Universal Periodic Review 37th session – Stakeholders Report

AUSTRALIA: Freedom of the press, freedom of expression, freedom of religion or belief, indigenous people, refugees, adequate standard of living

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Discrimination Against Indigenous people

1. Human rights of indigenous people were a major concern during previous UPR reviews of Australia. During the 2nd cycle review, 59 recommendations were addressed to Australia in relation to this issue.[1] 2019 Human Rights Measurement Initiative data[2] shows that indigenous people are still particularly at risk of violation in all categories of human rights.
2. In 2009, the government committed to the "Closing the Gap" strategy which aims to reduce disadvantage among Aboriginal and Torres Strait Islander people with respect to life expectancy, child mortality, access to early childhood education, educational achievement, and employment outcomes. Australia has failed in closing the health gap that sees indigenous people suffering much lower health and life expectancy rates than the wider population. The Australian Human Rights Commission (AHRC) found in 2018 that measures had been implemented "only partially and incoherently."[3] Health equality plans were adopted, but never sufficiently funded and implemented, while there was no plan to address housing and health infrastructure. Social determinants, critical to addressing root causes of the health gap, have been disconnected from health planning until recently.
3. The 1991 Royal Commission into Aboriginal Deaths in Custody made the central strong recommendation that the rate of Aboriginal incarceration be reduced, particularly as incarceration has led to c. 434 deaths since 1991.[4] While the rate of Aboriginal deaths in custody has decreased partly since 1991, Aboriginal incarceration has doubled.[5]
4. A 2018 Deloitte Report found that recommendations aimed at diverting indigenous people from prison have the lowest implementation rate nationally.[6] This is especially needed to prevent Aboriginal people being criminalized from youth.
5. All states and self-governing territories of Australia have set the age of criminal accountability at 10. For children aged between 10 and 14, Australia applies *Doli incapax,* an old, common law, rebuttable presumption that children lack capacity to be criminally responsible for their acts. To rebut this presumption, the prosecution must prove beyond reasonable doubt that the child knew that his / her act was seriously morally wrong. This principle is applied inconsistently and arbitrarily, as it can be very difficult for children to access expert evidence, particularly children in regional and remote areas. The Victorian Council of Social Services Report in late February 2020 found that: "Setting the minimum age of criminal responsibility in Australia at 10 years of age harms children, in particular Aboriginal and Torres Strait Islander (ATSI) children. It is discriminatory, out of step with human rights standards and neuroscientific understanding of children's brain

[1] UPR Info Database.
[2] https://humanrightsmeasurement.org/aboriginal-people-and-torres-strait-islanders-suffer-human-rights-violations-in-australia/ and https://rightstracker.org/en/country/AUS?as=hi
[3] Australian Human Rights Commission, *Close the Gap – 10 years Review (2018)*, 2018.
[4] https://www.theguardian.com/australia-news/2020/jun/06/aboriginal-deaths-in-custody-434-have-died-since-1991-new-data-shows
[5] Prof. Mick Dodson, former Australian of the Year in 2009 noted that not all Royal Commission's recommendations have been implemented.
[6] https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-review-implementation-recommendations-royal-commission-aboriginal-deaths-custody-251018.pdf

development."[7] The AMA (Australian Medical Association) has called for a raise of the age of criminal responsibility to 14 years of age (March 2019).

6. Youth offending is strongly associated with disadvantage. Child offenders are also more likely to have experienced child abuse and neglect, disability, mental illness, drug and alcohol abuse, exposure to crime, violence and homelessness. Current responses fail to address these disadvantages in a therapeutic and effective way addressing why children commit crimes. Early exposure to the criminal justice system potentially increases the likelihood of poor outcomes for vulnerable youth. It can cause further harm and 10–14-year-old children in the youth justice system risk becoming chronic, long-term offenders due to harmful environments and isolation from family and support services. Aboriginal and Torres Strait Islander children are particularly affected. They are over-imprisoned, making up about 60 per cent of the young children in youth jails, despite being only about 5 per cent of the population (aged 10-17).[8]
7. The 1991 Royal Commission recommended that the offense of public drunkenness be abolished. In 2017 Tanya Day, was arrested in Victoria for being drunk in public and died in custody when in very similar circumstances a drunken white man was warned and returned home and is still alive. The Victorian government has announced it will abolish the offence of public drunkenness. However, all States need to do so.
8. The 2017 "Uluru Statement From the Heart"[9] emerged from a hard-won consensus from indigenous representatives and asked especially for a voice to Parliament. Its main proposal has been rejected by former Prime Minister Turnbull and the current government has ignored it. The government's alleged and misleading argument is that indigenous people wanted a third chamber of parliament. This has deeply demoralized indigenous people who rightfully feel their democratic right to a representative body or voice has been denied. It has recently been confirmed by the Minister for Indigenous Affairs, Ken Wyatt, that due to the C-19 pandemic it will not be dealt with during this parliament term i.e. in the next two years.

Recommendations:

9. **Recognize Aboriginal and Torres Strait Islanders as the First People of Australia in its Constitution.**
10. **Collect and provide updated statistical data on the ethnic composition of the indigenous population, including data, disaggregated by sex, on the socioeconomic situation and representation in education, employment, health, housing, public and political life of ethnic groups and indigenous peoples, in order to evaluate the equal enjoyment of rights and develop targeted strategies.**
11. **Develop and implement a new and strong national response to fulfill the right to health of indigenous people.**
12. **Increase funding for diversionary programs and police training in order to keep indigenous people, especially children, out of jail and away from risk of death in custody.**
13. **Raise the age of criminal liability to 14 at minimum.**

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[7] Victorian Council of Social Service, *Review on Raising the Age of Criminal responsibility*,February 2020 https://vcoss.org.au/policy/review-on-raising-the-age-of-criminal-responsibility/

[8] Ibidem

[9] https://www.referendumcouncil.org.au/final-report.html#toc-anchor-ulurustatement-from-the-heart

14. **Abolish the practice of arresting and incarcerating children under 16.**
15. **Commit to addressing and preventing the over-representation of Aboriginal and Torres Strait Island children in prison.**
16. **Abolish the offense of public drunkenness in all states.**

Protect the Rights of Asylum Seekers and Refugees

17. Australia's harsh treatment of asylum seekers, by detaining them onshore but also since 2012 deporting them offshore to detention facilities in Nauru and Papua New Guinea (PNG), was another major topic of its 2015 UPR review, with 39 recommendations addressing this issue.[10] Unfortunately, the treatment of asylum seekers is still a major concern.
18. The number of immigrants held in detention in Australia has dropped from a record 12,000+ people in 2013 to an average of 2,000 people since 2016.[11] However, the mandatory detention provisions in the 1958 Migration Act are still in place: according to these provisions, all migrants and asylum seekers arriving in Australia without a visa are systematically detained. In December 2019, there were 504 refugees and asylum seekers within this onshore system, along with other immigration detainees.[12] All are held in prison-like facilities and detention can last months, or many years. Detainees can be forcefully and arbitrarily relocated from one centre to another, with minimal warning or explanation.Regarding the offshore processing system, as of 30 September 2019, there were 562 persons on both Nauru and Papua New Guinea (Manus Island), with a further 47 people detained by PNG in the Bomana Detention Centre. Following a civil society ("Kids Off Nauru") campaign to transfer children from Nauru, the last child left Nauru on 28 February 2019, while there were still 122 in July 2018. Since offshore processing began in 2012, over 4,000 people were sent to Nauru or PNG.
19. A four year campaign and by-election victory by an independent and former Australian Medical Association president led to the overturning on 12 February 2019 of part of the brutal "Borderforce Act" and passing of the Home Affairs Legislation Amendment (Miscellaneous Measures) or "Medevac Bill". It allowed for temporary transfer of patients in offshore detention to Australia for medical or psychiatric treatment or assessment. Medevac was an independent process preventing political interference in a critically ill person's access to healthcare. It followed public outcry about ongoing health crises of detainees - including children - on Nauru and Manus (PNG) islands. Children as young as 11 were reliably reported to be attempting suicide. Experts regularly warned of insufficient medical facilities on the islands, while the UN SR on the human rights of migrants described camp facilities as "cruel, inhuman and degrading" in 2016.
20. Medevac led to 135 refugees accessing Australian-based medical treatment for 9 months in 2019. But the government argued the law had been a "border protection" risk and

[10] UPR Info Database.
[11] Department of Home Affairs, *Immigration Detention and Community Statistics Summary,* 31 December 2019 - https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-december-2019.pdf
[12] Department of Home Affairs, *Immigration Detention and Community Statistics Summary, 31 December 2019* - https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-december-2019.pdf

"loophole" for advocates to bring asylum seekers into Australia.

21. Further, the former controversial law was reinstated in December 2019 after Independent, Dr Phelps, lost her seat in Parliament following the federal election. Recently, asylum seekers, still in Australia from the Medevac program have protested, with support of doctors, at the lack of physical separation and risks of exposure to COVID-19 in the ill-equipped hotels where they were detained.

Recommendations:

22. **Ensure all asylum seekers, regardless of mode of arrival, ethnicity or country of origin, have access to a fair and prompt refugee status determination procedure.**
23. **Ensure refugees and asylum seekers are protected against refoulement and ensure viable and safe resettlement arrangements for all entitled to international protection.**
24. **Repeal section 197 (c) of the Migration Act 1958 and find alternatives to the systematic detention of all migrants and asylum seekers arriving in Australia without a visa. Ensure detention is only a last resort and allow regular judicial review of detention decisions.**
25. **Halt Australia's policy of offshore processing of asylum claims, transfer all asylum seekers and refugees to Australia and process any remaining asylum claims while guaranteeing all procedural safeguards.**
26. **Grant access to adequate health care treatment to asylum seekers in offshore asylum centres until these can be dismantled, including by facilitating their transfer to mainland facilities if medically required.**

Adequate standard of living and right to work

27. The "Newstart Allowance" is a welfare payment available fortnightly for unemployed persons and many single mothers. However, this allowance has not been increased in real terms since 1994, despite significant increase in living costs. According to the Australian Council of Social Service (ACOSS), the weekly allowance for a single person was $160 below the poverty line on average until 2020. While according to estimates, a single unemployed person needs a minimum of $433 per week to make a living, Newstart was granting $278 a week. Consequently, 55% of people receiving Newstart were living below the poverty line. In addition, most of them (70%) have been unemployed for over a year on a payment set up to cover short-term unemployment. The unemployment payments are so low that they are an obstacle for persons searching for employment.[13]
28. During the 2020 coronavirus pandemic and economy shutdown the government commendably introduced Job Seeker to replace NewStart and Job Keeper (for people in work but where businesses were forced to shut down in the pandemic) and raised rates to $1500 a fortnight. But the government still considers reverting to previous Newstart rates.

[13] ACOSS, *Raise the Rate. Increase Newstart and related payments*, March 2018 - https://www.acoss.org.au/wp-content/uploads/2018/03/Raise-the-Rate-Explainer-1.pdf

29. Gig and casual workers (including many university teachers), migrant visa workers, international students, hospitality and arts workers in intermittent employment are not included in those schemes. Many have been reduced to poverty and despair, even homelessness. The younger generation and women in part-time and gig roles have suffered most from the economic shutdown.

Recommendations:

30. **Establish Job Seeker and Job Keeper as permanent schemes in order to guarantee a right to adequate standard of living and right to work.**
31. **Establish an independent Social Security Commission to advise on the fulfillment of the right to an adequate standard of living over the long-term.**
32. **Improve unemployment services, particularly for long-term unemployed, to facilitate timely return to work.**
33. **Guarantee the right to an adequate standard of living for gig and casual workers, migrant visa workers, international students, hospitality and arts workers in intermittent employment.**

Access to Justice for the Victims of the Centrelink Robodebt disaster

34. 470,000 people received incorrect automated debt notices from the Federal Government's Centrelink Robodebt, demanding repayment for welfare overpayments which were miscalculations through an averaging system gone wrong. After years of trauma, suicides, etc. the government has finally acknowledged the problems of the scheme and that victims will no longer be required to return the alleged overpayments and that those who have repaid, incorrectly, will be refunded. But this does not include interest foregone or damages. The government refuses to apologise and has strongly encouraged victims to settle out of court instead of through a class action.

Recommendation:

35. **Provide adequate remedy and compensations to the victims of the Centrelink Robodebt Program's miscalculations of automated debts.**

Freedom of Expression: Rising Levels of Suppression of Dissent, Freedom of the Press, and Whistleblowers.

36. In 2018 the Australian government made it a criminal offense for journalists to receive classified information from military or intelligence sources.[14] Reporters Without Borders considers that "Australia adopted one of the toughest defamation laws of the world's liberal democracies in 2018, while its laws on terrorism and national security make covering these issues almost impossible."[15]
37. The Australian Broadcasting Corporation's (ABC) 2017 exposure of deadly violence against civilians by Australian soldiers in Afghanistan which may have amounted to war

[14] National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018
[15] https://rsf.org/en/australia

crimes triggered a massive intervention into the freedom of the press. In June 2019, the Federal Police searched ABC's Sydney headquarters and seized thousands of documents over the 2017 broadcast. The Australian Federal Police has now recommended prosecutors consider laying charges against an ABC journalist over the stories.

38. The home of News Ltd journalist Annika Smethurst was also raided over articles relying on leaks from government whistleblowers. Federal Police claimed this raid was justified because these activities breached national security laws. The Federal Court of Australia ruled that the police raid was legal. Eventually, in late May 2020, the Federal Police dropped charges against the journalist, without apology or compensation for trauma to the journalist.
39. A whistleblower revealed Australia's electronic spying of East Timor representative during negotiations. The spying was aimed at helping secure very favourable 2002 deal regarding oil supply access to the Great Sunrise Fields, 450km North-West of Darwin and 150km South of Timor-Leste. Multinationals seeking to exploit the Timor Sea were the great beneficiaries. Witness K, a senior intelligence officer, feeling deeply uncomfortable about this procedure, approached the Inspector General of Intelligence and Security and was allowed access to an approved lawyer. The latter helped the Timor-Leste government to build a case against Australia, presented to the International Court of Justice (ICJ) in 2013. The case at ICJ was discontinued after an amicable settlement occurred in 2015 and a much fairer deal for Timor-Leste was signed in 2018.
40. However, Witness K was bullied into abandoning the case: his house was raided (2013), his passport seized for years. Shortly after the 2018 deal with Timor-Leste was signed, the Australian government approved his prosecution and that of his lawyer for conspiring to breach section 39 of the Intelligence Services Act for allegedly communicating information obtained while employed or under a confidentiality agreement with the Australian Secret Intelligence Service (ASIS). While Witness K was successfully coerced to plead guilty, his lawyer Bernard Collaery fought the charges in the ACT (Australian Capital Territory) supreme court. The court case is still ongoing in secret, but he is disputing its secrecy.
41. In another case, the Australian Tax Office (ATO) is pursuing a young former employee. Richard Boyle, who sought to get it to address its bullying of small businesses, was ignored, and when he leaked the information to the press, he was charged with 66 offenses, including alleging disclosure of confidential taxpayer information, recording and disclosing tax file numbers, and taping of conversations (without permission). The whistleblower faces over 160 years imprisonment if convicted of breaching laws on handling public documents and recording phone calls when he spoke out in 2018 on the Australian Taxation Office's (ATO) mistreatment of taxpayers, toxic culture and abuse of power. He alleged that some ATO staff were categorically instructed to use aggressive debt collection practices, called garnishee notices, allowing them to seize funds without due process from bank accounts of Australian taxpayers. Boyle's home was raided, and his laptop and phone seized. The ATO justified this as protecting taxpayer confidentiality and as being critical for the integrity of Australia's tax system. Since then Boyle has lost his job, suffered depression, insomnia and stress-related heart issues.

Recommendations:

42. **Adopt a new Media Freedom Act protecting the freedom of the press along international standards.**
43. **Ensure that whistleblowers get adequate protection in cases where breach of confidentiality is justified by the defence of a public interest.**
44. **Ambiguity and doubt about legislative and administrative protections and a secretive stress on security should be replaced by clarity and transparency so that whistleblowers will have sufficient incentive to come forth.**

Protection of freedom of expression in relation to minority opinions on marriage

45. A number of incidents occurred where people expressing criticism against same sex marriage have been confronted to social hostility. Students have been excluded from state universities, religious schools fear prosecution for expressing traditional religious views about human sexuality, employees and directors have been sacked, removed, demoted or threatened with removal for expressing religious views about government programs or public debates, not only from private companies but also from state universities and professional organisations. (See list of cases in Appendix A).

Recommendations:

46. **Guarantee freedom of expression for all, religious or non-religious persons, including on controversial social issues such as same-sex marriage, by enacting federal legislation on freedom of expression.**
47. **Foster a climate of tolerance and respect in a genuinely pluralistic society, where minority opinions can be expressed without fear of reprisal, including at workplaces, schools and universities.**

Legislative gaps in the protection of freedom of religion or belief in Australia

a. The need for comprehensive federal human rights legislation

48. Unlike most modern democracies, Australia has no single and systematic legislative document incorporating human rights at constitutional level. Focusing on the right to freedom of religion or belief, its protection in law consists mainly in a patchwork of inconsistent and incomplete State and Federal rights which varies from State to

[16] Human Rights Law Centre "Freedom of religion must be protected under Australian law and balanced with other rights" *Opening statement* before Joint Standing Committee on Foreign Affairs, Defence and Trade Human Rights Sub-committee, 7 Jun 2017 <https://www.hrlc.org.au/news/2017/6/7/freedom-of-religion-or-belief-should-have-federal-protection-with-appropriate-mechanism-for-balancing-competing-rights> "Australia has not yet translated the international obligations it signed up to into our domestic law. There is a patchwork of legal protections across the states and territories that protect people from discrimination and vilification on the basis of their religion. With the exception of workplace protections, there is a gap in federal law when it comes to legal protection from discrimination on the basis of religious belief."

State.[16] However, there are individual provisions in the Australian Constitution, including the section 116 which states: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."[17]

49. This provision captures four distinct protections preventing the creation of a law that: 1) establishes any religion, 2) imposes any religious observance, 3) prohibits the free exercise of any religion, or 4) imposes a religious test for office. This covers some but not all of the protections afforded by Article 18 of the ICCPR. Besides, it applies only to the making of laws by the federal government, and not at all to the States and Territories.[18] In fact, two referendums attempting to extend this protection to the States were unsuccessful.[19]

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[16] Human Rights Law Centre "Freedom of religion must be protected under Australian law and balanced with other rights" *Opening statement* before Joint Standing Committee on Foreign Affairs, Defence and Trade Human Rights Sub-committee, 7 Jun 2017 <https://www.hrlc.org.au/news/2017/6/7/freedom-of-religion-or-belief-should-have-federal-protection-with-appropriate-mechanism-for-balancing-competing-rights> "Australia has not yet translated the international obligations it signed up to into our domestic law. There is a patchwork of legal protections across the states and territories that protect people from discrimination and vilification on the basis of their religion. With the exception of workplace protections, there is a gap in federal law when it comes to legal protection from discrimination on the basis of religious belief."

[17] Other protections include the right to vote (s. 41), protection against unjust acquisition of property (s 51(xxxi)), the right to trial by jury (s 80), and prohibition of discrimination based on State of residency (s 117) – see also Eburn, M (1995) "Religion and the Constitution – an illusory freedom" 8(2) *Religion Studies Review* 77.

[18] "The fact is that s. 116 is a denial of legislative power to the Commonwealth, and no more. No similar constraint is imposed upon the legislatures of the States. The provision therefore cannot answer the description of a law which guarantees within Australia the separation of church and state." *DOGS case* [1981] HCA 2 per Wilson J 38; see also *Grace Bible Church v Redman* (1984) 36 SASR 376 where the South Australian Supreme Court held that there was no common law equivalent of s 116.

[19] Australian Electoral Commission (2007) *Referendum Dates and Results 1906 – Present* http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm; 1944 and 1988, the 1988 referendum has the dubious distinction of being the least successful referendum to date.

[20] *Krygger v Williams* [1912] HCA 65 (a conscientious objection case where the appellant was a Jehovah's Witness); *Judd v McKeon* [1926] HCA 33 (a case on voting where socialism might be treated as a religion); *Adelaide Company of the Jehovah's Witnesses Inc v. Cth* [1943] HCA 12 (regulations declaring Jehovah's Witnesses a subversive organisation struck down); *Crittenden v Anderson* [1950] (Unreported, High Court of Australia, Fullagar J, 23 August 1950), extracted in 'An Unpublished Judgment on s 116 of the Constitution' (1977) 51 Australian Law Journal 171, 171 – (before a single judge, challenging a Roman Catholic elected member for foreign allegiance); *A-G (Vic); Ex Re Black v Commonwealth (DOGS case)* [1981] HCA 2 (determining Commonwealth grants to religious schools does not breach s 116); *Church of Scientology v Woodward* [1982] HCA 78 (s 116 argument about security risk of Scientologist rejected); *Church of the New Faith v Commissioner of Payroll Tax (Vic) ("New Faith")* [1983] HCA 40 (pay-roll tax exemption does not violate s 116); *Kruger v Cth* [1997] HCA 27 (the stolen generations case); *Williams v. Commonwealth of Australia* [2012] HCA 23 (funding for school chaplains does not infringe s 116). Other High Court of Australia cases that consider religious issues include *Wylde v Attorney-General for NSW* [1948] HCA 39 (where the court declined to interfere with internal governance of doctrine within the Church of England in NSW) and *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (freedom of religious speech).

50. The High Court of Australia has considered this provision several times[20] and has appropriately adopted a fairly broad definition of "religion"[21] including the right to no religion at all.[22] The protection goes beyond protecting opinion to protecting exercise of religion.[23] However, the very limited scope of this provision is insufficient to protect the whole spectrum included in freedom of religion or belief. Changing the scope of section 116 in order to adopt a definition in line with the international right to freedom of religion or belief would require a constitutional amendment.
51. Only the Australian Capital Territory (ACT) (in the *Human Rights Act* 2004 (ACT)) and state of Victoria (in the *Charter of Human Rights and Responsibilities Act 2006* (Vic)) have enacted more systematic human rights legislation. Section 14 of both Acts provides for a *"right to freedom of thought, conscience, religion and belief".* Both Acts present human rights in a clear and systematic way and provide mechanisms to scrutinise new laws in conflicts with those rights and mechanisms for enforcing those rights.

Recommendation:

52. **Adopt comprehensive federal legislation giving full legal effect to all the human rights included in the international treaties Australia is a party to, across all state and territory jurisdictions.**

b. Freedom of religion or belief and anti-discrimination legislations: hiring personnel and providing public services

[20] *Krygger v Williams* [1912] HCA 65 (a conscientious objection case where the appellant was a Jehovah's Witness); *Judd v McKeon* [1926] HCA 33 (a case on voting where socialism might be treated as a religion); *Adelaide Company of the Jehovah's Witnesses Inc v. Cth* [1943] HCA 12 (regulations declaring Jehovah's Witnesses a subversive organisation struck down); *Crittenden v Anderson* [1950] (Unreported, High Court of Australia, Fullagar J, 23 August 1950), extracted in 'An Unpublished Judgment on s 116 of the Constitution' (1977) 51 Australian Law Journal 171, 171 – (before a single judge, challenging a Roman Catholic elected member for foreign allegiance); *A-G (Vic); Ex Re Black v Commonwealth (DOGS case)* [1981] HCA 2 (determining Commonwealth grants to religious schools does not breach s 116); *Church of Scientology v Woodward* [1982] HCA 78 (s 116 argument about security risk of Scientologist rejected); *Church of the New Faith v Commissioner of Payroll Tax (Vic) ("New Faith")* [1983] HCA 40 (pay-roll tax exemption does not violate s 116); *Kruger v Cth* [1997] HCA 27 (the stolen generations case); *Williams v. Commonwealth of Australia* [2012] HCA 23 (funding for school chaplains does not infringe s 116). Other High Court of Australia cases that consider religious issues include *Wylde v Attorney-General for NSW* [1948] HCA 39 (where the court declined to interfere with internal governance of doctrine within the Church of England in NSW) and *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (freedom of religious speech).

[21] *Adelaide Company of the Jehovah's Witnesses Inc v. Cth* [1943] HCA 12, 3-7 per Latham CJ; *Kruger v Cth* [1997] HCA 27 (where s 116 was deemed to apply to indigenous religions – see also *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2011] FCAFC 100); see generally Baines, Charlotte "The church and state relationship in Australia: the practice of s 116 of the Australian Constitution" [2007] *ANZLH E-Journal* 3 in their discussion of the *New Faith* case [1983] HCA 40; possibly *Judd v McKeon* [1926] HCA 33 per Higgins J where there is a suggestion that socialism might be treated as a religion for the purposes of s 116.

[22] "The prohibition in s. 116 operates not only to protect the freedom of religion, but also to protect the right of a man [sic] to have no religion." *Adelaide Company of the Jehovah's Witnesses Inc v. Cth* [1943] HCA 12 per Latham CJ 3.

[23] *Ibid*, 5.

53. There is a variety of State and federal anti-discrimination laws[24] which provide some limited protections and exemptions for religious organisations such as religious schools, universities, and para-religious organisations (including aged-care facilities, health-care providers, youth facilities and welfare organisations), in order to protect their right to organize internally or provide their services according to their freedom of religion or belief. However, there is no consistency across State borders and what might be exempted in one State or Territory might be protected in another, and federal laws may apply side-by-side with inconsistent State and Territory laws.[25]
54. Regarding internal job appointments, federal anti-discrimination laws allow exemptions for religious institutions including educational institutions established for religious purposes to apply tenets and doctrines of the religion in a non-arbitrary way and in good faith – this is called the religious exemption.[26] These exemptions are not universal though. Neither NSW nor the ACT exempt religious organisations from these requirements. Not only is freedom of religion of the institutions at stake, but also, cases of religious schools and para-religious organisations providing services to children, the right for parents and legal guardians to ensure the religious and moral education of their children conforms to their own convictions as required by Article 18.4 of the ICCPR.
55. The right not to be compelled to rent places of worship such as a church, mosque, synagogue or indigenous sacred site for purposes inconsistent with the religious beliefs of their usual beneficiaries needs better protection.[27] Similarly, other religious compounds should not be forced to rent their premises for events that go against their convictions. The provisions in *Marriage Amendment Act* of 2017 are a best practice in this regard and need to be extended.
56. In a case in Victoria concerning the religious interests of a Christian organisation that runs a campsite Christian Youth Camps (CYC) and the interests of a youth support organisation, Cobaw, wanting to hire that facility for an event supporting LGBTQI

[24] These include the *Australian Human Rights Commission Act 1986* (Cth) (sometimes referred to as the HREOCA based on its original title); the *Racial Discrimination Act 1975* (Cth), the *Fair Work Act 2009* (Cth) and the *Sex Discrimination Act 1984* (Cth) at the federal level, and in the States and Territories the *Discrimination Act 1991* (ACT), the *Anti-Discrimination Act 1977* (NSW), the *Anti-Discrimination Act 1996* (NT), the *Anti-Discrimination Act* (Qld), the *Equal Opportunity Act 1984* (SA), the *Anti-Discrimination Act 1998* (Tas), the *Equal Opportunity Act 2010* (Vic), and the *Equal Opportunity Act* (WA).

[25] The federal Human Rights Commission has powers under a number of the federal Acts to hear complaints alleging breach of a human right including Article 18 of the ICCPR. Both the *Racial Discrimination Act 1975* (Commonwealth of Australia Constitution Act - Cth) and the *Anti-Discrimination Act 1977* (New South Wales - NSW) prevent religious discrimination only where related to race, not otherwise to religion, however the Commonwealth protects against employment discrimination in the *Fair Work Act 2009* (Cth) and *Australian Human Rights Commission Act 1996* (Cth). This goes beyond the s 116 Constitutional protection against religious tests for employment by applying it to the private sector and preventing other workplace discrimination. The *Discrimination Act 1991* (ACT), *Anti-Discrimination Act 1996* (NT), *Anti-Discrimination Act 1991* (Queensland - Qld), *Anti-Discrimination Act* 1998 (Tasmania - Tas), *Equal Opportunity Act 2010* (Vic) and *Equal Opportunity Act* 1984 (Western Australia - WA) do prevent discrimination on purely religious belief, affiliation or activity grounds (with most also protecting political belief and activity) although the federal, ACT and Tasmanian provisions provide more protections beyond employment discrimination for attributes other than religion.

[26] See *Sex Discrimination Act 1984* (Cth) ss 37-38.

[27] Indeed Queensland law acknowledges this in s 48 of the *Anti-Discrimination Act 1991* (Qld) which creates a right to "restrict access to land or a building of cultural or religious significance by people who are not of a particular sex, age, race or religion."

youth,[28] Cobaw was successful in their petition to VCAT. CYC were required to extend their service to Cobaw despite objections to their purposes on a religious basis.[29] Unfortunately, the tribunal did not take sufficiently into account the fact that such organisations are offering a significantly subsidised price for their services and facilities rather than a truly commercial rate as often the facility itself was donated by patrons supporting the aims and objectives of the group offering the facilities in the assumption that this subsidy will only be extended to groups consistent with the aims of the organisation.

Recommendations:

57. **Consolidate existing non-discrimination provisions into a comprehensive federal law, in order to ensure adequate and effective substantive and procedural protection against all forms of discrimination on all the prohibited grounds, including religion, and intersectional discrimination, as well as access to effective and appropriate remedies for all victims of discrimination.**
58. **Adopt a consistent federal law to allow faith-based organisations to maintain their distinctive identity by either giving preference in the employment of staff or to select staff appropriate to the mission of the organisation in order to protect the religious freedom of those organisations.**
59. **Protect the ability of religious schools, universities, and para-religious organisations to choose their staff in a way that respects the right for parents and legal guardians to ensure the religious and moral education of their children.**
60. **Protect the freedom of religious organisations not to be forced to rent their facilities to events or organisations in opposition to their convictions and values.**

[28] *Cobaw Community Health Services v CYC Ltd (Anti-Discrimination)* [2010] VCAT 1613;.

[29] This decision was appealed to the Supreme Court in *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 which decided that the Charter did not apply as the events pre-dated its introduction but affirmed the decision of VCAT on different grounds; note the dissenting opinion of Redlich JA takes better account of the fact that CYC were being asked not only to avoid applying their own private morality to other persons, but also that Cobaw was "encouraging views repugnant to the religious beliefs" of CYC, at 520.