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CONSULTATION ON RELIGION AND BELIEF RIGHTS

I am grateful to the Commission for giving the Church of England, along with other organisations, the opportunity to comment on your proposed intervention in certain legal cases.

Your deadline was very tight and in the time available I have not been able to consult the Archbishops' Council or its Mission and Public Affairs Council. I attach an analysis, produced at staff level, which I hope may be helpful on the specific issue of 'reasonable accommodation'. More generally it may be useful if I summarise the broad approach which official submissions from the Church of England have taken consistently over a long period.

First, we see the preservation of religious freedom- which includes the freedom to manifest religious affiliation and live according to those convictions- as fundamental to a free society. We acknowledge that there are instances where careful balances have had- and will continue to have- to be struck, whether in the drafting of legislation or in its interpretation and application, between potentially competing rights. But any legislation which might require people to choose between obeying their religious convictions and obeying the law is at best questionable and certainly requires very substantial justification.

Secondly, legislation outlawing discrimination on grounds of religion and belief in employment and other contexts has a useful role to play but has led to a number of cases which should have been resolved informally and not become a matter of litigation. Whether people can wear a cross at work or pray with someone (with the latter's consent) should not be something about which courts and tribunals have to rule.

Thirdly, it remains crucial that churches and other faiths retain the freedom to order their internal affairs in a way that is consistent with their own doctrines and religious convictions. Those are not issues that are to the fore in the cases on which you are proposing to intervene, partly because Government and Parliament has for the most part taken care to ensure that legislation does safeguard that freedom. But they remain of key importance.

WILLIAM FITTALL
Secretary General

EQUALITY AND HUMAN RIGHTS COMMISSION

CONSULTATION ON
LEGAL INTERVENTION ON RELIGION AND BELIEF RIGHTS

A Church of England response

Question 1. Please let us know if you think the UK tribunals and courts applied the correct principles to the cases of *Eweida* or *Chaplin* to ensure that freedom of religion and belief was properly respected as set out in articles 9 and 14 of the European Convention. Please let us have your views on the cases and whether there are specific aspects you think are important.

1.1 We find it slightly odd to be asked whether we think the UK tribunals and courts decided these cases correctly. There is nothing in the reasoning of the judgments which is manifestly wrong or contradictory. The two stages involved in deciding whether in each case an unjustifiable breach of Articles 9 and 14 occurred – namely, whether the restriction on wearing a cross over other clothing at work amounted to an interference with the right to manifest religious belief, and if so, whether the interference was justified – seem unimpeachable. We are not inclined to second-guess the conclusions of the tribunals and courts, especially in view of the fact that the European Court will rule on the correctness of the decisions.

1.2 Nevertheless, we note that there was a widespread sense, in the media and in society generally, that the restrictions on wearing crosses imposed by the respective employers were unnecessary and excessive. We therefore welcome the Commission's intention to intervene on the ground that the tribunals and courts may not have given sufficient weight to Article 9(2) of the Convention.

1.3 The fact that these cases centred on the right to wear a particular item of jewellery shows that some kinds of dispute about the manifestation of religion are relatively straightforward and ought in principle to be resolvable without undue controversy or litigation. We understand that there are circumstances where the right to wear a cross- or indeed another religious symbol- at work may need to be constrained, where that constitutes a proportionate means for an employer of achieving a legitimate aim (eg the safety of staff and those they work with), and where the rules are applied in a genuinely non-discriminatory way. It is also the case that dress codes play significantly different roles in different religions, so there is an inherent problem of what counts as equal treatment. All that said, questions of dress should not normally impinge upon the rights and freedoms of others. The relative solubility of such problems sets them apart from the more difficult, and arguably more important, cases where the manifestation of religion or belief is potentially in conflict with other rights and freedoms.

Question 2. Please let us know if you think the UK tribunals and courts applied the justification test correctly in the cases of *Ladale* or *McFarlane*. Please let us have

your views on these cases and whether there are specific aspects you think are important.

2.1 It is not for us to offer a view on whether these cases were decided correctly in accordance with the law. We note that both cases involved a conflict between an employee's religious convictions and the demands of their job – in one case a duty to officiate at civil partnership ceremonies and in the other a requirement to give counselling to same-sex couples as part of the organisation's service to the public. A refusal to offer particular services on the ground of moral disapproval of the behaviour of the recipients is not in all circumstances a manifestation of religious belief, and even where it is, it would be difficult for organisations if they were in all circumstances required continually to fine-tune their deployment of staff in accordance with the conscientious beliefs of those employees.

2.2 On the other hand, it seems unnecessarily restrictive and coercive to treat the relation between the requirements of a job and the conscientious convictions of an employee as a zero-sum game in which one must necessarily yield completely to the other. Provided that the rights and interests of third parties are safeguarded, it is surely desirable to try to reconcile employers' requirements and employees' conscientious difficulties where they come into conflict.

2.3 The situation is complicated by the widespread adoption by organisations of equality and diversity policies to which all employees are expected to give assent and compliance. While it would be wrong to allow so-called conscientious objections to legitimise the denial or curtailment of others' rights and freedoms, there may be a danger of creating cultures in which employees feel constrained by management diktats and peer pressure to act against their conscientiously-held beliefs without being able to explain the moral dilemmas which they experience in the workplace.

Question 3. Do you think some concept akin to reasonable accommodation for individuals wishing to manifest their religion or beliefs in the workplace should be incorporated into the approach to human rights in the UK?

3.1 The concept of 'reasonable accommodation' has its origins in employment law and in Canada it is applied to the law on religion and belief. A closely related concept is that of 'reasonable adjustment' introduced into UK law by the Disability Discrimination Act. This places a duty on employers to take such steps as are reasonable, in all the circumstances of the case, to prevent a disabled person from being at a substantial disadvantage compared with a person who is not disabled [DDA, s.6(1)]. However, the analogy between disability and religion or belief is problematic. Quite apart from the possible implication that religious belief is a deficiency that needs to be compensated for, the requirements of reasonable adjustment to take account of disability are in many respects more objective and less open to challenge than those appropriate to the reasonable accommodation of religious belief.

3.2 The application of reasonable accommodation to religion in the workplace was examined in a Home Office research study of 2001 by Bob Hepple QC and Tufyal Choudhury, *Tackling religious discrimination: practical implications for policy-makers and legislators*. They point out that it is usually the manifestation or practice of a religion or belief which needs to be accommodated and suggest five questions to be asked in each particular case. These are: How should it be determined that a practice is a *religious* practice? What factors should be taken into account in determining whether the employer has met the duty of accommodation? What are the key areas in which the duty to accommodate religious practice will arise? What are the possible options in such situations? and, On whom should the duty of enforcement fall?

3.3 Hepple and Choudhury identify the most common areas in which employers are required to accommodate religious practice as dress codes, break policies for observance of prayer times, the avoidance of religious questions in recruitment and job applications and the provision of religious leave. These fall very much within the province of the *Eweida* and *Chaplin* cases, where the emphasis is upon the positive right of the employee to manifest their religion, and not upon the potential conflict between the right to manifest religion and the requirements of employers and the protection of the rights and freedoms of others, as in the *Ladele* and *McFarlane* cases.

3.4 In its Discrimination Law Review of 2007, the previous Government discussed the proposal that future equality legislation should extend the duty of reasonable adjustment from disability to other protected characteristics, or even adopt the more extensive concept of reasonable accommodation. It rejected the idea on several grounds. First, it considered that a general duty of reasonable adjustment would put undue burdens on employers. Second, it argued that it would not be possible to extend the duty of reasonable adjustment beyond disability because of the limits placed upon it by European law on positive discrimination. Third, general duties of reasonable adjustment or reasonable accommodation would conflict at various points with the existing law on indirect discrimination. These raise significant questions to the viability of a duty of reasonable accommodation in relation to religion and belief, although it must be acknowledged that they are objections to its introduction across the whole territory of equality law.

3.5 In Section 2 of the consultation paper, the Commission presents reasonable accommodation as a concept to be applied "where someone believes that they are being put at a disadvantage because of rules and practices that do not take into account their right to manifest their religion or belief". It is hard to see what this adds to the existing protection of Article 9 rights. It goes on to say, "We believe that – where possible – ways should be found within the law of promoting the resolution of such disputes at an early stage, without protracted, costly, complex legal proceedings that irretrievably damage relations between the parties."

3.6 This exposes a major ambiguity at the heart of the consultation. Reasonable accommodation is being advanced as a possible means of dealing with the intractability of the issues raised by the cases cited. However, the concept is being defined in two very

different ways. The duty of reasonable accommodation has a clear meaning in law, though we have argued that its introduction would do little to resolve the conflicts in the *Ladele* and *McFarlane* cases, and that it would bring a number of other practical problems. In the Commission's own explanation of reasonable accommodation, it is clear that the concept is being defined in a much looser sense, as an aspect of good employment practice, which we would support, namely seeking conciliation and informal resolution of disputes in preference to litigation. As it says, "Reasonable accommodation would allow people to explore what might be done to overcome or reduce any disadvantage; and if any of those options were or were not reasonable."

3.7 We are therefore faced with a strong legal concept of reasonable accommodation which, even if it were viable, would probably add relatively little to the ways in which conflicting Convention rights are currently balanced by the courts, and a weaker concept which is hard to object to, but whose practical effects would be very limited indeed. As the consultation paper says, "the accommodation of rights should not require the rights of one person to cancel out or trump the rights of another. It would not be reasonable for an accommodation on religious – or indeed any other – grounds to result in other unlawful discrimination. Nor would it be reasonable for an accommodation to infringe the fundamental rights of others, not least because this would breach article 9(2) of the European Convention on Human Rights." In cases where rights appear to conflict, and the clarifying voice of the courts is required to achieve resolution, reasonable accommodation would seem to have little room for manoeuvre.

3.8 We note that the consultation question itself reflects the ambiguity of the concept of reasonable accommodation, in that it speaks of "some concept akin to" it being "incorporated" – a word with formal and legal resonance. But incorporated into what? "The *approach* to human rights in the UK" – which sounds like a highly diffuse phenomenon. For these reasons, we suspect that the concept of reasonable accommodation is likely to be either unnecessary (strong version) or ineffective (weak version). In either case, it is unlikely to be of much help in resolving the dilemmas surrounding religious rights and freedoms to which the Commission has rightly drawn attention.

Mission and Public Affairs Division
5th September 2011