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Religious Freedom Review Submission of the Church of the Flying Spaghetti Monster Australia
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1. Recommendations

- 1.1. Australia should have a Bill of Rights to protect the fundamental human rights of all individuals in the country. This Bill of Rights should fully implement the totality of the international human rights instruments to which Australia is a party, with all their checks and balances.
- 1.2. The Australian Law Reform Commission, in their 2015 report on Traditional Rights and Freedoms stated that there are no Commonwealth laws that 'significantly encroach on freedom of religion in Australia'.¹ In light of the ALRC findings, no further legislation to protect 'religious freedom' seems either needed or warranted. The only major thing that has happened since then is that we now have marriage equality and no one's freedom to believe what they want has been affected by that.
- 1.3. There is no 'hierarchy of rights' under accepted practice or international law. The United Nations Human Rights Committee has made it very clear that all human rights need equal protections.
- 1.4. To introduce new legislation that gives additional rights and privileges to a particular sector of the community goes against the legal, political and social basis of the Commonwealth of Australia; that **all individuals are equal under the law**. All people should be bound by and entitled to the same benefits and protections under the law equally.
- 1.5. Current exemptions extended to religious organisations must be removed. The right of freedom of religion or belief are **only** the right of the individual; they are not the right of organisations and corporations.
- 1.6. Failing that, any religious organisation that receives public funding to supply a public service, whether that be a hospital, a homeless shelter, a school or any other public/social service, must not be allowed to access religious exemptions in the provision of those services.
- 1.7. There is no religious compulsion for religious organisations to run schools, hospitals or other public services. To make them follow the same laws everyone else needs to follow whilst providing these services is not denying them their 'religious freedom'. They can simply stop running schools, hospitals and other public services. Other, secular, organisations can take over providing these public services utilising the government funding that the religious organisations currently access.
- 1.8. Religion can be a wonderful, positive and very personal thing. However, some people simply wish to discriminate against other people, and religion is an easy way of validating that discrimination. That is why people tend to cherry-pick the sacred texts. This discrimination must not be allowed.
- 1.9. A person's gender identity and/or sexual orientation are not valid reasons to give a person less rights to protections from discrimination than other members of the community.
- 1.10. Many religious privileges are not extended to other sections of the community, or to adherents of minority religions or belief systems. This imbalance needs immediate correction.
- 1.11. Male genital mutilation should only be performed on minors in cases of medical necessity.
- 1.12. Aboriginal and Torres Strait Islander religions and beliefs should have special protections due to the history of their negation since colonisation.

2. Summary

The Church of the Flying Spaghetti Monster Australia (the Australian Church) believe that the basic right of all people in Australia to realise their full potential and participate fully in society can only be achieved when all people, whatever their backgrounds, ethnicity, creed, religion, colour, orientation, nationality or home planet receive equality of opportunity and treatment in all areas of life. The best and most effective way to ensure all fundamental rights are protected would be the enactment of a Bill of Rights.

It is a matter of concern that current religious exemptions are more worried with gender identity and/or sexual orientation than protecting a person's right to non-discrimination. It is almost as if some religious organisations are completely obsessed with what a person's gender is, how people use their genitals and how they conduct their private lives. We would like to respectfully tell those organisations what is in other people's underwear is none of their business and does not make them any less worthy of having the same fundamental human rights as anyone else.

Australia needs a Bill of Rights and when this Bill of Rights is implemented, in the context of protecting religious freedom or belief, there needs to be a clear distinction made between those practices that are an essential part of adherence or obligation to a particular religion or belief and those practices that are merely permissible under the teachings of a particular religion or belief. It must be remembered that the scope of freedom of religion or belief is not without limits. There is an element of objectivity required by demonstrating that a situation does not automatically fall within 'religion or belief' simply by assertion of such.

The Australian Church recognises that people can be at their best and at their worst in relation to religion. Religious faith is one of the most potent agents for good and for evil in the lives of people. Extreme caution must be used to ensure that protections of religious freedoms and beliefs cause no harm to the Australian community. In a multicultural society such as Australia it is important that provisions be made to ensure that people are able to practise their religion or belief, whether that be theistic, non-theistic or atheistic, and most vitally that any practice of religion or belief does not infringe upon the fundamental individual human rights of others.

Below, you will find our thesis on why everything we have stated in the above paragraphs is true. We even did research and stuff!²

3. Who we are

We are a fast growing, but minority, religious group who believe in equality, freedom, safety and acceptance of everyone. We believe in celebrating the fact that each one of us is here. We believe that what any number of consenting adults do in their own time is none of our business. We believe we have a religious calling to point out and correct any bigotry we witness. We believe it is a really wonderful thing to want to help your fellow humans, and that when it comes to improving another's quality of life, every small advancement is precious.

4. Bill of Rights

This entire discussion about religious freedom could easily be addressed by simply enacting an Australian Bill of Rights. Ultimately, instead of many differing discrimination Acts, a Bill of Rights must be considered as the only logical way to implement international human rights instruments. Australia is one of the few democracies without such a document protecting the rights of people who are in this country. There are many good examples of how these sorts of Charters work in practice, for instance the European Convention on Human Rights and the Canadian Charter of Rights and Freedoms. Both

of these documents have been in existence over many years, so evidence of how they have worked in practice and any amendments that were required over time can be easily studied as a basis for an Australian Bill of Rights.

The Australian Church believes there is a need for federal legislation to implement international human rights law. However, the implementation of any international treaty to which Australia is a party requires the implementation of the entire document, not just cherry-picked parts, to ensure that all fundamental human rights are protected. Any legislation must fully comply with relevant international treaties, covenants and declarations on fundamental rights including, but not limited to:

- The entirety of the Universal Declaration of Human Rights (UDHR);
- The entirety of the International Covenant on Civil and Political Rights (ICCPR);
- The entirety of the Covenant on the Elimination of Discrimination Against Women (CEDAW);
- The entirety of the Convention on the Rights of the Child (CROC);
- The entirety of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP);
- The entirety of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Elimination of Intolerance Declaration);
- The entirety of the Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity Resolution (Gender Resolution); and
- The entirety of the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms Declaration (Right and Responsibility Declaration).

However, ensure that they only allow protections of religious freedoms as far as those protections do not infringe upon others' rights, especially in relation to women, children, the LGBTIQ+ community, and Indigenous people and include both freedom **of** religion and freedom **from** religion in any discrimination protections.

Cherry-picking must remain a pastime to be done to the sacred texts by religious adherents, and not a pastime to be done by government legislators whilst implementing international human rights instruments. People want and deserve a clear separation between the Church and the State in Australia. Theocracies, from a historical perspective along with some outstanding current examples worldwide, are generally not a lot of fun for people who are not adherents of the 'chosen' belief system.

Conclusion: It is about time Australia caught up to the rest of the world and had a Bill of Rights. A Bill of Rights is needed, and it needs to include all the checks and balances of international human rights instruments.

5. Defining 'religion and belief'

Article 18 of the UDHR, Article 18 of the ICCPR and article 1.1 of the Elimination of Intolerance Declaration all use the expression 'freedom of thought, conscience and religion'. However, and most importantly, the phrase 'or belief' is also used in these instruments, with the drafting history of the Elimination of Intolerance Declaration indicating broad international agreement that 'religion or belief' encompasses theistic, non-theistic and atheistic beliefs.³ These interpretations are broad enough to

encompass the many, varied belief systems, including Pastafarianism, and to include the spirituality prominently found in Aboriginal and Torres Strait Islander beliefs and religions.

The UN Human Rights Committee have always adopted a broad interpretation of 'freedom of religion or belief' as covering freedom of theistic, non-theistic and atheistic beliefs and the freedom not to subscribe to any of these beliefs. The Committee have made statements upon the scope of 'religion and belief' in relation to the ICCPR Article 18 clearly expressing this definition.⁴

The Committee has pointed out that the ICCPR 'does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice'.⁵ These freedoms are protected unconditionally and without hierarchy.⁶ United Nations Rapporteurs have also taken the view that 'religion or belief' encompasses theistic, non-theistic and atheistic beliefs.⁷

The High Court has also noted that 'the guarantees in s 116 of the Australian Constitution would lose their character as a bastion of freedom if religion were so defined as to exclude from its ambit minority religions out of the main streams of religious thought'.⁸ Whilst the Australian Constitution does give the Commonwealth power to make laws with respect to external affairs, it must be remembered that this Head of Power only enables the Commonwealth to make a law implementing an international treaty provided the law gives effect to the terms of the instrument in a reasonably appropriate and proportional way.⁹ Therefore, the term 'religion and belief' must be implemented in the broadest possible manner.

Conclusion: The term used in any implementation must be 'religion or belief' and it must be interpreted as broadly as possible to protect theistic, non-theistic, and atheistic beliefs, as well as protecting the right to hold none of these beliefs.

6. Religious freedom

From a historical perspective, freedom of religion has been used to refer to the tolerance of different theological systems of belief, while freedom of worship has always been defined as freedom of individual action. So religious freedom means that an individual can, without oppression, believe and worship, or alternately, practise freedom from belief and worship, as they wish. They can change their beliefs or their religion at any time; and they can associate with others to express their beliefs.

Religious freedom is **not** the right to interfere with others' rights to manifest their beliefs, nor a right to discriminate against other people. Religious freedom is **not** the freedom, based on one's own religious beliefs, to refuse services to others, to denigrate others, to restrict the civil rights of others, or to force your own beliefs and practices upon them. As the High Court has held, 'General laws to preserve and protect society are not defeated by a plea of religious obligation to breach them'.¹⁰

Instead of having anti-discrimination legislation under multiple pieces of differing legislation, an Act that was analogous to the British Equality Act would bring all types of anti-discrimination under one piece of legislation. We would like to point out that the British Equality Act implicitly removes any exemptions from organisations that engage in government funded public duties. This brings us to our next point.

Conclusion: Religious freedom means that an individual can, without oppression, believe and worship, or alternately, practice freedom from belief and worship, as they wish. It is not a right to discriminate against other people. Religious freedom is **NOT** the freedom to discriminate.

7. Individual rights

Both historically, and in the rights outlined in international instruments, these are rights of individuals. As such, they are **not** applicable and should **not** be applied to organisations or institutions. The only exception to this is the rights of Indigenous people, who have the right to pursue their human rights as a collective under UNDRIP.

Despite these rights being individual rights, we have the strange situation in Australia of religious exemptions only seeming to apply to religious organisations and not to individuals. Individuals can access some protections, but not the exemptions to discriminate based on their own personal beliefs.¹¹

The Australian Church believes that the present situation would seem to go against history and the intent of international law. Therefore, all religious organisations and institutions should be removed from being able to access the religious privilege offered by the current exemptions to the anti-discrimination laws. Human rights, including the right to freedom of religion, are purely individual rights and should only apply to people as individuals.

Conclusion: Please **read** what the UDHR and ICCPR actually say on human rights. Human rights are individual rights and must not be extended to institutions or businesses.

8. Rights hierarchy

Freedom of religion and belief has never been unconditional. It is just one of a larger body of human rights and any consideration concerning an individual's right to religious freedom or belief must certainly examine acceptable limits on its expression in so far as it adversely impacts others' rights and does not discriminate.¹²

The United Nations Human Rights Committee has made it very clear that all human rights need equal protections and that the unconditional protection of freedom of religion and belief do not apply to manifestations of religion or belief which may be made subject to limitations for defined purposes under both the ICCPR and the Elimination of Intolerance Declaration.¹³

In the 1998 Human Rights Commission report on Article 18 of the ICCPR, Chris Sidoti wrote that the state needed to protect the right to non-discrimination and equality,¹⁴ and he continued on to point out that only fundamental aspects of religious belief should be considered for protections, not merely permissible aspects.¹⁵

The Australian Church would also like to point out that when looking at 'religious beliefs' a careful distinction must be made between what is a genuine 'religious conviction' and what is a 'cultural conviction'. The nature of religious belief also means that adherents of differing beliefs believe things that are directly contradictory to each other. While some may believe in the inherent 'sinfulness' of what is in someone's underwear, another may believe that people are created in different manifestations by their deity to teach about tolerance, acceptance and love for their fellow human. It would seem difficult to justify discrimination based on gender identity and/or sexual orientation as being a 'religious conviction' of Christianity when many Christians do not seem to have a religious basis within their faith communities of exclusion of members based on gender identity and/or sexual orientation. Importantly, there is a considerable difference between having the 'freedom of religion' to believe that people are inherently unworthy because of their gender identity and/or sexual orientation and the manifestation of that belief into an action that deliberately discriminates against such persons.

Conclusion: There is no ‘hierarchy of rights’ – all rights must be checked and balanced against each other. This is also known as - your ‘rights’ are **not** more worthy than my ‘rights’, and you are **not** more special than, or better than, anyone else.

9. Discrimination by individuals

Recent calls for certain individuals to have the ‘right’ to discriminate in the supply of goods and services on the right of ‘religious freedom’ are quite frankly absurd and immoral. We would like to know if it would simply be religious adherents who can ‘legally discriminate’ against women and the LGBTIQ+ community. Alternatively, would we have the situation become farcical and dangerous as:

- A person leaving a particular faith was legally discriminated against by other members of that religious community for upsetting their religious sensibilities?
- A Hindu business owner in a rural town refusing service to a farmer who raises cattle for slaughter because slaughtering cattle upsets their religious sensibilities?
- A Jewish person legally being able to refuse to bake and sell a cheese and bacon roll to a non-Jewish person, even though they work at an atheist’s bakery because it upsets their religious sensibilities?
- A Muslim business owner or service provider being legally allowed to refuse service to a disabled person who utilises a service dog because it upsets their religious sensibilities?
- A person legally refusing services to a person because of the colour of their skin or the religion they follow, because to provide services would hurt their religious sensibilities?

Or, once again, are we just going to be discriminating against one criteria, that being gender? It is completely immoral to continue discrimination against women and the LGBTIQ+ community, it would be completely outrageous to start extending these ‘rights to discriminate’ even further in a modern, civilised society.

What is also absurd is the idea that a person who owns a business should have more rights and be exempted from the same laws that must be followed by every other individual in society. To do such a thing would make an ‘elite’ part of society who would not be being treated equally by the law, because they would be above it. To do such a thing goes against the very foundation of our social, political and legal system that is based upon the Rule of Law. Everyone in this country should be bound by and entitled to the same benefits and protections under law. Any situation where the Rule of Law is being ignored is both dangerous and inherently immoral. A bit like the situation we presently have with religious organisations being able to legally discriminate against individuals based upon their genitalia and how they conduct their private lives.

Conclusion: Please stop focusing on genitalia to discriminate against people. We live in what is supposed to be a just, fair, and secular society where it would be inherently wrong to give one sector of the population greater rights than other sectors simply based upon what those people believe. No one should be above the law.

10. The Paradox of Tolerance

Tolerance of difference is a fine ideal, but complete tolerance is, in principle, completely illogical and therefore irrational. Complete tolerance requires society to tolerate even intolerance. Thus, if a person is preaching or practising intolerance, the tolerant person cannot speak out against what the intolerant person is doing, since speaking out against intolerance would itself be an act of intolerance. In other

words, the principle of tolerance requires us to grant intolerant people the right to be intolerant. This is obviously self-contradictory, since tolerance cannot condone what it specifically is in contradiction of.

This comes from the paradoxical position that a society that tolerates everything will become intolerant due to the intolerance being tolerated. A perfect society would run smoothly, with each individual accepting the similarities and differences between and amongst all members. However, in reality this approach does not work, so an ideal society should be tolerant of everything except intolerance. Therefore, there is a need to reject and outlaw intolerance that leads to discrimination against certain subsets of the population.

When deciding which group will not be tolerated, account needs to be taken of the actual harm caused. This means weighing up the effects of allowing certain types of discrimination to occur in society. The paradox of tolerance acknowledges that some speech should not be protected precisely because allowing it to go forward promotes the destruction of the basis of free speech. It may normalise the idea that people of colour should have fewer rights than white people, that homosexual people should have fewer rights than heterosexual people, that disabled people should have fewer rights than able-bodied people. Clearly, this situation cannot be tolerated.

Although freedom of speech, conscience and belief should have certain protections, it should never protect speech or actions that cause actual harm to another. Having your 'religious sensibilities' offended is quite different to having a discriminatory practice condoned because it is aimed at a certain arbitrary feature of another human, such as their ethnicity, gender, orientation or disability. Freedom of thought, conscience and belief are quite different to direct discrimination against another. Any exemptions or limitations should have regard to the health of the community as a whole and not allow arbitrary discrimination that would serve to divide our diverse society.

Conclusion: Intolerance must not be tolerated. Let us have some logic and common sense.

11. Protecting dignity

For many years, the notion of religious freedoms in Australia has been fiercely contested in 'the extent to which it is lawful for religious groups to discriminate' through the operation of 'religious exemptions' in anti-discrimination legislation, most notably those in relation to gender.¹⁶ Having such broad religious exemptions is in direct defiance of the Covenant on the Elimination of Discrimination against Women (CEDAW).

Religious exemptions to anti-discrimination legislation exist at the intersection between competing values. Whilst they do affirm the importance of the right to religious liberty, which is protected by numerous domestic and international legal instruments,¹⁷ religious exemptions to anti-discrimination legislation seem to place the values of religious freedom above the right to be treated equally and not be discriminated against. As Andrew Altman notes, 'claims of religious liberty are frequently made by persons who wish to engage in activities that appear to amount to discrimination.'¹⁸ This leaves the unenviable task to governments and the law to attempt to maintain a balance by 'restricting ... liberty for the sake of upholding, perhaps even promoting, equality'.¹⁹

As anti-discrimination laws have moved their attention from access and distribution to self-identity, the right to religious freedom and the right to live free from discriminatory actions and behaviours have come into conflict more often.²⁰ In requiring both sides to argue which particular right should be given greater freedom, the present gender based anti-discrimination legislation entrenches this appearance of direct opposition of these rights. The Racial Discrimination Act 1975 (Cth) finds balance in a much more non-conflicting way by legislating against acts that are likely to 'offend, insult, humiliate or

intimidate',²¹ but providing for broad, public interest-based exemptions.²² In this way, it manages to sustain a balance between robust public debate and the need to protect marginalised or disadvantaged groups from hate speech²³ on a case-by-case basis.

The Australian Church advocates that any exemptions in any other anti-discrimination legislation follows the Racial Discrimination Act example of being broad and public interest based, adjudicated on a case-by-case basis. However, the Australian Church believes that in addition to protecting the human rights of women, and due to the history in Australian society of discrimination and marginalisation, there are two specific marginalised minority groups that are in need of 'special consideration' when it comes to the balancing of fundamental human rights. The first of these groups are the LGBTIQ+ community. The second group, Aboriginal and Torres Strait Islanders, will be discussed later.

Conclusion: People are **not** pawns or collateral damage; they are human beings, deserving of the same rights as everyone else. Any present religious exemptions in anti-discrimination legislation must be changed to broad public interest based exemptions.

12. Gender and gender identity

Personal gender identity and sexual orientation are 'complex and multifactorial, involving genetic, hormonal, psychosocial and other contributing factors'.²⁴ They are not a mental health issues,²⁵ or 'lifestyle choices'. However, discrimination remains a critical issue, especially amongst those who discriminate on gender and gender orientation grounds, because this behaviour in itself reinforces to them that women and LGBTIQ+ people are less worthy of fundamental rights than other people are. When people accept that one group is less worthy of rights than another, this type of thinking can become entrenched in a society. Just look at the Rohingya or West Papuan people and their current plight for a recent example of that.

Several overseas and local studies have identified various health risks found to affect sexual and gender minorities in a disproportionate manner.²⁶ There are higher rates of depression, anxiety and mood disorders²⁷ and suicide attempts,²⁸ overall.²⁹ Contributing factors to these disproportionate numbers include stigma, discrimination, bullying and risk of violence. Studies have found that LGBTIQ+ people have suffered from verbal harassment, family gossip, fear of being in public, family exclusion, rejection by friends, and feeling like the police refused to protect them.³⁰ Additionally, many have suffered discrimination such as eviction, job loss, denial of medical services, physical or sexual assault, and even death.³¹

While it would seem common sense, it should be pointed out **clearly** that the right to personal identity would be of little value if that right cannot be affirmed and embraced in a public context,³² which is the effect of broad religious exemptions in gender based anti-discrimination legislation. In the case of *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd*³³ Redlich JA explicitly stated that Cobaw Community Health Services' objectives of protecting people's 'self-worth and personal dignity' are of 'intrinsic value'.³⁴

Dignity is at the core of equality and that is observed in several international jurisdictions;³⁵ the Canadian Supreme Court has held that the concept of dignity ensures 'equal recognition' for all members of society, who are all 'equally deserving of concern, respect and consideration'.³⁶ In the Basic Law of the Federal Republic of Germany (the Constitution of Germany), respect for human rights is expressed as dependent on respect for dignity: Article 1 states that 'human dignity shall be inviolable', and from this derives the existence of 'inviolable and inalienable' human rights.³⁷

It seems incredibly difficult to validate the concept that religious beliefs barring interracial marriage would not justify an exemption from the racial discrimination law, but the religious belief that gender identity and/or sexual orientation is 'sinful' would justify an exemption from gender based discrimination law.³⁸ The simple fact of the matter is that maintaining religious exemptions in gender based anti-discrimination law is about continuing misogyny, homophobia, and stigmatisation of a minority group; it is not about religious freedom.

Australian civil law is directed against less serious harms than criminal law. Religious organisations are subject to these laws too; they cover for example, 'intentional infliction of emotional distress'.³⁹ However, the same cannot be said for gender based anti-discrimination law.⁴⁰ It seems inherently difficult to justify treating the interest of being free from discrimination based on gender identity and/or sexual orientation and the discrimination's consequent assault on a person's dignity as less worthy of protection than the interests underpinning Australian civil laws. Any assertion that gender based discrimination causes less harm than other civil wrongs both overestimates the harm caused by civil wrongs and underestimates the harm caused by gender based discriminatory acts.⁴¹

The disproportionate and severe health issues amongst LGBTIQ+ people is attributable to the 'widespread stigma, perpetuated by centuries of ignorance, and in an environment of institutionalised and legalised discrimination; they are not the *de novo* consequences of expressing non-heterosexual and non-conforming gender identities.'⁴² To look after the LGBTIQ+ community we must remove religious exemptions that are causing them harm. Actual, documented harm is being caused by the continuance of these exemptions that allow stigmatisation and discrimination. Removing exemptions will assist the Australian community as a whole through greater acceptance of diversity, lowering the very real cost to people of the negative effects of stigmatisation and discrimination and the financial and resource costs of the additional health care needs this is causing. We need to stop harming people.

Conclusion: Gender based discrimination causes actual harm to people. Religious exemptions to anti-discrimination legislation must be revoked. Same = same - it does **not** matter what a person's gender identity and/or sexual orientation, or how they conduct their private life, they all deserve the same rights.

13. Religious exemptions

There are thousands of different religions, so by logical conjecture, not all of them can be 'right' because they all believe different things.⁴³ This does not make those beliefs 'wrong' but it also does not make them 'special'; it actually makes them rather unimportant in relation to each other and in the great scheme of things. We are pretty sure that quite a few of them also state that 'only God can judge' so we would encourage all religious people to take note of that and stop being so judgemental. It is absolutely none of your business what a person's gender identity and/or sexual orientation is, and absolutely none of your business what they do, as long as they do it with other consenting adults.

In Australia, legal religious exemptions exist for faith-based schools, hospitals, welfare and housing services, that directly discriminate against people based on their sexual orientation, gender identity, intersex status or even their marital status. We have the unacceptable situation where students can be expelled, staff can be fired, and essential services for vulnerable people can be refused to someone because of gender identity and/or sexual orientation, and how they choose to conduct their private life with other consenting adults.⁴⁴

Any consideration of religious freedom must be properly balanced against the need for universal human rights protections, principally the right to be protected by anti-discrimination legislation, but also

rights of privacy, freedom of expression and association. The current religious exemptions and exceptions in gender based anti-discrimination law at both State and Commonwealth levels diminish the appropriate coverage of universal anti-discrimination protections. Religious exemptions on any grounds should be specifically limited to those circumstances where there is a specific religious element to employment or the provision of goods and services; this should be the same as having inherent requirements and genuine occupational qualifications.

Conclusion: Your personal religious beliefs are just simply NOT that 'special'. Others' rights to privacy, freedom of expression, belief and association are just as important.

13.1. Gender based discrimination

There are no 'religious exemptions' in the Racial Discrimination Act, however, under the Sex Discrimination Act 1984 (Cth) (SDA) - that states it is unlawful to discriminate against a person on the basis of a person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding, and family responsibilities⁴⁵ - there are religious exemptions:

- s23(3)(b), which allows discrimination in the provision of accommodation by religious bodies;
- s37, which allows discrimination in the ordination or appointment of priests, ministers of religion or members of any religious order, the training or education of persons seeking ordination or appointment, the appointment of persons to perform religious duties or functions, and any other act or practice of a body established for religious purposes that 'conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion'; and
- s38, which allows discrimination by educational institutions established for religious purposes in relation to the employment of staff and the provision of education and training, provided that the discrimination is in 'good faith in order to avoid injury to the religious susceptibilities of adherents of that religion'.

This means that a religious school may lawfully choose not to employ a pregnant, unmarried teacher in circumstances where this would be discriminatory conduct for a non-religious organisation.⁴⁶ It becomes even more bizarre when the reason for her pregnancy may well be because she was unable to access proper contraception from the pharmacy because the pharmacist had a religious objection to dispensing them, or because her doctor had a religious objection and would not prescribe them to her.

The area in which blanket exemptions have proved particularly problematic is in relation to protection from discrimination for LGBTIQ+ people, although other individuals may also experience discrimination based on sex, marital or relationship status, pregnancy or age. The continued general exemptions for religious organisations limit equality under the law with respect to anti-discrimination protection, and they are based solely on gender identity and/or sexual orientation and how a person conducts their private life. This sounds utterly ridiculous because it is utterly ridiculous.

This is a fundamentally critical issue in the context of the increased outsourcing of government functions to religious organisations, especially in the areas of education, health, aged care, recreational services and community services. Religious organisations also provide many other publically subsidised services to the public and, as such, religious exemptions can have a significant impact on the ability of people, including women and LGBTIQ+ persons, to find and remain in work, or access essential services. While s37(2) of the SDA now specifically removes Commonwealth funded

aged care from the exemption, religious organisations are major employers and service providers in Australia. This aged care exemption was removed under the justification that ‘when such services are provided with tax payer dollars, it is not appropriate for providers to discriminate in the provision of those services’.⁴⁷ We heartedly agree with this statement, and think it should be extended to all sectors where public services are subsidised with taxpayer dollars.

It is unacceptable that religious organisations are not subject to the same laws as other significant employers and organisations. As a general principle, religious organisations should be required to adhere to a degree of accountability that reflects their level of participation in employment and other public services, which is an area of public life clearly covered by anti-discrimination law. Religious exceptions need to be constructed in a manner that appropriately recognises the religious/secular divide and balances the right to equality with rights to freedom of thought, religion and belief.

Limiting religious exemptions to those circumstances where there is a specific religious element to employment strikes an appropriate balance between religious rights and freedoms. We support continued exceptions where a religious body employs a person as a priest, minister of religion or in a capacity directly related to the promotion of that worldview. The Australian Church ourselves believe the ultimate head of the Australian Church must be a person who understands the difference between teal and fuchsia.⁴⁸ However, there should not be general religious exemptions for religious bodies for simply any acts and practices. It should be unlawful to discriminate against a school librarian hired by a religious organisation on the grounds of their gender identity and/or sexual orientation and marital status. Gender identity and/or sexual orientation and marital status have no relevance on the person’s ability to lend books, knowledge of the Dewey Decimal system or ability to assist a student with an enquiry.

We would encourage the Government to narrow the focus of current religious exemptions to bring them into line with the approach to exemptions taken for all other employers and service providers. As Starke J opined in 1943, an individual’s freedom to act upon their religious beliefs is constrained by the right of other members of society to protection against ‘unsocial actions or actions subversive of the community itself.’⁴⁹

In today’s world of high unemployment, it is not as simple as having a person find another position in a secular institution if a religious institution disapproves of their gender identity and/or sexual orientation or how they conduct their private life. The stark reality is that people require employment to be able to eat, pay for somewhere to live and cover household bills. People should not have to be forced to conform to doctrines they do not adhere to due to fear they will become unemployed. Threats to their job security such as those made to over 180,000 people by some leaders of the Catholic Church in 2017 are an unacceptable situation,⁵⁰ and a shocking display of religious privilege and fear mongering. If people lose their jobs, they may be forced to attempt to access welfare services provided by religious organisations that will once again discriminate against them. This situation goes against ICCPR Article 18.2 that states, ‘No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.’

Australia has a high percentage of religious schools in the education sector; such schools are receiving substantial Federal and State government funding. This gives religious organisations an inordinate amount of influence and the opportunity to impose their beliefs and judgements on people who do not share them. Under the current system, religious schools have threatened the employment of teachers who identify as LGBTIQ+ and have neglected to support LGBTIQ+ students.⁵¹ If the Australian government permits this discrimination to continue, then it is denying equal rights to both employees of religious schools and vulnerable young students.

The Australian Church believes that there is a vital societal need to maintain the public/private divide. It must be demarcated to state that religious freedoms can only apply as far as the point that the religious beliefs of one person or group do not negatively impact upon other people and society generally.⁵² General religious exemptions given to religious organisations are directly contrary to the protections specified in UDHR, ICCPR, CEDAW, CROC, the Elimination of Intolerance Declaration, and the Gender Resolution.

13.2. Tax

Currently, religious organisations receive tax-exempt status due to the public benefit *presumed* to be derived from the advancement of religion within the Charities Act 2013. Religious organisations are exempt from the Goods and Services Tax, income tax, fringe benefits tax at the Federal level; land tax, stamp duty, payroll tax and car registration at the State level; rates, and some power and water charges. Religious institutions cannot be considered 'taxpayers' and as such they should not get to have a say in law making and politics. They are not citizens and they are not even contributing to the cost of running our society. In fact, they are costing the rest of us money. It is utterly ludicrous that Australians who do not have religious beliefs are subsidising the exemption of the organisations of those that do.

The Australian Church believes that the advancement of religion, in and of itself, should not be recognised as an approved charitable purpose. As a religious organisation ourselves we object to these tax exemptions and refuse to utilise them. While many religions do engage in charitable activities that genuinely benefit the wider public that should allow them tax exemptions, others do not and should not have access to tax exemptions. We know we are not alone in this belief; an Essential Report poll completed in April 2016 found that 64% of Australians think religious organisations should now be taxed.⁵³

13.3. Special religious education

We have another unacceptable situation in regards to unqualified people coming into public schools and having ridiculous access to the impressionable minds of students. Special religious education in publically funded schools is at odds with the Australian Curriculum⁵⁴ as developed by the Australian Curriculum Assessment and Reporting Authority (ACARA).⁵⁵

The ACARA Board consists of members who represent the Australian Government and all education streams across states and territories. The Australian Curriculum is taught in Australian government schools for reception to year 10 students. Special religious education is also at odds with the national Early Years Learning framework '*Belonging, Being & Becoming*' (2009) Department of Education and Training (Cth)⁵⁶ that promotes inclusion and respect for diversity and guides the learning of children from birth to 5 years of age and through the transition to school in Australia.

The Australian Curriculum has been developed over many years with the input and extensive consultation of actual expert educators, current teachers, principals and schools, academics, authorities and associations, state and territory educational authorities and major professional associations. Please see '*Curriculum Development Process Version 6*' (2012) by ACARA⁵⁷ to understand just how extensive the development and consultation process has been to create the Australian Curriculum. The Curriculum has been accepted and adopted Australia-wide as being best practice and the appropriate content for the education of children.

The Australian Curriculum does focus on educating children on understanding diversity and acceptance of difference. To allow the promotion of specific belief systems during school hours is at direct odds with the stated position of ACARA (i.e., the experts in the education of children) on religious education in public schools. In the Australian Curriculum, religion is represented as a study

'about religion' rather than study about a particular religious faith. The Australian Curriculum already has lessons on the diversity of religions in Australia, and lessons that focus on Australia's Judeo-Christian heritage. It also looks at different belief systems from around the world and throughout history. Clearly, the importance of educating children about religion has been acknowledged and extensively covered by the Australian Curriculum in an inclusive manner.

To have a cohesive multicultural society there must be a basic understanding in the community of each other's differences and similarities. There is abundant evidence that religious based organisations that have been allowed to operate programs in public schools have focused upon trying to convert children to their particular belief system, and have disseminated information that is not inclusive for all the diversity that occurs in the student population. Please refer to the '*Report on the Review of the Connect Religious Instruction Materials*' (2016) by the Queensland Department of Education and Training⁵⁸ and to Deanne Carson's 2015 report '*A critical analysis of you: an introduction*'.⁵⁹

Dissemination of this sort of information can lead to certain children feeling unaccepted because of their difference, and could lead to bullying behaviours by classmates because of their differences. This is of great concern especially for LGBTIQ+ students who are not accepted because of their differences by some religious belief systems. Making the conditions available for such bullying to occur in publically funded schools goes against the *Melbourne Declaration on Educational Goals for Young Australians* (2008) by the Ministerial Council on Education, Training and Youth Affairs⁶⁰ that states that public education systems must 'provide all students with access to high-quality schooling that is free from discrimination based on gender, language, sexual orientation, pregnancy, culture, ethnicity, religion, health or disability, socioeconomic background or geographic location'

There are numerous opportunities for parents to allow their children to be educated in their choice of specific religious beliefs outside of official school hours. The vast majority of religious institutions already have in place educational opportunities aimed specifically at children. If parents wish to have their child's education focused upon a certain religious belief, there are a great number of them out there to choose from. There is no place for this type of education to be allowed in publically funded schools during official school hours to the detriment of the available schooling hours for the teaching of the Australian Curriculum.

13.4. National Chaplaincy Program

The National School Chaplaincy Program (NSCP) was initiated in 2006. Its purpose was to install religious workers into schools for "pastoral care", despite the fact that there had been no research identifying such a need, and there still is not. Funding for the NSCP is conditional upon every chaplain being religious.⁶¹

The NSCP has received criticism from parents, teachers, the Australian Psychological Society, the Australian Education Union, the Queensland Teachers Union and the Australian Council of State School Organisations.⁶² Public schools are secular by nature and must be open to students from all faiths and none. The Australian Church is concerned that chaplains are recruited and trained by fundamentalist religious organisations. Chaplains are employed almost entirely by evangelical organisations including Scripture Union Queensland, ACCESS Ministries, Schools Ministry Group, YouthCARE and Generate Ministries.

The NSCP guidelines state that chaplains are not permitted to seek to convert students nor engage them in counselling; however, instances of both are widespread. In recent times, providers of chaplains in schools have been documented publicly stating that their aim is to convert schoolchildren. Throughout 2015 through to the 2017 school year, Secular Public Education⁶³ has

regularly received numerous complaints from across Australia related to chaplains evangelising and proselytising in public schools. This is done with programmes and activities initiated and/or arranged by the chaplain, such as Bible Clubs, JAFFA Clubs (Jesus A Friend for All), the SHINE program for girls, visiting evangelical bands and the advertising of Christian camps through school newsletters.

Chaplains' religious beliefs make them ill-suited to be able to support young people who are questioning their sexuality. The preference of the religious over the non-religious, for no reason other than their religiousness, is completely unacceptable in government policy. Such an explicitly religious program is utterly out of step with modern Australian society. Chaplains are unable to be advocates for the true interests of ALL students and it is imperative that students should be able to access guidance from a professionally qualified counsellor.

As Dr David Zyngier stated in *Education Matters Magazine*:

“As a former teacher and principal, and now education researcher, I find it unbelievable that our taxes are being used to put religious (and overwhelmingly Christian) men and women into our multicultural public schools to “help young students as they grow and struggle to find their place in life”. If parents opt to send their children to a public secular school then that is what they should get. This is the role for professionally-trained social and welfare workers accredited by the appropriate professional organisation and not a fundamentalist Church organisation like the Scripture Union and Access Ministries.”⁶⁴

13.5. Blasphemy laws

In Australia, blasphemy law is a common law relic in all states except for Queensland and Western Australia where it has been abolished. Being able to comment upon or criticise a belief is a fundamental right under international law such as the UDHR and the ICCPR enshrined under the concept of ‘Freedom of Speech’. ‘Freedom of Speech’ does not include freedom to incite hatred, or freedom to act.

The personal religious beliefs of Pastafarians compel us to speak out against inequality and harm, especially when that harm is done in the name of ‘religious belief’, because harm is harm, no matter what sort of pretty veneer or cherry on top you want to try to put on it. If your religious belief compels you to harm others then, quite frankly, your religious belief is wrong and we are not going to stop saying that and/or making fun of your beliefs at whatever opportunity we have. Truth is a defence in any defamation action. We have this right to protect others’ rights under the Right and Responsibility Declaration, and, we are simply following the tenets of behaviour of our religious belief, so there.

Conclusion: The current extent of religious privilege in Australia is causing harm to other groups, especially those that are vulnerable. The vast amount of government public/social services that have been outsourced to religious institutions means it is imperative the institutions that receive government funding for supplying these services to the public are not allowed to discriminate in the supply of the public/social service.

14. Religious discrimination

Throughout history, there have been many different practices performed in the name of religion that have now been outlawed, or have never been contemplated as being allowable in Australian society, due to their infringement upon others’ human rights or fundamental freedoms. These things include, but are not limited to:

- Slavery

- Killing non-believers
- Death sentences for blasphemy or heresy
- Burning ‘witches’
- Stoning adulterers to death
- ‘Honour’ killings
- Sati – widow burning
- Child brides
- Punishing rape victims
- Female genital mutilation
- Incest
- Infanticide
- Taking of female virgins as spoils of war
- Selling your daughter
- Punishing homosexual males for having consensual sex
- Punishing left-handed people

Whilst some of these things were outlawed simply due to their being covered by general criminal laws, others needed to be rectified by the passing of specific legislation. These limits on religious practices are seen as a necessary imposition to ensure that the fundamental human rights of all of Australian society are protected.

The Australian Law Reform Commission (ALRC), in their 2015 report on ‘Traditional Rights and Freedoms’ stated that there are no Commonwealth laws that ‘significantly encroach on freedom of religion in Australia’.⁶⁵ In light of the ALRC findings, no further legislation to protect ‘religious freedom’ seems either needed or warranted.

Conclusion: Here is a list of things we thankfully do not let religious people do. If the ALRC, a body of legal experts, found no problem with the current state of religious freedom in Australia then, frankly, there is no problem with the current state of religious freedom in Australia.

15. Medical care

15.1. Contraceptives

Presently in Australia, there is the unacceptable situation of health services that are run by religious organisations (that also accept government funding) being able to discriminate over whether they give contraceptive or fertility services. These facilities are supposed to provide healthcare to the public and the discriminatory organisational practice of not providing medical treatment to people should not be an area where a religious exemption applies. No organisation that is in receipt of public funds for providing a public service should be allowed to discriminate in this way.

It was reported by Leslie Cannold in 2001 that a pregnant woman in a Catholic Health Australia run public hospital was refused proper medical treatment when complications rendered her foetus unviable, and she had to wait almost a week until sepsis set in before the foetus was removed.⁶⁶

What a way to turn a terrible situation into something horrific and twisted. This sort of situation is where the right of the woman to reasonable health care has been denied by religious privilege. It is unacceptable that in Australia a woman cannot easily and readily access an appropriate medical procedure for the health condition that is requiring treatment. Such a situation is in direct opposition to the UDHR and CEDAW and must be rectified.

Conclusion: Having or not having children is only the business of individuals, as is their right to access adequate and appropriate medical treatment.

15.2. Medical treatment of minors

Several religious groups have conscientious objections to particular forms of medical treatment. Examples include some eastern religions' objections to the use of drugs, Christian Scientists' opposition to medical examination and treatment based on their concept of disease, Scientology's dismissal of psychology and opposition by Jehovah's Witnesses to blood transfusions.⁶⁷

Allowing an adult to choose whether or not they wish to consent to particular medical procedures and a treatment based on their beliefs is perfectly acceptable. However, when it comes to the necessary medical treatment of children, the best interests of the child must override the beliefs of the parents. Even if refusal of medical treatment was considered a religious practice, the prohibition of this practice upon children is justified by ICCPR Article 18.3 and Elimination of Intolerance Declaration Article 1.3 as an allowable limitation on the right to manifest religion or belief because the limitation is necessary for the protection of the rights of the child. The Australian Church considers any refusal of necessary medical treatment upon a minor to be a violation of internationally recognised human rights standards under a number of instruments.⁶⁸ Obviously, this would only be applicable in situations where there was an immediate threat to the life or risk of serious harm occurring to the child without medical intervention, and would not apply otherwise.

15.3. Child genital mutilation

15.3.1. Female genital mutilation

Female genital mutilation or female circumcision is the collective term for a number of different practices.⁶⁹ Female genital mutilation is not considered a religious practice. It is generally accepted as having pre-dated Islam, Christianity and other major religions. Genital mutilation of young females is a traditional practice in many African, Asian and Middle-Eastern countries.

All jurisdictions in Australia have passed legislation directly outlawing this ritual practice. Additionally, the Australian Law Reform Commission considered that female genital mutilation would constitute an assault under ordinary criminal legislation.⁷⁰

15.3.2. Male genital mutilation

Although male genital mutilation is also a practice that occurred before the founding of the Abrahamic religions, it is now a practice of mainly the Jewish, Muslim and some Indigenous cultures. However, only the Jewish and some Indigenous cultures seem to have an age preference for when this ritual is performed. The Australian Church strongly feels that this ritual should not be performed upon a child. There is no reason the adherent of a particular belief should not wait until they have obtained the age of consent before deciding whether they wish to follow this particular ritual. Male children of these particular belief communities are not considered outcasts if they have not had this ritual performed.

To protect female children from genital mutilation but not male children goes against the ideals of gender equality, and against the rights of the child to bodily autonomy if performed for any reason except for medical necessity. Male genital mutilation violates Articles 3, 19 and 24 in CROC relating to

the best interests of the child, protection from abuse and neglect and the right to the highest attainable standard of health.⁷¹ It also violates Article 7 of the ICCPR that prohibits cruel, inhuman or degrading treatment. However, there can be no questioning of the appropriateness of this practice when it is undertaken for necessary medical purposes.

Even if considered a religious ritual, the prohibition of this practice upon children is justified by ICCPR Article 18.3 and Elimination of Intolerance Declaration Article 1.3 as an allowable limitation on the right to manifest religion or belief because the limitation is necessary for the protection of the rights of the child. The Australian Church considers any non-medically essential genital mutilation performed upon a minor to be a violation of internationally recognised human rights standards under a number of instruments.⁷²

16. Royal Commission into Institutional Responses to Child Sexual Abuse

The Final Report by the Royal Commission into Institutional Responses to Child Sexual Abuse runs to over 17 volumes and reflects an exhaustive, comprehensive inquiry that ran for over five years. The inquiry conducted 57 public hearings and 8,000 private sessions. Approximately 4,000 institutions were reported to the Royal Commission, which heard from 1,200 witnesses over 400 days of testimony. The Royal Commission uncovered the horrific extent of institutional child sexual abuse and found many institutions had failed children over many decades. The Royal Commission has estimated the number of child victims in the tens of thousands. Four hundred and nine (409) recommendations have been made.

The Royal Commission has called for a systematic overhaul of the culture, structure and governance practices that allowed such horrendous child abuse. It would be neither possible nor appropriate to consider all the recommendations in this submission.

As widespread as the abuse has shown to be, the Catholic Church across Australia has accounted for the greatest number of cases overall, with almost 4,500 alleged victims and 1,800 alleged perpetrators over the past 35 years. The analysis found 7% of Catholic priests were alleged sexual offenders.

In the Final Report Summary, on page 16, it was found that perpetrators were allowed to maintain access to children and often they were transferred to other locations. It was found that there was a systematic failure by the institutions to accept that child abuse was a crime with substantial, long term consequences for the victim, but was seen as a 'mere moral failure' on the part of the perpetrator.⁷³

A few of the major recommendations by the Royal Commission include:

- religious ministers be forced to report information confided to them in confessional;
- a new criminal offence be created for failing to protect children within an institution;
- a new National Office for Child Safety be created; and
- celibacy in the Catholic Church be voluntary.

Catholic Archbishop of Melbourne, Denis Hart, has said he does not fully support some of the recommendations delivered by the Royal Commission. In particular, Archbishop Hart does not support any changes to confession that would force a priest to report information to authorities.

The Australian Church maintains that religious organisations have historically had a privileged position in Australian society. Thus, the deference and preferential treatment accorded to religious organisations has in fact enabled much of the harm experienced by the victims of child abuse. Religious organisations and their clergy have been allowed to escape accountability and place

their religious law above Australian law. This is not 'religious freedom'; this is criminal behaviour. Until these organisations are held to account, they will always consider themselves and their actions, no matter how heinous, to be above the secular laws of this country.

Dominican priest Tom Doyle, an American canon lawyer and previously a consultant to Pope Francis' Pontifical Commission for the Protection of Minors was interviewed for an article in the Newcastle Herald on 4 January 2018. He made it clear he believes it is essential for the Australian Government to apply pressure on the Church to act on the Royal Commission recommendation to name child sexual abuse as a crime in church law, rather than a sin or moral failure.⁷⁴ The Australian Church agrees.

The Australian Church believes highlighting these few points from the Royal Commission is important to reinforce our stance that religious freedoms should never infringe upon the fundamental human rights of others. Far from being the bastion of morality that they proclaim themselves to be, religious organisations have a terrible history of child abuse, condoning domestic violence and the covering up of criminal behaviour. As Cory Bernardi recently said, 'Most Australians have no place, or don't have any time for moral lectures or virtue-signalling from people in an industry that has a very chequered history.'⁷⁵ For once, on this point, we agree with him. The findings of the Royal Commission are one fundamental reason that the rights of the individual under the ICCPR must not be extended to organisations and all religious exemptions extended to them must be removed.

Conclusion: Religious organisations are known to harbour and protect paedophiles and some are much worse than others are. They are not bastions of morality, and cannot claim to hold any moral authority in light of the findings of the Royal Commission.

17. Aboriginal and Torres Strait Islander People

Only one religious/spiritual group in Australia should have special protections for their religious freedoms. Aboriginal and Torres Strait Islander peoples have, in particular, suffered from discrimination imposed by Australian law. In addition to being denied the right to vote for many decades, various laws have permitted the forced removal of their children, prevented them from marrying, limited their freedom of movement and permitted their wages to be confiscated,⁷⁶ as well as losing their traditional lands. Institutionalised racism and generational trauma are still adversely affecting Aboriginal and Torres Strait Islander people today. Additionally, in Australia, there is a terrible lack of knowledge, recognition and respect for Aboriginal religious and spiritual beliefs.⁷⁷

On 13 September 2007, the United Nations Declaration on the Rights of Indigenous Peoples was adopted by the United Nations General Assembly. The Declaration sets out the individual and collective rights of Indigenous people, as well as their rights to culture, identity, language, employment, health, education and other issues (UNHRC 2007). The Australia Government officially endorsed the declaration on 3 April 2009. Despite this, Aboriginal and Torres Strait Islander people are still highly disadvantaged in Australia.

According to data from the Australian Bureau of Statistics, in 2011, there were 669,900 people, representing 3% of the total Australian population who identified as Aboriginal and Torres Strait Islander. However, in her 2017 United Nations Report, Special Rapporteur on the Rights of Indigenous Peoples, Ms Victoria Tauli-Corpuz, found that Aboriginal and Torres Strait Islander people made up 27% of the total Australian prison population in 2016, something Ms Tauli-Corpuz described as a 'major human rights concern'⁷⁸ and stated that urgent measures should be taken as a national priority.

As of 2015, 35% of all children placed in out of home care were Aboriginal or Torres Strait Islanders. At that time, Aboriginal and Torres Strait Islander children numbered just 5.5% of all children 0-17 years old in Australia. As Ms Tauli-Corpuz stated in her report 'In 1997, the year in which the report entitled 'Bringing Them Home' was published, Aboriginal and Torres Strait Islander children constituted 20 per cent of children in out-of-home care. By 2016, that figure had increased to 36 per cent, with Aboriginal and Torres Strait Islander children being 10 times more likely than non-Indigenous children to be in out-of-home care.'⁷⁹

Recent estimates show that an Aboriginal and Torres Strait Islander male born in 2010-2012 is likely to live to 69 years, approximately 10 years less than a non-Indigenous male. An Aboriginal and Torres Strait Islander female born in 2010-2012 is likely to live to 74 years, whereas a non-Indigenous female is likely to live to 83 years. Babies born to Aboriginal and Torres Strait Islander women are almost twice as likely to die in their first year as those born to non-Indigenous women.

The leading causes of death for Aboriginal and Torres Strait Islander people living in NSW, Qld, WA, SA and the NT in 2015 were coronary heart disease, diabetes, chronic lower respiratory disease, and lung and related cancers. Tuberculosis notifications were 11 times higher for Indigenous people than for Australian born non-Indigenous people in 2009-2013. In 2015, hepatitis C notifications were five times higher for Aboriginal and Torres Strait Islander people than for non-Indigenous people.

For many Aboriginal and Torres Strait Islander people, spirituality and religious belief are integral and intrinsic parts of their culture and identity, and the fact that those aspects have survived 'is testament to the strength and resilience of Aboriginal and Torres Strait Islander cultures.'⁸⁰ However, significant barriers do persist to the full expression of cultural and spiritual beliefs. These barriers include access to traditional land, the recognition and protection of sacred sites, and the loss of language. As such, 'special protection' needs to apply to enable these belief systems to flourish. As recommended by UN Special Rapporteur, Mr. Abdelfattah Amor, Aboriginal and Torres Strait Islander must be able to maintain connection to their lands and sacred sites.⁸¹

Aboriginal spirituality comes from a person's sense of belonging to the land, the sea, and other people and to one's culture. It is an expression of cultural heritage, and it is inherent in stories, ceremonies and dance, values and structures. These multifaceted and many belief systems provide a depth of belief and give the 'answers to the great universal religious questions of humankind, the questions about origins, meaning, purpose and destiny'.⁸²

UN Special Rapporteur for Indigenous Peoples, Erica-Irene Daes, has stated that Aboriginal beliefs and spirituality are intrinsically linked to the land generally and to certain sites and objects of significance in particular. Their preservation is fundamental to the spiritual and religious life of Indigenous people.⁸³ As Lorraine Inje, Chairperson of the Aboriginal Language Centre stated in 1997:

'There can be no reconciliation without justice. Justice for indigenous people can only be brought about by the acceptance, recognition and appreciation of the spiritual connections that indigenous people have to traditional lands.'⁸⁴

The Australian Church acknowledges that Aboriginal and Torres Strait Islander groups need to affirm and express their identity collectively, and that sometimes this involves the right to exclude. For example, in certain situations it would seem acceptable for an Aboriginal and Torres Strait Islander group to protect its cultural identity and beliefs by excluding non-Indigenous people, and for them to maintain their tradition of men's and women's business. This is in line with statement made by the United Nations, in regard to the ICCPR, that:

'Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States

may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.¹⁸⁵

Conclusion: it must be acknowledged that Aboriginal and Torres Strait Islander people are suffering from actual harm in many areas due to institutionalised racism and generational trauma, and that some of this harm stems from a lack of understanding and acknowledgment of Aboriginal and Torres Strait Islander spirituality and religion, and its vital importance in Aboriginal and Torres Strait Islander culture and identity. Legislation relating to matters such as Aboriginal and Torres Strait Islander health care, social services, cultural heritage and land rights should make certain that Aboriginal and Torres Strait Islander religious and spiritual beliefs are given ‘special protections’ and ensure their rights to their culture.

18. References

¹ The Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, December 2015, 5.154.

² It may be noted that some of this submission is substantially similar to another submission. This is because the author also wrote that one, but for a different organisation.

³ D J Sullivan, ‘Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination’, 82 *American Journal of International Law* 487, page 491 n.17 (1988).

⁴ For example; ‘*The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.*’ General Comment No. 22 (1993) paragraph 1-2 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.3, 1997, page 36.

⁵ ‘*Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. Any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community would be of concern.*’ General Comment No. 22 (1993) paragraph 2 in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.3, page 3.

⁶ General Comment No.22 (1993) paragraph 3.

⁷ For example, T C Van Boven, *Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/Sub.2/1989/32 1989, paragraph 5; E Odio Benito, *Study of the Current Dimensions of the Problems of Intolerance and of Discrimination on Grounds of Religion or Belief*, UN Doc. E/CN.4/Sub.2/1987/26 1986, paragraph 13, reprinted in *Human Rights Study Series No.2*, UN Sales No. E.89.XIV.3, 1989; A Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, UN Doc. E/CN.4/Sub.2/200/Rev.1, page 1 n.1, UN Sales No.60.XIV.2 (1960) reprinted in (1978) 11 *New York University Journal of International Law and Policy* page 227.

⁸ *Church of the New Faith v Commissioner for Payroll Tax (Vic.)* (1983) 154 CLR 120, pages 131-132.

⁹ *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, pages 646, 674, 688; *R v Poole; Ex parte Henry* (No. 2) (1939) 61 CLR 634; *Airlines of New South Wales v New South Wales* (No. 2) (1965) 113 CLR 54, pages 82, 102, 118, 126, 141; *Commonwealth v Tasmania* (the Franklin Dam case) (1983) 158 CLR 1; *State of Victoria v Commonwealth of Australia*; *State of South Australia v Commonwealth of Australia*; *State of Western Australia v Commonwealth of Australia* (1996) 138 ALR 129.

¹⁰ *Church of the New Faith v Commissioner for Payroll Tax (Vic.)* (1983) 154 CLR 120, 136. Mason ACJ and Brennan J. See also *Kruger* (1996) 190 CLR 1, 160 (Gummow J).

¹¹ *Burke v Tralagga* (1986) EOC ¶92-161.

¹² ‘*There is a wide range of justifications advanced for laws that interfere with freedom of religion, including, but not limited to, protecting people from discrimination in public life, preventing a greater harm, and limitations where laws directly interfere with other legal rights and freedoms.*’ The Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, December 2015, 5.57.

¹³ ‘*Limitations may be applied only for those purposes for which they are prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of*

morals derives from many social, philosophical and religious traditions; consequently limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Human Rights Committee, General Comment 22, (1993).

¹⁴ *'The scope of the state's power to restrict or influence religious expression must be consistent with both the right to manifest religion or belief and the permitted limitations on that right. In determining the scope of permissible limitations clauses, states should proceed from the need to protect the rights guaranteed under the ICCPR, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26, notably including religion.'* Chris Sidoti, Human Rights Commissioner, Article 18 Freedom of religion and belief. (1998) 30.

¹⁵ *'The importance of this distinction gains added weight in the context of article 18.3 of the ICCPR. Article 18.3 allows limitations on the manifestation of religion or belief where they are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others. Clearly it is difficult to argue that laws necessary to protect fundamental rights and freedoms and the other important social interests listed in article 18.3 should be overridden by practices which are permissible but not essential or fundamental to religion or belief.'* Chris Sidoti, Human Rights Commissioner, Article 18 Freedom of religion and belief. (1998) 43.

¹⁶ Reid Mortensen, 'A Reconstruction of Religious Freedom and Equality: Gay, Lesbian and De Facto Rights and the Religious School in Queensland' [2003] QUTLawJl 16; (2003) 3 Queensland University of Technology Law and Justice Journal 320, 323.

¹⁷ See, e.g., Racial and Religious Tolerance Act 2001 (Vic) s 8 ; Anti-Discrimination Act 1991 (Qld) s 124A(1); Anti-Discrimination Act 1998 (Tas) s 19(d); International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2(1), 18. The Commonwealth, New South Wales and South Australia are notable exceptions, as they do not have such explicit legislative protections.

¹⁸ Andrew Altman, Discrimination (30 August 2015) Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/archives/fall2015/entries/discrimination/>>.

¹⁹ Thomas Giegerich, 'Freedom of Religion as a Source of Claims to Equality and Problems for Equality' (2000) 34 Israel Law Review 211, 212.

²⁰ See generally Joel Harrison and Patrick Parkinson, 'Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' [2014] MonashULawRw 19; (2014) 40 Monash University Law Review 413, 414.

²¹ Racial Discrimination Act 1975 (Cth) s 18C.

²² Ibid s 18D.

²³ Eatock v Bolt [2011] FCA 1103; (2011) 197 FCR 261, 311 [210] (Bromberg J).

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²⁸ Testa, R. J., Michaels, M. S., Bliss, W., Rogers, M. L., Balsam, K. F., & Joiner, T. (2017). Suicidal ideation in transgender people: Gender minority stress and interpersonal theory factors. Journal of Abnormal Psychology, 126(1), 125–136.

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³⁰ Stahlman, S., Sanchez, T. H., Sullivan, P. S., Ketende, S., Lyons, C., Charurat, M. E., Baral, S. D. (2016). The prevalence of sexual behavior stigma affecting gay men and other men who have sex with men across sub-Saharan Africa and in the United States. *JMIR Public Health and Surveillance*, 2(2), e35.

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³² Murphy, Bobbi, "Balancing Religious Freedom and Anti-Discrimination: *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd*" [2017] *MelbULawRw* 5; (2017) 40(2) *Melbourne University Law Review* 594

³³ *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* [2014] *VSCA* 75; (2014) 308 *ALR* 615

³⁴ *Cobaw* [2014] *VSCA* 75; (2014) 308 *ALR* 615, 713 [438].

³⁵ Fredman, 'Substantive Equality Revisited', above n 53, 17–20. For an example of the centrality of dignity in foreign jurisdictions see, e.g., Constitution of the Republic of South Africa Act 1996 (South Africa) s 36(1); Grundgesetz für die Bundesrepublik Deutschland [Basic Law of the Federal Republic of Germany] art 1(1).

³⁶ *Law v Canada* [1999] 1 *SCR* 497, 529 [51] (Iacobacci J).

³⁷ Grundgesetz für die Bundesrepublik Deutschland [Basic Law of the Federal Republic of Germany] arts 1(1)–(2).

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³⁹ Cass Sunstein, 'On the Tension between Sex Equality and Religious Freedom' (Working Paper No 167, University of Chicago Law School, June 2007), 7.

⁴⁰ Cass Sunstein, 'On the Tension between Sex Equality and Religious Freedom' (Working Paper No 167, University of Chicago Law School, June 2007) 3, 4.

⁴¹ Cass Sunstein, 'On the Tension between Sex Equality and Religious Freedom' (Working Paper No 167, University of Chicago Law School, June 2007) 7, 8.

⁴² Ronald O. Valdiserri, David R. Holtgrave, Tonia C. Poteat & Chris Beyrer, *Unraveling Health Disparities among Sexual and Gender Minorities: A Commentary on the Persistent Impact of Stigma*, *Journal of Homosexuality* Vol. 0, Iss. ja, 2018

⁴³ For example, Scientologists believe that our spirits are called thetans, and originally the thetans were of extra-terrestrial origin, Mormons believe something similar except they believe the spirit was a pre-mortal existence, and we were placed on Earth later. Christians, on the other hand, believe that the Earth was created for humans by God.

⁴⁴ Tosca Lloyd, 2018: a year that draws a line against prejudice, privilege and power, *The Age* January 7 2018.

⁴⁵ Sex Discrimination Act 1984 (Cth) ss 5–7.

⁴⁶ The Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, December 2015, 5.81.

⁴⁷ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill (2013)* [2.31].

⁴⁸ *The Gospel of the Flying Spaghetti Monster. 3. I'd really rather you didn't judge people for the way they look, or how they dress, or the way they talk, or, well, just play nice, okay? Oh, and get this in your thick heads: woman = person. Man = person. Samey-samey. One is not better than the other, unless we're talking about fashion and I'm sorry, but I gave that to women and some guys who know the difference between teal and fuchsia.*

⁴⁹ *Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 *CLR* 116, 155 (per Starke J).

⁵⁰ Michael Koziol, *Married Sunday, fired Monday: Churches threaten to dismiss staff who wed same-sex partners* August 20 2017. <<http://www.smh.com.au/federal-politics/political-news/married-sunday-fired-monday-churches-threaten-to-dismiss-staff-who-wed-samesex-partners-20170817-gxy4ds.html>>

⁵¹ See, for instance <http://www.smh.com.au/federal-politics/political-news/married-sunday-fired-monday-churches-threaten-to-dismiss-staff-who-wed-samesex-partners-20170817-gxy4ds.html>, and <http://www.theage.com.au/victoria/gay-students-human-rights-breached-by-catholic-schools-20160614-gpippiq.html>

⁵² Human Rights Law Centre, Submission 148 quoted in The Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, December 2015, 5.78.

⁵³ <http://www.essentialvision.com.au/tax-on-religious-organisations>

⁵⁴ <http://www.australiancurriculum.edu.au/>

⁵⁵ <https://www.acara.edu.au/>

⁵⁶ Department of Education and Training (Cth) (2009) *Belonging, Being & Becoming* https://docs.education.gov.au/system/files/doc/other/belonging_being_and_becoming_the_early_years_learning_framework_for_australia.pdf

⁵⁷ ACARA (2012) Curriculum Development Process Version 6 https://acaraweb.blob.core.windows.net/resources/ACARA_Curriculum_Development_Process_Version_6.0_-_04_April_2012_-_FINAL_COPY.pdf

⁵⁸ Queensland Department of Education (2016) Report on the Review of the Connect Religious Instruction Materials.

<http://statements.qld.gov.au/Content/MediaAttachments/2016/pdf/Review%20of%20RI%20Connect%20materials%20August%202016.pdf>

⁵⁹ Deanne Carson 2015 A critical analysis of you: an introduction. <http://religionsinschool.com/wp-content/uploads/2015/10/Carson-2015-Review-you-an-introduction.pdf>

⁶⁰ Ministerial Council on Education, Training and Youth Affairs (2008) Melbourne Declaration on Educational Goals for Young Australians

http://www.curriculum.edu.au/verve/_resources/National_Declaration_on_the_Educational_Goals_for_Young_Australians.pdf

⁶¹ “A chaplain is an individual who is recognised through formal ordination, commissioning, recognised religious qualifications or endorsement by a recognised or accepted religious institution.” (re: funding) Project Agreement for the National School Chaplaincy Programme Contract

⁶² Australian Psychological Society – submission to the Consultation Process for the National School Chaplaincy Program, 1 July 2010; Australian Education Union – Submission to the Select Committee into the Abbott Government’s Budget Cuts, September 2014; Queensland Teachers Union – Fact Sheet November 2013; Australian Council of State School Organisations – Peter Garrigan, speaker at the Humanist Society of Queensland Conference in October 2012.

⁶³ Secular Public Education Limited is an Australian not-for-profit charity advocating for the protection of human rights and advancing education

⁶⁴ Dr David Zyngier - senior lecturer in curriculum and pedagogy at Monash University, Australia

⁶⁵ The Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, December 2015, 5.154.

⁶⁶ Leslie Cannold, *The questionable ethics of unregulated conscientious refusal*, ABC Religion and Ethics 25 Mar 2011 < <http://www.abc.net.au/religion/articles/2011/03/25/3174200.htm>>

⁶⁷ Chris Sidoti, Human Rights Commissioner, Article 18 Freedom of religion and belief. (1998) 51.

⁶⁸ For example, CROC article 24.3; ICCPR article 7.

⁶⁹ Nahid Touibia, *Female Genital Mutilation, A Call for Global Action*, Rainbo, New York, 2nd edition, 1995, page 9.

⁷⁰ Australian Law Reform Commission, *Multiculturalism: Criminal Law*, Discussion Paper 48, Australian Law Reform Commission, Sydney, 1991, page 22.

⁷¹ Articles 3, 19 and 24 respectively.

⁷² For example, CROC article 24.3; ICCPR article 7.

⁷³ “In many religious institutions, the power afforded to people in religious ministry and the misplaced trust of parents combined with aspects of the institutional culture, practices and attitudes, to create risks for children. Alleged perpetrators often continued to have access to children even when religious leaders knew they posed a danger. We heard that alleged perpetrators were often transferred to other locations but they were rarely reported to police. The failure to understand that the sexual abuse of a child was a crime with profound impacts for the victim, and not a mere moral failure capable of correction by contrition and penance (a view expressed in the past by a number of religious leaders) is almost incomprehensible. It can only be explained by acknowledging that the culture of some religious institutions prioritised alleged perpetrators and institutional reputations over the safety of children.”

⁷⁴ “By persisting in calling sexual abuse a moral failure the institutional church is continuing to try to avoid the true nature of child abuse, as well as its own accountability. Its insistence on calling it a moral failure is tantamount to claiming there are two standards of accountability and the church is “special”, with the right to respond to sexual abuse within its own system and its own standards.”

⁷⁵ Cory Bernardi quoted in Julia Holman and Alex McDonald, *Hottest 100: Down Under* singer Colin Hay slams Cory Bernardi’s alternative music countdown, 18 January 2018. < <http://www.abc.net.au/news/2018-01-18/hottest-100-down-under-singer-slams-cory-bernardis-ac100/9340990>>

⁷⁶ Williams, George. *The legal assault on Australian democracy* [online]. QUT Law Review, Vol. 16, No. 2, 2016: [19]-41.

<<https://search.informit-com-au.ezproxy.flinders.edu.au/documentSummary;dn=639016193525566;res=IELHSS>>

⁷⁷ *'The cultures and traditions of the original inhabitants of our continent stretch back into the Dreamtime of 60,000 years ago. When the first Europeans arrived in 1788 to establish a militarily run penal settlement, they made little sustained effort to understand the nature or the content of those cultures and traditions, or the strength of the bonds between the Indigenous peoples and their land or territory. Nor was there any real understanding of the extent to which the Indigenous belief in the supernatural enriched the lives of the Aborigines, provided continuity with the past while explaining the present, identified and regulated relationships, provided the context and content of aspirations and regulated almost all aspects of life and conduct.'* Sir William Deane, Governor General of Australia, 'Religion and cultural diversity: global challenges and local responsibilities, Address for the opening of the 1997 Religion and Cultural Diversity Conference Melbourne, 28 July 1997, in (1997) 19(1) Migration Action 3'

⁷⁸ Tauli-Corpuz, Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia, Human Rights Council, Thirty-sixth session, 11-29 September 2017, Agenda item 3

⁷⁹ Tauli-Corpuz, Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia, Human Rights Council, Thirty-sixth session, 11-29 September 2017, Agenda item 3

⁸⁰ Katja Mikhailovich and Ms Alexandra Pavli, *Freedom of Religion, Belief, and Indigenous Spirituality, Practice and Cultural Rights*, 2011, 16.

⁸¹ *'The land and sacred sites hold a fundamental significance for the Aboriginals, insofar as their beliefs are identified with the land. A basic question is therefore the recognition of an Aboriginal religion intrinsically related to the land within the framework of an Australian society essentially based on Judeo-Christian and western values. In the view of the Aboriginals, maintaining the integrity of the land takes on a religious dimension, which therefore has to be preserved.'* Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1996/23, Addendum, Visit to Australia (Amor Report), UN Doc. E/CN.4/1998/6/Add.1, page 17.

⁸² Edwards, W. 1994, 'Living the Dreaming', in C. Bourke, E. Bourke & W. Edwards (eds), *Aboriginal Australia*, University of Queensland Press, Brisbane, 66 quoted in Poroch, N., Arabena, K., Tongs, J., Larkin, S., Fisher, J. & Henderson, G. 2009, *Spirituality and Aboriginal People's Social and Emotional Wellbeing: A Review*, Discussion Paper No. 11, Cooperative Research Centre for Aboriginal Health, Darwin, 6; Edwards, W. 1994, 'Living the Dreaming', in C. Bourke, E. Bourke & W. Edwards (eds), *Aboriginal Australia*, University of Queensland Press, Brisbane, 66.

⁸³ Chris Sidoti, Human Rights Commissioner, Article 18 Freedom of religion and belief. (1998) 30.

⁸⁴ Lorraine Inje, Chairperson, Aboriginal Language Centre, quoted in *Human Rights and Indigenous Australians*, Proceedings of the Australian Reconciliation Convention, 26-28 May 1997, Book 3, The Council for Aboriginal Reconciliation, Commonwealth of Australia, 1997.

⁸⁵ General Comment No. 23 (1994) in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/ Rev.3, page 41.