Date: 3 June 2022
From: Mr. James Barrett
To: Mr. Ahmed Shaheed
Special Rapporteur on Freedom of Religion or Belief
By email: hrc-sr-freedomofreligion@un.org

Input for the GA Report of the Special Rapporteur on Freedom of Religion or Belief

Dear Mr. Shaheed,

Introduction

I am an Australian lawyer with experience in native title law as well as constitutional, administrative and human rights law. I first worked with Indigenous Australians in relation to legal issues affecting them as an Aurora Intern, living and working in the remote Pilbara region of Western Australia on the lands of the Jaburrara, Ngarluma and Yindjibarndi peoples (in 2015). I assisted the legal team of the Yindjibarndi people in a successful native title claim over lands at the spiritual heart of their community. Since then, I have worked: (i) on the Royal Commission for the Protection and Detention of Children in the Northern Territory (in 2017); (ii) for the National Coordinating Judge of the Native Title practice area within the Federal Court of Australia, Her Honour Justice Jayne Jagot (in 2018); and (iii) for His Honour Justice James Edelman of Australia's federal supreme court, the High Court of Australia (in 2020), among other roles. I have published multiple articles relating to Indigenous Australians and public law, one of which was quoted at length in submissions to Parliament by the President of the Law Council of Australia.[1] Most recently, I attended Harvard Law School, on the lands of the Massachusett, as a Fulbright Scholar with a focus on advancing the wellbeing of young, Indigenous, and socioeconomically disadvantaged people.

I am a white Australian. I make this submission as an individual, with the intention of conveying my insights, from my own observations and research, about freedom of religion and belief for Indigenous Australians. The views I convey, and any errors I make, are solely attributable to me. I defer to the submissions of Indigenous Australians or their chosen representatives to the extent that my own submissions are inconsistent with theirs.

I will proceed by addressing each of your 3 Key Questions succinctly, with a focus on Indigenous Australians. There are hundreds of Indigenous groups in Australia, each with their own regional or local beliefs and practices; what I understand of one group is not necessarily true of all groups.

[1] Moses, *Question on Notice: Migration Amendment (Strengthening the Character Test) Bill 2019* (Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 23 August 2019), 4-5, quoting Barrett, *The Deportation of an Aboriginal Man Frustrated* (AUSPUBLAW, 13 March 2019), https://auspublaw.org/2019/03/the-deportation-of-an-aboriginal-man-frustrated/.

1. Engaging the right to freedom of religion or belief

1.1 *Religion: beliefs, practices, and terminology*

Whilst it may not always be appropriate to imprint Western conceptions upon Indigenous understandings of the world and its creation, it would be patronising to suppose that these are mere "beliefs" or "lore" and not "religions" only because they do not involve bibles or churches. In a sense, Indigenous Australian beliefs do involve bibles and churches: their bible is the spoken word, music or dance, and their churches are in the land around them. Many Indigenous beliefs and practices embody the quintessential features of a religion, at least as that concept was imported to Australia and is commonly understood in everyday language. In the past, courts and commissions of inquiry did not always or universally realise this.[2] But today, virtually everyone from anthropologists routinely involved in native title cases[3] to judges of the High Court of Australia[4] recognises that many Indigenous beliefs and practices are religious.

Take the beliefs and practices of the Yindjibarndi people of the Pilbara region as an example. My own observation is that these beliefs and practices are consistent with the concept of a religion. Some of the Yindjibarndi themselves have come to associate these beliefs and practices with religion. In particular, the Christian religion imported by missionaries, which came to be entwined with their own Dreamtime lore. I observed Michael Woodley, a senior law man within the Birdarra law kept and practised by the Yindjibarndi people, give evidence to this effect in the case of *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia* [2017] FCA 803; 365 ALR 624. I observed Mr. Woodley give uncontested testimony that:[5]

- Yindjibarndi land is inhabited by powerful creation spirits known as *Marrga*;
- "*Minkala* (the Yindjibarndi name for God) gave the Birdarra law to the Marrga, whom Minkala sent to Earth to create the Pilbara, as it is today, and to bring law to the *Ngaardangarli* (being the Pilbara Aborigines)";
- the Marrga divided the Ngaardangarli into several groups with their own languages and law and commanded each group to carry out a sacred duty to keep the law and speak for the "domain" within the Pilbara that they inhabit;

[2] *See* Maddox, *Indigenous Religion in Secular Australia* (Parliamentary Library Research Paper No. 11 1999-2000, 7-16.
[3] Palmer, *Australian Native Title Anthropology: Strategic Practice, the Law and the State* (2018) ch. 5.
[4] *See, e.g., Western Australia v Ward* [2002] HCA 28; 213 CLR 1 at [14]; *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20; 235 CLR 232 at [95]; *Love v Commonwealth* [2020] HCA 3; 270 CLR 152 at [363], [450].
[5] *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia* [2017] FCA 803; 365 ALR 624 at [52].

- the Marrga still live on the land and keep "watch" to make sure the Yindjibarndi are upholding their sacred duty. There are images of the Marrga carved in or painted on rock all over Yindjibarndi country, to remind the Yindjibarndi that the Marrga are watching;
- if Yindjibardi fail in their duty, they fall ill and the land "dries up"; and
- the people, their language, their law, and the land, are not separate entities but manifestations of a Whole known as "Yindjibarndi".

1.2. *Relationships between the UDHR, ICCPR & UNDRIP*

The protections of religious freedom and belief in art. 12 of UDHR and arts. 18 and 27 of the ICCPR are connected to UNDRIP in at least the following ways. Article 12 of UNDRIP refers to access to religious and cultural sites and similar matters. Moreover, arts. 8(2)(b), 10, 25-32 of UNDRIP all refer to, or seek to protect, the relationship between Indigenous people and their lands. For Indigenous Australian groups the ability to access and relate to land is part-and-parcel with the ability to access and religious and cultural sites, because the land *is* a religious and cultural site. More than that, the Indigenous people are part of the land and must care for and speak for the rest of the land. I have observed Indigenous people relate that they feel unwell when off-country for too long, and even relate deaths within their community to various things which have gone wrong on the land. To invoke Mr. Woodley's testimony:[6]

> "I do not feel or see myself as something that is separate and different from Yindjibarndi country because my spirit comes from my country and is always connected to it. It's the same for all Yindjibarndi. This is why, if Yindjibarndi country is hurt because the Birdarra Law is not followed, Yindjibarndi people suffer. The Yindjibarndi people were commanded by the Marrga to look after Yindjibarndi country, in accordance with the Birdarra Law".

1.3. *Is freedom of religion and belief an appropriate framework and how is it applied domestically?*

Yes, it is an appropriate framework at least for some Indigenous Australian groups. For example, the Yindjibarndi invoked the freedom of religion in the case of *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2011] FCAFC 100; 194 FCR 562, which related to an arbitral determination with respect to mining acts in connection with their land under the *Native Title Act 2009* (Cth). They invoked art. 27 of the ICCPR, as well as s. 116 of the Australian Constitution (which provides a narrow protection for freedom of religion). The Court held, not unreasonably, that the provisions were not unconstitutional and art. 27 of the ICCPR did not control the interpretation of the impugned provisions of the Act.[7] Although they lost this case, the Yindjibarndi have maintained that

[6] Ibid at [53].
[7] *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2011] FCAFC 100; 194 FCR 562 at [105]-[109].

systemic deference to the commercial conduct of mining companies has "trampled" upon their religious freedom.[8]

Australia's system of native title can incidentally protect religious freedoms and guarantees under international law by affording Indigenous people property rights or similar interests in domestic law. In *Wurridjal v Commonwealth* [2009] HCA 2; 237 CLR 309, Kirby J stated:[9]

> "There is … express recognition of the cultural, religious and linguistic rights of indigenous peoples, including in United Nations treaties of general application to which Australia is a party. Commonly, such cultural, religious and linguistic rights are directly connected to the land of indigenous peoples, warranting protection of their property rights."

But, there is no general rule of law requiring Australian courts to interpret the *Native Title Act* (or other statutes) in accordance with Australia's international obligations. Nevertheless, it is possible for statutes to incorporate or confirm the relevance of (or *irrelevance* of) international laws and instruments.[10] This is a potential path forward.

The recently elected Labor Government has promised to promote the establishment of a Voice to Parliament; a mechanism to help Indigenous Australians provide input on legislation affecting them.[11]

2. Mapping lived experiences of Indigenous peoples

It is expedient to answer the various aspects of question 2 together. In my answer, I will focus on the effects of external forces on the religious beliefs and practices of Indigenous Australians; in particular, on effects which I have seen in my work or research. My three primary areas of exposure to Indigenous affairs have been with respect to: (A) native title recognition; (B) regimes of incarceration and protective custody; and (C) compulsory management of welfare benefits. I will briefly discuss how each of these could bear on freedom of religious practices directly or indirectly.

A. **Native title recognition** is connected to freedom of religion because conduct which makes it difficult for Indigenous groups to observe religious beliefs and practices can make it difficult for them to establish native title to its full extent, which can in turn make it difficult for those groups to reinvigorate their beliefs and practices. This occurred in the case of *Yorta Yorta v Victoria* [2002] HCA 58; 214 CLR 422. The High Court of Australia held, by majority, that a recognition of native title required the unbroken observance of traditional beliefs and practices

[8] Yindjibarndi Aboriginal Corporation, *Inquiry into the Native Title Amendment (Reform) Bill 2011* (Submission to the Senate Standing Committee on Legal and Constitutional Affairs, 30 August 2011), 16.
[9] *Wurridjal v Commonwealth* [2009] HCA 2; 237 CLR 309 at [269].
[10] *See, e.g.*, ss. 5(1) & 197C of the *Migration Act 1958* (Cth).
[11] Australian Labor Party, *Fulfilling the Promise of Uluru*, https://www.alp.org.au/policies/fulfilling-the-promise-of-uluru#:~:text=The%20Uluru%20Statement%20from%20the,the%20Uluru%20Statement%20in%20full.

by a claim group in a claim area from white settlement to the present day. The unfortunate reality recognised by the Court in *Yorta Yorta* is that the process of colonisation itself might (and often did) break this link. As *Yorta Yorta* demonstrates,[12] it was historically common in Australia for Indigenous people to be removed from their lands by agencies of the state and placed in missions or reserves elsewhere, putatively for their own benefit.[13] Some groups, such as the Yindjibarndi, have been able to observe in traditional practices in an unbroken lineage, despite colonial and modern interference on their land. But groups in areas of the country where there has been greater development or interference have found it harder to establish native title rights and interests.

B. **Regimes of incarceration and protective custody** also have a relationship to freedom of religious belief and practices. A person who is jailed or moved into protective custody away from their land and people will necessarily find it more difficult to observe traditional religious beliefs and practices connected with their land. As the Royal Commission into the Protection and Detention of Children in the Northern Territory recognised,[14] art. 30 of the Convention on the Rights of the Child (CRC) provides:

> "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."

The Royal Commission looked to the West Kimberley Regional Prison, for Indigenous adults, as a model, albeit imperfect, for meeting this problem in respect of incarceration.[15] The Prison is built into and inspired by the natural landscape, which is the traditional land of many inmates.

I am aware that critics in the prison abolition movement might suggest it is perverse and self-contradictory to build "human rights prisons" of this sort. But the stark reality is that Indigenous Australians are amongst the most incarcerated people in the world.[16] States will not

[12] *Yorta Yorta v Victoria* [2002] HCA 58 at [65], [105]-[106], [152]-[153].

[13] These policies have not been left entirely in the past, "[t]he impact of the Stolen Generation is still raw for many Aboriginal people, and the removal of children compounds this trauma.": Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) Vol. 3B 272.

[14] Ibid at Vol. 1 182.

[15] Ibid at Vol. 2B 259-363, 469.

[16] The prevalence of Indigenous Australians in the prison population is 14 times that of their prevalence in the general adult population (28% vs. 2%): Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander Prisoner Characteristics* (4 December 2019), https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2018~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics%20~13.
For comparison, the prevalence of Black Americans in prison, whilst high, is approximately 3 times that of their prevalence in the general population: Gramlich, *Black Imprisonment Rate in the U.S. has Fallen by a Third Since 2006* (Pew Research Center, 6 May 2020), https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/.

eliminate the carceral system overnight. Those Indigenous people who find themselves in the carceral system as it stands should not be abandoned there.

C. **Compulsory management of welfare benefits** disproportionately impacts Indigenous Australians.[17] Studies have reported that programs for the quarantining of welfare benefits could potentially reduce the ability of Indigenous people to take short-term trips on-country.[18] This could affect their spiritual relationship with the land because they could not visit the land at all or as regularly as they would do otherwise. However, these findings are largely based on mixed, anecdotal evidence and a causal link between welfare quarantining and mobility has not been definitively established.

3. Good (and bad) practices

It is again expedient to address the matters under question 3 together, to address a pressing example of good (and bad) practices with respect to the freedom of religious belief and practice of Indigenous Australians. That is access to and respect for sacred sites. It will be recalled that art. 12 of UNDRIP refers to the right of Indigenous peoples "to maintain, protect, and have access in privacy to their religious and cultural sites". A pressing concern in Australia is that Indigenous religious and cultural sites have been bulldozed or blown up by mining companies without the prior and fully informed consent of the traditional owners, or otherwise than in accordance with the consent granted.[19]

Following its detonation of 46,000-year-old caves in Juukan Gorge,[20] Rio Tinto was deeply apologetic, stating: "we fell far short of our values" and "breached the trust placed in us by Traditional Owners".[21] It also published 11 new commitments for the better integration of the local Puutu Kunti Kurrama and Pinikura peoples into decision-making and protection of cultural heritage.[22] Whilst some

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[17] Humpage, *Income Management in New Zealand and Australia: Differently Framed but Similarly Problematic for Indigenous Peoples*, 36 *Critical Social Policy* 551, 560, 561 (2016). This is by design: programs which quarantine a portion of a recipient's welfare income and limit the spending of that quarantined portion were originally recommended in order to advance Indigenous welfare, as part of the Northern Territory Emergency Response (NTER) measures and Cape York Welfare Reform Project in 2007, and the Forrest Review in 2014.

[18] Vincent et al., *"Moved on"? An Exploratory Study of the Cashless Debit Card and Indigenous Mobility*, 55 *Aust J. Soc. Issues* 27, 32 (2020).

[19] *See, e.g.*, Reuters, *Fortescue Apologises for Clearing Land on Aboriginal Sacred Site* (24 February 2021), https://www.reuters.com/world/asia-pacific/fortescue-apologises-clearing-land-aboriginal-sacred-site-2021-02-24/.

[20] Guardian News, *Juukan Gorge Traditional Owners Show Destruction from Rio Tinto Blast of Aboriginal Site* (YouTube, 12 October 2020), https://www.youtube.com/watch?v=s3tVznXBkUs.

[21] Rio Tinto, *Juukan Gorge* (2022), https://www.riotinto.com/en/news/inquiry-into-juukan-gorge.

[22] Ibid. The commitments are:

1. "Remedying and rebuilding our relationship with the PKKP people"
2. "Partnering with Pilbara Traditional Owners in modernising and improving agreements"
3. "Establishing the new Communities and Social Performance model"
4. "Building local capability and capacity to support the site General Manager"
5. "Improving our governance, planning and systems where it relates to communities"
6. "Reducing barriers to, and increasing, Indigenous employment"
7. "Increasing Indigenous leadership and developing cultural competency within Rio Tinto"

critics might say these are corporate platitudes intended only to please shareholders and keep its social licence to operate, the reality is not that simplistic. For instance, Rio Tinto does integrate a large number of Indigenous Australians into its permanent workforce. In its Reconciliation Action Plan: 2016-2019, Rio Tinto said that 1,450 of its permanent employees are Indigenous Australians, representing approximately 5% of its permanent workforce.[23] It has acknowledged there is "more work to do to increase representation in professional and leadership roles".[24] But the Juukan Gorge breach of trust was a setback for the company's reconciliation ambitions, which are probably genuinely held. Reconciliation Australia suspended Rio Tinto from its Reconciliation Action Plan (RAP) program.[25]

Also purportedly in response to the Juukan Gorge incident, the Parliament of Western Australian passed the *Aboriginal Heritage Act 2021* (WA). However, the Act and the process by which it was drafted and enacted has been heavily criticized by some Indigenous leaders including Dr. Hannah McGlade, who is a human rights lawyer and member of the UN Permanent Forum for Indigenous Peoples. According to Dr. McGlade, many Indigenous people are angered by the law because it "retains the right of the Minister to make the decision to destroy and damage … significant and sacred sites", allows mining companies – but not Indigenous people – to obtain merits review of government decisions, and does not establish an independent authority for Indigenous heritage.[26]

I would welcome any questions you have in connection with my submission by return email.

Yours sincerely,

James Barrett

8. "Establishing a process to redefine and improve cultural heritage management standards"
9. "Establishing an Australian Advisory Group"
10. "Elevating external consultation"
11. "Elevating employee engagement"

[23] Rio Tinto, *Reconciliation Action Plan: 2016-2019*, 6, 12.
[24] Rio Tinto, *People*, https://www.riotinto.com/en/sustainability/people.
[25] Reconciliation Australia, *Statement on Rio Tinto* (9 June 2020), https://www.reconciliation.org.au/statement-on-rio-tinto/.
[26] ABC News (Australia), *Human Rights Lawyer Takes Juukan Gorge Case to the UN* (YouTube, 18 November 2021), https://www.youtube.com/watch?v=bW8Tm1Qi5B0.