



August 2019

# Religious Discrimination Bill – Exposure Draft

## Submission Form

Date of Submission: 2/10/2019

### Your details

**Organisation Name:** Australian Nursing and Midwifery Federation

**Organisation Type:** Trade union and professional organisation

*i.e. not-for-profit, religious institution, educational facility, etc.*

*If you are providing a submission on behalf of an organisation, please provide the name of a contact person*

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## Your Submission

Please respond in the box provided below.

1. The Australian Nursing and Midwifery Federation (ANMF) is Australia's largest national union and professional nursing and midwifery organisation. In collaboration with the ANMF's eight state and territory branches, we represent the professional, industrial and political interests of more than 275,000 nurses, midwives and carers across the country.
2. Our members work in the public and private health, aged care and disability sectors across a wide variety of urban, rural and remote locations. We work with them to improve their ability to deliver safe and best practice care in each and every one of these settings, fulfil their professional goals and achieve a healthy work/life balance.
3. Our strong and growing membership and integrated role as both a trade union and professional organisation provides us with a complete understanding of all aspects of the nursing and midwifery professions and see us uniquely placed to defend and advance our professions.
4. Through our work with members, we aim to strengthen the contribution of nursing and midwifery to improving Australia's health and aged care systems, and the health of our national and global communities.
5. The ANMF thanks the Attorney-General's Department for providing this opportunity to comment on the exposure drafts of the 'Religious Discrimination Bills' (the **Bills**) and in particular the *Religious Discrimination Bill 2019* (the **RD Bill**).
6. The ANMF ask the Committee to read our submission in conjunction with that of our peak body, the Australian Council of Trade Unions (ACTU). The ANMF supports the submissions of the ACTU with respect to the matters not addressed in this submission. The ANMF submission discusses:
  - A. Religious conscientious objections and health practitioner conduct (indirect discrimination);
  - B. Conduct in direct compliance with legislation and potential contradictions; and

## C. ANMF position on the Bills

### A. Religious conscientious objections and health practitioner conduct (indirect discrimination)

7. The Australian Human Rights Commission defines ‘indirect discrimination’ as occurring when “there is an unreasonable rule or policy that is the same for everyone but has an unfair effect on people who share a particular attribute”<sup>1</sup>. The RD Bill encompasses indirect discrimination generally at clauses 8(1) and (2), providing:

#### **Discrimination on the ground of religious belief or activity—indirect discrimination**

##### *Indirect discrimination*

- (1) A person *discriminates* against another person on the ground of the other person’s religious belief or activity if:
- the person imposes, or proposes to impose, a condition, requirement or practice; and
  - the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons who have or engage in the same religious belief or activity as the other person; and
  - the condition, requirement or practice is not reasonable.

##### *Considerations relating to reasonableness*

- (2) Subject to subsections (3), (5) and (6), whether a condition, requirement or practice is reasonable depends on all the relevant circumstances of the case, including the following:
- the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice;
  - the feasibility of overcoming or mitigating the disadvantage;
  - whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice;
  - if the condition, requirement or practice is an employer conduct rule—the extent to which the rule would limit the ability of an employee of the employer to have or engage in the employee’s religious belief or activity.
8. The RD Bill then goes further than other Commonwealth indirect discrimination laws by providing for extra grounds that are to be considered ‘indirect discrimination’. This includes ‘statements of belief’ covered in clauses 8(3) and (4) of the RD Bill. As the focus of this submission concerns the ‘health practitioner conduct rules’ indirect discrimination provisions, the ANMF will not address this clause in much detail. We refer to the detailed submissions of the ACTU and the Human Rights Law Centre in this respect.
9. The RD Bill also goes further than other Commonwealth indirect discrimination laws by providing for the additional ground of ‘conscientious objections by health practitioners’ as being a potential ground for indirect discrimination as provided in clauses 8(5) and (6):

#### **Conditions that are not reasonable relating to conscientious objections by health practitioners**

- (5) For the purposes of paragraph (1)(c), if a law of a State or Territory allows a health practitioner to conscientiously object to providing a health service because of a religious belief or activity held or engaged in by the health practitioner, a health practitioner conduct rule that is not consistent with that law is not reasonable.

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<sup>1</sup> Australian Human Rights Commission, *Indirect Discrimination*, (<https://www.humanrights.gov.au/quick-guide/12049> accessed 2 October 2019)

Note: A requirement to comply with a health practitioner conduct rule that is not reasonable under this subsection is also not an inherent requirement of work (see subsection 31(7)).

(6) For the purposes of paragraph (1)(c), if subsection (5) does not apply, a health practitioner conduct rule is not reasonable unless compliance with the rule is necessary to avoid an unjustifiable adverse impact on:

- (a) the ability of the person imposing, or proposing to impose, the rule to provide the health service; or
- (b) the health of any person who would otherwise be provided with the health service by the health practitioner.

Note: A requirement to comply with a health practitioner conduct rule that is not reasonable under this subsection is also not an inherent requirement of work (see subsection 31(7)).

10. 'Health practitioner conduct rules' are defined at clause 5 of the RD Bill. In the definition 'person' includes a body corporate, such as an employer:

*health practitioner conduct rule* means a condition, requirement or practice:

- (a) that is imposed, or proposed to be imposed, by a person on a health practitioner; and
- (b) that relates to the provision of a health service by the health practitioner; and
- (c) that would have the effect of restricting or preventing the health practitioner from conscientiously objecting to providing the health service because of a religious belief or activity held or engaged in by the health practitioner, being a religious belief or activity that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the health practitioner's religion.

11. In the Explanatory notes of the RD Bill, examples are provided of what would and would not constitute 'unjustifiable adverse impact' for the purpose of a 'health practitioner conduct rule':

147. ...if non compliance with a health practitioner conduct rule could result in the death or serious injury of the person seeking the health service, this would generally amount to an unjustifiable adverse impact.

148. Similarly, non compliance with a policy that required the sole medical practitioner in a small rural community to prescribe contraception in appropriate cases may amount to an unjustifiable adverse impact on the ability of that practice to provide medical services to that community, and may also have an unjustifiable adverse impact on the health of women seeking contraception (such as women seeking the Pill for non-contraceptive use, such as in order to treat endometriosis or polycystic ovary syndrome), as they may be unable to access alternative healthcare promptly without significant travel and cost.

12. The RD Bill effectively provides that the default position of all 'health practitioner conduct rules' is that they are not reasonable unless the person implementing such a rule demonstrates an unjustifiable adverse impact on a health service. It is unclear what an 'unjustifiable adverse impact' is in the health service environment.

13. The examples in the RD Bill's explanatory notes are disturbing because they appear to show that the bar is set very high for health services to demonstrate that a 'health practitioner conduct rule' was reasonable, when the exemptions in clauses 8(5) and 8(6) are taken into consideration. The Bill

appears to impose a higher legal bar than ‘reasonableness’ tests used in other indirect discrimination laws, of which the ‘health practitioner conduct rule’ is a part.

14. For example, the *Racial Discrimination Act 1975* (Cth) defines ‘reasonableness’ at s. 9(1A) in the context of “having regard to the circumstances of the case”. Section 7B of the *Sex Discrimination Act 1984* (Cth) defines ‘reasonableness’ in the context of whether “the condition, requirement or practice is reasonable in the circumstances”. The *Disability Discrimination Act 1992* (Cth) at s. 6(3) states that a “requirement or condition is reasonable, having regard to the circumstances of the case”. The RD Bill has a similar definition of ‘reasonableness’ at clause 8(2) but as demonstrated goes much further in subsequent clauses.

15. The *Voluntary Assisted Dying Act 2017* (Vic) (**VAD Act**) is an example of a law that provides for conscientious objections for the purposes of clause 8(5) of the RD Bill. At s.7 of the VAD Act a conscientious objection definition is spelled out very clearly:

***Conscientious objection of registered health practitioners***

*A registered health practitioner who has a conscientious objection to voluntary assisted dying has the right to refuse to do any of the following—*

- (a) to provide information about voluntary assisted dying;*
- (b) to participate in the request and assessment process;*
- (c) to apply for a voluntary assisted dying permit;*
- (d) to supply, prescribe or administer a voluntary assisted dying substance;*
- (e) to be present at the time of administration of a voluntary assisted dying substance;*
- (f) to dispense a prescription for a voluntary assisted dying substance.*

16. This level of clarity in the VAD Act is not provided in the RD Bill. This could lead to confusion for both health practitioners and health services in the delivery of health care. Under State and Territory laws, the right to conscientiously object is largely limited to certain types of health services (such as abortion and voluntary assisted dying) and is often conditional, such as requiring assistance where necessary to preserve life or provided a referral is organised for the patient.<sup>2</sup>

17. Australia is a party to the International Covenant on Civil and Political Rights (ICCPR). The ICCPR recognises the right to freedom of thought, conscience and religion in article 18<sup>3</sup>. Article 18 is the primary international legal provision protecting freedom of religion or belief. It stipulates, in part:

*3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.*

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<sup>2</sup> e.g. conscientious objection to assist in abortion is subject to a duty to refer and to assist when necessary to preserve life or in an emergency: *Abortion Law Reform Act 2008* (Vic), s 8; *Termination of Pregnancy Act 2018* (Qld), s 8

<sup>3</sup> International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 generally, and for Australia, 13 November 1980)

18. The Bill does not appear to implement this balancing aspect of the ICCPR at Article 18. It does not ensure that the fundamental rights and freedoms of everyone are protected. By allowing a health practitioner who claims a conscientious objection a broad discretion in accordance with the doctrines, tenets, beliefs or teachings of their religion, the right to have healthcare delivered in a non-discriminatory manner can be undermined.

19. For example, the ANMF is very concerned that the wording in the Bill will allow for discrimination against the LGBTIQ+ community. It is not clear whether a pharmacist could refuse to provide hormones to a transgender patient, on the grounds of conscientious objection. Honorary Associate Professor Ruth Mcnair notes that even now with current laws in place that there is substantial discrimination where some health professionals have told LGBTIQ+ Australians: "I don't treat people like you".<sup>4</sup> If these Bills become law then matters will undoubtedly get worse.

#### B. Conduct in direct compliance with legislation and potential contradictions

20. Clause 29 of the RD Bill states that it is not unlawful for a person to discriminate against another person, on the ground of the other person's religious belief or activity, if the conduct constituting the discrimination is in direct compliance with a provision of a law of a State or a Territory or in compliance with a law of the Commonwealth or an instrument made under law of the Commonwealth. In addition, the law or instrument must not be prescribed by the regulations.

21. The Health Practitioner Regulation National Law (the National Law) is a series of state Acts of Parliament<sup>5</sup>. A mandatory or voluntary notification made under the National Law could be conducted in compliance with legislation of a state or territory. A notification is a complaint or concern about a registered practitioner that is lodged with the Australian Health Practitioner Regulation Agency (AHPRA) or a National Board (e.g. the Nursing and Midwifery Board of Australia).

22. The example given in the explanatory notes refers to state police exercising their powers but from a plain reading of the RD Bill, compliance is broader than this. It is not difficult to imagine that employers might want to report more matters to AHPRA instead of dealing with an issue "in house" in order to ensure they cannot run afoul of the discrimination provisions in the Bill.

23. There is plenty of potential for contradictory outcomes in the RD Bill and its operation. One potential conflict is between the individual being able to exercise a conscientious objection as opposed to an employer or another party being able to make reports under law to AHPRA for unprofessional conduct.

24. A registered nurse who had a genuine conscientious objection which was found to be not 'unjustifiable' in accordance with clause 8(6) of the RD Bill could still potentially have a notification with AHPRA brought against them for unprofessional conduct, which may not be discrimination since it could be conducted in direct compliance with state or territory legislation. This is because the nurse must conduct

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<sup>4</sup> Ireland, J. 'This will drive people back into the closet': LGBTIQ warning on religious discrimination bill, *The Sydney Morning Herald*, 10 September 2019 (<https://www.theage.com.au/politics/federal/this-will-drive-people-back-into-the-closet-lgbtqi-warning-on-religious-discrimination-bill-20190910-p52ppz.html> accessed 2 October 2019)

<sup>5</sup> See <https://www.ahpra.gov.au/About-AHPRA/What-We-Do/Legislation.aspx>

themselves in accordance with the 'Code of conduct for nurses'<sup>6</sup>, which is made under the National Law. The code provides at clause 4.4:

To prevent conflicts of interest from compromising care, nurses must:

- a. act with integrity and in the best interests of people when making referrals, and when providing or arranging treatment or care
- b. responsibly use their right to not provide, or participate directly in, treatments to which they have a conscientious objection. In such a situation, nurses must respectfully inform the person, their employer and other relevant colleagues, of their objection and ensure the person has alternative care options

25. This leads to a hypothetically contradictory outcome where:

- i. a registered nurse invokes their conscientious objection to not perform a procedure for a patient; which does not have an "unjustifiable adverse impact" on a patient or the health service. The employer is restrained from taking action because of the "health practitioner conduct rule" in s.8(6) of the RD Bill;  
*but at the same time*
- ii. the registered nurse could potentially be reported to AHPRA if their objection was not done in compliance with the Code of Conduct for Nurses or the employer thought their behaviour was not in the best interests of people. AHPRA has a range of powers under the National Law, including suspension and deregistration. This is because clause 29 of the RD Bill provides that there is no discrimination if someone is acting in direct compliance with a provision of a law of a State or a Territory, which reporting a person to AHPRA could be.

26. Patient safety and welfare is what health practitioners, including nurses and midwives, strive to put at the forefront of their vocation. The confusing and contradictory nature of the Bills will make patient safety and welfare more difficult for health practitioners, and the health services they work in, to deliver. This is because health services and the health practitioners who work within them are supposed to wade through competing legal interests that do not appear to have been considered by the Commonwealth Government.

### C. ANMF position on the Bills

27. The Bills fail to prevent religious discrimination in the same way as existing Commonwealth and state/territory discrimination laws protect discrimination on the grounds of age, disability, sex and race. Instead, the Bills benefit religious belief and activity over other discrimination attributes. One of the many examples of this is that statements of belief cannot constitute discrimination for the purposes of s.17(1) of the *Anti-Discrimination Act 1998* of Tasmania. Section 17(1) protects against behaviour that "offends, humiliates, intimidates, insults or ridicules another person".

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<sup>6</sup> Code of Conduct for Nurses, *Nursing and Midwifery Board of Australia*, (<https://www.nursingmidwiferyboard.gov.au/Codes-Guidelines-Statements/Professional-standards.aspx> accessed 2 October 2019). Registration as a nurse requires a person to practise within the relevant Nursing and Midwifery Board of Australia (NMBA) approved standards, codes, guidelines and frameworks.

28. Instead of a standalone RD Bill that pushes some rights ahead of others, the ANMF suggests that religious discrimination should be included in a larger and more comprehensive Bill of Rights. Human rights are 'universal, indivisible and interdependent and interrelated'.<sup>7</sup> If religious freedom is to be strengthened, it should go together with an improved system that provides for competing rights to be balanced through a comprehensive legislative Bill of Rights. Such a bill would recognise and safeguard fundamental human rights. It would also strike an appropriate balance where intersections of competing rights arise.
29. The wording in the RD Bill will potentially allow for *more* discrimination against the LGBTIQ+ community, women and racial minorities. As former Tasmanian anti-discrimination commissioner, Robin Banks noted: "Religious speech is so privileged (in the Bills) it will allow people to engage in racist, ableist, sexist anti-LGBTI speech."<sup>8</sup>
30. The ANMF submits that the RD Bill should not be passed because the provisions are not in line with other Commonwealth anti-discrimination laws, are poorly drafted and have the potential to make patient safety and welfare more difficult to deliver. A law concerning religious discrimination should be incorporated into a broader Bill of Rights with the standard indirect discrimination tests found in other Commonwealth indirect anti-discrimination laws used. This would mean that indirect discrimination would be found to occur only where there is an unreasonable rule or policy that is the same for everyone but has an unfair effect on people who share a particular religious belief or activity.

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<sup>7</sup> Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights in Vienna on 25 June 1993, at [5].

<sup>8</sup> Karp, P. "Religious discrimination bill attacked as 'extraordinary foray in the culture wars'" *The Guardian*, 30 August 2019 (<https://www.theguardian.com/world/2019/aug/30/religious-discrimination-bill-attacked-extraordinary-foray-culture-wars> accessed 2 October 2019)