, and taking action when they consider, on reasonable grounds, the standard of nursing to be unacceptable. This includes a responsibility to question and report what they consider, on reasonable grounds, to be unethical behaviour and treatment.

Further, nurses must take steps to ensure that not only they, but also their colleagues, provide quality nursing. In keeping with approved reporting processes, this may involve reporting, to an appropriate authority, cases of unsafe, incompetent, unethical or illegal practice. Nurses also support colleagues whom they reasonably consider are complying with this expectation (NMBA, 2013a, p.3).

Nurses' primary responsibility is to provide safe and competent nursing. Any circumstance that may compromise professional standards or any observation of questionable, unethical or unlawful practice should be made known to an appropriate person or authority. If the concern is not resolved and continues to compromise safe and competent care, nurses must intervene to safeguard the individual and, after exhausting internal processes, may notify an appropriate authority external to their employer organisation (NMBA, 2013b, p. 2).

Similarly, midwives are accountable for the standard of care they provide; helping to raise the standard; and taking action when they consider, on reasonable grounds, the standard to be unacceptable. This includes a responsibility to question and report unethical behaviour or treatment (NMBA, 2013c, p. 3).

According to the *Code of Ethics for Midwifery in Australia* (NMBA, 2013c), midwives take steps to ensure that not only they, but also their colleagues, provide quality maternity care. This may involve reporting to an appropriate authority, cases unsafe, incompetent, unethical or illegal practice.

The *Code of Professional Conduct for Midwives in Australia*, (NMBA, 2013d, p. 3) requires midwives to make known to an appropriate person or authority any circumstance that may compromise professional standards, or any observation of questionable, unethical or unlawful practice, and intervene to safeguard the individual if the concern is unresolved.

These documents, together with other published practice standards (e.g. decision-making frameworks, guidelines and position statements), provide a framework for accountable and responsible nursing and midwifery practice in all clinical, management, education and research areas.

Not-for-Profit Aged Care

The QNMU and our federal body, the Australian Nursing and Midwifery Federation (ANMF) have consistently called for greater protection of employees in the aged care sector who wish to raise issues in relation to the quality of care provided to residents of aged care facilities.

Aged Care providers receive substantial sums of Commonwealth funding. There is a public interest in ensuring that providers disperse these funds for the benefit of residents and to provide the highest quality of care. Since 2016, the Aged Care Complaints Commission (ACCC) has investigated any complaint relating to a Commonwealth subsidised residential or home-based aged care services. Consumers can make an anonymous complaint about any area that impacts their health, safety or wellbeing, such as the care they receive, living conditions, how they interact with the staff or their daily lifestyle (ACCC, 2016).

This leaves staff vulnerable to allegations possibly from an anonymous source over a range of matters related to aged care.

Although presently there are mandatory reporting requirements in relation to reportable assaults, many aged care employees are reluctant to make complaints related to the quality of care, poor facilities, resident neglect or the misappropriation of public funds because the potential for making such complaints may result in the termination of their employment, a reduction in the number of shifts or hours or other less favourable treatment.

Aged providers operate in both the for-profit and non-for-profit sectors. Legislation should provide all nurses working in aged care with protection for disclosures they make in relation to poor facilities, resident neglect, unacceptable standards of nursing or the misappropriation of funds. For these reasons, we seek amendments to the legislation covering not-for-profit providers.

The QNMU recommends:

- The proposed amendments to the *Corporations Act 2001* should also apply to large charities and non-for-profit organisations covered by the *Australian Charities and Not-for-Profits Commission Act 2012*.

Disclosure to third parties

The QNMU endorses the ANMF's *Whistleblowing* policy that states 'health care managers who receive complaints or reports of misconduct, corrupt conduct or criminal conduct must manage the complaint in accordance with relevant legislation and the organisation's policies and procedures' (ANMF, 2017).

Employers have an obligation to ensure they comply with any relevant whistleblower legislation (State, Territory and Commonwealth). Legislation provides protection against reprisals in some circumstances, for example in Queensland the *Public Interest Disclosure Act 2010* for state public sector disclosures and *Health Ombudsman Act 2013* provide a system for dealing with complaints and other matters relating to the health, conduct or performance of health practitioners and the services provided by health service organisations.

Section 275 of the *Health Ombudsman Act Qld 2013* gives protection to a nurse or midwife reporting unethical treatment or behaviour to the Health Ombudsman. This section applies to a person who, honestly and on reasonable grounds, gives information to the Health Ombudsman, a staff member of the Office of the Health Ombudsman or an authorised person for the purpose of a health service complaint. The person is not subject to any liability for giving the information and no action, claim or demand may be taken or made of or against the person for giving the information.

Depending on the circumstances, it may be that a disclosure to a prescribed entity or person is inappropriate or unworkable. In such cases, the person wishing to make the disclosure has no option available to them.

More concerning is that this type of process potentially excludes a person who has disclosed information about improper conduct from protection merely because that person has disclosed the information to the wrong person or entity. Given the array of regulatory bodies within the health sector, such an occurrence is quite possible. For example, a nurse may disclose information to a regulatory agency such as the ACCC and find themselves without appropriate protections. In our experience, nurses and midwives seeking to disclose information may be unfamiliar with the reporting process for the relevant agency.

We advise nurses and midwives who make a complaint or report or who are the subject of a complaint or report to seek support and advice from the QNMU in the first instance. In that regard, the QNMU believes whistleblowers should be permitted to make a disclosure to a third party.

Under s1317AAC(1) of the bill –

- (1) Each of the following is an **eligible recipient** in relation to a regulated entity that is a body corporate:
 - (a) an officer of the body corporate or a related body corporate;
 - (b) an auditor, or a member of an audit team conducting an audit, of the body corporate or a related body corporate;
 - (c) an actuary of the body corporate or a related body corporate;
 - (d) a person authorised by the body corporate to receive disclosures that may qualify for protection under this Part;
 - (e) in relation to a disclosure of information by an individual who is an employee of the body corporate—a person who 16 supervises or manages the individual.

- (3) The regulations may prescribe persons or bodies that are **eligible recipients** in relation to all regulated entities, or in relation to a class or classes of regulated entities

Section 1317AA(3) of the bill provides -

Disclosure to legal practitioner

- (3) A disclosure of information by an individual qualifies for protection under this Part if the disclosure is made to a legal practitioner for the purpose of obtaining legal advice or legal representation in relation to the operation of this Part.

Further, s1317AAD provides -

- (1) A disclosure of information (the **emergency disclosure**) by an individual (the **discloser**) qualifies for protection under this Part if:
 - (a) the discloser has previously made a disclosure of that 8 information (the **previous disclosure**) that qualifies for protection under this Part under subsection 1317AA(1); and
 - (b) a reasonable period has passed since the previous disclosure 11 was made; and
 - (c) the discloser has reasonable grounds to believe that there is an imminent risk of serious harm or danger to public health or safety, or to the financial system, if the information is not 15 acted on immediately; and
 - (d) after the end of the period referred to in paragraph (b), the discloser gave the body to which the previous disclosure was 18 made a written notification that:
 - (i) includes sufficient information to identify the previous disclosure; and
 - (ii) states that the discloser intends to make an emergency disclosure; and

- (e) the emergency disclosure is made to:
 - (i) a member of the Parliament of the Commonwealth, a State or a Territory; or
 - (ii) a journalist.

(2) In this section:

journalist means a person who is working in a professional capacity as a journalist for any of the following:

- (a) a newspaper or magazine;
- (b) a radio or television broadcasting service;
- (c) an electronic service (including a service provided through the internet) that:
 - (i) is operated on a commercial basis; and
 - (ii) is similar to a newspaper, magazine or radio or 2 television broadcast.

These provisions limit disclosure to an 'eligible recipient', legal practitioner or, in an 'emergency', a member of the Parliament of the Commonwealth, State or Territory or a journalist.

We contend there are circumstances where whistleblowers need clear and accessible pathways to disclose information to third parties in certain circumstances when internal disclosure systems are ineffective. For our members, the QNMU represents a legitimate point of contact where they can seek advice or representation often because they have felt it was either unsafe or difficult to make a disclosure within their organisation, or they have confronted serious obstacles in doing so.

The ability for whistleblowers to raise their concerns with a third party be it a legal practitioner, journalist, member of Parliament or union creates a powerful incentive for organisations to act according to prescribed legislation and standards. This is particularly so in the health sector where the workers themselves are subject to extensive regulation.

It is a core function of unions to protect and advance workers' rights and conditions of employment. Unions and other third parties themselves should be immune from reprisal action in the event they decide to act on the disclosure or make the information public. We suggest that not only does the person making the disclosure need protection but also the third party.

The *Public Interest Disclosures Act 2010 Qld* facilitates the disclosure, in the public interest, of information about wrongdoing in the Queensland public sector and provides protection for those who make disclosures. In Queensland, individual Hospital and Health Boards are responsible for establishing a contact point for public interest disclosures. It has been our experience that when members seek protection under this act, actually locating the contact

position can often be difficult and a lengthy response time mitigates against taking this form of action.

This is why we seek rigour in the timeliness and integrity of the process to give greater protection to the individual and enhance faith in whistleblowing as a benefit to the public interest.

The QNMU recommends:

Schedule 1 Part 1 s1317AA of the bill be amended to include the following additional sub-clause -

Disclosure to trade union

A disclosure of information by an individual qualifies for protection under this Part if the disclosure is made to a trade union for the purpose of obtaining advice or representation in relation to the operation of this Part.

Schedule 1 part 1 s1317AS (5) be amended to include the following additional requirement -

The timeframes within which the company will take action and respond.

Conclusion

The QNMU welcomes measures to strengthen whistleblower legislation so there is consistent protection across sectors and organisations and the reporting authorities are easily accessible. As we have argued, the array of whistleblowing legislation operates alongside industrial and professional regulation and for registered professions this presents a level of complexity and uncertainty that can often preclude an individual from taking action.

References

Aged Care Complaints Commissioner (2016) retrieved from

<http://www.myagedcare.gov.au/quality-and-complaints/aged-care-complaints-commissioner>

Australian Nursing and Midwifery Federation (2017) *Whistleblowing Policy* retrieved from

http://anmf.org.au/documents/policies/P_Whistleblowing.pdf

Nursing and Midwifery Board Australia (2013a) *Code of Ethics for Nursing in Australia*.

Nursing and Midwifery Board Australia (2013b) *Code of Professional Conduct for Nurses*.

Nursing and Midwifery Board Australia (2013c) *Code of Ethics for Midwifery in Australia*.

Nursing and Midwifery Board Australia (2013d) *Code of Professional Conduct for Midwives in Australia*.

Legislation

Corporations Act 2001

Health Ombudsman Act 2013 Qld

Public Interest Disclosure Act 2010 Qld