COMBATING DISCRIMINATION IN GOODS AND SERVICES

TOWARDS THE UNIFORM AND DYNAMIC IMPLEMENTATION OF EU ANTI-DISCRIMINATION LEGISLATION:
THE ROLE OF SPECIALISED BODIES
REPORT OF THE FIFTH EXPERTS' MEETING, HOSTED BY THE BRITISH COMMISSION FOR RACIAL EQUALITY,
29-30 JANUARY 2004

Combating discrimination in Goods and Services is the fifth in a series of seven publications under the project 'Towards the uniform and dynamic implementation of EU anti-discrimination legislation: the role of specialised bodies', which is supported by the European Community Action Programme to Combat Discrimination (2001-2006). The other publications in this series are *Proving Discrimination* (ISBN no. EN: 2-9600266-7-5; FR: 2-9600266-8-3), *Protection against discrimination and gender equality: how to meet both requirements* (ISBN no. EN: 2-9600266-9-1; FR: 2-930399-00-7), *Equal Pay and Working Conditions* (ISBN no. EN: 2-930399-01-5; FR: 2-930399-02-3), and *Discrimination in Working Life – Remedies and Enforcement* (ISBN no. EN: 2-930399-03-1; FR: 2-930399-04-X)

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ISBN No.: 2-930399-05-8
This publication is also available in French: ISBN No.: 2-930399-06-6

2 INTRODUCTION
DAVID ZILKHA, SENIOR POLICY OFFICER (EUROPE), COMMISSION FOR RACIAL EQUALITY

4 GOODS AND SERVICES: SETTING THE SCENE
COLM O'CINNEIDE

9 OVERVIEW OF THE LEGAL AND PROMOTIONAL APPROACHES OF THE COMMISSION FOR RACIAL EQUALITY (CRE)
1. LEGAL APPROACHES OF THE CRE
RAZIA KARIM

2. CRE PROMOTIONAL APPROACHES
DAVID ZILKHA

3. DISCRIMINATION CASE STUDY: ETHNIC MINORITY EXPERIENCE OF THE POLICE & THE RESPONSE OF THE CRE
PHIL PAVEY

15 POSITIVE ACTION IN THE ACCESS TO AND SUPPLY OF GOODS AND SERVICES
CLAUDIA LAM

22 POSITIVE ACTION IN GREAT BRITAIN – THE RACE EQUALITY DUTY
LISA KING

25 DISABILITY AND 'REASONABLE ADJUSTMENT' IN GOODS AND SERVICES IN GREAT BRITAIN
CATHERINE CASSERLEY

28 COMMUNITY PERSPECTIVES ON PROMOTING EQUALITY IN EUROPE: EXPERIENCES OF THE EUROPEAN MONITORING CENTRE ON RACISM AND XENOPHOBIA (EUMC) UK SECRETARIAT
ANJA RUDIGER

31 COMMENTS AND DISCUSSION

34 PROGRAMME

35 PARTICIPANTS

INTRODUCTION

DAVID ZILKHA, SENIOR POLICY OFFICER (EUROPE), COMMISSION FOR RACIAL EQUALITY (CRE)

The CRE was delighted to host the fifth in the series of experts' meetings in London in January 2004, bringing together colleagues from specialised bodies across Europe.

An introduction and overview of the topic of the first day - tackling discrimination in goods and services - was provided by Colm O'Cinneide, a respected academic in this field. There were then presentations on the CRE's approach, as the legislation that set up the CRE in 1976 also included provisions outlawing racial discrimination in the provision of goods and services, hence this is an area where the CRE has much to contribute. The presentations concentrated solely on grounds of racial/ethnic origin, given that the directives do not prohibit discrimination in goods and services across wider grounds. However the discussions throughout the day often concerned a broader range of grounds reflecting the fact that many countries have gone further than the minimum in their anti-discrimination law and/or the remit of their specialised body(-ies). There was also recognition of the proposed directive which would create a similar prohibition on grounds of gender.

One of the most contentious issues in Britain has concerned the definition of the term 'services'. It was always seen to include commercially provided services and public services such as healthcare, but case law established that services which involved an 'enforcement' function (such as police, prisons, or licensing by local authorities) were outside the scope of the legislation. This situation changed with legislation in 2000 which ensured that racial discrimination was unlawful in all public functions, with very few exceptions. A case study presentation was given to help illustrate the concept of racial discrimination in the 'service' provided by the police. (There was a further case study presentation on access to finance but space restrictions mean that this cannot be included in the publication.)

Despite having had legislation on goods and services for several decades, the British experience shows that for many minority communities barriers and disadvantage persist due to the process of institutional discrimination. Change can be more effectively achieved through a combination of the prohibition of discrimination (with associated enforcement action) and the use of positive and proactive measures to support equality such as positive action, the topic of the second day.

The day again started with an introductory overview, provided by Claudia Lam of the European Commission against Racism and Intolerance, followed by contrasting examples in relation to racial/ethnic origin and disability in Britain. The first was a CRE presentation on the race equality duty, which came into force in 2001 and requires all public bodies to take active steps to promote race equality; the second a presentation on the concept and practical application of 'reasonable adjustment' in relation to disability, provided by Catherine Casserley of the British Disability Rights Commission.

The final presentation aimed to provide a community perspective on the work of specialised bodies. Anja Rudiger, of the UK Secretariat of the EUMC (European Monitoring Centre on racism and xenophobia), took on the role of 'critical friend' drawing on the views of community organisations expressed at their national roundtables, in order to provide a number of recommendations to specialised bodies.

In welcoming participants the Chair of the CRE, Trevor Phillips, stressed the need for the CRE both to share our experience and to learn from the experiences of others. This was achieved thanks to the stimulating and open debate, for which the CRE would like to thank all partners and participants. The CRE would also like to extend a special thank you to the Dutch Equal Treatment Commission, the lead partner for the project, and the Migration Policy Group, who provide the project's secretariat, for their support in making the meeting such a success.

GOODS AND SERVICES: SETTING THE SCENE

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1. INTRODUCTION

Racial and ethnic discrimination in goods and services often receives less attention than discrimination in employment. Nevertheless, discrimination in the provision of goods and services can involve the manifestation of some of the most virulent and overt forms of racial prejudice. It can also involve more hidden and insidious forms of prejudice, and has proved very difficult to identify and remove. It is also often difficult to define with any precision the scope of the term "goods and services", which potentially extends across a wide range of private and public activities, including the provision of education, housing, transport, service delivery and the provision of goods. A variety of legal, promotional and political strategies may have to be used to attack the different forms of discrimination that occur across these different activities: the use of traditional legal approaches alone has in this context often proved inadequate.

2. THE BACKGROUND AND CONTEXT

Many of the most overt and aggressive forms of racial and ethnic discrimination that gave rise to the US civil rights movement in the early 1960s involved unequal treatment in the provision of goods and services, often involving the vicious segregation of Afro-Americans in education, public transport, restaurants and housing. Equivalent patterns of discrimination occurred in the UK in the same period with the influx of Afro-Caribbean and South Asian migrants, epitomised by the "no blacks, no Irish, no dogs" signs that often appeared on signs for rented accommodation in London.[1] In France, hostility to North and West African migrants also took the form of goods and services discrimination by private and occasionally public sector providers. Employment discrimination in all three countries was also common, but the highly public nature of goods and services discrimination and segregation in housing and other forms of service delivery was often the most visible form of racism in practice.

As a consequence, the first steps taken to combat race discrimination in Europe concentrated upon attacking overt forms of discrimination, often initially through the criminal prohibition of such discrimination in employment and goods and services. In the UK, when this penal approach proved inadequate due to the burden of proof requirement and the reluctance of prosecution authorities to bring cases forward to trial, the US approach of imposing civil liability for acts of direct and indirect discrimination was adopted. Various forms of civil liability were also introduced in other European states to a greater or lesser degree, often however linked to a continued emphasis upon the use of criminal sanctions as the main vehicle for attacking racism, with both forms of regulation supplemented by constitutional guarantees of equality of treatment. The effect of these measures was to limit the visibility of overt forms of discrimination. However, the extent of concealed discrimination remained considerable, even if it varied in shape and nature from state to state. Often the lack of visible forms of racism and prejudice generated considerable complacency in many European states as to the extent of race discrimination actually embedded in their societies.

This tendency towards complacency has been particularly pronounced in the goods and services field, in contrast to the employment context. Since the late 1960s and early 1970s, the development of EC and national sex discrimination law, with its focus on combating employment discrimination, has meant that the use of anti-discrimination legislation by litigants, enforcement bodies and pressure groups has tended to focus upon employment issues. For example, in the UK, the interpretation of the Equal Treatment Directive by the European Court of Justice and precedent developed by the UK courts in applying national sex discrimination law has heavily influenced the application of the similarly worded and structured race discrimination legislation. This has meant that litigants in employment cases have been able to rely upon a range of previous decisions that have clarified the extent of the law and the range of circumstances which would be deemed to constitute race discrimination.

There has been a lack of similar precedent in goods and services discrimination and in other areas of equality law, which has often resulted in the UK and elsewhere in a lack of focus upon forms of discrimination outside the employ-

[1] *See Anthony Lester, "Discrimination: What Can Lawyers Learn From History" [1994] PL 224; see also A. Lester and G. Bindman, Race and the Law (London: Penguin, 1972) p. 123.*

ment context, and very low levels of litigation involving goods and services in particular. Combined with forms of discrimination in this area becoming less overt and more concealed and indirect in nature, this has meant that goods and services discrimination has often been the "forgotten" or at least the most neglected aspect of equality law.

3. THE DEFINITION OF DISCRIMINATION IN GOODS AND SERVICES

There are a variety of forms of goods and services discrimination, differing in their visibility, motive, and "vulnerability" to legal deterrence, as well as taking different forms in different European contexts. What exactly constitutes goods and services discrimination is therefore difficult to define with any precision. The Racial Equality Directive and national legislation in general does not attempt to define the term. It is unclear whether a narrow interpretative approach should be adopted in defining this concept: this would treat the provision of goods and services as solely involving the supply of material goods and specific services as part of an exchange process that is open to the public at large, or to "sections of the public" to use the terminology of the UK anti-discrimination legislation. This would include the selling of goods in shops, restaurants and other commercial sites open to the public, and the supply of services such as house maintenance, financial advice and legal support.

This narrow definition of the term could exclude the delivery of public services to the public at large such as education, housing and social welfare: the UK Race Relations Act 1976 specifically prohibited discrimination in education and housing in addition to prohibiting discrimination in the supply of goods and services, to ensure that the scope of the legislation was not interpreted in an excessively restrictive manner. It could also exclude the performance of state functions such as immigration control, policing and resource allocation that might be defined as not involving the provision of "services" to specific individuals and groups, and therefore outside the scope of the definition. The House of Lords, the UK's highest court, adopted this narrow interpretation in *R v. Entry Clearance officer ex p Amin*,[2] defining the provision of goods and services as only extending to state acts which might be done by a private person. This distinction was criticised, and proved difficult to apply. The provision of tax advice by the state,[3] the allocation of work to prisoners[4] and the provision of assistance by the police to members of the public[5] have all been treated by the UK courts as involving the delivery of services in a manner similar in nature to the provision of services by private persons, while immigration clearance[6] and the deportation of illegal migrants[7] were not.

The *Amin* decision was not in line with the intention of the drafters of the UK's legislation, and was ultimately reversed by the Race Relations (Amendment) Act 2000, which extended the scope of race discrimination law to all the public functions of public authorities.[8] It illustrates the conceptual and practical difficulties that a narrow definition of "goods and services" may produce, and the type of formalist legal logic that might be produced by such a decision, which could (and did in the case of *Amin* in the UK) have a negative impact upon the scope and effectiveness of race discrimination law.

Lester and Bindman, two of the leading architects of the UK's legislation, argued in 1972 that the term "goods and services" should be given its "ordinary and natural meaning… 'goods' are any moveable property, including merchandise or wares… 'services' refer to any conduct tending to the welfare or advantage of other people… each of these expressions is deliberately vague and general: taken together, they cover a very wide range of human activity".[9] This wide approach to defining goods and services is preferable, to prevent *Amin*-style formalist distinctions from creeping into the development of EC and national anti-discrimination law. Equality bodies should be prepared to produce advice on the basis of this wider approach. S. 29 of the UK Race Relations Act also prohibits discrimination in the provision of "facilities" in addition to "goods and services", while the Directive and other national legislation does not. A narrow, formalist approach to the definition of goods and services may see this omission of any explicit reference to "facilities" as a problem: the wider approach advocated here would not, as facilities open to the public would invariably come within this wide, purposive approach that would ensure that the impact of race discrimination law is not artificially constrained or limited. In practice in the UK, no distinction is made in the approach of the courts between facilities and the provision of goods and services, and none should be introduced at EC or national level. This wider definition may also cover the provision of state services such as education, welfare and housing, which can all be defined as coming within the scope of "goods and services" as they involve the provision by the state of public services. As discussed above, the UK

[2] *[1983] 2 AC 818, House of Lords.*
[3] *See Savjani v Inland Revenue Commissioners [1981] QB 458, Court of Appeal.*
[4] *See Alexander v Home Office [1988] 1 WLR 968, Court of Appeal.*
[5] *See Farah v Metropolitan Police Commissioner [1998] QB 65, Court of Appeal.*
[6] *See Amin.*
[7] *See R v Immigration Appeal Tribunal, ex p Kassam [1980] 1 WLR 1037, Court of Appeal.*
[8] *See C. O'Cinneide, "The Race Relations (Amendment) Act" [2001] Public Law 220.*
[9] *A. Lester and G. Bindman, Race and Law (London: Penguin, 1972), 260.*

legislation specifically prohibits discrimination in education and housing, independently of its prohibition of discrimination in the provision of goods and services: this was done as part of a "belt and braces" approach, to ensure the legislation was given adequate scope and clarity. The EC Directive makes similar specific provision, referring to "social protection including social security and healthcare; social advantages; education…", but includes housing in its definition of "goods and services". No great emphasis should be placed upon the question of the extent to which the provision of goods and services overlaps with these other grounds, as the Directive applies equally across all these grounds. However, the definition of goods and services may be relevant if a narrow interpretation is given by the European Court of Justice or national courts to the terms "social protection" and "social advantages": a wide definition of what service provision is may fill the gaps left by narrower definitions of other terms.

A key definitional issue does in contrast surround the requirement in the Directive regarding the provision of goods and services "which are available to the public" (with the UK legislation covering provision "to the public or to a section of the public"). This appears to exclude the provision of goods and services to a closed and fixed group of private persons. The UK legislation has been interpreted as applying to bars and clubs whose facilities are open to non-members.[10] Private clubs in contrast were held to be completely exempt from the scope of the legislation by the courts,[11] until s. 25 of the 1976 Act extended the prohibition on discrimination to clubs (including political parties) with 25 or more members who operate a regulated membership policy. (Clubs with non-regulated membership policies which are effectively open to all comers will be treated as making services available to a section of the public and therefore covered by the legislation, if they are providing goods and services.[12]) However, the Directive is restricted in scope to where goods and services are made available to the public, which could exclude private clubs and other bodies. This will in all likelihood lead to real difficulties in defining the scope of the Directive and of national legislation that is framed in line with its scope, if it does not attempt to clarify the question of what constitutes "availability". Defining what constitutes availability to the public has caused repeated difficulties in US anti-discrimination law, in particular in the case of political party membership, bars and sports clubs. It may also lead to considerable gaps in protection, if national implementation measures leave considerable leeway for private bodies to continue to discriminate.

A separate issue may arise if national implementing legislation or judicial interpretation or even popular belief regards "availability to the public" as only extending to the provision of goods and services to the general public, i.e. as excluding goods and service provision to individual members or sections of the public, or confining the scope of the prohibition to state action designed to benefit the populace at large. Limiting the scope of goods and services provision in this way would reintroduce the artificial distinction between public and private spheres that has restricted the implementation of anti-discrimination law across the different equality grounds.[13]

While personal autonomy in one's private life remains a key constitutional and moral value for European states in general, it should be recognised that combating inequality and racism requires legislative intervention in the conduct of businesses and the supply of goods and services to prohibit discrimination. Nor does this come at a significant cost to personal autonomy or privacy: there is little or no human dignity or personal integrity surrendered by preventing individuals from being racist or discriminatory in their interactions with others. Equality bodies need to continue to make clear that the Directive's requirements apply across the full range of goods and service delivery to members of the public, and to emphasise that anti-discrimination law applies to interactions between individuals where the provision of goods and services is involved, as well as arguing and reinforcing the moral case for this. It is likely that the ECJ will adopt this approach, as have the UK, Ireland, US, Canada and many European countries.

Interesting light is cast on the question of how the ECJ will define goods and services by the European Commission's proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services, that are defined as "available to the public, including housing, as regards both the public and private sectors, including public bodies".[14] Recital 10 of the proposed Directive states that "services should be taken to be those which are normally provided for remuneration". In its commentary on the proposed articles, the Commission states that "the Directive does not apply to transactions which are carried out in a purely private context, such as, for example, the renting of a holiday home to a family member or the letting of a room in a private house. In this way, the concept of goods and services has the same

[10] See Gill v El Vino Co Ltd [1983] 1 All ER 398.
[11] Dockers Labour Club & Institute Ltd.v Race Relations Board [1976] AC 285, House of Lords.
[12] Triesman v Ali, Times Law Reports, 7 February 2002, Court of Appeal.
[13] See e.g. N. Yuval-Davis, "Women, Citizenship and Difference", (1997) 57 Feminist Review 4-27. See also F. Olsen "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harvard Law Review 1497.
[14] Article 1, Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services, 2003/0265(CNS).

meaning as in Council Directive 2000/43/EC and should be restricted to those which are normally provided for remuneration. The concept of goods and services available to the public could therefore include: access to premises into which the public are permitted to enter; all types of housing, including rented accommodation and accommodation in hotels; services such as banking, insurance and other financial services; transport; and the services of any profession or trade."[15]

While the Commission's interpretation is not determinative, it is interesting that the definition of goods and services advanced here is wide in nature, including as it does access to housing, transport and other services. This would seem to be capable of including most state services, and the guarantee against discrimination on the grounds of race or ethnic origin in "social advantages" can also be used together with this wide definition of "goods and services" to make sure that discrimination by public authorities in goods and services will be contrary to the Directive. The Commission's emphasis on "remuneration" is also interesting: if adopted by the ECJ, this would ensure that most forms of goods and service delivery were included within the scope of the Directive, leaving only a few narrow areas that would come within the protected sphere of personal autonomy. However, it should be emphasised that "remuneration", if used as the test in this context to decide what comes within the definition of "goods and services", should also ideally include the supply of goods and services for non-for profit purposes, as otherwise the scope of the directive will be very restricted.

4. THE ROLE OF LEGISLATION IN COMBATING DISCRIMINATION IN THE PROVISION OF GOODS AND SERVICES

What is noticeable in comparative experience of combating discrimination in the provision of goods and services is how few legal cases are actually brought in this area in the bulk of European and North American states, in comparison to the amount generated in the employment context.[16] Some of the reasons for this have already been discussed, namely the development of European sex discrimination law and the carry-over of lessons and practice from this field to race discrimination.

Other reasons exist. Instances of goods and services discrimination will often be single, individual events that the victim will choose to ignore, disregard or otherwise decide not to make the subject of a complaint. In the employment context, a victim of discrimination will be locked into the employment contract, or have a substantial amount of financial or emotional interest invested in the job in question. He or she will therefore in all likelihood be more willing to bring a complaint than if he or she is subject to a single act of discrimination in the provision of goods or services. In addition, the amount of compensation may be very small. There may also be greater difficulties of proof involved, especially as there will rarely be any chance to rely upon the goods and services equivalent of statistical employment patterns, or there may very often be a lack of supporting evidence to confirm the act in question happened.

There also is often a considerable support infrastructure for bringing employment cases, such as the assistance often provided by trade unions, which is unavailable to an individual litigant in a goods and services case. Judicial or arbitration remedies for goods and services complaints may also be less accessible and more expensive, intimidating and risky than is the case with employment complaints. For example, in the UK, goods and services cases go to the county court, which will usually involve legal costs and the possibility of incurring the costs of an unsuccessful action: employment cases in contrast are usually heard in employment tribunals, which need involve no legal costs. There may also be a lack of awareness of the extent of anti-discrimination law in this area.

In addition, minorities facing intimidation and high levels of racism may be very unwilling to challenge goods and services discrimination, especially when it involves the police, schools or other forms of public service delivery. Expectations of discriminatory treatment on the part of public authorities may become so established that disadvantaged groups may simply not consider challenging these practices. Anti-discrimination laws such as those required by the Directive usually rely upon the willingness of individuals to bring cases to challenge racism and other forms of prejudice: goods and services discrimination appears to be a context where individual litigants are less likely to come forward than in other areas. The isolated cases that do come forward may often in turn

[15] *See COM(2003) 657 final, 5 November 2003, 12-13, available at http://register.consilium.eu.int/pdf/en/03/st14/st14812.en03.pdf (last accessed 7 July 2004).*

be ineffective in ensuring a change of attitudes throughout society at large. Particular ethnic groups, such as the Roma in many European societies at present, may suffer such high levels of discrimination and social exclusion that there may be no realistic prospect of them being able or willing to utilise the legal system to seek redress in any meaningful or systematic manner.

It may also be the case that many forms of disadvantageous treatment of minorities in the provision of goods and services will not constitute direct or indirect discrimination as defined by legislation. This is particularly true again in the context of public service delivery, where assumptions, stereotypes or a failure to take positive action to recognise and make special provision for the needs of minorities may contribute greatly to the social exclusion of particular groups.[17] These structural forms of prejudice may not always give rise to specific instances of discrimination which could ground a successful equality case in the courts, especially where a failure to take necessary action is at issue, or a pattern of prejudice that combines several different factors. In the UK, the 1999 Macpherson Report into the death of Stephen Lawrence, a young black teenager whose murder was committed by white racists and the subsequent investigation was undermined by police stereotyping of the victim and his friends, highlighted this problem of "institutional racism", defined by the report as:

"the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtless, and racist stereotyping which disadvantage minority ethnic people". [18]

Conventional litigation approaches may be inadequate or ineffective in combating this type of structural form of discrimination, and certainly have proved limited in the UK context. Similar patterns of institutional discrimination may also arise in the context of service delivery in the private sector. Large-scale banks, utilities or other financial organisations may operate credit or service policies that disadvantage ethnic minorities, for example. Again, anti-discrimination legislation similar to that required by the Directive may not be capable of addressing this problem: stereotypes or assumptions may not be enough to ground a legal action, and the combination of a series of different yet mutually reinforcing prejudicial factors may produce considerable disadvantage, but may not be sufficient to give rise to a finding of direct or indirect discrimination.[19]

5. OVERCOMING THE LIMITATIONS OF THE LAW

It may therefore be difficult to combat goods and services discrimination through standard legal strategies, in particular when discrimination does not take an overt form. This poses challenges for equality bodies charged under the Race Directive with promoting equality. These bodies may have to use innovative tactics to overcome the limitations of the law. Many equality bodies, such as the Irish Equality Authority and the Belgian Centre pour l'Egalité des Chances et la Lutte contre le Racisme (CECLR) for example, often gather legal evidence of goods and services discrimination directly using their staff or assist disadvantaged groups to do the same.[0] Appropriate cases have to be selected to develop good precedent and to set an example across society. Overt forms of prejudice and blatant breaches of the law need to be immediately confronted by litigation, to prevent erosion of respect for and compliance with the law.

However, it has to be recognised that while legal enforcement is a key element of any response to goods and services discrimination, it is not a sufficient tool by itself. Strategic legal enforcement needs to be matched by the use of additional strategies to promote good practice, educate goods and services providers, and ultimately by the imposition of positive duties and other requirements that would require providers to take action to eliminate unfairness or inadequacy of treatment, and to monitor the ethnic origin and special needs of users of their goods or services if appropriate. The UK has introduced such duties upon public authorities in the context of race discrimination, and in Northern Ireland across all the equality grounds.[21] Such duties are linked to mainstreaming initiatives, and may be necessary to assist in closing the gap that the inadequacies of legal enforcement leave in anti-discrimination law. A combination of legal and non-legal strategies will need to be deployed to combat the thus-far neglected persistence of goods and services discrimination in European societies.

OVERVIEW OF THE LEGAL AND PROMOTIONAL APROACHES OF THE COMMISSION FOR RACIAL EQUALITY (CRE)

1. LEGAL APPROACHES OF THE CRE

RAZIA KARIM, HEAD OF LEGAL POLICY, CRE

Statutory powers and duties of the CRE

The CRE's **statutory duties**, which relate to law enforcement under the Race Relations Act 1976 (RRA 76) prior to its amendment in 2000 and 2003, are to:
- work towards the elimination of racial discrimination - s 43(1)(a) RRA 76
- to promote equality of opportunity and good race relations
- keep under review the working of the Race Relations Act - s 43(1)(C) RRA 76
- consider every application for assistance and inform the applicant of the decision in writing within two months - s 66(1) & (3) RRA 76
- conduct a formal investigation if required by the Home Secretary - s 48(1) RRA 76
- establish and maintain a register of non discrimination notices - s 61 RRA 76

The **statutory powers** that relate to law enforcement are to:
- provide services to individuals who believe they have been victims of racial discrimination - s 66 RRA 76
- support or initiate proceedings for judicial review - s 53(2) RRA 76
- conduct a formal investigation (general or named) for any purpose connected with section 43 - s 48 RRA 76
- issue non discrimination notices - s 58 RRA 76
- initiate legal proceedings to stop pressure/instructions to discriminate and discriminatory adverts s 63 RRA 76
- issue codes of practice, breach of which is admissible as evidence in legal proceedings - s 47 (1) & (10) RRA 76
- make recommendations for changes to the law or to policies or practices - s 51 RRA 76
- apply to a designated County Court for an injunction to stop persistent discrimination - s 62 RRA 76
- serve a compliance notice in respect of a breach of the new racial equality duty – s 71D RRA 76

Law enforcement tools/tactics that have been **successfully used** to support the Commission's powers and duties include:
- advising, assisting and representing individuals taking cases under the Act
- the systematic follow up of successful findings of racial discrimination at employment tribunal and employment appeal tribunal
- discrimination or actor testing (for example, where two identically qualified people apply for a job or a try to rent a flat and should receive identical treatment – one person is from the majority ethnic group and one from a minority group)
- Responding to government consultation on proposed legislation
- Reviews of the race relations legislation with suggested reform
- Formal investigations
- Cases undertaken to challenge discriminatory advertisements
- Cases dealing with complaints of pressure or instructions to discriminate

Assistance to Individuals

There is a statutory duty on the Commission to consider applications for assistance from individual victims of discrimination.

The Commission has a discretionary power to grant such assistance as it thinks fit. This ranges from initial advice, negotiating settlements (not arbitration or mediation) and full representation in the courts including appeal courts.

The government consultation paper on Racial Discrimination, which preceded the Race Relations Act 1976, envisaged a "powerful Race Relations Commission responsible for enforcing the law on behalf of the community as a whole".

It is important to remember that, prior to the Race Relations Act 1976, there was no right to individual redress; under the Race Relations Act 1965 the Race Relations Board and a network of local conciliation committees had the power to investigate complaints, attempt conciliation and to obtain a satisfactory assurance against further unlawful discrimination. The power to bring civil proceedings lay with the Attorney-General (the Lord

Advocate in Scotland) but could only be exercised after attempts at conciliation had proved unsuccessful.

The right to individual redress was therefore regarded as an important new right for complainants not just as a matter of principle but for the maintenance of good race relations also:

'To abandon a whole group of people in society without legal redress against unfair discrimination is to leave them with no option but to find their own redress. It is no longer necessary to recite the immense damage, material as well as moral, which ensues when a minority loses faith in the capacity of social institutions to be impartial and fair.'

It is therefore not surprising that law enforcement became one of the primary functions of the Commission.

The Race Relations Act 1976 provides for the power to grant assistance where:
a. Where the case raises a question of principle.
b. Where the complexity of the case, and the applicant's position in respect of the respondent, or other person is such that it would be unreasonable to expect the applicant to deal with the case unaided.
c. By reason of any other special condition.

In 2003 the Commission decided to become more strategic in its approach to cases. It decided that in order to ensure the fairest distribution of resources the Commission when exercising its discretion will take into account:
- Whether the applicant has previously been provided with assistance
- Whether or not alternative sources of support or funding are available to the applicant
- Whether other persons will benefit from a favourable decision in the court or tribunal
- Whether the case concerns or will advance one of the strategic priorities
- The sector or industry in which the matter arises and whether or not the Commission has a particular interest in that sector or industry
- Whether the case will result in a clarification or change to the law, and whether this could result in significant change and affect large numbers of people
- Whether there is also an important Human Rights factor
- The Commission's financial situation

Successful cases taken in relation to goods and services have included access to pubs and clubs, as there were widespread complaints that it was common practice for them to refuse entry to people from some ethnic groups.

Formal Investigations
The Commission has investigations powers of two types: general formal investigation and named formal investigation.
- A general investigation is carried out into a sector, trade or profession to uncover patterns of discrimination.
- A named investigation is carried out against a specific named individual or organisation where we have reasonable belief that the individual or organisation has committed or is committing acts of unlawful discrimination. This is generally ascertained on the basis of a finding of discrimination by a court or tribunal.

Formal investigations are highly legally structured. There is a strict procedure for drawing up terms of reference and these must be strictly adhered to. Depending on the organisation being investigated, formal investigations can be very lengthy. The CRE has powers to compel the production of documents or witnesses to give evidence.

There are four main reasons why formal investigations are effective:
- It means that the burden does not only fall on victims to prove that discrimination is taking place;
- The fact of repeat discrimination by some organisations is an indication that litigation by victims will not achieve eradication of discrimination;
- Patterns of discrimination may affect a wide group and the investigation can expose such patterns in a way that an individual case cannot;
- It is a vital tool where discrimination is accepted or colluded with up the chain of command, (e.g. as found in investigations into Ford Motor Company and the Household Cavalry).

Successful formal investigations in relation to goods and services have included:
- Secondary school admissions
- Homelessness and discrimination by a local authority
- Estate agencies – in the sale of homes for private occupation
- Immigration control procedures
- Prison Service in relation to treatment of prisoners

The commenced a general formal investigation into the police service in December 2003.

2. CRE PROMOTIONAL APPROACHES

DAVID ZILKHA, SENIOR POLICY OFFICER (EUROPE), CRE

The Commission for Racial Equality exists to eliminate racial discrimination and promote equality of opportunity and good relations between people of different racial groups. It does this through its legal and enforcement powers, as set out in the preceding pages, and also through the promotional and policy approaches outlined in this paper. (N.B. The distinction is used for descriptive purposes and is not absolute in that there is crossover between enforcement and promotional approaches, for example: Codes of Practice are used in Court cases, or, research may inform a CRE decision to undertake a Formal Investigation.)

The approaches described are not listed in any order of priority – different approaches are more appropriate in some contexts and for some subject areas, a combination often achieving the most effective results. The CRE's methods and activities also reflect changing public attitudes and different public and parliamentary contexts. Earlier decades involved work on proving that discrimination exists and building public perception that it was wrong – ideas that are now generally established. Work then focused more on establishing basic equal opportunity practices, supported by legal action, and public campaigns to build support for anti-racism. More recently with wider acceptance of the existence of institutional racism, there have been greater opportunities to move beyond basic equal opportunity frameworks to concentration on the differential outcomes experienced by different ethnic groups, and to plan and deliver services in a way that goes beyond a 'one-size-fits-all' approach which tends to disadvantage many minority communities. There are also increasing opportunities to work on effective integration and on promoting good relations between different communities.

Working with government

The CRE seeks to influence the way that government departments plan and deliver their services. This can involve participation in government steering/advisory groups, responding to government consultations, lobbying and/or advising for changes to the law. For example, a project to make public procurement more accessible to ethnic minority businesses, or, national targets for heart disease that take account of inequalities between ethnic groups.

Working with inspectorates

Public services are generally subject to audit, inspection and regulation by national level agencies. The CRE provides expert advice to these agencies regarding what they should be looking for in public services. This can either involve a thematic inspection that focuses only on race equality, or ensuring that general inspections pay attention to differences in the quality of service received by different ethnic groups. For example, inspections in education have compared the rates of exclusion from school, and the reasons for it, between different ethnic groups.

Codes and standards

The CRE has the power to produce statutory Codes of Practice to provide guidance as to how organisations can meet the requirements of the law. 'Statutory' means that they are approved by Parliament and that they will be referred to in Court – an organisation is not obliged to follow the Code of Practice but if it does not do so then it must prove how it has complied with the law in some other way. Statutory Codes have been produced for Rented Housing, Employment, and the Race Equality Duty.

The CRE also produces non-statutory guidance documents (in some case also known as Codes of Practice), but

these have not been approved by Parliament and cannot be used in Court. Examples include a Code of Practice for Maternity Services, a Guide for Small Businesses, an Education Standard, and a Guide to Ethnic Monitoring. The CRE sometimes works with other organisations to produce documents that cover other equality grounds such as disability and gender, for example the Local Government Equality Standard. This standard also provides an example of work with inspectorates as local authorities are required to assess their performance and report on it in relation to the standard.

Work with other organisations

The CRE works with professional organisations and associations, supporting them in providing good practice advice to their members, and/or working in partnership to lobby for change in a particular sector. Examples include organisations for police, doctors, and housing professionals.

There are other general standards for which many organisations seek to attain accreditation, for example, Investors in People (IIP) which recognises excellence in employment practices. The CRE has worked with IIP to ensure that equal opportunity practices are a core feature of the standard, so that an organisation which has poor equality practices should not be able to attain accreditation.

An evidence-based approach

Ethnic monitoring is a central feature of the UK approach. Individuals are asked to describe their ethnic group for the national census, to employers, and in many cases in accessing public services (only the census is compulsory). This provides statistical evidence for employment rates and conditions, educational achievement, access to healthcare, treatment by the criminal justice system, and many other areas. The CRE provides guidance on issues such as how ethnic monitoring should be carried out, how it should be explained to staff or service users and how the information should be used.

The CRE also undertakes more in depth research or public opinion polls, which can help to provide explanations, details, or identify solutions for problems that have either been identified through statistical data or through community concerns. For example research has recently been undertaken into public attitudes about what 'British' means, which then helps to identify priority areas for CRE work on public attitudes.

Projects or initiatives that concentrate on one sector or issue

Some major projects that the CRE has run, sometimes in partnership with other bodies, have had very specific targets, for example: Sporting Equals – a project to promote race equality in sport; Leadership Challenge – a project to promote personal responsibility and action for race equality by heads of organisations; and MP Shadowing – a project which aims to increase the number of ethnic minority Members of Parliament over the long term.

Work with communities

The CRE has a network of regional offices in England, an office in Scotland and an office in Wales, all of which maintain dialogue with community organisations and are therefore able to identify and respond to the issues that matter most to communities and quickly recognise any changing patterns or new concerns. The CRE also funds a network of Race Equality Councils, which work at a local level. At a national level, the CRE undertakes regular consultation with community organisations and representatives to inform its strategies and priorities.

Media and campaigns

The CRE has a high media profile and seeks to ensure informed and responsible reporting, positive public attitudes and better understanding. The CRE works with the media both on day-to-day topical issues, and through longer- term work to improve standards. Asylum has received extensive and often very negative media coverage – the CRE produced and encouraged reference to a basic factsheet which separates the facts from the myths. To encourage high quality, responsible and informed coverage, the CRE set up an annual awards scheme, Race in the Media awards, which now has a high profile and carries significant prestige.

The CRE also works with relevant specialist publications. For example, articles or interviews which explain 'technical' legal issues of race relations legislation as it affects the housing sector; or, CRE support for public recognition of excellence and innovation in relation to race equality in health care, as a category in the Nursing Times Awards.

Many public information and education campaigns have been undertaken by the CRE, some have simply involved making information available, whereas others have intentionally challenged attitudes and have often resulted in controversy, extensive media coverage and public debate.

3. DISCRIMINATION CASE STUDY: ETHNIC MINORITY EXPERIENCE OF THE POLICE & THE RESPONSE OF THE CRE

PHIL PAVEY, SENIOR POLICY OFFICER (CRIMINAL JUSTICE), CRE

Context

Police officers have unique coercive powers over their fellow citizens and wide unsupervised discretion in their use, therefore any unfair discrimination in this area can be particularly destructive to people's lives. The UK has seen increasing public recognition of racial discrimination in policing, as in other criminal justice agencies, over recent decades. Much research and statistical evidence shows marked racial differences in the way comparable suspects and defendants are treated. The main CRE concerns are described in more detail below.

Pressure for change generally increased when police law enforcement functions became open to challenge under the Human Rights Act, which came into force on 2 October 2000. The CRE aims to monitor cases with a racial equality dimension so as to advise where appropriate and to disseminate any subsequent positive judicial decisions.

The Race Relations (Amendment) Act 2000 was a consequence of the Stephen Lawrence Inquiry[22] Report and it provided the best opportunity ever to secure racially fair policing. For the first time police law enforcement functions were brought within the scope of the Race Relations Act, so allowing individual litigation and CRE Formal Investigations into areas such as stop/searches, arrests and charges. Also police authorities and chief officers, like all public authorities, are bound by the duty imposed by the Act to promote good race relations and equality of opportunity in carrying out all their functions. All police forces published race equality schemes by May 2002, as required, setting out their arrangements for fulfilling the duty.

Stop and Search

This is the most contentious issue and the most destructive of good police/community relations. The concerns are 'disproportionality' in the racial pattern of use (black people are 5 times more likely to be stopped) and discourtesy, often described as extreme.

In 2001, the Home Secretary accepted the Lawrence Inquiry recommendation, supported by the CRE, that stops as well as searches should be recorded and monitored with regard to ethnicity. The expanded monitoring is being phased in, starting in selected areas within seven police forces from April 2003. The CRE has proposed joint work with the Association of Chief Police Officers (ACPO) in the context of police forces' duty to promote race equality, and is planning action to raise public awareness that use of the power can now be subject to complaints of discrimination.

Racist Incidents

The recorded number of racist incidents doubled year-on-year in the late 1990s, though this rate of increase has recently been much lower. It appears that the rise represented increased reporting by victims and fuller recording by the police, since the British Crime Survey 2000 estimated a fall in *actual* incidents from 1995-99. Certainly the national network of Multi-Agency-Panels (MAPs) developed since 1990 often allows reporting to other agencies, in which victims may have more confidence, and when such reports are passed to the police they may

[22] *Cf. Colm O'Cinneide at p.8 of this publication.*

be less likely to be disregarded. The Stephen Lawrence Inquiry Report may have encouraged more victims to report, and it also led to an improved definition of a racist incident as "any incident which is perceived to be racist by the victim or any other person", which removed the previous initial stress on police perception. The CRE has contributed to guidelines for police handling of racist incidents.

Police 'Diversity' Training

Diversity training in police forces is essential for achieving the necessary culture shift, but historically this has not been effective. The CRE has submitted evidence to government leading to improvements. For example, the London Metropolitan Police (the Met) devote one week of the 20-week new recruit training to equality issues, compared with half a day formerly, and can demonstrate how they have a "golden thread" on these issues running through other courses such as detective training. From 2000 to 2003 they and other forces also had two days' training on race equality, with community involvement, to all officers regardless of what other training they may have had.

A thematic inspection specifically of training within police forces was conducted in 2002 and its report, *Diversity Matters*, was published in March 2003. This found pockets of good practice and dedicated work by individuals, but a widespread lack of senior management support, and a reliance on 'one size fits all' courses rather than training derived from individual needs analyses.

Employment

The Home Secretary's Action Plan included challenging targets regarding ethnic minority recruitment, retention and progression. Forces are expected, for example, to increase ethnic minority employment to a level in line with the ethnic minority population of the area they serve, over ten years. For the Met, for instance, this would mean 20% compared with 3% in 1999. Nationally, ethnic minority officers have increased from 2% of the total in 1999 to 3.5% in 2002. However, retention rates for ethnic minority officers fell substantially short of the 2002 target of parity with white officers.

Police Complaints

There was widespread dissatisfaction about the system of the police investigating themselves, which was in place until April 2004. The overrepresentation of ethnic minority people amongst complainants, and the tiny proportion of racial discrimination complaints upheld were of particular concern to the CRE. The CRE is in favour of maximising the powers and role of a new independent investigative body, broadening the scope of matters that may be complained about, facilitating complaints (for example by making Chief Constables vicariously liable for the acts of officers who may not be able to be identified) and proposing safeguards (for example relating to informal procedures). A new Independent Police Complaints Commission (IPCC), with many though not all of the powers and functions favoured by the CRE, was set up in April 2004.

Deaths in Police Custody

Ethnic minority people have been consistently overrepresented in these tragic cases, though the overall figures are small. There have been recommendations designed to prevent such deaths and figures show a steady reduction, shown as: total number (ethnic minority number). 1998/99: 65(12); 1999/2000: 47(9); 2000/01: 32(3); 2001/02: 36(2). The CRE will monitor whether this improvement is maintained, and will press the Government on further action (for example in regard to control and restraint techniques) if necessary.

Police Service Delivery to Victims of Crime

Ethnic minority people are more likely to be the victims of crime, but so far not enough has been done to ensure that they receive the same level of protection or courtesy as others. How far forces deliver equality of service to victims will to some extent be reflected in the Home Secretary's performance indicators (i.e. public satisfaction surveys and levels of complaints), but this area needs to be added to other guidance and regularly reviewed.

POSITIVE ACTION IN THE ACCESS TO AND SUPPLY OF GOODS AND SERVICES

CLAUDIA LAM, ADMINISTRATOR AT THE SECRETARIAT OF THE EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE (ECRI)[23]

As yet, there has not been as much success in combating discrimination in the access to and supply of goods and services as there has been in combating discrimination in employment. This is doubtless due to the fact that the fight against discrimination has seen its major advances in equality between women and men, within which the main sphere of activity has been in employment. As far as goods and services are concerned, obvious cases of discrimination are without doubt more frequent in relation to racial discrimination[24] than discrimination against women or men. To give just one example, cases where an individual is refused admission to a bar or nightclub on the basis of their ethnic origin or the colour of their skin are still common throughout Europe. This does not mean that there are no cases of discrimination on the grounds of sex in the access to goods and services. Evidence of this is the fact that the European Commission has proposed a Directive implementing the principle of equal treatment between women and men "in the access to and supply of goods and services".[25] This proposal contains a provision which permits positive action.[26] In addition, it is clear that discrimination in the access to and supply of goods and services is particularly likely to affect disabled people, some of whom require special facilities, for example a lift in order to gain access to a building. However, this paper concentrates mainly on positive action aimed at preventing racial discrimination in the access to and supply of goods and services. First, it is important to clarify the concept of positive action. This will be followed by an examination of the European standards in relation to positive action. It will then be possible to outline the different degrees of positive action and give examples in the sphere of access to and supply of goods and services. Finally, the national specialised body to combat discrimination can play a crucial role in the adoption of positive measures to promote equality.

1. THE CONCEPT OF POSITIVE ACTION

The first problem is to define the concept of positive action. This is necessary in order to have a clear and constructive discussion of the issue. It is easy to end up having a dialogue of the deaf on this subject, as there are considerable differences in the positions regarding what is meant by the term positive action and what is permitted or prohibited by law in this sphere. From the point of view of language, do we mean the same thing when we talk about positive action, positive measures, affirmative action, positive discrimination and positive obligations?

The concept of **positive action** clearly has a very wide scope and has no legal significance as such, except that it appears as the title of the clause on this subject in the Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.[27] According to the Directive, positive action consists of maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.[28] We shall use the same definition here. Thus the issue is to ensure full equality, by remedying an existing inequality or by maintaining the equality which already exists. In practice, it must be said that, unfortunately, it is more often a question of compensating for than of preventing racial discrimination. We see no difference between positive action and **positive measure(s)**, as we consider that these two terms describe the same thing. Regarding the concept of ***affirmative action***, which is often encountered in documents in English, there is probably no longer any need to distinguish between these terms. This expression is more common in the United States than in Europe, but it describes the same thing.

The ambiguities inherent in the concept of **positive discrimination** require more attention. This term is problematic because it gives rise to confusion. On the basis of the case law of the European Court of Human Rights, discrimination is necessarily illegal and so cannot really be "positive". The Court defines discrimination as differential treatment without objective and reasonable justification, that is treatment which does not pursue a legitimate aim or where there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[29]

[23] The ideas expressed in this text are personal and are solely those of the author.

[24] ECRI defines the grounds of racial discrimination as "race", colour, language, religion, nationality and national or ethnic origin in its General policy recommendation no. 7 on national legislation to combat racism and racial discrimination, adopted on 13 December 2002. To consult the text of the Recommendation and for further information on ECRI, please go to the ECRI website (www.coe.int/ecri) or contact the ECRI Secretariat (ECRI Secretariat, Directorate General of Human Rights – DG II, Council of Europe, F-67075 STRASBOURG Cedex, Tel.: +33 (0) 3 88 41 29 64, Fax: +33 (0) 3 88 41 39 87, E-mail: combat.racism@coe.int).

[25] COM (2003) 657 final. See European Commission, Bulletin of the European Union, 11-2003, Equal opportunities for women and men 1/5, http://europa.eu.int/abc/doc/off/bull/en/200311/p103023.htm, site accessed on 18 February 2004.

[26] In pursuance of Article 5 of the proposal for a Directive, entitled "positive action": "The principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex."

[27] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19/07/2000 p. 0022 – 0026.

[28] Article 5 of the Directive, entitled "Positive action", provides that "With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin".

[29] According to established case law of the European Court of Human Rights. ECRI uses this definition in its General policy recommendation no. 7 on national legislation to combat racism and racial discrimination, adopted on 13 December 2002.

It is thus hard to see how discrimination can be "positive" if it does not fulfil the conditions of legitimacy and/or proportionality. Moreover, it is no coincidence that many people have spoken out against positive discrimination, believing that it is harmful and should be prohibited. The truth is that all discrimination should be prohibited, which is not to say all "differential treatment". In actual fact, according to the terminology of the European Court of Human Rights, one should really talk about "positive differential treatment" to describe the special measures taken to compensate for or prevent inequality. Measures of this type pursue a legitimate aim by definition and, if there is a reasonable relationship of proportionality between the measures employed and the aim pursued, they cannot be discriminatory measures according to the case law of the European Court of Human Rights.

Finally, it is important to make a distinction between positive action and **positive obligations**, such as exist in the case law of the European Court of Human Rights. These positive obligations are those undertaken by the states which are party to the European Convention on Human Rights (ECHR). For example, the Court considers that, although the objective of Article 8 of the ECHR, enshrining the right to respect for private and family life, is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These may involve the adoption of measures to ensure respect for private life even in relationships between individuals.[30]

Thus positive action is not synonymous with positive obligation according to the case law of the European Court of Human Rights. Nevertheless, the question is whether there is a positive obligation to take positive measures to compensate for or prevent inequality, that is a "positive obligation inherent in an effective respect" of the prohibition of discrimination as stipulated in Article 14 of the ECHR and in Protocol No. 12 to this Convention.[31] This leads us on to an examination of the European standards regarding positive action.

2. EUROPEAN STANDARDS REGARDING POSITIVE ACTION

A quick look at the provisions in European and national laws shows that, in general, positive action is not prohibited. Indeed, sometimes it is expressly permitted, in other cases it is encouraged and, in some countries, it is obligatory.

The ***European Directive*** *implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* permits the Member States of the European Union to take positive measures, but it does not impose this.[32] The same principle applies to the *European Directive establishing a general framework for equal treatment in employment and occupation.*[33]

In order to establish what constitutes or does not constitute a positive measure for the Court of Justice of the European Communities, one must refer to the case law of the Court relating to equality between women and men in employment, for example as found in the *Kalanke* judgement. In this case the Court examined a national rule guaranteeing women absolute and unconditional priority for appointment or promotion. According to the Court, such a measure does not come within the framework of positive actions permitted by the Directive on equal treatment of men and women, because it goes beyond promoting equal opportunities and substitutes for it the result, equality of representation, which is only to be arrived at by providing such equality.[34] In contrast, for such a measure to be considered as permitted "positive action", in the national rule granting preferential treatment to women for appointment or promotion, provision can be made for a "saving clause", allowing a man to be chosen in exceptional circumstances for reasons specific to the male candidate (skills or qualifications, etc.) without this discriminating against women.[35] Thus it is not easy to draw the line between what counts as positive action permitted by Community law and what should be considered as going too far to be acceptable. The Court of Justice of the European Communities has not yet had the opportunity to look into measures aimed at compensating for or preventing racial inequalities and it is therefore difficult to know what position it might take on this point.

[30] See in particular European Court of Human Rights, 9 October 1979, Airey, series A no. 32, p. 17, para. 32.

[31] Protocol No. 12 to the ECHR makes provision for a general prohibition of discrimination. On 30 June 2004 it had been ratified by six States (Bosnia-Herzegovina, Croatia, Cyprus, Georgia, San Marino, Serbia-Montenegro) and signed by 28 other States. Four more ratifications are required for it to come into force. See the website of the Council of Europe Treaty Office: http://conventions.coe.int/.

[32] See Article 5 of the Directive, quoted above.

[33] See Article 7, entitled, "Positive action" which provides: "1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1 [religion or beliefs, disability, age or sexual orientation]. 2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment."

[34] Court of Justice of the European Communities, 17 October 1995, Eckhard Kalanke v Freie Hansestadt Bremen, Case C-450/93, European Court reports 1995, page I-03051.

[35] Court of Justice of the European Communities, 11 November 1997, Hellmut Marschall v Land Nordrhein-Westfalen, Case C-409/95, European Court reports 1997 page I-06363.

Within the framework of the **Council of Europe**, the European Court of Human Rights has not really had the opportunity to look into the issue of positive action and its relationship to the principle of non-discrimination found in **Article 14 of the ECHR**. At most it stated in the *Belgian Linguistics Case* that, "certain legal inequalities tend only to correct factual inequalities" and are therefore admissible.[36] In the *Thlimmenos* case there is at least an encouragement – if not an obligation – to adopt positive measures where they are necessary, since the Court noted that there is discrimination "when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different".[37]

The adoption of **Protocol No. 12**[38] provided the opportunity to specify that the adoption of positive measures is in accordance with the ECHR. In the preamble, the State Parties reaffirm that the principle of non-discrimination does not prevent them from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for these measures. Since this is a "reaffirmation", it should be understood that these measures have always been authorised by the ECHR. Nevertheless, in relation specifically to the Protocol, it is stipulated that this does not impose any obligation to adopt such measures.[39]

Article 4, paragraph 2, of the **Framework Convention for the Protection of National Minorities** makes provision for special measures to promote complete equality between people who belong to a national minority and those who belong to the majority. In paragraph 3 it expressly specifies that these measures should not be considered as acts of discrimination. Article 15 of the Framework Convention goes further, by obliging the Parties to create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.

Paragraph 5 of the **ECRI General Policy Recommendation no. 7 on national legislation to combat racism and racial discrimination** calls on the Member States of the Council of Europe to provide in their legislation that "the prohibition of racial discrimination does not prevent the maintenance or adoption of temporary special measures designed either to prevent or compensate for disadvantages suffered by persons designated by grounds [such as race, colour, language, religion, nationality or national or ethnic origin] …or to facilitate their full participation in all fields of life. These measures should not be continued once the intended objectives have been achieved".[40] ECRI does not restrict itself simply to emphasising the fact that positive action should be permitted. According to ECRI, the law should place public authorities under a duty to promote equality and to prevent discrimination in carrying out their functions.[41] The private sector might be placed under a similar obligation.[42] Similarly, ECRI demands that the law should place public authorities under a duty to ensure that those parties to whom they award contracts, loans, grants or other benefits respect and promote a policy of non-discrimination. In particular, the law should provide that public authorities should subject the awarding of contracts, loans, grants or other benefits to the condition that a policy of non-discrimination be respected and promoted by the other party. The law should provide that public authorities impose that the violation of this condition may result in the termination of the contract, grant or other benefits. ECRI also suggests that the law should provide for the possibility of imposing a programme of positive measures among the sanctions which may be imposed on a legal entity which perpetrates an incident of racial discrimination.[43] According to ECRI, this type of sanction is an important remedy in promoting long-term change in an organisation. For example, the party at fault could be obliged to organise for its staff specific training programmes aimed at countering racism and racial discrimination. The national specialised body should participate in the development and supervision of such programmes.[44]

In **national law**, positive measures are generally permitted, even if some restrictions may be imposed, as will be seen below in the section on different degrees of positive action. In **Hungary**, the Law on equal treatment[45] stipulates in Article 11 (entitled "positive discrimination") that measures aimed at eliminating unequal opportunities are not considered as a violation of the principle of equal treatment, if they are based on an objective evaluation of the situation of a particular social group, if they are provided for by the law or a collective agreement and are applicable for a specific period of time or until a particular condition is fulfilled. The Law requires that such measures do not to violate any fundamental rights, do not provide any unconditional benefit and do not exclude the consideration

[36] *European Court of Human Rights, 23 July 1968, case "Relating to certain aspects of the laws on the use of languages in education in Belgium".*

[37] *European Court of Human Rights, 6 April 2000, Thlimmenos v Greece, paragraph 44: "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."*

[38] *See above.*

[39] *Point 16 of the Explanatory report to Protocol No.12 to the ECHR: "The third recital of the preamble refers to measures taken in order to promote full and effective equality and reaffirms that such measures shall not be prohibited by the principle of non-discrimination, provided that there is an objective and reasonable justification for them (this principle already appears in certain existing international provisions: see, for example, Article 1, paragraph 4, of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women and, at the regional level, Article 4, paragraph 3, of the Framework Convention for the Protection of National Minorities). The fact that there are certain groups or categories of persons who are disadvantaged, or the existence of de facto inequalities, may constitute justifications for adopting measures providing for specific advantages in order to promote equality, provided that the proportionality principle is respected. Indeed, there are several international instruments obliging or encouraging states to adopt positive measures (see, for example, Article 2, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4, paragraph 2, of the Framework Convention for the Protection of National Minorities, and Recommendation No. R (85) 2 of the Committee of Ministers to member states on legal protection against sex discrimination). However, the*

of individual circumstances. These conditions clearly aim to respect the case law of the Court of Justice of the European Communities as found in its judgements on equality between women and men. Some national legislation goes further. In **Bulgaria**, the Law on protection against discrimination, adopted on 16 September 2003, does not restrict itself to authorising positive action (see Article 7, for example). It specifies that, if it is necessary in order to achieve the aims of this Law, national and local bodies *must* take positive measures, particularly in the case of multiple discrimination (see Article 11). In **Sweden**, the law states that the employer has a duty to set measurable targets and to take concrete measures to combat ethnic discrimination in professional life. If an individual considers that his/her employer has not fulfilled their obligations, s/he may lodge a complaint with the Ombudsman against Ethnic Discrimination (DO) who will propose measures which should be taken. The DO is also entitled to take the initiative and raise these issues with the employers. If the employer is not prepared to accept the DO's proposals, the DO may approach the Board against Discrimination, which can require the employer to fulfil their obligations on pain of civil penalty. In the **United Kingdom,** the public bodies have a duty to eliminate discrimination and promote equal opportunities and good inter-ethnic relations.[46]

A comparative examination of all the instruments in Europe reveals that there is a general recognition of the fact that the adoption of special measures to promote full equality is compatible with the principle of non-discrimination (even if the group in question cannot be considered as a minority group, as for example in the case of special measures taken in favour of women to ensure full equality of the sexes). The minimum condition for this compatibility is the existence of a legitimate goal (that of ensuring full equality) and the relationship of proportionality between the means employed and the aim sought. Some legal instruments also stipulate that special measures must be temporary[47]– the limit being the moment when the disadvantaged group achieves complete equality – but others do not require this limitation in time. In fact, it all depends on the type of measures and the group at which they are aimed. For example, national minorities have specific characteristics which justify permanent measures affording specific rights to their members, such as the opportunity to learn their language at school. With regard to disabled people, it is difficult to stipulate that the measure must be temporary, as some disabilities will not disappear over time and thus require permanent special measures.

3. DIFFERENT DEGREES OF POSITIVE ACTION

A cursory look at the situation in some countries might lead one to think that their legislation prohibits positive action. For example, it is not uncommon to hear that "positive discrimination" is not allowed in France. How then does one explain the fact that the French High Council on Integration (Haut Conseil français à l'intégration), while being opposed to "positive discrimination", proposes positive measures? The High Council put forward proposals to improve the representation of cultural diversity and people with an immigration background on French television, by requiring both public and private stations to ensure that the cultural diversity of the country is well-represented and to produce an annual report on the action they have taken in this area.[48] In reality, as can be seen in the case law of the Court of Justice of the European Communities described above, everything depends on the degree of positive action. This term is so vague that it embraces a wide range of measures from the general to the specific. In this area, the measure making provision for quotas, for example for access to university, is without doubt the most contested.

a) A campaign to **promote the principle of equality among people regardless of their ethnic origin** among the general public fits into the category of positive action aimed at compensating for or preventing inequality between people on the basis of their ethnic origin. Such a measure could hardly be seen as creating an unjustified benefit for members of one ethnic group to the detriment of another group. At the same time, while such a measure is of undeniable usefulness, its effectiveness in eliminating existing inequalities is very relative.

b) The **promotion of equal opportunities** goes further. It is about giving opportunities to individuals who belong to an ethnic group which is under-represented in certain areas, such as higher education. The aim is to

present Protocol does not impose any obligation to adopt such measures. Such a programmatic obligation would sit ill with the whole nature of the Convention and its control system which are based on the collective guarantee of individual rights which are formulated in terms sufficiently specific to be justiciable."

[40] In point 14 of the Explanatory Memorandum, ECRI gives two examples. An example of temporary special measures designed to prevent or compensate for disadvantages linked to one of the grounds enumerated in the Recommendation: a factory owner who has no black employees among his managerial staff but many black employees on the assembly line might organise a training course for black workers seeking promotion. An example of temporary special measures designed to facilitate the full participation, in all fields of life, of persons designated by the enumerated grounds: the police could organise a recruitment campaign designed so as to encourage applications particularly from members of certain ethnic groups who are under-represented within the police.

[41] See Paragraph 8 of the Recommendation. The Explanatory Memorandum specifies that, "The obligations incumbent [on the public authorities] should be spelled out as clearly as possible in the law. To this end, public authorities could be placed under the obligation to create and implement 'equality programmes' drawn up with the assistance of the national specialised body [to combat racial discrimination]... The law should provide for the regular assessment of the equality programmes, the monitoring of their effects, as well as effective implementation mechanisms and the possibility for legal enforcement of these programmes, notably through the national specialised body. An equality programme could, for example, include the nomination of a contact person for dealing with issues of racial discrimination and harassment or the organisation of staff training courses on discrimination."

[42] See Point 27 of the Explanatory Memorandum.

[43] See point 34 of the Explanatory Memorandum relating to Paragraph 12 of the Recommendation.

achieve de facto equality in higher education and also in access to employment. One measure for promoting equal opportunities is, for example, to provide supplementary courses in the official language of a State for students whose native language is different, whether they are immigrants or members of a linguistic minority which has long been established in the State in question. This type of measure is generally greeted favourably because it does not involve any concrete advantage, since the starting point is different (in the example given here, the difference is as a result of people not speaking at home the language which is used in school). The effectiveness of such measures cannot really be assessed, although, as in the case of the promotion of the principle of equality, it is clear that they are useful.

c) Things become more complicated when it comes to compensating for a de facto inequality through more radical measures than those described in the two cases above. Such measures require a preliminary stage in which the de facto inequality is quantified, so that specific targets can be set in order to compensate for it, for example in the form of quotas. In addition, it should be noted that the expression "positive discrimination", which is the most controversial, is often placed in the same category as the establishment of **quotas**. Some people are in favour of positive action (of the type described in the two examples above) but against positive discrimination (such as the establishment of quotas to fulfil). In terms of equality between men and women, it would be possible, for example, in the case of a particular university degree, to calculate the number of women and men with this degree, in order to establish whether there is an imbalance. For example, if women, who represent 50% of society, only represent 15% of the people with this degree. On the basis of this analysis, it would be possible to set quotas for access to the course leading to this degree, requiring that at least 40% of the course is made up of women. The same reasoning could also be brought to bear in the case of a minority group, the aim being to ensure that the proportion of this group who hold this degree is equivalent to the proportion of this group in the overall population of the country. The establishment of quotas is applicable where there is a desire to achieve rapid and quantifiable results, but it often draws criticism from the section of the population which is over-represented to start with, which sees itself as suffering an injustice through such a system. Nevertheless, these types of quotas already exist – and not only for ethnic minorities in the United States.[49] In Switzerland, there is a Federal ordinance which aims to "promote improvement" in universities, stipulating that each university must in principle allocate 40% of certain posts (especially among teaching staff) to women.[50] In some cases this means that universities which hold a recruitment process for a post in an area where the number of women is lower than 40% refuse to accept applications from men. In Greece, a quota of 0.5% has been established in universities for the Muslim minority of Western Thrace. The first assessment of this measure is generally considered to be positive. It must be pointed out that, as a general rule, when a quota is established it is lower than the figure which would correspond to absolute equality (for example, 40% and not 50% for women). It is really about speeding up the process leading to absolute equality and not about establishing it completely.

4. EXAMPLES OF POSITIVE ACTION IN THE ACCESS TO AND SUPPLY OF GOODS AND SERVICES

The sphere of access to and supply of goods and services lends itself to positive action just as much as employment does. It may appear to be more difficult to impose positive action in an area where the private sector plays a major role, for example in property rental by private individuals. However, the vast majority of contracts linked to goods and services concern professional relationships and this certainly opens the door to positive action. For example, an estate agency commissioned to sell or rent a property for an individual should be able to play a part in eliminating discrimination in access to housing. Moreover, the service sector is particularly well suited for positive action because of the predominance of public authorities in the provision of services. In the wider sense, services include the police, education, health, social protection, social housing and culture etc., all of which are more or less the exclusive domain of the State. Thus it is easy to envisage a public body being required to take measures to compensate for a de facto inequality.

[44] See Point 34 of the Explanatory Memorandum relating to Paragraph 12 of the Recommendation.
[45] Law CXXV of 2003 on equal treatment and the promotion of equal opportunities, adopted on 22 December 2003.
[46] In pursuance of the Race Relations (Amendment) Act 2000. On this point, see other contributions in this publication.
[47] See in particular Article 2, paragraph 2 of the International Convention on the Elimination of All Forms of Racial Discrimination, which permits special measures which aim to ensure the enjoyment without restriction of fundamental rights for certain racial groups, provided that these measures are not maintained after the objectives for which they were taken have been achieved. A similar condition is imposed in Article 4.1 of the International Convention on the Elimination of All Forms of Discrimination against Women: "Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved". This Convention makes provision in Article 4.2 for the possibility of so-called permanent special measures i.e. irrespective of any time limits in relation to protecting maternity, because it is not really expected in this sphere that the issue of full equality between men and women will be resolved over time.
[48] See the joint initiative of the High Council on Integration and the Broadcasting Council (Conseil supérieur de l'audiovisuel), Annex 7 in the Annual report 2003 of the High Council on Integration to the Prime Minister, "The contract and integration".
[49] For a critical study of "affirmative action" in the United States, see John D. SKRENTNY, "Egalité devant l'emploi aux USA une politique frileuse et incohérente", in Hommes et Migrations, France-USA, Agir contre la discrimination, II - Méthodes et pratiques, N° 1246, November/December 2003, p. 28-43.

We shall provide a number of examples here of positive measure in the access to and supply of goods and services, in particular in relation to public services. One way of improving the situation with regard to racial discrimination by members of the police force is to recruit people into the police force who belong to ethnic groups which are vulnerable to discrimination. The result of such a measure will be to reduce the chances of people who belong to these groups suffering discrimination on ethnic grounds when dealing with the police. This is not so much because such persons may find themselves faced with a police officer from the same ethnic minority, but rather because the presence of ethnic minority officers will help to raise awareness of cultural diversity and the problem of racial discrimination among their colleagues who belong to the majority population. It is also important that the composition of the police force reflects that of society and the principle of different degrees of positive measures comes into play here. An information campaign might be mounted to encourage members of the under-represented groups to put themselves forward for the police recruitment process. In addition, entry to the service might be facilitated by establishing less strict or different conditions for people from a particular ethnic group for a certain time period. Finally, it would be possible to go further, by establishing a minimum recruitment quota for people from the particular ethnic minority. Another way of actively combating racial discrimination by the police is to use training to raise officers' awareness of the culture of a minority group. An introduction to the language of the minority population may also be a means of improving relations with the police and preventing cases of discrimination arising from communication problems.

The principle applied to the police can also be applied to positive action aimed at combating discrimination in access to care. Often all that is needed in order to avoid instances of discrimination is to raise awareness among care staff of the culture of minority groups. For example, it was noticed in France that, at certain hospitals, immigrants of African origin encountered hostility from care staff when they presented themselves at the accident and emergency department. When the issue was investigated, it turned out that the hostile reaction of the staff was due to the excessive use by some people of African origin of the accident and emergency services.[51] This excessive use did not arise because of a lack of consideration for the public service, but rather was the consequence of a habit acquired in the country of origin, where going to the doctor generally involves going to the free health centre where the region's only doctor is based. This habit, practised in France, leads to people going to the accident and emergency services for problems which could be resolved by a local GP, which would enable a better quality of care and less of a burden on the hospital emergency services. In an example like this one, once the problem has been identified, it is possible to establish better communication between the health centre and the people involved, so that they understand when they should go to the emergency services and when they should consult their GP. A member of staff could be designated and trained to do this. In this way, people of African origin who come to the accident and emergency department for valid reasons will not be confronted with exasperation and hostility from staff.

5. THE ROLE IN POSITIVE ACTION OF THE SPECIALISED BODY TO COMBAT DISCRIMINATION

In its *General Policy Recommendation no. 7*, ECRI suggests that the national specialised body to combat racism and racial discrimination (hereafter the specialised body) play a role in the development and supervision of positive measures.[52] Clearly, the specialised body can play a role in each of the measures described above, provided that it has the necessary powers and human and financial resources. Two levels of intervention can be identified in relation to positive action: action at national level and action on a case-by-case basis.

[50] Ordinance of the Swiss Federal Department of Home Affairs (Département fédéral intérieur helvétique) on contributions related to projects aimed at promoting improvement in cantonal universities during the academic years 2000/01 to 2003/04, of 12 April 2000, RS 414.204.201, 2000-1165, p.2097.
[51] See Alice Sedar, "La médecine confrontée aux migrants", Le Figaro, 14 February 2003, p. 12.
[52] See in particular Points 27 and 34 of the Explanatory Memorandum.

a) Positive action at national level

The specialised body can be charged with organising general awareness-raising campaigns on the issue of racial discrimination. It can provide information on the measures necessary to prevent and punish racial discrimination. Its role could be to monitor the situation of racial discrimination at national level by producing statistics, assessing the impact of positive actions taken and publishing annual reports, as well as compiling examples of best practice and codes of conduct for public bodies and/or private enterprises.

b) Positive action on a case-by-case basis

Depending on its resources, the specialised body can adopt a case-by-case approach which will allow it to make relevant adjustments for individual sectors or even individual companies.

The specialised body could launch a campaign to encourage private companies, such as night clubs for example, to sign up to a charter of good practice. The night club managers could sign the charter and thereby make a public commitment to preventing and combating racial discrimination in their establishments.[53] Signing the charter could entitle them to display a symbol of their commitment at the entrance to their establishments.

The specialised body could also provide training aimed at the staff of particular companies, for example estate agencies, which would help to raise awareness among staff who come into contact with the buyers and sellers about the dangers of racial discrimination and better ways of preventing it. The training could also cover cultural diversity to which the providers of goods and services must adapt.

It would also be desirable to provide that the specialised body can be approached by companies to carry out a review of equality in the company. The expertise of the specialised body should help to identify obstacles to equal opportunities and propose concrete solutions to overcome these obstacles.

It goes without saying that in the States where public and private bodies are obliged to promote equality the specialised body should play a supervisory role. It should even be in a position to impose sanctions or to take legal action against an organisation which does not comply with its obligations. In order to ensure the effectiveness of the specialised body's role, whatever it may be, in relation to positive action, it is important that it is enshrined in the legislation and that the body is given all the resources necessary for it to fulfil its remit successfully.[54]

[53] This type of "good conduct" charter was the subject of a campaign by the French organisation Mouvement contre le racisme et pour l'amitié entre les peuples (MRAP – Movement against Racism and for Friendship between Peoples), which encouraged people to sign charters in areas such as access to leisure and access to employment. See the MRAP website: http://www.discriminations-racistes.org/.

[54] On this subject, see the ECRI General Policy Recommendation no. 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level. For the text of the Recommendation and information about ECRI, please go to the ECRI website (www.coe.int/ecri) or contact the ECRI Secretariat (ECRI Secretariat, Directorate General of Human Rights – DG II, Council of Europe, F - 67075 STRASBOURG Cedex, Tel.: +33 (0) 3 88 41 29 64, Fax: +33 (0) 3 88 41 39 87, E-mail: combat.racism@coe.int).

POSITIVE ACTION IN GREAT BRITAIN – THE RACE EQUALITY DUTY

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Positive Action

The Race Relations Act 1976 allows for Positive Action under Section 35 to meet the special needs of people from particular racial groups in relation to training, education, welfare, or other benefits. For example, an organisation may find that it has a high proportion of employees of African origin but none in more senior posts – the organisation could offer a management training programme aimed specifically at African staff. As another example, an ante-natal service may cover an area with a large Bangladeshi population but have very few Bangladeshi women using the service - the organisation could provide an outreach worker to encourage and help Bangladeshi women to access the service. In both these cases, the organisation would have to regularly review whether there was continuing under-representation or special needs in order for positive action measures to continue, as measures are supposed to be temporary in response to disadvantage.

Race Equality Duty

An amendment to the Race Relations Act in 2000 introduced a new 'positive duty' on public authorities. Under Section 71 of the Act, listed public authorities in carrying out their functions shall have due regard to the need to:
- eliminate unlawful racial discrimination
- promote equality of opportunity
- promote good relations between people of different racial groups.

'Listed' public authorities includes all main central, regional and local government departments and agencies and all main public services, such as education, health, and criminal justice agencies.

Context for the duty

An independent Inquiry into the police investigation of the murder of black teenager Stephen Lawrence was highly critical and caused widespread attention to and acknowledgement of the issue of institutional discrimination. The Inquiry report gave the following definition:
"Institutional racism consists of the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people."

Many communities had lost faith 'in the system' and there was a clear need for public authorities to rebuild trust and to demonstrate fairness in the way that they operate – in providing services, in their decision making, in employment practices. The government decided that legislation was needed to systematically address these issues, through changes to the Race Relations Act. This coincided with major public sector reforms and provided an opportunity to include 'fairness' in the modernisation process.

Principles of the duty

Obligatory: All listed authorities, approximately 43,000, have had to comply with the duty since April 2001. The duty is obligatory and enforceable.
Relevant: Race equality and therefore the duty will be more relevant to some functions of public authorities (e.g. housing provision) than it is to others (e.g. internal financial procedures), i.e. it will affect people more.
Proportionate: The level of attention or 'weight' given to race equality should be proportionate to how important or 'relevant' it is in relation to a particular function or activity.

Complementary: The three parts of the duty (i.e. eliminating discrimination, promoting equality, promoting good relations) support each other and may often overlap. However, they are different and public authorities must consider each individually to ensure that it effectively meets the duty.

Implementation of the duty

There are requirements on public authorities to take certain steps in order to meet their duty. These have been enforceable since 2002, some aspects directly by the CRE and some via the Courts, and include the publication of a race equality scheme (or policy), and ethnic monitoring and other specific procedures. There is an expectation that authorities will ensure that race equality considerations are central to their business processes and planning ('mainstreaming'), and that an evidence based approach will be used in the development and review of policies or services. Implementation of the duty should focus on results for communities ('outcomes'): for example, minimising equality gaps in service delivery; parity in customer satisfaction and confidence levels; improvement in community relations.

CRE approach

In order to ensure effective implementation of the duty, the CRE has:

- produced both a statutory code and additional non-statutory guidance documents to help public authorities understand what they need to do;
- run seminars to raise awareness among and gain the support of senior level public sector managers (many of these events were targeted towards specific sectors, such as Health, Criminal Justice, Education, etc.);
- provided training for and materials for NGOs so communities know what they should expect from public authorities;
- produced leaflets for frontline public sector staff and for the general population explaining legal rights;
- promoted information through media work with both general and specialist media;
- worked with Inspectorate bodies (see detail below);
- conducted or commissioned research (see detail below);
- undertaken a range of specific projects or programmes, such as supporting good practice networks, or, the Beacon award scheme for those local authorities demonstrating excellence in their approach to race equality.

The initial approach concentrated mainly on providing advice and support to help authorities understand what they need to do, with enforcement approaches being considered where authorities are not acting on the advice.

CRE work with Inspectorates

All main parts of the public sector in GB are subject to audit, inspection and regulation by national level agencies, which are themselves subject to the duty. The CRE has worked with Inspectorates for many years but the level of this work has shifted significantly as a result of the duty, and the importance of the role that Inspectorates can play in ensuring it succeeds.

Thematic inspections are useful as they can focus solely on race equality addressing all issues in depth. The CRE has also worked to ensure that race equality is considered as a feature of all inspections. The CRE produced a guidance document to provide a 'framework' for Inspectorates to use, provided expert advice and agreed Memoranda of Understanding with individual Inspectorates. These Memoranda set out the roles and responsibilities of the Inspectorate and of the CRE respectively, covering topics such as how and when information will be shared and the powers available to each organisation.

The CRE has also been involved in negotiation to ensure that public sector performance management systems, and national and local targets reflect good race equality practice. (Some of these are set by central government departments, others by the Inspectorates themselves.)

Research

The CRE has been involved in research over many years in order to:
- establish an evidence base proving discrimination exists and describing its nature
- learn about public attitudes and public knowledge
- to contribute to sharing and disseminating good practice.

All of these contribute to informing the CRE's approach and advice in supporting implementation of the duty.

The CRE also commissioned research specifically to establish a baseline as to the level of compliance with the duty over the first year. The research found that among public authorities:
- the focus to date had been on setting up processes rather than focusing on results;
- 70% said the duty had produced benefits in improving policy making and service delivery;
- the top third show that the duty is a lever that works in steps to achieving race equality;
- 30% have no outcomes identified (this rises to over 50% in the case of schools).

Taking the agenda forward

Within the CRE a team of 4 staff are advising public authorities on implementing the positive duty. 6-8 policy specialists are looking at how the duty is affecting the health sector, education, etc. The CRE will work to ensure:
- greater focus on outcomes and delivery;
- monitoring of the implementation of the duty to identify non-compliance or failings, and to identify examples of good practice;
- further progress with other Inspectorates and regulatory bodies;
- that race equality is built into performance management regimes;
- that the duty is an effective lever to deliver race equality throughout an authority, and for those who receive services.

DISABILITY AND 'REASONABLE ADJUSTMENT' IN GOODS AND SERVICES IN GREAT BRITAIN

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1. INTRODUCTION

The British Disability Discrimination Act 1995 (DDA 1995) was the result of years of campaigning by disability rights activists, and was passed only after 17 private member's bills had been introduced to no avail. The Act covers employment, access to goods, facilities and services, premises, education and transport in so far as it allows the government to set minimum standards for accessible trains, coaches and buses. The basic non-discrimination duties, employment rights and first rights of access came into force on 2 December 1996. The first phase of reasonable adjustment relating to goods, facilities and services – the part of the Act this presentation addresses - came into force on 1 October 1999, and the final phase of 'reasonable adjustment' will come into force in October 2004. The government has, however, accepted that the 1995 Act is insufficient and has introduced a draft Disability Discrimination Bill 2003 to fill many of the gaps. This draft bill includes the introduction of a duty on public bodies to promote equality of opportunity for disabled people at every stage in their policy and decision-making.

2. DEFINITION OF DISCRIMINATION

Under section 19(2) of the DDA 1995, the Act applies to anyone who is a service provider, which is defined as being "…concerned with the provision, in the United Kingdom, of services to the public", with or without payment. This may also include websites. It excludes anything in so far as it consists of the use of any means of transport, public functions and private clubs. If the new bill is adopted, private clubs and public functions will be included in the DDA 1995. Education is dealt with by separate provisions.

Discrimination is defined under the DDA 1995 in two ways: treating a disabled person less favourably for a reason relating to his disability than you would treat others to whom that reason would not apply, and where you cannot show that the treatment in question is justified (s20(1)). The treatment can only be justified if it meets one of the strict conditions laid down in the Act. Discrimination also occurs when the provider of services fail to comply with the reasonable adjustment duty (s21) without justification. Because discrimination can occur where the treatment is "for a reason relating to disability", it is broader than the traditional "direct" discrimination approach. There is no concept of indirect discrimination, but the reasonable adjustment provisions addresses the barriers which indirect discrimination would normally deal with.

3. REASONABLE ADJUSTMENT DUTY

There are three parts to the reasonable adjustment duty. These relate to: policies, procedures and practices, physical feature, and the provision of auxiliary aids and services. According to s21 of the DDA, reasonable steps must be taken to change practices, policies or procedures that make it impossible or unreasonably difficult for a disabled person to use a service. For example, a 'no dogs' policy in a restaurant should be altered to accommodate the needs of blind persons with guide dogs, or a practice of requiring a driving license as a means of identification would need to be waived. In the case of physical features that make it impossible or unreasonably difficult to use a service, reasonable steps must also be taken to remove or alter these, provide a means of avoiding them, or provide a reasonable alternative method of service. Finally, reasonable steps must be taken to provide auxiliary aids and services if it would enable or make it easier for a disabled person to use the service, for example, the

provision of information on tape, in Braille, through a sign language interpreter, or assistance in a supermarket for someone who needs assistance to do their shopping.

The reasonable adjustment duty is *anticipatory* in that a service provider cannot simply wait for a disabled person to approach them for the duty to be triggered. Service providers need to consider the barriers which disabled people face in advance of their approaching them, and they need to consider ways of removing the barriers. The Disability Rights Commission have been able to rely on this aspect of the duty as a legal basis for promotional work. The duty is *evolving*, in other words, what is a reasonable adjustment may change over time, as technology or circumstances change. The duty is enforceable when it is "impossible or unreasonably difficult for a disabled person to use the service", which means - according to the Code of Practice referred to below - considering the time, inconvenience, effort, discomfort or loss of dignity involved in using the service and whether this would be considered reasonable by anyone else having to endure similar difficulties.

With the exception of the employment provisions, the legislation does not give any guidance as to what is 'reasonable'. The DRC has produced a Code of Practice on Rights of Access to Goods, Facilities, Services and Premises, explaining the legal rights and requirements under the DDA 1995. The Code has to be taken into account by courts and tribunals where relevant, and so is a statutory code. It is also a critical source of advice for service providers seeking guidance on how to ensure they are making reasonable adjustments. The code lists a number of factors which are taken into account in deciding whether the adjustment is 'reasonable'. These include the effectiveness of the step taken, its practicability, financial and other costs of making the adjustment, the extent of any disruption caused, the extent of the service provider's financial and other resources, the amount already spent on adjustments, and the availability of financial or other assistance.

4. THE WORK OF THE DISABILITY RIGHTS COMMISSION IN RELATION TO THE REASONABLE ADJUSTMENT DUTY

The Disability Rights Commission Act 1999 led to the establishment of the Disability Rights Commission (DRC) in April 2000. The DRC has the competency to inform, advise and assist individuals. The DRC offers advice to service providers on how to meet the reasonable adjustment duty.

The DRC provides a helpline and produces publications, aimed at both disabled people and service providers. It develops and promotes good practice through its practice development department, which, for example, assists particular sectors or service providers (e.g. hairdressers) in drafting guidance. The DRC also runs programmes and campaigns to influence public attitudes, e.g. open4all in October 2004.
It provides a casework and conciliation service. Conciliation is provided free of charge to both the client and the defendant. In order that the conciliation is entirely independent it is contracted out to a professional conciliation service, the costs of which are met by the DRC. The conciliation may be over the phone or the parties may meet in person, and the results are binding on both parties. Approximately 80% of conciliation is successful. Awards are usually lower than would be received through the courts, but this is a reflection of the fact the interest of both parties is in finding a resolution to the problem without going through the legal process. Usually the conciliation results in a change in policy on the part of the service provider.

The DRC supports legal cases, conducts formal investigations and enters into binding agreements. It can seek injunctions for persistent discrimination and produces statutory codes of practice. The last research carried out into the operation of the Act indicated that, so far, 53 cases have been brought in relation to discrimination in the provision of or access to goods and services, compared to the some 9000 cases that have been brought before employment tribunals. A significant reason for the discrepancy between jurisdictions is the differences in procedures

between the employment tribunals – where employment cases are brought - and the county courts, where goods and services cases are brought. In county courts claimants must pay fees to bring their cases, there is a much more complicated procedure to deal with, and judicial awareness of disability and the DDA 1995 is low. DRC would therefore like to see tribunals deal with cases involving goods and services as well as employment. A high profile example of a goods and services case is the one which the DRC very recently supported brought against Stansted Airport and Ryanair by a disabled man who has cerebral palsy and arthritus so is unable to stand for considerable periods of time and needs a wheelchair when moving through crowds and queues. He had been charged for use of a wheelchair to get him to the plane. The court held that by not providing a wheelchair free of charge, Ryanair had failed to meet their duty under the DDA to make a reasonable adjustment for the man. The court awarded £1336 in compensation, which covered the original cost of hiring a wheelchair (£36.00), the purchase of a wheelchair by Mr Ross (£300) and injury to feelings (£1,000). The court held that a wheelchair also constitutes 'auxiliary aid' under the DDA. The DRC has considered bringing a group legal action against Ryanair, if it fails to pay compensation to fifty disabled people who have complained about the wheelchair charge. Ryanair have appealed the case, though, and the outcome of the appeal, to be heard in November 2004, is awaited.

COMMUNITY PERSPECTIVES ON PROMOTING EQUALITY IN EUROPE: EXPERIENCES OF THE EUROPEAN MONITORING CENTRE ON RACISM AND XENOPHOBIA (EUMC) UK SECRETARIAT

ANJA RUDIGER, EXECUTIVE CO-ORDINATOR, EUMC UK SECRETARIAT

The remit, objectives and activities of specialised equality bodies are shaped by public and political processes and by the involvement of many different stakeholders. As major actors in the struggle for race equality and a prime target group of discrimination, black and minority ethnic communities should have a key voice in informing the work of specialised bodies. Where these bodies hold a broader equality brief, other disadvantaged groups have a similar role to play.

The UK Secretariat of the European Monitoring Centre on Racism and Xenophobia (EUMC) has compiled a set of recommendations from black and minority ethnic communities to specialised bodies, which emerged from regional and national Roundtables organised over the past few years by the UK Secretariat. Attended by a wide and varying range of participants, these Roundtables issue concrete recommendations to the EUMC and to public authorities at all levels, including specialised bodies.

The 'communities' participating in the Roundtables consist of people working at the grassroots to fight discrimination and who are themselves affected by discrimination. Britain has a large black and minority ethnic community and voluntary sector, made up of many thousands small community groups and organisations engaged in the struggle for race equality. Very often these groups are not included in policy debates or decision-making, even though they are directly affected by the outcomes. Therefore, it is vital that specialised bodies take community perspectives into account and work inclusively.

10 RECOMMENDATIONS FOR SPECIALISED BODIES FROM EUMC UK ROUNDTABLES (2000-2003)

I. PARTICIPATION

Recommendation 1: Increase the involvement of community organisations

Equality initiatives at national and EU level must be developed in co-operation with organisations led by disadvantaged groups themselves, not simply on behalf or for those groups. To be serious about equality means to work inclusively at all times. Promoting equality of opportunity, equality of treatment, and possibly even equality of outcome, cannot be done in a paternalistic way.

Specialised bodies should put in place a distinct and systematic mechanism that ensures the active involvement of the communities they aim to support. This should include some form of direct dialogue and the facilitation of participatory processes. It is important that these processes are flexible and tailor-made to match the needs of different communities.

For example, the CRE is unique among British specialised bodies to have a local network of Racial Equality Councils (RECs). It needs to work much more closely with the RECs and support them in holding local authorities accountable.

The involvement of community organisations in national and international affairs should also be strengthened. Specialised bodies, and organisations such as the EUMC and ECRI, could help build networks that link local organisations to those working at national and EU level, and to those in other Member States.

Recommendation 2: Build capacities of community organisations and support access to funding/resources

Capacity building is still needed for many organisations from disadvantaged communities. Britain has one of the most developed black and minority ethnic voluntary sectors in Europe, yet more targeted support is needed for this sector. Measures should include:

- Support in making funding procedures from EU, national and local government sources more flexible, accessible and transparent.
- Promotion of cross-community partnerships, e.g. in implementing EU-funded projects, based on fair and equal governance arrangements, possibly guided by local 'compacts' or charters that regulate relations between statutory and voluntary sector.
- Development of accessible support systems by local authorities for black and minority ethnic organisations and businesses to help them pursue transnational collaborations.

Recommendation 3: Improve consultation with communities

Over the last few years Britain has developed a sound culture of consultation on public policymaking. It was one of the few countries that consulted widely on the implementation of the EU anti-discrimination Directives. However, at grassroots level the impression persists that consultation is often restricted to certain stakeholders or known 'community leaders' and that the proliferation of consultation exercises does not increase actual community involvement. Doubts exist over whether recommendations emerging from consultations have a real impact on decision-making, or whether decisions have already been taken prior to consultation. Specialised bodies such as the CRE are not seen to be supporting a culture of meaningful consultation.

Proposed guiding principles for effective and credible consultations:

- clarity about what is consulted on, how and with whom
- designed to achieve a clear aim
- clear and straightforward content
- cover substantive issues, not just technicalities
- recommendations should be acted upon
- wherever possible, consultations should be carried out by local people rather than national contractors
- ensure inclusiveness and take place at all levels
- provide support to enable the participation of grassroots organisations with limited resources

Recommendation 4: Facilitate information exchange and networking

Specialised bodies, and the EUMC and ECRI, need to strengthen their efforts to facilitate transnational information exchange. Best practice should be shared across Europe, especially on innovative measures such as Britain's positive duty on public authorities to promote race equality. This means specialised bodies such as the CRE need to enhance their international focus and share experiences with similar bodies in other Member States. They must ensure that the information produced and shared is relevant to the situation on the ground and accessible to grassroots organisations.

Measures could include:

- Facilitating a broad and inclusive transnational debate on the implementation of the anti-discrimination Directives
- Providing clear information to the public on new legislative requirements, particularly to employers and those affected by discrimination
- Creating and promoting regional, national and European project registers to encourage collaborative working

II. POLICY ACTION

Recommendation 5: Advocate harmonisation of legal provisions to achieve full and equal protection for all Article 13 equality grounds

The two anti-discrimination Directives should be implemented in an integrated way, exceeding minimum requirements, so that national legislation addresses the needs of all equality strands, as well as of people affected by multiple discrimination. Specialised bodies should push for an extension of the provisions of the Race Equality Directive to the groups covered by the Employment Directive, for example by extending the goods and services provision to all equality grounds. A single equality law that covers all anti-discrimination grounds could provide a clear common standard. Britain needs to introduce at least some form of religious discrimination legislation that extends beyond the employment sector. In a survey of public sector bodies the UK Secretariat also found significant support for extending the public duty to promote race equality to all equality grounds.

Recommendation 6: Promote target setting

Specialised bodies should encourage, or indeed require, all public authorities, and ideally also the private sector, to set specific, quantitative equality targets. Equality considerations need to be mainstreamed into all programmes, policies and practices, and every organisation should have an equal opportunities policy. This would require ethnic monitoring, and a regular review of all policies and practices to ensure that they promote equality, are non-divisive and foster cohesion rather than segregation. Setting a standard for performance could help making organisations more accountable. The EUMC has issued a similar recommendation to the European Commission.

Recommendation 7: Promote positive action

Structural discrimination and institutional racism must be tackled effectively. Therefore, the implementation of the Racial Equality Directive should also include positive action provisions to tackle under-representation of people from black and ethnic minority communities in public institutions and in senior positions in the private sector.

For example, requiring equal opportunities measures as part of contract compliance principles could help ensure that contracted staff reflect the composition of the community served. As a starting point the CRE has begun to advise local authorities on including equality principles in public procurement.

III. PROSECUTION

Recommendation 8: Enforce compliance, based on robust monitoring

Specialised bodies need to have a strong and effective enforcement role. They should be able to carry out audits and formal investigations to hold institutions and companies accountable and achieve change. Effective remedies and sanctions must be available widely and at all levels. Enforcement must be based on robust and systematic monitoring of compliance, undertaken by specialised bodies, but also by the EUMC and the European Commission, in conjunction with NGOs. Monitoring must be for a purpose, i.e. to enable action against non-compliance.

Recommendation 9: Ensure accessibility of support and legal redress

Remedies can only be effective if victims can access them and receive prompt advice and support. This requires the availability of adequate resources, such as legal aid, but also direct support from the specialised bodies. Services and information provided by the specialised bodies must be easily accessible to a wide range of people.

IV. PUBLIC LEADERSHIP

Recommendation 10: Show leadership in public debates

Specialised bodies, and the EUMC, should become more pro-active in setting the tone of public debates at national and EU level to combat the rise of racism and xenophobia. The populist appeal of xenophobic rhetoric, so often used by political leaders, must be counteracted. Specialised bodies, and the EUMC, are well placed to tackle national and transnational racist actions and attitudes. For example, all bodies responsible for race equality should monitor and address racist elements in immigration and asylum policies and debates.

COMMENTS AND DISCUSSION

POINTS RAISED BY PARTICIPANTS AT THE LONDON MEETING

Goods and services

- Goods and services are still a very new area in anti-discrimination under EC law and national law in EU Member States. In many States the law reflects the EC directives by protecting against discrimination in goods and services only in relation to racial and ethnic discrimination.
- The UK has outlawed discrimination in both employment and in goods and services on the grounds of sex and race since the mid-1970s. Discrimination on the grounds of religion and sexual orientation has only been subject of legislation since 2003, when secondary legislation (regulations) was adopted to transpose the Framework Directive covering only employment and occupation.
- The Swedish anti-discrimination legislation in penal law is viewed as fairly weak in regard to goods, facilities and services. Roma over the years have been the main victims in such cases of discrimination, for whom entry into restaurants, clubs, as well as access to housing, can be difficult. The civil law against discrimination, based on the EU directives, is much better and gives powers to the Ombudsman to take action in court against perpetrators. It is hoped that the powers of the Ombudsman against Ethnic Discrimination in relation to employment will be extended to cover discrimination in goods, facilities and services: these powers require every employer to take measures to promote equality in the workplace by creating equal opportunities and rights in practice in order to counteract and prevent discrimination. If they fail to do so, the Ombudsman can, on penalty of a civil fine, order them to fulfil their duties. Since 2002 the same duties have applied to universities on all grounds covered by the EU directives except age. However the law here is a dead letter, since there are no sanctions. There has been an equivalent duty in relation to gender equality since 1980.
- In the Netherlands housing, welfare, healthcare, culture and education have been brought under the definition of goods and services in relation to the Equal Treatment Act. Under the Equal Treatment Act 1994 public services were not included, but these are included in the amended Equal Treatment Act (amended April 2004) as far as they deal with social protection, including social advantages and social security. However, complaints of discrimination against the police are not covered by the Equal Treatment Act and must be referred to the National Ombudsman. In Austria too the National Ombudsman ("Volksanwaltschaft") keeps check of public service, including the police. Although in the UK in the past it was questioned whether some police powers (e.g. stop and search) fell within the definition of goods and services, today the police are considered as a whole as providing a service.
- Slovakia has some limited anti-discrimination clauses in various laws but an Anti-Discrimination Bill currently in parliament will extend the country's powers in this area. Currently, the only possible legal way to prevent discrimination in the area of goods, facilities and services is through the Consumer Act, which states that every customer should enjoy the same level of treatment.
- In Portugal, where Roma and Africans are often refused entry into restaurants and bars and there have been cases of violence by the police in handling such minority groups, it is often hard to prove racial discrimination, especially in equal access to goods and services. The legal process is also very slow although attempts are being made to change this.
- In Belgium findings of discrimination in goods and services in cases brought by the Centre for Equal Opportunities and Opposition to Racism have concerned overt discrimination in access to nightclubs and housing, e.g. estates agents found to discriminate on the instruction of the house owner. Until 2003 only criminal law could be invoked in such cases, under which proving discrimination was very difficult. It is hoped the 2003 civil non-discrimination law will make this easier as civil law anti-discrimination procedures are faster, shorter and free from the necessity to prove intent or guilt.
- It was suggested administrative law should be used as an alternative to civil and criminal law, e.g. stripping bars of their license to sell alcohol.

Positive action

- In order to undertake positive action measures, a disadvantaged group must be identified and it must be possible to determine when the disadvantage has been eradicated. Difficulties to do so may be encountered when no kind of ethnic monitoring is permitted. In Austria a national census including ethnic monitoring was undertaken using self-identification methods, but the results were not satisfactory, as many people refused to participate or declare themselves to be member of a minority. In Belgium, methods have been developed in the Flemish community, but both the Walloon and Flemish communities remain sceptical about ethnic monitoring. What is to be feared is that the extreme right play on results of ethnic monitoring in a negative way, for example in placing the blame for crime levels. On the other hand, it is felt in the UK that it is better to have an informed debate which monitoring allows. It was noted that new systems using computers to filter self-identification forms filled in by employees, rather than human hands, is proving to be a successful, less invasive, alternative. ECRI and the 2001 World Conference against Racism in Durban both recommend ethnic monitoring as a tool to help combat racism.
- In Finland the law transposing the EC Directives, in force from 1 February 2004, allows for positive action and places an obligation on state and municipal public authorities to promote equality in all their activities. They must draw up a plan on how they will do this, though the legislation does not provide for enforcement of this obligation.

Disability and reasonable accommodation

- In relation to disability discrimination, the question arose as to how to deal with the problem of lack of resources to fund reasonable accommodation measures, which may lead to long delays in achieving the end sought. It was suggested that even if an employer or service provider is unable to make all reasonable adjustments immediately, they should be putting resources aside to be able to do so in the future.
- Given the restricted scope of the Framework Directive, there is concern that in provisions on reasonable accommodation some countries are distinguishing between measures required in the context of vocational training, which is covered by the directive's scope, and measures in the context of general education, which the directive does not cover. This has led to some Dutch educational institutes that provide both general and vocational training distinguishing between the measures they take to accommodate the needs of disabled students in one or the other type of education.
- In Great Britain there is no requirement to provide reasonable adjustment for pre-sixteen year olds, whereas for post-sixteen year olds the government is channelling a lot of resources into making reasonable adjustments in higher education.
- In several countries the adjustment of historic buildings to accommodate the needs of disabled people is a contentious issue, as exemptions are sometimes granted. The British Disability Rights Commission works with planning authorities in Great Britain to ensure they know the ramifications of their decisions, as they are under a legal obligation to take the needs of disabled people into account.

Independence of specialised bodies

- Specialised bodies must be independent in carrying out their functions. Usually the specialised body is dependent on the state budget but this should not prevent independence of activity. The budget may be allocated by the parliament or by the government, and it is felt that there are pros and cons to both of these options. The body should be established by law, although this is not in itself a guarantee, as was seen in Denmark when the Board on Ethnic Equality was closed at the end of 2002 despite being established by law in 1997. Ideally the mandate of the body should also be established by law. If the body is placed within a ministry, it is advisable to ensure a guarantee of independence in the exercise of its functions is anchored in the statute setting up the body.
- Independence also means remaining neutral of other parties such as employers' associations and NGOs, but that does not prevent the specialised body from working closely with any of these parties, for example it may wish to train them, share information with them, or implement their views.

- The recommendations for independence laid down in ECRI's General Policy Recommendation No. 2 on Specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level, adopted on 13 June 1997, and the UN Commission on Human Rights' Paris Principles, adopted in 1992, on the status, powers and functioning of national human rights institutions were recalled.

Finally, it was suggested that, based on the work done by ECRI and the EUMC, there is more understanding of the crossover between racial and religious discrimination at the European level than at national level. The idea of further legislation on religious discrimination at EU level was discussed. There are mixed views as to whether the time is right to introduce more EC legislation at this stage. The considerable sensitivity of issues of discrimination relating to religion means the issues must be extensively discussed first.

PROGRAMME

THURSDAY, 29 JANUARY 2004

9.00-9.15 Welcome and introduction

9.15-10.30 Goods and Services: Setting the scene
Colm O'Cinneide, Faculty of Laws, University College London

Role of the specialised body in tackling discrimination:
- CRE legal/enforcement approaches, Razia Karim, Head of Legal Policy, CRE
- CRE promotional approaches, David Zilkha, Senior Policy Officer, CRE

11.00-12.00 Plenary discussion and Presentation on project: Information exchange

13.45-14.15 Short case study presentations outlining discrimination issues and how specialised bodies can tackle them:
i) Access to finance for ethnic minority businesses/individuals, Sonny Tank, Senior Policy Officer, CRE
ii) Ethnic minority experience of the Police, Phil Pavey, Senior Policy Officer, CRE

14.15-16.00 Workshops

16.30-17.30 Plenary discussion

19.30 Dinner

FRIDAY, 30 JANUARY 2004

9.10-10.30 Positive action: setting the scene, Claudia Lam, ECRI Secretariat

Positive action in Great Britain, Lisa King, Head of Public Duty Policy, CRE

Disability and 'reasonable accommodation', Catherine Casserley, Senior Legislation Advisor, Disability Rights Commission, Great Britain

11.00-12.00 Plenary discussion

14.00-14.30 Short case study presentations
Community perspectives on promoting equality in Europe: experiences of the EUMC UK Secretariat, Anja Rudiger, Executive Co-ordinator, EUMC Secretariat

14.30-15.45 Plenary discussion

15.45-16.45 Future of the project

Closing remarks

PARTICIPANTS:

Austria:
Sandra Konstatzky, Ombud for Equal Employment Opportunities
Ingrid Nikolay-Leitner, Ombud for Equal Employment Opportunities

Belgium:
Dirk De Meirleir, Centre for Equal Opportunities and Opposition to Racism
Laurent Jadoul, Centre for Equal Opportunities and Opposition to Racism

Cyprus:
Eliza Savvidou, Office of the Commissioner for Administration (Ombudsman)

Denmark:
Mandana Zarrehparvar, Danish Institute for Human Rights

Finland:
Mikko Puumalainen, Ombudsman for Minorities

Greece:
Chryssi Hatzi, Ombudsman's Office, Human Rights Department

Hungary:
Eszter Regényi, Office of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities

Ireland:
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Brian Merriman, Equality Authority

Italy:
Mario Serio, Ministry of Equal Opportunities

Netherlands:
Edith Brons, Equal Treatment Commission
Nurcan Günes, Equal Treatment Commission
Art Hendriks, Equal Treatment Commission
Marcel Zwamborn, Equal Treatment Commission

Norway:
Ella Ghosh, Centre for Combating Ethnic Discrimination

Poland:
Lidia Goldberg, Secretariat of Government Plenipotentiary for Equal Status for Women and Men

Portugal:
João Figueiredo, High Commissioner for the Immigration and Ethnic Minorities

Romania:
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Slovakia:
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Viera Kusendová, Ministry of Labour, Social Affairs and Family, Dept. of Equal Opportunities and Anti-discrimination

Spain:
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David Zilkha, Commission for Racial Equality

Council of Europe:
Claudia Lam, Secretariat of the European Commission against Racism and Intolerance

Migration Policy Group:
Isabelle Chopin
Janet Cormack
Jan Niessen

TOWARDS THE UNIFORM AND DYNAMIC IMPLEMENTATION OF EU ANTI-DISCRIMINATION LEGISLATION: THE ROLE OF SPECIALISED BODIES

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* ('Framework Directive', prohibiting discrimination on the grounds of religion or belief, disability, age and sexual orientation) enhance the potential to combat discrimination in the European Union. These compliment the existing legislative programme on sex discrimination, which was most recently added to by *Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.* All EU Member States required legislative change to ensure compliance with these Directives.

Under Article 13 of the Racial Equality Directive, a specialised body (or bodies) must be designated for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies that have a wider brief than racial and ethnic discrimination. Article 8a of Directive 76/207/EEC as amended by Directive 2002/73/EC requires the same in relation to discrimination on the grounds of sex. The bodies' tasks are to provide independent assistance to victims of discrimination, conduct independent surveys on discrimination, and publish independent reports and make recommendations on any issue relating to such discrimination. Many States have thus been faced with the challenge either of establishing a completely new body for this purpose, or revising the mandate of an existing specialised body.

The project *Towards the uniform and dynamic implementation of EU anti-discrimination legislation: the role of specialised bodies* is funded by the European Community Action Programme to Combat Discrimination (2001-2006). It creates a network of specialised bodies with the objective of promoting the uniform interpretation and application of the EC anti-discrimination directives, and of stimulating the dynamic development of equal treatment in EU Member States. It promotes the introduction or maintenance of provisions that are more favourable to the protection of the principle of equal treatment than those laid down in the Directives, as allowed under Article 6(1) of the Racial Equality Directive and Article 8(1) of the Framework Directive. The partners of the project are the Ombud for Equal Employment Opportunities (Austria), the Centre for Equal Opportunities and Opposition to Racism (Belgium), the Equality Authority (Ireland), the Equal Treatment Commission (Netherlands, leading the project), the Ombudsman against Ethnic Discrimination (Sweden), the Commission for Racial Equality (Great Britain), the Equality Commission for Northern Ireland, and the Migration Policy Group (Brussels).

The project provides a platform for promoting the exchange of information, experience and best practice. Specialised bodies from other existing and acceding EU Member States are also participating in the activities of the project.

This is the report of the fifth in a series of 7 experts' meetings conducted under the project, which was hosted by the Commission for Racial Equality (CRE) in London on 29-30 January 2004. The theme of the meeting was *Combating discrimination in Goods and Services*. The four previous publications in this series are *Proving Discrimination, Protection against Discrimination and Gender Equality: how to meet both requirements, Equal Pay and Working Conditions,* and *Discrimination in Working Life – Remedies and Enforcement.*

CGB Commissie Gelijke Behandeling
THE EQUALITY AUTHORITY
Equality Commission FOR NORTHERN IRELAND
COMMISSION FOR RACIAL EQUALITY
BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT UND GENERATIONEN
Anwältin für Gleichbehandlungsfragen