

EQUALITY AND DIVERSITY

Church of England Response to DTI Consultation Document

1. The Church of England welcomes the opportunity to respond to the Consultation Document which the Government issued on 23 October.

General

2. In response to the earlier Consultation Document on implementing the Article 13 Directives on race and employment we looked forward to discussing with DTI officials our approach to issues of equality and diversity. We have been grateful for the discussions over recent months and hope that any remaining areas of disagreement can be explored further in the same positive spirit.

3. Without repeating all the general points made in our earlier response, we would like to re-emphasise our strong support for creating a legal framework to safeguard basic rights and to promote dignity, equality and respect for all members of society. For Christians, that understanding of equality is derived from our belief about the justice of God and His action in the world.

4. The inter-action between public law and public attitudes on certain issues is necessarily complex. By formulating enforceable rights and proscribing what is clearly wrong, the law can itself help to influence attitudes positively as it has done over the past quarter of a century with anti-discrimination legislation on gender and race. For anti-discrimination legislation to be effective it must, however, retain the support of fair-minded people and be seen to be both necessary and workable. We believe that this is achievable in respect of the new strands of discrimination covered by the European Directive. There are, however, some respects in which we believe the draft regulations need amendment if that objective is to be achieved.

5. We comment in more detail on this below. The general point to underline is that we want to be in a position where we can encourage our own members to contribute to the development of best practice in this important area of our social life. The best context for this will be one in which there has not been a difficult and polarising public debate about the extent to which the regulations respect the doctrinally based needs of the Churches and other faith-based communities.

6. The Church recognises that the Government has limited scope for manoeuvre in implementing the Directive. At the same time, it is important not to read Article 4 in isolation. Article 2 (5) of the Directive, together with paragraph 24 of the Preamble have the clear intention of protecting the rights and freedoms of Churches and religious organisations and allow member-States to make provision for this in national law. Moreover, the implementation of the Directive must be consistent with freedom of thought, conscience and religion as enshrined in Article 9 of the European Convention on Human Rights.

A Single Equality Body?

7. Our staff attended the seminar organised by the DTI's Women and Equality Unit on 25 July. The Consultation Document (*'Equality and Diversity: making it happen'*) helpfully

identifies a number of the key issues which need to be addressed before a single equality body could sensibly be introduced.

8. With the introduction of new strands into anti-discrimination legislation we agree that the arguments for creating a single Equality Commission merit serious consideration. A single body could have advantages both for individuals and groups who believe they are experiencing discrimination and for employers seeking to put in place equal rights procedures and policies in a coherent and consistent way. Properly structured, a single body could reduce some of the bureaucratic and cost overhead. We understand that in Northern Ireland it has been possible to bring together successfully the work of the Fair Employment Commission, the Commission for Racial Equality and other bodies into a single Equality Commission.

9. Nevertheless, there are undoubted risks and challenges in attempting such a substantial organisational change. It seems to us that these need to be considered quite carefully before any decision – even one of principle – is taken. We note, for example, that apart from a passing mention in paragraph 7.8, there is no substantive discussion of the resource implications of creating a single body. It may be that a single body would create some economies of scale and enable more resources to be focused on the key tasks of education and enforcement, but this, together with wider affordability issues, needs to be considered before any decision, even of principle, is taken.

10. In assessing the case for a single commission it will also be important to be satisfied that there would be no loss of focus on the individual strands and, in particular, no artificially homogenised approach. While there may be some common principles, race, gender, age, disability, religion and sexual orientation, each raise their own distinct issues in relation to tackling discrimination. It is not axiomatic that identical investigation and enforcement powers are needed for each.

11. We therefore welcome the Government's preference for a 'wide and deep debate' and believe that the Government should take time to give all the options careful consideration.

Draft Regulations

12. We have five concerns about the present draft of the Regulations. The first two relate to the draft Employment, Equality (Religion and Belief) Regulations. The third relates to both those and the draft Sexual Orientation Regulations. The fourth relates to the amendment to the draft Race Relations Act 1976 (Amendment) Regulations and the fifth arises solely in relation to the draft Sexual Orientation Regulations.

13. The first is, we believe, the most straightforward. Regulation 7 of the Draft Employment Equality (Religion and Belief) Regulations defines the exception for genuine occupational requirement. We are content with this, subject to the clarification we ask for in paragraph 14 and an amendment to include **dismissal**. The present formulation is, in our view, inadequate and illogical, in that it confers protection on Churches and religious organisations at the point of recruitment and promotion but not in relation to dismissal. If, for example, someone abandoned their allegiance to the Church it would be unacceptable for them to be able to insist on remaining in post which carried with it a genuine occupational qualification.

14. Secondly, also on Regulation 7, we believe that it would be highly desirable, in the interests of clarity for both employers and employees, if the Regulations were to be more precise about when an organisation can be said to have 'an ethos based on religion or

belief' and how that ethos will be determined for the purposes of Regulation 7(3) of the draft Employment Equality (Religion and Belief) Regulations. In the absence of express provision in the regulations, the position of many organisations (particularly those not established for explicitly religious purposes) may remain very unclear pending the provision of guidance through individual cases.

15. The third point concerns discrimination by way of **harassment**. Here, we believe that the wording of the Directive itself at Article 2 (3) is to be preferred to the wider concept of harassment used in both sets of Draft Regulations.

16. The change we seek could be effected by replacing 'or' with 'and' at the end of Regulation 5(1)(a) in both sets of Regulations. We also believe that the phrase 'including in particular the perception of B' should be omitted. It seems to us that the key point here, and one which we strongly support, is that individuals should have legal protection against harassment. That is clearly achieved by the words 'if, having regard to all the circumstances, it should reasonably be considered as having that effect'.

17. We believe that the particular emphasis in the present draft on the perception of the complainant is unnecessary, will be unduly onerous to employers and, despite the suggestion in paragraph 19 of the explanatory notes, increase the risk of trivial claims. We accept that there are instances in the discrimination field where the perception of the individual should have particular weight – for example in influencing whether the police record a reported crime as a racially motivated offence. But in relation to these regulations we believe that the present draft does not quite strike the right balance. If the law makes it possible for people to succeed in cases which are not truly deserving there is a risk of undermining the broad support for the law for employers and the general public which we need to see.

18. Our fourth concern is that the proposed Regulation 25 in the draft Race Relations Act 1976 (Amendment) Regulations might result in an undue narrowing of the exemption for charities conferred by s.34 of the Race Relations Act 1976. We are concerned that the test of 'compensating for disadvantage' might not be met in the case of a religious body - for example a Christian charity working overseas - which focussed its work on the religious needs of a particular ethnic group. We believe it to be an unjustified and undesirable restriction on charitable activity that work which focussed on the **religious** needs of a particular ethnic group could, under the Regulation as drafted, be at risk of challenge on grounds of discrimination unless it could be said to 'meet the special needs of persons of that group in regard to their education, training or welfare'.

19. The final, and fundamental issue, arises from the potential conflict between the requirements of the law and religious belief. Such a conflict could arise here, in relation to **sexual orientation and sexual conduct**. In its doctrines and teachings the Church of England, along with other Churches and faith groups, draws a clear distinction between orientation and behaviour. We understand, however, that the Courts and tribunals are most unlikely to recognise any clear-cut distinction along these lines in considering discrimination cases brought under the new regulations. This means that actions taken by the Church to enforce its own doctrines and beliefs in relation to sexual conduct could be found unlawful. For example, a bishop who denied ordination to someone in a gay or lesbian relationship might be found to be discriminating unlawfully on grounds of sexual orientation.

20. The Church of England's own teaching is set out most clearly in the document *Issues in Human Sexuality* which was a statement from the House of Bishops in November 1991. It noted that homosexual activity could not be endorsed by the Church as:

'... a parallel and alternative form of human sexuality as complete within the terms of the created order as the heterosexual. The convergence of Scripture, Tradition and reasoned reflection on experience, even including the newly sympathetic and perceptive thinking of our own day, make it impossible for the Church to come with integrity to any other conclusion. Heterosexuality and homosexuality are not equally congruous with the observed order of creation or with the insights of revelation as the Church engages with these in the light of her pastoral ministry.'

21. This does not mean that the Church challenges the principle that homosexuals should have full equality and protection before the law. On the contrary, we welcome the steps taken over recent years to combat all prejudice, to repudiate homophobic violence and to create new legal safeguards and protections. The new regulations are an important part of that process. Nevertheless, it is crucial that they do not encroach on the freedom which all religious organisations must have to set and enforce their own conduct rules in relation to those who work for and represent them.

22. What those conduct rules should be is a matter of continuing debate within the Church of England and indeed within many other Churches. The point is simply that however those internal debates are resolved, Churches and other faith-based organisations must not find themselves in a position where the law of the land is preventing them from conscientiously applying their own sincerely held doctrines and beliefs on moral issues.

23. The need to safeguard religious doctrine, belief and susceptibilities was, of course, recognised as long ago as 1975 by Section 19 of the Sex Discrimination Act. A corresponding provision was included by the Government in the Gender Reassignment Regulations of 1999. Our officials have already suggested to yours that the solution to our difficulties could be provided by a provision directly modelled on the earlier precedents.

24. We strongly urge the Government therefore to insert in part 5 of the Regulations the following provision:

'Nothing in parts II to IV of these Regulations shall render unlawful anything done for the purposes or in connection with an organised religion so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers'.

25. Parliament has already, rightly, accepted that the churches and other faith groups must be able to maintain differential treatment between men and women and between the married and unmarried where this is to comply with doctrine or to comply with religious susceptibilities. We believe that it would be wrong in principle as well as inconsistent and contrary to the Directive's underlying intention as set out in Article 2(5) and paragraph 24 of the Preamble, not to provide similarly in relation to sexual conduct.

26. Our officials stand ready to discuss details of this with yours if that would be helpful. Given the importance of the issue we would also want the opportunity for discussions at a very senior level of Government and possibly in partnership with other Church leaders, if a satisfactory solution cannot be found.

Archbishops' Council 23 January 2003