SUBMISSION OF THE AUSTRALIAN NURSING AND MIDWIFERY FEDERATION

TO THE PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

RELIGIOUS DISCRIMINATION BILL 2021 AND RELATED BILLS

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Introduction

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 300,000 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 Parliamentary Joint Committee on Human Rights for the opportunity to comment on the exposure draft of the Religious Discrimination Bills (the RD Bills) and in particular the Religious Discrimination Bill 2021 (RDB).

6. The ANMF asks the Committee to read our submission in conjunction with that of our peak body, the Australian Council of Trade Unions (ACTU).[1] The ANMF supports the submissions of the ACTU.

7. On 26 November 2021, the Attorney-General referred the following Bills to the Parliamentary Joint Committee on Human Rights for inquiry and report by 4 February 2022:

   - The Religious Discrimination Bill 2021
   - The Religious Discrimination (Consequential Amendments) Bill 2021
   - The Human Rights Legislation Amendment Bill 2021

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8. Submissions are due on 21 December 2021, with public hearings scheduled for 21 December 2021 and 13 and 14 January 2022. The ANMF takes this opportunity to express its deep concern about the timeline for this inquiry. It is apparent that this is a rushed process on behalf of the Government to push through controversial legislation in a manner intended to minimise the chance for making submissions and allowing attendance at inquiry hearings.

9. The previous Religious Freedom Bills have been rejected/withdrawn twice. The third iteration of the RD Bills remains deeply concerning and if passed will likely have serious negative implications for ANMF members in their employment in the health and aged care sectors. Our concern is also for workers in other sectors, particularly in education. The issue of equality of human rights is important for all workers and for people accessing services. The ANMF submission addresses the broader health implications of passing legislation that protects conduct that would otherwise be considered discriminatory.

10. The ANMF submits that the RDB should not be passed by the Parliament in its current form. We strongly recommend that all sections of the RDB that depart from the usual framework of anti-discrimination law be removed. To the extent that the RDB provides protection against unlawful discrimination on the grounds of religious belief or activity, the ANMF supports those parts of the Bill.

Aged care and private hospitals being able to discriminate on religious grounds

11. Section 19 of the RDB sets out the grounds under which it is unlawful to discriminate against an employee on the ground of an employee's religious belief or practice. Section 9 of the RDB provides, however, that religious hospitals, aged care facilities and accommodation providers are protected from discrimination when:

    - conduct is engaged in by the body in good faith.
    - a person of the same religion as the body could reasonably consider the conduct to be in accordance with the doctrines, tenets, beliefs or teaching of that religion;
    - the conduct is engaged in to avoid injury to the religious susceptibilities of adherents of the same religion as the body (s 9(5)(c)); and
    - the conduct is in accordance with a publicly available policy.

12. The provision also makes clear that conduct includes giving preference to persons of the same religion as the body, thus allowing preferential treatment for employees of the same faith.

13. Ironically, these provisions of the RDB will allow employers to blatantly discriminate on the grounds of a person's religion or lack of religion. For example, a faith based aged care facility would be able to justify refusing to hire or promote a worker of another faith on the grounds of their religious belief under this exemption in the RDB. With respect to the employment practices of aged care and private hospital facilities, these provisions are unprecedented.

14. At a time where there is unparalleled demand on both the health and aged care workforce, there is little reason to provide broader exemptions for faith based employment discrimination.

15. The ANMF shares the ACTU's concern that the protection of discriminatory employment practices may give further scope for employers to entrench insecure work, particularly in aged care. An aged care worker who is engaged at a faith based facility may become even more reluctant to raise employment or work related concerns or to act collectively, if they are concerned that their employer could adversely affect their employment on the basis that they do not share the same faith or religious beliefs.

16. The need for secure work and conditions in aged care to attract and retain appropriately skilled and qualified workers has never been greater.

Discrimination in education settings

17. The ANMF shares the very serious concerns about the RDB's provision for educational institutions to engage in discriminatory conduct, even if that conduct would be contrary to State and Territory ant-discrimination laws.[2]

18. There are two areas of particular concern for the ANMF in relation to this. The first is that nurses are employed in schools and other educational institutions, so may be subject to discrimination in their employment in a similar manner to teachers. This would be highly inconsistent with the role of a health professional in an educational setting.

19. For example, if a nurse is engaged to provide health and wellbeing services to students in a religious school setting, those services must be offered on the basis of best health practice, rather than be influenced by religious beliefs. Young people should not experience prejudice or barriers to being able to discuss sexual health in a safe and confidential manner.

20. In addition, the RDB fails to protect students in a religious education setting, particularly LGBQTI students. In a school setting, the ability to speak confidentially and safely with a health professional such as a school nurse, is extremely important. The health risks associated with alienating gender and sexually diverse people from the health system are set out below. These risks are amplified in the case of young people, particularly those whose sexual or gender identity does not conform with that of their religious education setting. Access to a trusted health professional who will not judge or treat a student adversely is extremely important.

Qualifying body conduct rules

21. The ANMF is particularly concerned about Part 3 of the RDB at section 15.

22. Section 15(1) provides that a qualifying body is prevented from imposing a condition, requirement or practice that restricts a person from making Statements of Belief outside of the course of practicing in the relevant profession, trade or occupation, unless the restriction is an essential requirement of the profession, trade or occupation.

23. Section 15(2) provides that a qualifying body discriminates against a person on the ground of the person’s religious belief or activity if the qualifying body conduct rule has, or is likely to have, the effect of restricting or preventing a person from making a statement of belief other than in the course of the person practising a relevant profession trade or occupation.

24. The effect of section 15 is to place both registered practitioners and their regulatory bodies in an invidious position that fails to recognise the nature and purpose of professional registration. The definition of ‘qualifying body’ would appear to include both Australian Health Practitioner Regulation Agency **(Ahpra)** and all of the professional Boards that operate under the Health Practitioner National Law to administer the National Registration and Accreditation Scheme.

25. The Nursing and Midwifery Board of Australia **(NMBA)** is the National Board for both the nursing and midwifery professions. The NMBA's role is to: register nurses, midwives and students of nursing and midwifery; develop standards, codes and guidelines for nurses and midwives; manage notifications, complaints, investigations and disciplinary hearings; assess internationally qualified nurses and midwives **(IQNMs)** seeking to practice in Australia; and approve accreditation standards and courses of study leading to registration or endorsement as a nurse or midwife.

26. The national Professional Practice Framework includes:

- Standards for Practice, including:
  - Registered nurse standards for practice,
  - Enrolled nurse standards for practice,
  - Nurse practitioner standards for practice.
- Codes of Conduct, including:
  - Code of conduct for nurses.
- Codes of Ethics, including:
  - International Council of Nurses (ICN) Code of ethics for nurses.
- Frameworks, including:
  - Decision-making framework (DMF),
  - Assessing standards for practice for nurses and midwives.
- Guidelines, including:
  - Guidelines for registration standards,
  - Professional practice guidelines,
  - Safety and quality guidelines for nurse practitioners.

- Registration Standards:
  - Criminal history,
  - English language skills,
  - Continuing professional development,
  - Recency of practice,
  - Professional indemnity insurance arrangements
  - Endorsement as a nurse practitioner,
  - Endorsement for scheduled medicines for registered nurses.

27. According to Ahpra and the NMBA:[3]

> Scope of practice is the full spectrum of roles, functions, responsibilities, activities and decision-making capacity that individuals within that profession are educated, competent and authorised to perform. Some functions within the scope of practice of any profession may be shared with other professions or other individuals or groups. The scope of practice of all health professions is influenced by the wider environment, the specific setting, legislation, policy, education, standards and the health needs of the population.

28. Nurses and midwives are respectively bound by a Code of Conduct, Standards of Practice and a Code of Ethics. Each of these documents applies to nurses and midwives in all aspects of their practice, regardless of setting. The overarching premise is that nurses and midwives are bound to promote health and wellbeing with respect to the individuals to whom they provide care, the broader community and globally. Section 15 of the RDB fails to recognise the interconnected nature of the regulatory framework under which nurses and midwives practice and the role of the NMBA in ensuring standards of practice and codes of conduct are met to ensure the safety of the public

29. This is expressed, for example in the International Nurses Council Code of Ethics, which states ' The values and obligations expressed in this Code apply to nurses in all settings, roles and domains of practice'. This applies equally to midwives.

30. The Code of Conduct applies to all nurses as follows:

> *The principles of the code apply to all types of nursing practice in all contexts. This includes any work where a nurse uses nursing skills and knowledge, whether paid or unpaid, clinical or non-clinical. This includes work in the areas of clinical care, clinical leadership, clinical governance responsibilities, education, research, administration, management, advisory roles, regulation or policy development. The code also applies to all settings where a nurse may engage in these activities, including face-to-face, publications, or via online or electronic means.*[4]

31. The combined effect of the Codes of Practice, Ethics and Standards of Practice is holistic in applicability and does not make distinction between conduct in the workplace setting as opposed to outside of work. While some Standards are directly linked to practice, the obligation for nurses and midwives to act ethically and in accordance with values of public health and respect for individuals does not cease at the end of a shift.

32. The Codes also provide obligations that extend beyond the time in which nurses and midwives are engaged in direct or face to face care. For example Principle 7 of the Registered Nurses Code of Conduct provides:

> *Principle 7: Health and wellbeing*
>
> *Value*
>
> *Nurses promote health and wellbeing for people and their families, colleagues, the broader community and themselves and in a way that addresses health inequality.*
>
> *7.1 Your and your colleagues' health*
>
> *Nurses have a responsibility to maintain their physical and mental health to practise safely and effectively. To promote health for nursing practice, nurses must:*
>
> *understand and promote the principles of public health, such as health promotion activities and vaccination*[5]

33. The COVID-19 pandemic has raised the issue of grounds for refusing vaccination to a high level of public discourse, much of which has played out on social media. One ground put forward for refusing vaccination is on the basis that receiving vaccination is contrary to religious belief. A nurse or midwife who is a member of a religion that opposes vaccination on the basis of faith, may be protected by the RDB from qualifying body sanction, for conduct such as spreading false or misleading information on social media that would otherwise be found to be in breach of the Code of Conduct.

34. The NMBA has a clear position statement on vaccines:

> *The NMBA recognises the Australian National Immunisation Handbook 10th edition as providing evidence-based advice to health professionals about the safe and effective use of vaccines and the public health benefits associated with vaccination. The NMBA supports the use of the handbook by registered nurses, enrolled nurses and midwives who are giving vaccines.*
>
> *The NMBA expects all registered nurses, enrolled nurses and midwives to use the best available evidence in making practice decisions. This includes providing information to the public about public health issues.*[6]

35. A further example of where there may be conflict between the Code of Conduct and the provisions of section 15 of the RDB can be seen in the positive duty required of nurses and midwives to observe culturally safe and respectful practice. The Code of Conduct states:

> ### *Culturally safe and respectful practice*
>
> *Culturally safe and respectful practice requires having knowledge of how a nurse's own culture, values, attitudes, assumptions and beliefs influence their interactions with people and families, the community and colleagues. To ensure culturally safe and respectful practice, nurses must:*
>
> *a. understand that only the person and/or their family can determine whether or not care is culturally safe and respectful*
>
> *b. respect diverse cultures, beliefs, gender identities, sexualities and experiences of people, including among team members*

> c. *acknowledge the social, economic, cultural, historic and behavioural factors influencing health, both at the individual, community and population*
>
> d. *adopt practices that respect diversity, avoid bias, discrimination and racism, and challenge belief based upon assumption (for example, based on gender, disability, race, ethnicity, religion, sexuality, age or political beliefs)*
>
> e. *support an inclusive environment for the safety and security of the individual person and their family and/or significant others, and*
>
> f. *create a positive, culturally safe work environment through role modelling, and supporting the rights, dignity and safety of others, including people and colleagues.*

36. There is a considerable risk that the RDB will provide protection for conduct that would breach the Code and as elaborated on below, this has potentially serious and negative health consequences.

37. The RDB fails to acknowledge that health professionals, such as nurses and midwives, by virtue of their registration accept standards of conduct that are integral at all times to the integrity and values of the profession. The RDB places both health professionals and qualifying bodies in a position of having to draw artificial distinctions between work and non-work time. The RDB creates the potential for qualifying bodies to be found to be discriminatory for seeking to enforce the standards of practice and conduct in circumstances that would otherwise clearly fall within the scope of the role of such qualifying bodies.

38. The ANMF submits this not only undermines authority of the qualifying body, but also the community standing of registered professionals. This goes further, in that a loss of confidence in health professionals, can have serious detrimental effects on individuals' decisions to access and approach health care services.

39. Put simply, the RDB by giving licence to individuals who are subject to professional oversight by a qualifying body, to express religious views that may be detrimental, exclusive or offensive to a range of individuals, for example gender and sexually diverse people, has the real potential to result in negative health outcomes for those people.

40. The ANMF expresses serious concern about the operation of section 15 of the RDB and urges this inquiry to remove this part of the RDB and the provisions in section 21 making it unlawful for qualifying bodies to implement and oversee conduct rules relevant to the profession. It should be noted that decisions made by qualifying bodies, which impact on the registration of regulated professionals are subject to review.[7]

41. The paragraphs below elaborate on how marginalised groups may be disadvantaged in accessing health care if discrimination on religious grounds is sanctioned.

The health impact of the RDB

42. The ANMF is concerned that the legislation proposed by the RDB would have serious negative implications for the health and wellbeing of people who are members of minority and often marginalised groups including people who are gender and sexually diverse.

43. It is abundantly clear that gender and sexually diverse people are often worse off in terms of health and wellbeing in comparison to the wider Australian population. [8,9,10] This is because of the history and ongoing nature of marginalisation and discrimination linked to poorer health services engagement and use and negative impacts of social determinations of health.[11,12] Discrimination in health care settings endangers LGBTQ people's lives through delays or denials of medically necessary care.[13]

44. There is extensive research evidence demonstrating that there are significant disparities between the physical and mental health and wellbeing of gender and sexually diverse people and the general population.[14,15,16] This gap is likely attributable to experiences of stigma and discrimination, violence, and abuse driven by homophobia, biphobia, transphobia and intersexphobia. [17,18,19,20] These experiences, which have accumulated over a long period of time still exist and are widespread in Australia today despite relatively recent advances such as the decriminalisation of homosexuality (1975-1997), same-sex marriage laws (2018) and the abolishment of 'gay panic' as a murder defence (2003-2020).

45. The stigma experienced by gender and sexually diverse people across many social contexts including schools, religious communities, sport, and health and social services has led to social and community marginalisation which also can be linked to negative social determinants of health including but not limited to higher rates of obesity, alcohol and drug use, and smoking.[21,22] These experiences have also contributed to barriers in accessing health and community services, due to peoples' actual or anticipated experiences of stigma and discrimination both within and by the health and medical sector as well as the community more broadly.[23]

46. Underutilisation and avoidance of health and social services from lack of engagement with preventive health interventions, non-participation in cancer and mental health screening, and delay or avoidance of treatment and support services for mental and physical illnesses contributes to gender and sexually diverse people experiencing worse physical health and wellbeing outcomes in comparison with the wider community.[24]

47. By making it harder for health professional regulating bodies such as the NMBA to enforce professional standards, the healthcare environment and broader community will become a less inclusive, less safe place for everyone, particularly members of minority groups. By removing protections under existing anti-discrimination laws that help to protect people from offensive, uninformed, insulting, demeaning or damaging statements based in or about religion, the proposed laws would contribute to known barriers that minority groups face when accessing healthcare. This in turn would lead to poorer healthcare engagement and worse health and wellbeing outcomes including otherwise avoidable morbidity and mortality. While statements that are malicious, that harass, threaten, intimidate, vilify or encourage serious offences would not be protected by the proposed law, the line between statements made 'in good faith' that would be allowed and those that would not be is unclear. Ultimately, the proposed legislation would allow people including healthcare professionals and staff to make certain statements that would be understood to be discriminatory under current laws.

48. It is important to understand that gender and sexually diverse people's relationships with healthcare can be problematic and based on a long history of trauma, marginalisation, and discrimination both within and beyond healthcare. This marginalisation is also often experienced to a greater extent by gender and sexually diverse people who belong to multiple marginalised and historically mistreated groups, including First Nations and culturally diverse people and people experiencing homelessness. [25]

Gender and sexually diverse people may feel more hesitant and fearful of engaging with healthcare services knowing that healthcare professionals and staff could have greater freedoms to express views that would be currently classified as discriminatory. Even if such statements are not experienced firsthand, overall the RDB would make healthcare and the community more broadly a less safe and inclusive space for gender and sexually diverse people by allowing currently discriminatory statements that cause fear and anxiety and reluctance to engage with healthcare services.

49. Australia has better waiting times for healthcare than many other countries, however long waiting times due to high demand and limited resources can still be problematic.[26,27,28] While waiting times impact everyone and not just gender and sexually diverse people,[29] this can lead to poorer access to care and treatment when it is needed,[30] and be a compounding factor for worse engagement with health services since gender and sexually diverse people may already delay presenting to health services due to past negative experiences or fear of future discrimination.[31,32]

50. Because the RDB leaves professional bodies with limited flexibility to consider whether statements made outside work contexts could cause harm to colleagues, clients, patients, or the public, regulatory bodies such as the NMBA will be prevented from responding reasonably to registrants who make who make offensive, uninformed, insulting, demeaning or damaging statements based in or about religion outside work contexts. This also risks undermining public confidence, particularly that of already marginalised minority groups, in the professions and can result in reduced trust and engagement with healthcare.

51. Many members of marginalised minority groups such as people who are gender and sexually diverse already experience fear and anxiety when engaging with healthcare services and health professionals. The RDB would amplify that fear and anxiety and likely result in worse engagement with services. Making it easier for health professionals to express potentially harmful views, risks reducing engagement of minority groups in the health system, thus perpetuating and worsening both physical, mental health and wellbeing outcomes.

ANMF position on the RD Bills

52. The RD 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 RD Bills prioritise 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 s17(1) of the Anti-Discrimination Act 1998 of Tasmania. Section 17(1) protects against behaviour that

    "offends, humiliates, intimidates, insults or ridicules another person".

53. Instead of a standalone RDB that prioritises 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".[23] 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.

54. The wording in the RDB as it currently stands will allow for more discrimination against the LGBTIQ+ community, women and racial minorities. Granting employers the power to hire and promote according to their "ethos" will ironically lead to more religious-based discrimination.

55. 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.

56. The ANMF is opposed to the RD Bills in their current format. The ANMF submits that the RD Bills should not be become law because their provisions are not in line with other Commonwealth anti-discrimination laws, are poorly drafted, promote discrimination and have the possibility to make patient safety and welfare more difficult to deliver.

57. The ANMF supports the ACTU in stating that the following principles should form the foundation of any Religious Discrimination Bill:

    - Every worker has the right to a safe, healthy and respectful workplace, regardless of race, religion, sexual orientation, sex, gender identity, disability, age or other personal attribute.
    - No worker should be unlawfully discriminated against because of their religion, unless religion is essential to the role, and the discrimination is reasonable and proportionate in the circumstances.
    - The ANMF supports the extension of the federal anti-discrimination law framework to protect workers from unlawful discrimination because of their religious beliefs or activities.
    - Religious organisations have the right to act in accordance with the doctrines, beliefs or teachings of their faith, subject to limitations necessary to protect public health, safety or the fundamental rights and freedoms of others.
    - No changes to the federal anti-discrimination framework should leave any worker worse off, or override or remove protections from any form of unlawful discrimination.
    - There should be no double standards when it comes to consequences for misconduct in a profession, trade or occupation – religious and non-religious workers should be treated equally.
    - Human rights belong to people, not bodies corporate.[33]

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1. Submission of the Australian Council of Trade Unions at page 19

2. RDB, section 11.

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5. Ibid., 14-15

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33. Submission of the Australian Council of Trade Unions at page 3-4