

Final Submission

To the Attorney-General, The Honourable Shannon Fentiman, regarding the review of the *Anti-Discrimination Act 1991 (Qld)* on behalf of Scripture Union Queensland

1. Purpose

- 1.1 Scripture Union Queensland (**SU QLD**) previously submitted a Key Issues Paper to the Queensland Human Rights Commission (**Commission**) to assist the Commission in preparing and finalising its Discussion Paper into the review of the *Anti-Discrimination Act 1991 (Qld)* (**AD Act**).
- 1.2 SU QLD has now had the opportunity to review the Discussion Paper. SU QLD thanks the Commission for its consideration of the key issues impacting both SU QLD and similar organisations' operations in its Discussion Paper.
- 1.3 SU QLD welcomes the opportunity to further develop its submissions with respect to the key issues it has identified within the AD Act to inform the Commission of the practical difficulties it faces in complying with the AD Act and proposed amendments.
- 1.4 In this context, the purpose of this Paper is to articulate SU QLD's position more comprehensively and to address the specific questions raised by the Commission, prior to the submission close date of 1 March 2022.

2. Summary

- 2.1 In particular, this Paper seeks to respond to the Commission's Discussion Questions 41 and 44, namely:
 - (a) Should the scope of the religious bodies' exemption be retained or changed? In what areas should exemptions for religious bodies apply? (**Discussion Question 41**); and
 - (b) Should the religious educational institutions and other bodies' exemption be retained, changed or repealed? If retained, how should it be framed? (**Discussion Question 44**).
- 2.2 SU QLD is concerned that the current narrowly defined exemptions to the AD Act, reflected in sections 25 and 109 of the AD Act, do not recognise or appropriately accommodate the valuable community contribution of religious organisations that provide services in the community, particularly when those services have a strong connection or link to the religious beliefs/ethos of the organisation.

- 2.3 SU QLD is a Christian organisation that employs individuals to provide services to Queensland schools as school chaplains. SU QLD submits that, to fulfil this role and ensure as an employer it can properly equip its employees to deliver the services of school chaplains (who are required to be commissioned in a faith and demonstrate this faith as part of the role description required by the Queensland Government), it must have the ability to recruit Christian employees. This is essential to SU QLD's service of providing spiritual support to students and staff, as well as necessary for SU QLD's compliance with its funding requirement to ensure staff have received an appropriate faith-based commissioning, as outlined in the Queensland Department of Education and Training's Standing Offer Arrangement (**Standing Offer Arrangement**). SU QLD's inability to preference Christian candidates under the AD Act imposes more onerous obligations on religious organisations than non-religious organisations (i.e. political parties). This issue is further discussed at 6.6.
- 2.4 Consequently, the AD Act has an unintended discriminatory effect, particularly in the area of employment, in relation to religious organisations and seeks to impose greater restrictions on religious organisations than those that exist on non-religious based organisations (for example, see examples 1 - 4 of s.25 of the AD Act). This discriminatory effect prevents the realisation of the AD Act's purpose, being 'to promote equality of opportunity for everyone by protecting them from unfair discrimination'.¹ It also puts the AD Act at risk of being deemed incompatible with section 15 of the *Human Rights Act 2019* (Qld) (**Human Rights Act**), which grants everyone recognition and equality before the law. The Commission's Terms of Reference provide that the AD Act will be assessed for its compatibility with the Human Rights Act.²
- 2.5 Consequently, this Paper submits that the scope of the religious bodies' exemption, as well as the religious educational institutions and other bodies' exemption, should be amended to support religious bodies undertaking a religious/spiritual function, which meets a community need in contexts outside the strict/formal bounds of a Church setting. Such amendments, SU QLD believes, will assist to properly reflect and promote the right to freedom of religion and association in Queensland.
- 2.6 This Paper discusses the right to freedom of religion and association in both the international and Australian legal context, including discussion surrounding the recent *Religious Discrimination Bill 2021* (Cth) (**Religious Discrimination Bill**), before addressing the particular work of SU QLD, the practical difficulties we face with the narrowly defined exemptions under the AD Act, and our recommended amendments.

¹ *Anti-Discrimination Act 1991* (Qld).

² Religious Freedom Review - Report of the Expert Panel (18 May 2018) page 130.

3. Legal Context

International Law

3.1 Australia is a party to the International Covenant on Civil and Political Rights (**ICCPR**). Article 18 of the ICCPR provides that:

'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.'

3.2 'Practice and teaching' includes 'acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers'.³ As was expressed by the Expert Panel in its report following the 2017 Commonwealth Religious Freedoms Review (**Expert Panel Report**), the right includes the freedom to 'train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief'.⁴

3.3 The right to freedom of religion 'is a right enjoyed by all, not just those of faith'.⁵ As Mason ACJ and Brennan J articulated in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* freedom of religion 'is of the essence of a free society'.⁶

3.4 Adherents may manifest religion either individually or in community with others and in public or private. Accordingly, 'the human right to freedom of religion or belief has a communal or 'associational' dimension'.⁷

3.5 SU QLD understands that the right to freedom of religion may be limited on carefully prescribed grounds, in the interests of the broader community. In the context of its review of the AD Act, the Commission will need to examine several intersecting rights, including the right to equality and non-discrimination, which are of equal weight and significance to the right to

³ Human Rights Committee, *CCPR General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) [4].

⁴ Religious Freedom Review - Report of the Expert Panel (18 May 2018) page 27.

⁵ Ibid page 8.

⁶ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 130.

⁷ Religious Freedom Review - Report of the Expert Panel (18 May 2018) page 26.

freedom of religion. SU QLD would be grateful to the Commission to take its concerns with the current drafting of the AD Act into account in striking an appropriate balance.

Australian Law

3.6 Section 116 of the Australian Constitution states that:

'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'

3.7 Religious conduct protected by section 116 extends to 'faith and worship, to the teaching and propagation of religion, and to the practices and observances of religion'.⁸

3.8 While various States and Territories protect against discrimination on the basis of religion, religion is not currently a protected attribute under Commonwealth anti-discrimination law. Freedom of religion was described variously in submissions to the Expert Panel as a 'poor cousin' to other human rights such as freedom from discrimination and a 'forgotten freedom'.⁹

Religious Discrimination Bill

3.9 On the recommendation of the Expert Panel, and in recognising that there is an opportunity to enhance protection for the right to freedom of religion in Australia, the Commonwealth Government introduced the *Religious Discrimination Bill 2021 (Cth)* (**Bill**) which prohibits discrimination on the ground of religious belief or activity in key areas of public life. The Bill intends to protect religious belief and activity to the same standard as other attributes protected under federal anti-discrimination law.¹⁰

3.10 To achieve this end, the Bill contains exceptions from conduct that will constitute discrimination. For example, a religious body will not discriminate against another person by engaging, in good faith, in conduct that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion or to avoid injury to the religious susceptibilities of adherents of the same

⁸ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 135–36 (Mason ACJ and Brennan J).

⁹ *Ibid* page 39.

¹⁰ The Parliament of the Commonwealth of Australia, Explanatory Notes - Religious Discrimination Bill 2021 page 2.

religion as the religious body.¹¹ This may include 'giving preference to persons of the same religion'.¹² As noted in the Bill's Explanatory Notes, this promotes 'the right to freedom of religion and association' by allowing religious organisations to conduct 'their affairs in accordance with their religious beliefs' and manifest their religion in community with others.¹³ These exceptions are intended to apply to several areas of public life including employment, education and the provision of goods, services and facilities.¹⁴

- 3.11 Additionally, certain religious organisations including aged care, disability, accommodation and hospital facilities benefit from specific exceptions which 'recognise the need for these bodies to be able to require or prefer staff or partners to be adherents of their religion in order to maintain the religious ethos' of the body.¹⁵ Educational institutions are also able to 'prefer people in employment who hold or engage in a particular religious belief or activity' so long as the preference is given in good faith and in accordance with a publicly available policy.¹⁶
- 3.12 The Bill was the subject of debate before the Parliamentary Joint Committee on Human Rights (**Joint Committee**) and the Legal and Constitutional Affairs Legislation Committee throughout January and February 2022. The Joint Committee published its inquiry report into the Bill on 4 February 2022 (**Inquiry Report**). The Bill was ultimately put aside on 10 February 2022. In contention was the Bill's treatment of religious schools who seek to discriminate on the basis of a student's gender identity in accordance with their religious ethos. This is not an issue relevant to this Submission.
- 3.13 Access to SU QLD's chaplaincy services is open to all people in a school community, religious and non-religious alike. We do not seek to limit who may access our services, and on this basis, our objectives are distinguishable from organisations that may seek to treat students differentially as identified in debates on the Bill. SU QLD consequently notes that any reference to the Bill in this Paper is for the purpose of illustrating points that were broadly accepted in debate, non-contentious and which are of continued relevance to the QHRC's Review.

¹¹ *Religious Discrimination Bill 2021* (Cth) ss 7(2) and (4).

¹² The Parliament of the Commonwealth of Australia, Explanatory Notes - Religious Discrimination Bill 2021 page 10.

¹³ Ibid page 10.

¹⁴ Ibid page 43.

¹⁵ Ibid page 11.

¹⁶ *Religious Discrimination Bill 2021* (Cth) s 11.

- 3.14 Several submissions to the Joint Committee highlighted the importance of enabling religious organisations to preserve their unique identities through staffing decisions.
- 3.15 As was cautioned by Mr Peter Wertheim, Co-Executive Chief Officer of the Executive Council of Australian Jewry:
- 'If Jewish religious and community institutions were to be prohibited from giving preference to Jewish people in their membership and that of their governing boards and committees, they may eventually find themselves with a non-Jewish majority of members or governors who would be free to vote to abandon the organisation's Jewish ethos and religious practices.'¹⁷
- 3.16 Some religious stakeholders argued that the exceptions reflected in the latest exposure draft of the Bill did not go far enough to protect freedom of religion and association. Mrs Wendy Francis, National Director of Politics at the Australian Christian Lobby, argued that the exceptions in the Bill should apply to 'religious organisations rather than just religious schools.... in the same way that political parties preference the employment of people who adhere to their ethos'. As Mrs Francis highlighted, 'just about every organisation has that same right'.¹⁸ This contention was also supported by Dr Alex Deagon, Constitutional Law Lecturer at the Queensland University of Technology, who, in a submission to the Expert Panel wrote, '...if the Australian Labor party allowed persons espousing non-Labor principles into a prominent' party position, how can it remain distinctively Labor?'¹⁹
- 3.17 In acceptance of these arguments, the Joint Committee in its Inquiry Report considered that 'the right to freedom of religion requires that faith-based organisations have a right to select staff, who are not only adherents of that faith, but who also support the organisation's religious doctrines and practices'.²⁰
- 3.18 Notwithstanding that the Bill has not yet proceeded, SU QLD considers guidance can be drawn from the debates before the Joint Committee in amending the exemptions with respect to religious bodies under the AD Act. As Dr Deagon argued in his submission to the Expert Panel, at a State level, 'broad anti-discrimination exemptions for religious individuals and

¹⁷ Parliamentary Joint Committee on Human Rights, *Proof Committee Hansard - Religious Discrimination Bill 2021* (21 December 2021) page 52.

¹⁸ Ibid page 22.

¹⁹ Dr Alex Deagon, Queensland University of Technology, *Submission to the Commonwealth Religious Freedom Review Panel*, page 10.

²⁰ Parliamentary Joint Committee on Human Rights, *Inquiry Report - Religious Discrimination Bill 2021 and related bills* (4 February 2022) page 111.

organisations are necessary to preserve religious freedom and religious diversity in a liberal democracy'.²¹

4. **Scripture Union Queensland**

State Government Chaplaincy/Student Welfare Funding Program

- 4.1 SU QLD is a Christian organisation that works with schools, local churches, and community groups towards a common vision: To see each child and young person connected and supported in community, serving others, and experiencing fullness of life.
- 4.2 SU QLD provides chaplains to State Government schools to provide students and staff with social, emotional and **spiritual** support in accordance with the State Government Chaplaincy/Student Welfare Funding Program (**State Program**). The State Program is partly funded by the Queensland State Government (using a combination of State Government funds and funding under the Commonwealth's National School Chaplaincy Program (**Commonwealth Program**)). It is similarly funded in other States and territories to ensure that State Government/non-denominational schools are able to provide chaplains to students and staff, if requested by the school.
- 4.3 The Commonwealth Program was established pursuant to a Project Agreement entered into by the Commonwealth and the States and Territories (**Project Agreement**). The Commonwealth Program consists of the provision of chaplaincy services in Australian schools to support student wellbeing through;
- (a) pastoral care services; and
 - (b) strategies developed in consultation with relevant school staff and the school principal that support the wellbeing of the broader school community, for example: coordinating volunteering activities and support, breakfast clubs, lunch time activities, excursions, schools incursions, and parent/carer workshops.
- 4.4 'Pastoral care' is defined in the Project Agreement as 'the practice of looking after the personal needs of students, not just their academic needs, through the provision of general spiritual and personal advice'.²²

²¹ Dr Alex Deagon, Queensland University of Technology, *Submission to the Commonwealth Religious Freedom Review Panel*, page 8.

²² Project Agreement for the National School Chaplaincy Program, page 8. Available at <https://federalfinancialrelations.gov.au/sites/federalfinancialrelations.gov.au/files/2020-04/nat_school_chaplaincy_prog-19-22.pdf>.

- 4.5 Under the State Program, Queensland schools have available to them a panel of chaplaincy and student welfare providers who have signed up to the Queensland Department of Education and Training's Standing Offer Arrangement. The panel arrangement, and a school's choice of provider from the Department's panel, is open to religious and non-religious organisations alike. By this means, the Queensland Government ensures that schools have a choice of provider, including the choice about the kind of chaplaincy service the school requires for its community (if any) at the discretion of the relevant school principal, in consultation with the school community.
- 4.6 In Queensland, to support additional hours of chaplaincy services requested by schools for which government funding is not available, additional funding is provided through community fundraising activities relying on SU QLD's charitable status and tax deductible gift recipient status.
- 4.7 SU QLD, like other religious bodies, has entered into a contract to provide these services to the Queensland Government. Currently, SU QLD chaplains are providing services to approximately 900 Queensland Government schools, resulting in SU QLD having placed chaplains in:
- (a) 63% of all Queensland state primary schools; and
 - (b) 88% of all Queensland state high schools.
- 4.8 At present, SU QLD chaplains are serving more than 400,000 Queensland students. SU QLD has worked with children, young people and families in Queensland for over 80 years. It has been recruiting, training and supporting state school chaplains since 1990.

The role of school chaplains

- 4.9 As set out on the Queensland Government's Education [website](#):
- 'Chaplaincy and student welfare worker services are optional for schools and provide students and staff with social, emotional and spiritual support, provide an additional adult role model in the school and enhance engagement with the broader community, including parents.'
- 4.10 The role of school chaplains and student welfare workers is further articulated in the Queensland Department of Education's [Role Statement for chaplaincy and student welfare work services](#) in the following terms:
- 'The role of a state school chaplain and student welfare worker is to provide social, emotional and **spiritual support** to students, parents and staff. The role of the

chaplain or student welfare worker will reflect the specific needs of the students attending the school. Activities provided by the chaplain or student welfare worker are at the discretion of the school principal, in consultation with the school community.

Chaplains and student welfare workers must be able to provide support for a range of day-to-day matters affecting the school community and communicate effectively with a diverse group of people. While chaplains and student welfare workers **personally model and own their own positions or beliefs**, they must avoid any claims or implications that any one religion, denomination or worldview is advantageous or superior to any other religion, denomination or worldview.

While recognising that **an individual worker may respond to questions and in good faith, express views and articulate values consistent with their own beliefs**, the chaplain or student welfare worker must not take advantage of their position to proselytise, evangelise, advocate for or denigrate a particular worldview or faith" (our emphasis added).'

- 4.11 While school chaplains must avoid claims or implications that their own spiritual belief is advantageous or superior to any other religion, a critical component of the school chaplaincy program is the provision of spiritual support and chaplains being able to model their own belief systems and articulate values consistent with these beliefs. To ensure chaplains are appropriately equipped to take on this responsibility, the training SU QLD can provide is based on the faith, doctrines and tenets intrinsic to our organisation, being Christianity.

Spiritual Support

- 4.12 In order to understand the holistic role of school chaplains, the concept of 'spiritual support' must be explored in the context of government schools. Spiritual support comprises not just what occurs in the classroom, but also a broad range of extra-curricular activities and voluntary interactions between students, staff, families, community members and community organisations that promote holistic wellbeing and positive community participation for students.
- 4.13 In government schools, the chaplaincy role is adapted both to the needs of students and the secular context in which chaplains operate. Spiritual support in government schools engages students in a way that is respectful, inclusive, supportive and non-discriminatory.
- 4.14 The Queensland Department of Education's guidance on chaplaincy and student welfare worker services defines 'spiritual support' in the following terms:

'Support that is provided to assist students to develop their unique spiritual health in an open and non-judgemental environment.

Spiritual health is one of the variables that influence an individual's level of overall health, and is considered to be a positive sense of belonging, meaning and purpose in life. It includes values and beliefs that influence the way people live and can be influenced by an individual's connection to themselves, others, nature and beyond.'

- 4.15 An example of a program provided by SU QLD is the A2B Life-Changing Groups framework. This program is designed to develop wellbeing, personal qualities, knowledge and skills through use of intentional presence, pastoral conversations, engaging group work and helping students set achievable goals and get 'from A to B'. The program enables students to engage in a non-coercive and supportive exploration of spiritual beliefs as a fundamental dimension of identity.
- 4.16 The community development activities led by school chaplains frequently involve promoting compassionate ideals and causes, sharing information on local and global needs and facilitating positive change-oriented action with students. While these activities and ideals are not exclusively spiritual or religious, they are strongly linked to core Christian beliefs, attributes and practices. In facilitating such activities, SU QLD school chaplains demonstrate what a spiritually infused life can look like. SU QLD considers that the role of our school chaplains is fundamentally the practical outworking of Christian beliefs. In this way, it can be understood that Christianity is essential to and inseparable from the role of SU QLD school chaplains.
- 4.17 SU QLD submits that in supporting the work of school chaplains as an outworking of Christianity in Queensland State schools, and allowing SU QLD to hire in accordance with its Christian ethos, the right to freedom of religion and association in Queensland is promoted.

Recognition by a faith-based community

- 4.18 SU QLD school chaplains provide spiritual support from their personal faith, being Christianity. Further, it is a **condition** of the Standing Offer Arrangement (referred to above) that school chaplains be recognised by the faith-based community through one of the following:
- formal ordination;
 - commissioning;
 - recognised religious qualifications; or
 - endorsement by a recognised religious institution.

- 4.19 SU QLD complies with this condition of the Standing Offer Arrangement by ensuring all school chaplains have undertaken a Christian commissioning by SU QLD, in its capacity as a recognised religious institution. SU QLD's faith-based community is, and has been since the late 1800s when founded, the local Christian churches. Notably, the Standing Offer Arrangement does not require a chaplain to be commissioned by multiple faiths or institutions, just that the chaplain must be commissioned or endorsed by a recognised religious institution. SU QLD meets that requirement.
- 4.20 SU QLD chaplains provide spiritual support through their belief and exemplification of Christianity, being:
- (a) the faith within which SU QLD can ensure appropriate commissioning and endorsement; and
 - (b) the framework in which SU QLD can provide employment supervision, support, training and qualifications to enable its employees to effectively perform their role.
- 4.21 While SU QLD acknowledges that chaplaincy services can be (and are) provided by organisations of other faiths, SU QLD's spiritual support, within the Christian framework, is clearly a service which meets the needs of hundreds of school communities and complies with the requirements of the required Standing Offer Arrangement from the Queensland Government. The State Government requirement for school chaplains to have faith-based training/commissioning will affect all religious organisations, not just SU QLD.
- 4.22 The requirement that school chaplains be recognised by a faith-based community is consistent with the Department of Education's encouragement of diversity in public life, including schools. In a statement on religious diversity, the Department noted:
- 'Queensland state schools embrace a multitude of cultural, **religious and non-religious beliefs** and encourage students to grow and develop as a whole person, in particular, in beliefs, values and attitudes.'
- 4.23 School chaplains make an important contribution to the educational outcomes of school students through their social, emotional and spiritual support work. An independent evaluation of the Commonwealth Program concluded chaplains are 'highly effective in boosting student well-being'.²³ The evaluation cemented the real and valued place in schools for the promotion of holistic wellbeing that is inclusive of a spiritual/religious dimension.

²³ Kantar Public, National School Chaplaincy Programme Evaluation (2017).

4.24 The National School Chaplaincy Association (**NSCA**), in a submission to the Expert Panel argued that the existence of religious chaplaincy roles in schools 'strongly promotes the human right to freedom of religion'. The non-coercive, voluntary nature of participation in the school chaplaincy program and the prohibition against proselytising, the NSCA noted, adequately protects the rights of students and their parents to determine whether to participate.²⁴ In the NSCA's view, a 'holistic educational system, based on 21st century thinking, should not seek to exclude a non-coercive and supportive exploration of beliefs about spirituality as a fundamental dimension of identity'.²⁵ SU QLD echoes this sentiment.

5. **Concerns with the AD Act**

5.1 The question then arises, for the purposes of the AD Act, how can any religious organisation provide spiritual support through chaplaincy services, or support and train its employees within the organisation's religious framework, if the organisation cannot recruit and employ people of that organisation's religious belief?

5.2 As canvassed in arguments put to the Joint Committee at paragraphs 3.14 to 3.16 above, many organisations, including political parties, have the right to preference the employment of individuals who adhere to their ethos. In the context of religious organisations, freedom of association and the right to manifest religion in community with others and participate in public life is key to protection of the right to freedom of religion. The additional restrictions applicable to religious organisations, which are not imposed on non-religious organisations, discourage religious association and have a discriminatory effect.

5.3 SU QLD is by no means the sole organisation impacted by the current unsuitably narrow provisions of the AD Act. We understand there are more than 20 other providers in a similar position.

5.4 SU QLD's respectful submission is that amendments to the AD Act are required to support religious bodies undertaking a religious/spiritual function, which meets a community need and, in particular, the requirements of the Standing Offer Arrangement, in a context that is outside the strict/formal bounds of a Church setting.

5.5 SU QLD supports the AD Act's purpose, however, the current narrowly defined exemptions in the AD Act do not recognise the valuable community contribution of religious organisations

²⁴ National School Chaplaincy Association, *Submission to the Expert Panel, Religious Freedom Review* (11 January 2018) page 6. Available at < <https://www.pmc.gov.au/sites/default/files/religious-freedom-submissions/787.pdf>>.

²⁵ Ibid page 5.

that provide services in the community from a religious framework – specifically that SU QLD, as a Christian organisation, seeks to employ only individuals of the organisation’s religious belief to provide services to schools as chaplains. This in no way limits or seeks to impact the students who can utilise the services of school chaplains, but is solely focussed on those employed by SU QLD to carry out the role of school chaplain.

5.6 SU QLD submits that the AD Act has an unintended discriminatory effect by imposing on religious organisations greater restrictions in relation to employment practises than those that exist on other, non-religious based organisations (for example, see examples 1 - 4 of s.25 of the AD Act). This discriminatory effect prevents realisation of the AD Act’s purpose and puts the AD Act at risk of incompatibility with the Human Rights Act. SU QLD would be grateful for the Commission to take into account its concerns with:

(a) s.25 of the AD Act; and

(b) s.109 of the AD Act.

5.7 These concerns are addressed further below.

6. **Section 25 of the AD Act - genuine occupational requirements**

The law

6.1 Sections 24 and 25 of the AD Act provide that it is not unlawful to discriminate in the work or work-related area if a person has imposed genuine occupational requirements for a position. Case authorities suggest that 'determining if a requirement is an inherent requirement must involve consideration as to whether a position would be essentially the same in the absence of the requirement'.²⁶

6.2 The examples of genuine requirements for a position listed in s.25(1) of the AD Act are as follows:

Example 1—

selecting an actor for a dramatic performance on the basis of age, race or sex for reasons of authenticity

Example 2—

²⁶ See *Re Boystown* [2014] QCAT 247 [10].

using membership of a particular political party as a criterion for a position as an adviser to a political party or a worker in the office of a member of Parliament

Example 3—

considering only women applicants for a position involving body searches of women

Example 4—

employing persons of a particular religion to teach in a school established for students of the particular religion

6.3 S.25(2)(b) provides that the genuine occupational requirement will apply to:

'any other work for a body established for religious purposes (also an employer) if the work genuinely and necessarily involves adhering to **and** communicating the body's religious beliefs.' (our emphasis added)

6.4 Further, s.25(3) of the AD Act stipulates that it will not be unlawful for an employer to discriminate against a person:

- (a) who openly acts in a way contrary to the employer's religious beliefs; and
- (b) it is a **genuine occupational requirement** of the employer that the person, in the course of, or in connection with, the person's work, **act in a way consistent with the employer's religious beliefs.**

Concerns

6.5 SU QLD, as a Christian organisation, wishes to employ school chaplains who are Christians so that it can:

- (a) ensure those individuals can undertake a Christian commissioning (required by the Standing Offer Arrangement);
- (b) appropriately support chaplains in undertaking their roles;
- (c) ensure chaplains can provide students with appropriate spiritual support and 'personally model beliefs' and 'articulate values consistent with those beliefs' (as referred to in the Department of Education's role statement for chaplains) which align with the religious beliefs of SU QLD as a religious body; and

(d) preserve its religious identity.

6.6 SU QLD respectfully submits that the right to freely exercise religion and manifest it in community with others, as enshrined in article 18 of the ICCPR and s.116 of the Constitution, is critical to preservation of unique group identity and in turn, social diversity.

6.7 Sections 25(2) and (3) of the AD Act in their current form impose additional hurdles that specifically religious organisations must overcome for the genuine occupational requirement exemption to apply. Political parties may engage in selective employment of those who share their political beliefs without the added need to demonstrate that:

(a) the work genuinely and necessarily involves adhering to and communicating the body's political beliefs;

(b) the prospective employee has openly acted in a way contrary to the employer's political beliefs; and

(c) it is a genuine occupational requirement of the employer that the person act in a way consistent with the employer's political beliefs.

6.8 In its Discussion Paper, the Commission has explained that the exemption operates as follows:

*'If it is a genuine occupational requirement that a person **act in a way consistent with the employer's religious beliefs** in the course of, or in connection with the work, the employer may discriminate in a way that is not unreasonable **if the person openly acts** in a way that is contrary to the employer's religious beliefs.*

Whether the discrimination is unreasonable will depend on factors such as whether the employment action is disproportionate to the behaviour, and the consequences for both parties.²⁷

6.9 Respectfully, it is not clear why an individual must 'openly act' in a way contrary to an employer's religious beliefs in order for a religious employer to lawfully engage in selective employment to retain its religious identity. If this same logic were applied to a political context, a political party of a particular persuasion would be prohibited from preferring employees who support their cause in employment decisions, unless that employee acted openly against their interest. An inability to preference candidates with a shared ethos in employment poses a risk to the preservation of group identity, social diversity and the ability of the religious association

²⁷ Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act - Discussion Paper* (November, 2021) page 117.

to manifest its 'religion or belief in worship, observance, practice and teaching' within the organisation (to use the language of Article 18 of the ICCPR).

- 6.10 These additional requirements are similarly not necessary for any of the examples provided in s.25(1) of the AD Act. SU QLD is concerned that the current drafting of the provisions has a discriminatory effect for non-educational religious organisations despite the express needs of the community for the services offered by SU QLD and other providers. SU QLD respectfully submits that, if religious organisations are to be afforded equal protection under the AD Act to political parties (and other organisations), a shared system of belief should be expressly permitted as an acceptable criterion for a position with a religious organisation.
- 6.11 By requiring that the work must involve 'adhering to and communicating' a group's religious beliefs in order to qualify as a 'genuine occupational requirement', the AD Act in its current form supposes that religious group identity requires both adherence and evangelisation in order to be afforded protection at law. SU QLD respectfully submits that such a requirement hinders religious association and participation in secular society. SU QLD's chaplains, for example, do not proselytise or evangelise while performing their roles within government schools. By respecting the clearly defined bounds of their role, and the intersectionality of theistic and non-theistic viewpoints in a public school environment by refraining from (without consent) 'communicating' their religious beliefs, ought a chaplain's 'membership' of Christianity be considered nonessential for the role? SU QLD respectfully questions the appropriateness of this additional hurdle, applicable only to religious organisations.
- 6.12 In the case of *Hozack v Church of Jesus Christ of Latter Day Saints (Hozack)*,²⁸ the Federal Court considered the legality of a decision to dismiss a member of the Church working as a receptionist after she breached an express term of her employment contract which required her to comply with the doctrines of the religion. The court ultimately adopted a narrow view of 'operational requirements', determining that adherence to the religious doctrines could not be considered an operational requirement in the circumstances as that particular Church employed non-adherents in various roles, the role of receptionist was not a 'position from which anyone would normally expect any particular leadership or example' and the position was not intrinsically religious in nature.
- 6.13 Adopting this same reasoning, SU QLD respectfully submits the Court must reach a different conclusion in the present circumstances. The role of a school chaplain is to lead and set an example for young children and, SU QLD considers that as the practical outworking of Christianity, the role of a school chaplain is inherently religious by nature. Additionally, SU QLD considers that it is its obligation, not only under the Standing Offer Arrangement, but also

²⁸ *Hozack v Church of Jesus Christ of Latter Day Saints* (1997) 79 FCR 441, 452.

under its Christian framework, to provide spiritual support through its belief and exemplification of Christianity. It is by employing Christian chaplains that SU QLD can ensure appropriate commissioning, endorsement, employment supervision, support, training and qualifications to enable effective performance of the role of SU QLD's school chaplains. Further, ongoing employment support and professional development programs for SU QLD's staff are delivered from a Christian framework and involve religious teachings. An amendment to the AD Act would clarify the position and avoid the need for potential judicial decision-making in this space.

- 6.14 In any case, this focus on external evangelisation ignores the internal dynamics and employment support a religious organisation provides its employees. In SU QLD (unlike the factual basis of *Hozack*), this includes those representing the organisation and its religious beliefs and values in external settings, such as chaplains in schools (as they 'model beliefs' and 'articulate values consistent with beliefs' (as referred to in the Department of Education's role statement for chaplains)). SU QLD provides its people with worship, prayer and Bible support and encouragement on a weekly basis in their local teams, and at various clustered support events and conferences throughout the year (along with professional development and support as appropriate to particular roles). Christians draw great strength and comfort from this shared experience, fellowship and encouragement, which provide energy, positive spiritual perspectives and religious teaching for staff, to support them in their beliefs and values which they can take into their roles, whether internally focussed or externally. These shared experiences are a key part of the culture and employee engagement for a religious organisation. It should be open to a religious organisation to choose this approach to build the internal culture of the organisation consistent with its religious beliefs and nature as an association of religious people without the impact of unduly restrictive anti-discrimination laws.
- 6.15 SU QLD has also considered the Queensland Anti-Discrimination Tribunal's (**QADT**) decision of *Walsh v St Vincent de Paul Society Queensland (No. 2)* [2008] QADT 32 (12 December 2008) (**Walsh**). In *Walsh*, the QADT considered whether it was a 'genuine occupational requirement' of the St Vincent de Paul Society (a Catholic organisation) that its volunteers be Catholic, after a non-Catholic volunteer was informed she could no longer hold the position of president unless she became Catholic. QADT concluded that inculcating the faith was not the society's primary function and it was not objectively necessary for a president to be Catholic. Notably, spiritual roles were not a primary responsibility of a president because the duties of a president were much more comprehensive. SU QLD respectfully submits that the QADT's reasoning should not apply to the services provided by school chaplains, because school chaplains (by definition) provide students and staff with social, emotional and **spiritual** support, including a requirement to personally model and own their own beliefs and articulate values consistent with their own beliefs (in accordance with the chaplaincy role statement

quoted earlier). The 'spiritual role' therefore falls squarely within the primary responsibilities of school chaplains, and on this basis SU QLD submits the reasoning in Walsh should not be applied to SU QLD to exclude the operation of the s.25 of the AD Act exemption. Again, an amendment to the AD Act would put this matter beyond doubt.

6.16 While SU QLD considers that it is strongly arguable that Christianity is a 'genuine occupational requirement' of the role of a SU QLD school chaplain, it draws the Commission's attention to the broader risk of narrow judicial interpretations of the 'genuine occupational requirement' exemption as it impacts religious organisations in the context of the AD Act and the consequent need for enhanced clarity in drafting.

6.17 Such interpretive difficulty does not arise with respect to the other clearly defined examples in s.25(1). Consequently, SU QLD would welcome amendments to the provision to clarify its application to religious organisations and ensure that equal protection is afforded to religious and non-religious organisations alike.

Recommendation

6.18 SU QLD considers that it would be appropriate for the QHRC to amend the AD Act to:

- (a) include an additional example in s.25(1) of the AD Act (**Recommendation 1**); and
- (b) delete ss.25(2) and 25(3) to remove the higher threshold that must be reached for religious organisations to evidence that there is a genuine occupational requirement for an employee to hold certain religious beliefs (**Recommendation 2**).

6.19 In relation to **Recommendation 1**, SU QLD respectfully suggests that the following example could be included in s.25(1) of the AD Act:

Example 5—

using belief in a particular religion as a criterion for a position with a body established for religious purposes

6.20 This example has been modelled off Example 2 and, in our view, provides for consistency in the treatment of religious and non-religious organisations.

6.21 In relation to **Recommendation 2**, SU QLD respectfully suggests that removing ss.25(2) - (3) of the AD Act would provide for a consistent approach to be reflected in the AD Act between religious and non-religious forms of discrimination. In the alternative, and if Recommendation 1 is accepted and implemented, SU QLD would also be supportive of the QHRC considering the following amendments to ss.25(2) - (3) of the AD Act:

- 2) Subsection (3) applies in relation to—
- a. work for an educational institution (an employer) under the direction or control of a body established for religious purposes; or
 - b. any other work for a body established for religious purposes (also an employer) if the work genuinely and necessarily involves adhering to **and communicating** the body's religious beliefs.
- 3) It is not unlawful for an employer to discriminate with respect to a matter that is otherwise prohibited under section 14 or 15, in a way that is not unreasonable, against a person if—
- ~~a. the person openly acts in a way that the person knows or ought reasonably to know is contrary to the employer's religious beliefs—~~
 - ~~i. during a selection process; or~~
 - ~~ii. in the course of the person's work; or~~
 - ~~iii. in doing something connected with the person's work; and~~

~~Example for paragraph (a)—~~

~~A staff member openly acts in a way contrary to a requirement imposed by the staff member's employer in his or her contract of employment, that the staff member abstain from acting in a way openly contrary to the employer's religious beliefs in the course of, or in connection with the staff member's employment.~~

it is a genuine occupational requirement of the employer that the person, in the course of, or in connection with, the person's work, ~~act in a way~~ **hold religious beliefs** consistent with the employer's religious beliefs.

7. Section 109 - Religious bodies

The law

- 7.1 The section 109 exemption provides that the AD Act does not apply in relation to:
- (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
 - (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
 - (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice; or
 - (d) unless section 90 (Accommodation with religious purposes) applies—an act by a body established for religious purposes if the act is—
 - (i) in accordance with the doctrine of the religion concerned; and
 - (ii) necessary to avoid offending the religious sensitivities of people of the religion.

7.2 Relevantly, an exemption under subsection 109(1)(d) of the AD Act does not apply in the work or work-related area or in the education area.²⁹

Concerns

7.3 SU QLD thanks the Commission for acknowledging in its Discussion Paper that:

'...consideration could be given to whether there is a need to extend the exemptions with respect to ordination, training and selection of leaders to **lay representatives who have an important spiritual role within a faith** but where the position falls outside of the role of priest, minister or member of a religious order'.³⁰

7.4 SU QLD echoes this concern and suggests that the religious bodies exemption provided for by s.109 of the AD Act is oppressively narrow and fails to take into account the existence and importance of religious bodies that do not employ or engage priests, ministers or members of a religious order.

²⁹ *Anti-Discrimination Act 1991* (Qld) s 109(2).

³⁰ Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act - Discussion Paper* (November, 2021) page 114.

- 7.5 SU QLD, a Christian organisation, seeks to employ Christians to fulfil the role of school chaplains, which in SU QLD's circumstances, is and has always been a role inextricably linked with Christianity.
- 7.6 The matters contemplated in subsections 109(1)(a) - (c) of the AD Act broadly relate to the:
- (a) ordination;
 - (b) appointment; and
 - (c) selection of people.
- 7.7 It is not clear whether it is intended for the exemption to apply in relation to the *employment* of people. The current ambiguity in s.109(1) of the AD Act means it is possible that the religious bodies exemption does not apply to SU QLD, given SU QLD *employs* individuals to provide services to schools as school chaplains, rather than ordaining, appointing or selecting individuals.
- 7.8 On interpretation of the term 'appointment' in the decision of *OV and OW v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606 (**OV and OW**), the Court of Appeal determined that the exercise by Wesley Mission of its statutory power to authorise a person as a carer under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) did not fall within the statutory definition of 'appointment' in s.56(c) of the *Anti-Discrimination Act 1977* (NSW). The concept of 'appointment', it was determined, 'bore the connotation of an appointment as an officer of the relevant body, or to carry out activities on behalf of the body rather than exercising powers of accreditation or authorisation in respect of third parties carrying out independent functions'. Accordingly, the Wesley Mission could not rely upon an exemption to discrimination in rejecting the application of a same-sex couple to be foster parents.
- 7.9 On the reasoning in *OV and OW*, it is arguable that SU QLD's employment of school chaplains could be a form of 'appointment' for the purpose of s.109(1)(a). However, the 'appointment' referred to in this subsection is restricted to appointment of people as:
- (a) priests;
 - (b) ministers of religion; or
 - (c) members of a religious order.
- 7.10 SU QLD respectfully submits that there is no apparent reason for the exemption in s.109 of the AD Act to be restricted to the ordaining or appointment of the above professions, and not

extended to the employment of, say, chaplains or other lay representatives of religions, who wish to be associated with an organisation that embodies the same religion/religious doctrines. Extending the application of the s.109 exemption to cover the employment of religious professions or vocations, rather than the ordination or appointment of the above specifically listed professions, would not detract from the purpose of the AD Act. On the contrary, it would recognise and seek to protect the right enshrined in s.116 of the Constitution - freedom of association.

Recommendation

- 7.11 SU QLD considers that it would be appropriate for the QHRC to consider the following amendments:
- (a) s.109(1)(a) of the AD Act to extend its application to the employment of adherents of a religion or a religious belief (**Recommendation 3**); and/or
 - (b) s.109(1)(c) of the AD Act to extend its application to the employment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice (**Recommendation 4**).
- 7.12 In relation to **Recommendation 3**, SU QLD respectfully suggests that s.109(1)(a) of the AD Act could be amended as follows:
- (a) the ordination~~-or~~, appointment, [employment or engagement](#) of priests, ministers of religion~~-or~~, members of a religious order, [or members, adherents or representatives of a body established for religious purposes](#);
- 7.13 In SU QLD's view, the suggested amendments to s.109(1)(a) would not result in unreasonable or unjustifiable discrimination, but rather would ensure equal treatment of the many religious professions and vocations in circumstances where the function for which they are to be employed is intended and required to provide spiritual guidance. Accordingly, the proposed amendments would afford greater clarity in understanding and consistency in the application of the AD Act.
- 7.14 In relation to **Recommendation 4**, SU QLD respectfully suggests that s.109(1)(c) of the AD Act could be amended as follows:
- (c) the selection~~-or~~, appointment, [employment or engagement](#) of people to perform functions in relation to, or otherwise participate in, any religious observance or practice;

7.15 Similarly to Recommendation 3, SU QLD considers that the proposed amendments to s.109(1)(c) of the AD Act would not result in an increased risk of discrimination, but would allow SU QLD to engage in appropriate, targeted employment practises in the same way non-religious organisations are permitted to.

8. **Conclusion**

8.1 SU QLD submits that, by placing additional restrictions on religious organisations which do not apply for non-religious organisations, sections 25 and 109 of the AD Act have a discriminatory effect on religious organisations and fail to recognise the valuable community contribution of religious organisations which provide services in a community context from a religious perspective and framework. This discriminatory effect prevents realisation of the AD Act's purpose and puts the AD Act at risk of being incompatible with the Human Rights Act.

8.2 SU QLD would be grateful if the Commission considered its concerns with the current exemptions, as well as its recommended amendments to strike a better balance between the right to freedom of religion and association and the right to equality and non-discrimination in Queensland.

8.3 Although recent trends suggest the proportion of the public identifying as having no religion is increasing, the 2016 census demonstrated that religion retains an important place in Australia's social fabric. We expect the 2021 census data concerning religious affiliation in Australia, which will be released in October 2022, will display a similar conclusion. Additionally, as the Expert Panel noted, the decline in religious adherence in Australia is out of step with 'trends in Australia's region and globally'.³¹ In fact, only 16% of the world's population is unaffiliated with a religion.³²

8.4 Legislation that discriminates against religious organisations, by imposing additional restrictions that impede their ability to associate and manifest their belief in community with others, signals a State-sanctioned preference for non-religious viewpoints. As The European Court of Human Rights has recognised:

Neutrality requires a pluralist approach on the part of the State, not a secularist one. It encourages respect for all worldviews rather than a preference for one... A

³¹ Religious Freedom Review - Report of the Expert Panel (18 May 2018) page 11.

³² Ibid page 12.

preference for secularism over alternative world views - whether religious, philosophical or otherwise - is not a neutral option.³³

- 8.5 SU QLD respectfully submits that its recommendations at 6.18 and 7.11 grant religious organisations equal treatment to other organisations under the AD Act, promoting the neutral treatment of various diverging viewpoints in our society.
- 8.6 As accepted by the Expert Panel in the Religious Freedom Review, the 'protection of difference with respect to belief or faith in a democratic, pluralist country such as Australia requires constant vigilance'.³⁴
- 8.7 If the Commission has any questions or requires further information in relation to the issues raised in this paper, SU QLD would welcome the opportunity to consult with the Commission.
- 8.8 In that regard, please let us know if we can provide any further information or assistance to the Commission throughout its conduct of the Review and preparation of its report to the Attorney-General.

³³ *Lautsi v. Italy*, Appl. No. 30814/06, Grand Chamber (18 March 2011), per Judge Power.

³⁴ Religious Freedom Review - Report of the Expert Panel (18 May 2018) page 8