LAW AS AN INSTRUMENT OF SOCIAL CHANGE – THE RACE RELATIONS ACT (RRA) OF 1976

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Abstract

The thesis examines to what extent law can be an instrument of social change with reference to the RRA 1976. It is argued that change to society through legal reform is a very slow process because of the limitations placed upon law. The study was conducted partly by theoretical analysis and partly by two empirical studies. Firstly, an analysis of the question of rights and judicial interpretations are addressed. Then the sociological and legal theories of race and ethnicity are discussed. An historical consideration of legislative intervention in race is explored to ascertain the politico-legal aspect of race legislation in the 1960's and 1970's. The research also identifies the limitations of the RRA 1976 in various areas with particular emphasis in relation to employment.

The aim of the first empirical study was to explore the current limitations of the law to prevent race discrimination and to investigate discriminatory advertisements and pressure cases under Sections 29, 30/31 RRA 1976. The extent of compliance with equal opportunity policy was ascertained by the impact on employers, as a result of either legal proceedings against them or by being reported to the CRE.

The second empirical study surveyed Industrial Tribunal cases throughout England, Wales and Scotland to ascertain inconsistencies in their performance. This survey is supplemented by the observation of race cases at Tribunals. The reforms to race legislation and the future of the CRE are analysed in effecting changes to society. Finally the RRA is compared to the Health and Safety Act and the anti-discrimination race laws in Europe The thesis established that law can be an instrument of social change but at a very slow pace. The empirical study on Industrial Tribunals reached rather positive conclusions on effecting changes in society. The CRE must rely heavily on the political and judicial will to bring about the transformation of society. If law can embrace sociology and bring about change, then law could become an effective machinery. If the foundations for changes are firmly in place, then I believe that the RRA 1976 can play a significant role as an instrument of social change.

Law as an Instrument of Social Change:

The RRA 1976

CHAPTER 1

INTRODUCTION

The aim of this research is to assess whether law can be an instrument of social change with reference to the RRA 1976. The main question to be answered in this project is whether or not the RRA 1976 and the CRE can bring about the elimination of racial discrimination. The thesis will explore the limits of the present race legislation in achieving social change. The study will argue the part the CRE could play in overcoming the limitations of the RRA 1976 and what its hopes are for the future. Reference will be made to the Stephen Lawrence Inquiry Report of 1999 and the Third Review of the RRA 1976 – Proposals for Reform - put forward to the Government.

I intend to conduct the assessment partly on the basis of theoretical analysis and partly on the basis of two empirical studies. I have been an employee of the CRE since 1985 in various capacities (legal officer, litigator, researcher and complaints officer). My reason for the research on discriminatory advertisements and pressure cases was because I worked as a legal officer for the CRE between 1985 - 1990 and was allocated special responsibility for the law on discriminatory advertisements and pressure cases. My particular experience in this area of the law raised cause for concern. My concern is the present policy of the CRE with regard to this area of the law. The policy is to allocate the major part of its resources to individual complaints. Pressure and advertisement cases are given a low priority. Discriminatory advertisements and pressure to discriminate relate to employment recruitment. Employment recruitment and discrimination is very significant in that employment is the pivot on which education, housing, social services and other issues of life

rotate. Only the CRE has powers under Section 63 RRA to bring proceedings under Sections 29, 30/31 RRA 1976. In many instances the individual has no knowledge that discrimination is occurring in these areas.

The aim of the first empirical study was to investigate discriminatory advertisements and pressure cases under Sections 29, 30/31 of the RRA 1976. Discriminatory advertisements are covered by Section 29 of the RRA which states that it is unlawful to publish or display an advertisement which indicates, or might reasonably be understood as indicating an intention to discriminate on grounds of colour, race, nationality or ethnic or national origin. Pressure cases are covered by Section 30/31 of the RRA, which makes it unlawful to give discriminatory instructions or exert pressure on an individual to discriminate. The CRE has brought several proceedings under these Sections of the Act and in many cases the matter was settled by obtaining an assurance not to breach the Act in future. To date, no significant research has been conducted to assess the impact of these proceedings on employers; the present research is intended to remedy this absence.

The number of cases under Section 29, 30/31 has increased over the years. A large number of employers involved are small organisations. The cases are referred to the CRE by employment agencies, job centres, youth training schemes (YTS) and careers services mainly and sometimes by individuals. The aim of this project was to ascertain the impact on employers as a result of either legal proceedings against them or by being reported to the CRE; and to investigate the extent of compliance with equal opportunity policy. A study of the employer's difficulties, attitudes and views was conducted by means of a postal Questionnaire followed by telephone interviews with employers. The purpose was to set out the implications of the cases indicating the areas of strength and weakness in the current state of legislation and to make recommendations.

My second empirical study was on Industrial Tribunals in race cases in England, Wales and Scotland. There has been a growing concern for a number of years about the low success

rate of race cases in Industrial Tribunals. There has been a general belief by those in the race industry that Tribunals appear to be reluctant to draw inferences permitted by law in favour of applicants. There is also a general feeling that there is a bias in favour of respondents. The CRE has also received a series of complaints from disgruntled applicants who do not succeed at Tribunals. Blame was accorded to Chairs and the Panel in not being sympathetic and understanding about race issues. The applicants always felt that their cases were strong enough to succeed and that they ought to have been compensated for breach of the RRA 1976. There were allegations that there were significant disparities in terms of success rates between different Chairs and different Tribunals. There were also questions raised on the extent of knowledge on race issues of the Chairman and the Panel. To date no research has been conducted on this aspect of Tribunals.

As my first empirical study on advertisements and pressure cases was inadequate to some extent regarding responses to Questionnaires, I decided to supplement my empirical study by including the research on Industrial Tribunals. This survey was conducted by me with some assistance of two colleagues from the CRE. One undertook work on computer analysis and the other assisted in filling in 200 of the 430 Questionnaires on Tribunals.

Access to research material was generally easy to obtain from my work, other sections of the CRE and the CRE library. Some books were obtained from outside libraries. The cases for the Tribunal research were obtained from the Central Office of Industrial Tribunal (COIT) for 1996-1997. Cases were selected from Tribunals located throughout Britain, Wales and Scotland to assess regional inconsistency in how decisions were reached. Material for the observation of cases was obtained by my personal attendance at Industrial Tribunals.

Methodology

My concern here is to explain what I did, how and why I did it. My reason for undertaking the research on the Race Relation Act 1976 and the Commission for Racial Equality was to explore whether it had been and whether it could be an instrument for a particular social

change, namely the elimination of racial discrimination in employment. The details of the methodology are set out in Chapter VII for the empirical study on discriminatory advertisements and pressure cases under the RRA 1976. Very briefly, quantitative analysis followed by telephone survey was used for discriminatory advertisements and pressure cases. Questionnaires were sent out to employers who were alleged to have breached or were reported to the CRE under Section 29, 30/31 of the RRA 1976 for a response.

In Chapter VIII, quantitative methodology was resorted to, followed by personal observation of cases at Industrial Tribunals. The research was conducted through analysis by Questionnaires based on 29 statistical indicators of 430 written decisions of Industrial Tribunals in race cases throughout England, Wales and Scotland. The statistical indicators were examined and analysed by reading of the written decisions and extracting the relevant information. The quantitative data was analysed by using computer software SPSS (Statistical Package of Social Science). The findings are shown in tables and figures. The details of the methodology are stated in Chapter VIII.

The Commission for Racial Equality (CRE)

The CRE is crucial to my research because the RRA of 1976 established the CRE as a body to deal with racial matters. The RRA of 1976 was and is perceived differently by the political parties in Britain. This will signify the extent of importance attached to the Act by the attitude of the different Governments to date. The CRE is intrinsically linked to the RRA 1976 and its powers and functions are limited by the Act. The history of the CRE through its various stages is traced. This aspect is discussed in Chapter IV and reference is made to the Race Relations Board (RRB) and the circumstances surrounding the need for such a body.

Appendix I concentrates on the functions and the limited powers of the CRE. It also addresses the achievements of the CRE since its inception in 1976. What are the limits to present race legislation in achieving social change and eliminating racial discrimination? The biggest stumbling block is the RRA 1976 itself which limits the functions and the powers of

the CRE. The two most significant powers are assisting complainants and instituting proceedings under Section 29, 30/31 of the RRA. The limits of the RRA are addressed more fully in Chapter II. The CRE's powers to conduct formal investigations are significant but once again this power is hampered by legal technicalities. These deficiencies need to be eradicated before formal investigations can be used as a powerful tool in bringing about social reform.

There are many areas of the RRA 1976, which need to be reformed before the Act can make enforcement easier to bring about change. This is set out in the CRE's Third Review of the RRA 1976 – Proposals for Reform in Chapter IX. Very briefly the CRE has put forward proposals for reform in the following areas, the power to issue new Codes of Practice under the RRA, a new definition of indirect discrimination and new levels of compensation, public sector responsibility to promote racial equality, undertake formal investigation without prior evidence of discrimination. It also imposes a duty of law Courts and Tribunals to draw inferences when respondents fail to respond to the R.R.65 Questionnaire, modification of the Civil Service Nationality Rules to allow wider access to employment in the Civil Service. The shift of the burden of proof to the respondent after a prima facie case of discrimination has been made out and clarifying positive action.

Other areas suggested for reform are definitions of victimisation, exceptions for employment in private households to be brought in line with the Sex Discrimination Act, statutory ethnic monitoring by employers, volunteers to be treated in the same way as employees, the procurement/tendering and award of contracts. A new definition of 'Genuine Occupational Qualification', the Act to apply to partnerships with more than six partners, serving members of armed forces to have direct access to Employment Tribunals. The time limit for lodging complaints of discrimination in employment should be extended to six months and the CRE has put forward a recommendation for the bringing of 'class actions' in Tribunals and Courts. The CRE could play a very significant part in overcoming the limitations of the RRA but it has to rely very heavily on the Government to bring about changes to the RRA. Following the

Stephen Lawrence Inquiry Report in 1999 as set out in Chapter IX, the Prime Minister and the Home Secretary have declared a positive commitment to tackle race discrimination. The CRE is concerned about the urgency for the reform of the RRA because it is determined to bring about changes to society in the attempt to eliminate race discrimination. The Home Secretary has agreed to many of the Commission's proposals. The Race Relations (Amendment) Act 2000 which strengthens and adds to the existing provisions of the 1976 Act, came into force in April 2001 (discussed in Chapter IX). If the findings and the recommendations of the Stephen Lawrence Inquiry are in fact addressed, significant changes can be achieved in this society in its efforts to stem race discrimination.

The Race Relations Acts

The 1965 RRA was very limited in scope. Problems based on colour and culture were emerging in the late 1950's because of the increase in the number of immigrants. Substantial discrimination in the field of employment, housing and public services was identified by the PEP (Political and Economic Planning) study in 1967. The Government was more concerned with immigration control than race relations. The race legislation of the 1960's is discussed in detail in Chapter IV. Attempts were made by Parliament to address discrimination and bring about social reform through legislation. The 1965 RRA covered only the periphery of racial discrimination and there was a growing sense of frustration among those administering the Act. In 1967, citizens of Asian origin had come to Britain in increasing numbers from Kenya. The 1968 RRA endorsed the Commonwealth Immigrants Act of 1962 and 1968 even though they were discriminatory. The limits on the 1968 Act with regard to immigration made social reform a remote target in reducing racial discrimination in Britain.

The RRA 1976 attempted to eradicate the defects of the RRA 1965 and 1968. The 1976 Act extended the definition of discrimination to include victimisation and indirect discrimination. The new right to complain directly to Industrial Tribunals and County Courts subject to five exceptions was created, the Race Relations Board and the Community Relations Council

were replaced by the CRE with much stronger powers of investigation and enforcement. The RRA 1976 legislation attempted to bring about reform of society by changing the attitudes and behaviour of the British people. Members of Parliament, campaign groups and immigrants are all taking active steps to bring about changes to race relations in Britain. The Third Proposal for Reform of the RRA 1976 and the Stephen Lawrence Inquiry 1999 will, hopefully, bring about significant reforms to the RRA 1976. The reason for undertaking the research was to identify the problems to bring about changes to society. I have doubts as to whether significant changes can in fact be achieved. These doubts will be brought to light in my two surveys. The study will focus on the obstacles and what has to be addressed to bring about social change. The reform of the RRA 1976, political will and government resources are the essential components to effect changes.

Chapter II

This is a significant chapter which attempts to explore as to whether law can be an instrument of social change. This limits of the RRA and the reasons for these limitations are explored. The question of 'rights' is analysed in relation to race and judicial interpretations are examined to assess as to whether the judiciary can bring about changes to society through legislation.

Chapter III

Sociological and Legal Analyses of Race and Ethnicity are explored.

Chapter IV

This chapter sets out the politico-legal context of race legislation in the 1960's and 1970's. It addresses race and law in the United Kingdom up to the 1970's.

Chapter V

This chapter concentrates on Race Discrimination law and the limits in the legislation. The Legal Criteria for Discrimination are also investigated. Pressure and Advertisement cases under the RRA 1976 are analysed.

Chapter VI

Race Discrimination in the workplace in the 1970's is discussed with particular reference to significant surveys on discrimination in employment 1985 – 2001.

Chapter VII

This chapter deals with the first empirical survey on discriminatory advertisements and pressure cases under the RRA 1976. The methodology, pilot study, Questionnaire survey and telephone surveys are set out. Finally, conclusions are drawn after identifying the problems of the survey.

Chapter VIII

This deals with the second empirical study on the conduct and performance of Industrial Tribunals throughout England, Wales and Scotland. This survey also concentrates on the observations of race cases at Industrial Tribunals.

Chapter IX

The recommendations of the Code of Practice in Employment are put forward. Reference is also made to the Lawrence Inquiry and the Proposals for Reform of the RRA 1976. Recommendations for reform of Section 29, 30/31 RRA, Tribunals and my comments on CRE's Third Review of the RRA 1976.

Chapter X

This chapter draws a comparison between the Health and Safety Commission, the Health and Safety Executive and the CRE.

Chapter XI

This chapter draws a conclusion to the whole thesis. It attempts to reveal whether the aim of the research topic has been answered. This chapter addresses the question as to whether law can be an instrument of social change with reference to the RRA 1976 by referring to the discussions in the previous chapters.

Appendix 5

This appendix raises the topic on anti-discrimination law in Europe and the lessons for the United Kingdom.

Terminology

The word "coloured" includes Asians, Afro Caribbeans and Africans.

CHAPTER II

LAW AS AN INSTRUMENT OF SOCIAL CHANGE

This chapter discusses the extent to which changes to society can be brought about through legislation. Can law influence social change and to what extent can it be used as an instrument to change patterns of social life? Law has come to be recognised as an agency of power and an instrument of Government, according to Roger Cotterrell (Cotterrell, 1992). Social change is held to occur only when social structure – patterns of social relations, established social norms and social roles change. A change in the established pattern of social relations between racial or ethnic groups in a society would constitute social change. He suggests that social change may occur by altering group norms or patterns of relations of individuals or groups to each other or to such common objects as the political, economic or social system (for example, the breakdown of barriers to employment of blacks in fields from which they were previously excluded by discrimination). It may alter the society's mores or basic values, a type of change which is "the most difficult to describe and undoubtedly the most difficult to achieve" (Grossman and Grossman, 1971: 6), as cited in Cotterrell p.47. Many factors contribute to change in society, for example, the extent of development of political organisations and consciousness, technological progress, degree of cultural unity or diversity and the extent and character of interaction with other societies. Grossman and Grossman, eds. 1971: 4, as cited by Cotterrell, p.47 discuss variations in social change in terms of rate, magnitude and scope. The rate of social change varies considerably from one society to another. This can alter patterns of individual behaviour. "Major ages of social change and mobility almost always involve great use of law and litigation" (Nisbet 1975 : 173) as cited in Cotterrell p.48. If given the necessary will and skill and a careful selection of the most appropriate strategies, law can do anything and everything to mould societies in accordance with legislators' wishes invoking changes.

Roscoe Pound (American jurist 1917), Ehrlich (1936), Yehezkel Dror (1959) and Allott (1980) as cited in Cotterrell p.51 all make a claim that "law is capable of achieving a restructuring of social relations" but they each place a different qualification on it. According to Roscoe Pound (Pound, (1917)) as cited by Cotterrell, p.51, law can deal only with the outside and not the inside of people and things. Pound draws a distinction between law and morals. How do we distinguish between a legal rule and a moral rule? The RRA is viewed by some not as a legal rule but rather as a moral rule. This in turn reflects the lack of strength of the legislation. In my view the Act is not accorded the same status as other Acts, it is seen as an insignificant piece of legislation to satisfy the demands of groups of people who are demanding their rights in society. Law and morality do not always correspond. Some think that it is morally wrong to discriminate but to legislate making discrimination unlawful is going a bit too far. The freedom of the individual could be construed as being restricted. The sanctions under the RRA are so ineffective that there is little or virtually nil fear of reprisals for breach of the RRA.

Law as an instrument of Government relies on some external agency to put its machinery in motion. Pound notes limitations arising because some morally important rights or duties defy legal enforcement. A decision must be derived from the basis of facts that are available. Pound sees evidence as problematic and controversial and it cannot be handled by the judges objectively. There is the problem of fact finding, for example, when trying to establish injury to feelings. Legal proof can never equal scientific proof (Levy-Bruhl 1964 : 150-2) as cited in Cotterrell, p.51. Pound echoes Ehrlich that in many areas of social life the sanctions of state law appear useless, disrupting rather than repairing social relations. Law according to Pound cannot attempt to control attitudes and beliefs, because of the problems of proof, but only observe behaviour. Pound sees this as a practical basis of the distinction between law and morals. Legal precepts do not enforce themselves. Law that cannot be enforced or invoked by citizens can hardly shape behaviour.

There are interests and demands that it might be desirable for the law to recognise but by their nature cannot be safeguarded or satisfied through law. This refers to limitations which Ehrlich suggested in viewing law as a special form of control. This is characterised by a relative clarity of its precepts. If these precepts are to be enforced by state agencies and to provide authority for the actions of numerous officials at all levels of the state, a high degree of clarity is essential. So there are limitations which arise from the difficulty of ascertaining the facts on which law is to operate (Pound 1917 : 161-2), as cited by Cotterrell p.51. Pound stresses how another aspect of the imitation of the law in that law often depends on interested parties – not professionally involved with the legal system to set its machinery in motion. It requires people who are motivated for some reason to invoke legal rules and procedures to call upon law in support of their interests, for example, in criminal law, where the prosecution is in the name of the crown or the state, law enforcement depends heavily on public reporting of crime to enforcement agencies such as the police. Law must provide incentives to ensure its own use, which is the availability of adequate remedies for the victim. The RRA 1976 fails in providing adequate remedies for breaches of the Act. If law is to be effective it must be in the interests of those upon whom the law depends for its invocation or enforcement to set the legal machinery in motion.

Ehrlich - "we shall have to get used to the idea that certain things simply cannot be done by means of a statute" (1936 : 375) as cited by Cotterrell p.55. Ehrlich sees the relationship between the norms for decision applied by state agencies and the patterns of thought and behaviour existing in society as uncertain and problematic. Ehrlich agrees with Pound on this issue and also on the limitations of the law which arise from the difficulty of ascertaining the facts on which law is to operate. Ehrlich sees the danger in generalising too widely about law from particular legal experience. He cites the attempt to use law in the United States in the 1920's and early 1930's to prohibit the manufacture, transportation and sale of alcoholic liquor for beverage purposes. This was an example of the failure to use law to alter deep-rooted patterns of social behaviour. The law had little effect on alcohol consumption especially among business and professional classes. The enforcement of the law was

ineffective. Social control through law was a total failure because the law enforcement agencies lacked co-ordination and adequate resources. During the 1970's laws penalising possession of marijuana was equally misguided in attempting (ineffectually) to penalise conduct not generally proved harmful, but viewed as morally wrong by the law although then being widely accepted among large sectors of the American population (Kaplan, 1971) as cited by Cotterrell p.56.

Yehezkel Dror (1959) a sociologist, as cited by Cotterrell, p.56, distinguishes between direct and indirect use of law in promoting change. He assesses that the direct use of law in attempting to change behaviour and attitudes by imposing on individual legal duties requiring change is fraught with problems. Dror is echoing the views of Pound. Law, argues Dror, can and does play an important indirect role in fostering social change in many ways. Law shapes various social institutions, which in turn have a direct influence on the rate of social change. Dror argues that legislation appearing to control 'external' behaviour may have the effect of making the practices and attitudes at which the law is really aimed at more covert and harder to detect. On the other hand, the laws structuring a national educational system influence the scope and character of educational institutions which themselves may directly influence social change. Patent laws protecting inventor's rights may encourage invention and promote change in technological institutions, which in turn may influence social change.

Law often provides the institutional framework for an agency specifically set up to exert influence for change, for example, the National Enterprise Board was created by the Industry Act 1975 to assist the United Kingdom economy. The Industry Act of 1980 was created because of a new set of social and economic priorities adopted in Government. Dror mentions a further legal strategy – the creation of legal duties to establish situations in which change is fostered, for example, the duties placed on Local Authorities with regard to public services of many kinds. He also adds that the preservation by law of the structure of a free market economy is "one of more important mechanisms of social change in many countries", as cited by Cotterrell p.57.

Statute law has shown ambitious legislative efforts to promote change through the creation of new legal duties for existing administrative authorities, for example, Health Services Act 1980, the extension of legal powers of Government ministers. The Food and Safety Act 1990, legislative provisions for the making of special grants and fiscal concessions, for example, Education Act 1980. Legislation is used to influence the character of established institutions in attaining social change. 'Educative Legislation' –, for example, RRA 1965 stresses conciliation rather than redress. Also the educative function of law was to change ideas by influencing behaviour. Under the 1976 RRA it was possible for individuals claiming race discrimination to take a case directly to Court or to an Industrial Tribunal with a wide range of remedies. This is aimed at promoting ideals through Governmental action rather than enabling the litigant to enforce his/her rights. If law is to be effective it must provide incentives to ensure its own use – this means the availability of adequate and suitable remedies for those whom it is designed to protect. These remedies must be attractive to motivate the victim of illegal practices to seek the aid of the legal system. Pound impressed the importance of enforcement. There are laws that provide inadequate enforcement in case of criminal law or limited incentives to invoke the civil law. There is no serious legislative intention of producing significant social change. The 1976 RRA made a range of remedies possible but there is still the difficulty of enforcing the law more widely.

In 1967 before a second RRA was enacted, the then Race Relations Board summed up the purpose of anti-discrimination legislation in five points - Race Relations Board (1966/67). The purpose was not simply to produce symbolic legislation to placate the victims of discrimination but rather to give support to those who wish to resist the pressures to discriminate and to educate those who are prejudiced. The problem with this educational perspective is that it rests ultimately on the idea that there is a social consensus about the need to improve equality of opportunity. Social legislation is achieved as a result of conflict between different social groups and their competing ideologies. Several of the purposes of anti-discrimination laws go well beyond the use of law to redress grievances or to control behaviour. The educative function of law was to change ideas by influencing behaviour.

Pound does not state that legislation could never succeed – he felt that "in their zeal to promote ideals, legislators sometimes omit to identify social interests with individual advantage and so make it possible for the law to rely upon individual initiative for enforcement of its precepts" (Pound 1917 : 165–166) as cited in Cotterrell p.54.

Laws are also created solely and primarily to put certain symbols or ideals into the statute book. There may be no realistic consideration in the enactment of this legislation of the possibilities of effective enforcement of the law. Symbolic legislation can be distinguished from educative legislation on the grounds that there is no serious legislative intention of producing significant social change. The object is to placate certain sections of the community, while avoiding change. Can law change beliefs as well as behaviour? In a study published in 1952 (Berger 1952 : 172) as cited in Cotterrell p.54 - "law can influence 'external acts' which affect or constitute the conditions for the exercise of the private inclinations and tastes that are said to be beyond the realm of law." Dror claimed that legislation appearing to control 'external' behaviour may have the effect of making the practices and attitudes at which the law is really aimed at more covert and harder to detect. A diversity of views has been expressed by various writers on the law. In contrast, Ehrlich uses the danger of generalising too widely about law from particular legal experience. He states that certain things simply cannot be done by means of a statute.

One writer concludes a study of the limits of law by remarking "that laws are often ineffective, doomed to stultification almost at birth, doomed by the over ambitions of the legislator and the under-provision of the necessary requirements for an effective law, such as adequate preliminary survey, communication, acceptance and enforcement machinery" (Allott 1980 : 287), as cited by Cotterrell, p.50. This view is very negative when compared to Nisbet who states that if the political will is present, changes can be effected through legislation. I accept Allott's view that if the enforcement machinery is weak, then changes are difficult. There are limits to the law. The problem is how to interpret the findings of field studies on the effectiveness of the law. It is difficult to find appropriate methods or isolating the effects of

law from other casual factors in change. There are difficulties in drawing general conclusions about law when the factors determining effectiveness may vary greatly from one type of law to another. Pound recognised the limits of effective legal action when he stated that law can deal only with the outside and not the inside of people and things. He concluded that law cannot attempt to control attitudes and beliefs but only observable behaviour.

"Law can be a powerful change when the change derives from a principle deeply embedded in our heritage" (Pennock and Chapman, eds. 1974 : 2) as cited by Cotterrell, p.59. Law must appear compatible with cultural assumptions and with the most generally accepted patterns of legal development. Whether law can reshape the mores of society becomes an issue because the connection between modern law and whatever mores may exist in society is far from clear and simple, as stated by Cotterrell. The question posed by Cotterrell is whether and in what way law has become (or can be) somehow freed from its social and cultural roots to the extent that it can be used as an instrument of social change. According to Savigny and Sumner as cited by Cotterrell, p.45. "As long as law is seen as an aspect of society – a certain side of social life as a whole – there can be no possibility of it 'standing apart' in some way and 'acting upon' society." To many people law appears as a technical regulation, lacking in moral element.

Friedman and Ladinsky define social change as "any non-repetitive alteration in the established modes of behaviour in society" (Friedman and Ladinsky 1967: 50 – as cited by Cotterrell p.47). Few societies, if any, are wholly static. Cotterrell cites clear examples of failures in the attempt to use law to alter deep-rooted patterns of social behaviour, for example, the prohibition laws in the United States. The law had little effect on alcoholic consumption, especially among business and professional classes but there are a range of legal strategies for promoting social change which are the nature of the enforcement agencies used, the degree of commitment of enforcement agents in implementing the law and the availability of resources.

"Law…. is only one component of a large set of policy instruments and usually cannot (be)…. .and is not used by itself. Therefore, focusing of exclusive attention on law as a tool of directed social change is a case of tunnel vision which lacks the minimum perspective necessary for making sense from the observed phenomena". (Dror 1970; 554 –as cited by Cotterrell p.65).

A failure by the legislators in many western societies to recognise this may have contributed to disillusionment. Cotterrell concludes that "the failure to see law as merely one aspect of a complex social whole affected by many social forces, and to see law as shaped by these forces probably to a far greater extent that it can shape them, leads to inevitable disillusionment when the legal instrument fails to achieve what the legal reformer intended" (Cotterrell (1992 : 65)). Law is an inherent aspect of society, it cannot be seen in isolation as a set of rules.

According to Roach legal doctrines, types of norms, courts, lawyers, judges, activities and values of groups or individuals including social movements are among the numerous dimensions to be taken into account when considering law as an instrument of social change. Durkheim focused on the division of labour, social solidarity, the collective consciousness and evolutionary social change. Weber saw changes linked with economic conditions. Some theorists disagree with the claim that law is objective, neutral or impartial. Feminist legal theorists show how law disadvantages women by perpetuating particular conceptions of gender yet most of the theories dispute that law is a reflection of general social norms.

"Luhmann describes the law as an autonomous, closed system that engages with its environment only to the extent that it transposes it into legal language, legal concepts and legal problems" as cited by (Roach (2000 :.76)).

Bourdieu (Bourdieu, 1987) states that social conflict is translated into legal debates. Habermas (Habermas, 1996) recognised the constraints placed on society by the legal profession and practice although he sees the need for law to regulate highly diverse societies. This idea reinforces the discussion by the critical legal theorists. The legal profession has undergone considerable change yet the legal services are not readily available to many because of the huge costs of legal advice.

"Social movements may adopt lawsuits as part of a campaign to use the courts as a mechanism of social change" (Felstiner et al, 1980-81: 639) as cited by Roach p117. This could be used to remedy social problems and bring about social change (Mather and Yngvesson, 1980-81:817) as cited by Roach p177. Once again this becomes a rights based argument involving legal language and removed from the social experience of life. Different models of law are used – adversial trial and law as regulation in which mediation and compensation plays a part. In the area of feminism legal reform did not meet the aims of the social movement activists. This is because "legal change neither necessarily nor directly translates into changed perceptions, practices and attitudes on the part of all the decision makers who are engaged in the application of new laws" (Roach (2000: 197)).

The victims of harms are reluctant to use legal remedies e.g. in cases of domestic violence and rape because they perceive the law as being discriminatory in these areas. The failure of law reform reinforces gender inequality. According to Roach simply reforming various statutes will not directly transform discriminatory practices and entrenched attitudes towards women. On the other hand, legal change can have important symbolic functions. The situation of some women has improved and precedents have been created so that the position of women can be improved. "Viewing law as a complex of diverse and often contradictory pieces of legislation, judicial statements and enforcement practices, it is not surprising that advances in one area may be thwarted by legal impediments in another" (Roach (2000 : 198)) for e.g. abortion although it is legally available in some instances it is not readily available to all women because of the existence or non existence of legislation

e.g. national health or private health insurance. Law cannot be isolated from other social institutions, it is seen as an integral component of social organisation. Activists see law as a critical strategy for social reform but with constraints based on cultural values, legal consciousness etc. "Law is an important constitutive force moulding social relations and identities, which in turn also constitute and shape law" (Brigham, 1996:129-54) as cited in Roach p.230. "Law provides resources for social change, e.g. legal language and the power of legal concepts that can be used to articulate identities or claims, but it also limits the capacity for social activism" (Bower) 1994) as cited by Roach p.231. Change to society can be pursued through litigation and judicial decisions e.g. civil rights groups and women's movements and by lobbying parliament. Social policy programmes were established through legislation. According to Roach many legal reforms have not attained their goals. With reference to criminal justice e.g. legal reform for rape, the victims still experience difficulties during prosecution. Law on Race Discrimination and Civil Rights have not brought about widespread equality or the eradication of discrimination. Roach sees legal change requiring "interpretation, application and enforcement", (Roach(2000: 234)). Aspects of law are seen as reflecting social change. The views held by Roach for law acting as an instrument of social change are not as optimistic as Cotterrell. Roach concludes " engagement with the law must be one strategy for social reform, but legal change does not depend on social movement activism", (Roach (2000: 235)). There is the worrying problem of the isolation of law from society. Changes have to be brought about in relation to social movement.

Limits of the Race Relations Act (RRA), Reasons for these Limitations and Rights

This discussion further attempts to answer whether law can be an instrument of social change. The limits of the RRA, the reasons for these limitations coupled with the question of rights is analysed. The Race Relations Board gave a classic liberal definition of the aims of anti-discrimination legislation. The purpose was not simply to produce symbolic legislation to

placate the victims of discrimination but rather to give support to those who wished to resist the pressures to discriminate and to educate those who are prejudiced: "A law is an unequivocal declaration of public policy, a law gives support to those who do not wish to discriminate, but who feel compelled to do so by social pressure, a law gives protection and redress to minority groups, a law thus provides for the peaceful and orderly adjustment of grievances and the release of tensions, a law reduces prejudice by discouraging the behaviour in which prejudice finds expression." Race Relations Board (1966/67). The first two and last of the principles are mainly concerned with the effect of legislation upon people in a position to discriminate. The law is a statement of public policy by Parliament intended to influence public opinion. The law has had a limited success in changing consensus of opinion. The third and fourth principles are concerned with redressing the grievances of minorities rather than curbing discrimination and prejudice among the majority.

The Question of Rights

The question of "rights" is analysed in relation to race. Who are critical legal scholars? The critical legal studies movement commenced in the 1970s. Critical legal scholars are social scientists, law teachers, students and legal workers who are attempting to link legal theory and practice with the effort to create a just society. They are dissatisfied with the existing state of legal practice and they wish to bring about social change. They are highly critical of the role of law and the legal institutions in present day society.

The recognition that the rights of each citizen depended upon maintaining the rights of all was a central theme in the US Declaration of Independence (1776). In that document, each citizen was declared to have natural rights to the security of life, the exercise of social and political liberty, and to the pursuit of the economic goals of his own choosing. The Declaration also asserted that "all men are created equal". A Massachusetts legal code of 1641 had asserted the right of every person "...whether inhabitant or foreigner to enjoy the same justice and law that is general for the colony".

Liberalism is seen by many critical legal studies members as the dominant ideology in the western world, which operates to legitimate the economic and political status quo. Rights are discussed in formal courtroom settings thus alienating one from real human experience. With regard to race discrimination, this is a real social problem, which the Court turns into an argument about rights. The Court arrives at an illusion of a right answer. The Court legitimises the experience as to whether the complainant has been discriminated against or victimised on racial grounds. We find therefore a prominent critical legal writer - Alan Freeman stating that:

> *"Viewing law as ideology showed law to be a belief system portraying the world as consistent, despite presuppositions that were in fact contradicted by experience, yet seemingly accepted by people who were alienated from themselves, from others, from their work, and ultimately cut off from their own experiential truth." (Freeman, 1987).*

The above quotation helps the thread of the argument in that the race legislation was creating an illusion of eliminating discrimination thus bringing about a change to society. The real life experiences of discrimination are translated into highly legal technical language, which bears very little resemblance to the practical realities of discrimination. Furthermore Freeman argues that in order to employ ideology as the basis of his critique of law and rights he has to make a number of assumptions: one of them is that:

> *"People do slide into a false consciousness about the world, which is irrational, imaginary or inverted and conceals and cuts them off from their own experience."* Ibid (note above).

The concept of 'false consciousness' will present a problem for minorities. It demeans them to claim they are prey to a 'false consciousness'. The false consciousness which he refers to is that of the Court, not the minorities. If minorities rely on rights in the Courts then they are

caught up in it. The minorities are deluded about their concept of rights. They are subjected to formal procedures in the Courts which have very little connection with their actual experience of being subjected to discrimination. According to Alan Freeman, the state bestows the individual rights and these rights are talked about in a formalised way. The myths of 'vested rights' and 'equality of opportunity' were necessary to protect the legitimacy of the dominant order and thus constituted insuperable barriers to the quest for significant redistributive reform. Freeman's central argument is that severe limitations of legal reform were dictated by the legitimating role of legal discourse. "If law functions to reinforce a world view that things should be the way they are then law cannot provide an effective means to challenge the present order." (Freeman (1987 : 147)). Minorities are not consenting to their own oppression; they are challenging the present order to bring about equality and change social norms. Freeman's criticism of society dealing with race discrimination is reflected in the manner in which cases are conducted in Industrial Tribunal. This is because the RRA 1976 is riddled with technicalities. I agree with his criticism.

The Positive and Negative Aspects of CLS

Richard Delgado (another critical writer) asks what does critical legal studies (CLS) have to offer racial minorities in their quest for social justice? What legal theory best meets the needs and desires of minorities? Any acceptable theory must be radical, or at any rate progressive, since minorities want to change the world. Although CLS purports to be a radical theory, minorities have not flocked to it. The CLS programme has both negative and positive features. The negative themes include a far-ranging attack on American legal and social institutions, while the positive themes describe an alternative utopian society. Delgado admits that at the outset the CLS negative programme contains much that is useful for minorities. "The CLS critique of the social order demonstrates that current arrangements and distributions of power are neither necessary nor natural and that hierarchy irrationally places some at the top while it sacrifices those at the bottom." (Delgado (1987 : 153)). However, the CLS negative programme also contains elements that repel and in fact threaten minorities. These elements include (i) disparagement of legal rules and rights (ii) rejection of

piecemeal change, (iii) idealism and (iv) use of the concept of false consciousness. Much of CLS scholarship in these areas is either risky, since it asks minorities to give up something of value, or unreliable, because it is based on presuppositions that do not correspond to our experience. According to the Critical Legal Scholars "rights legitimise society's unfair power arrangements, to allow only so much injustice. The CLS members see rights as oppressive, alienating and mystifying". Critical scholars reject the idea of piecemeal reform. An unfair social system survives by using piecemeal reform to disguise and legitimise oppression, for example, the RRA 1976. The CRE wants radical reforms on the Act but so far only piecemeal reforms have been achieved. The CLS would not accept this description of 'radical'.

The CRE wants very profound changes so that society itself can be transformed dramatically. This is in keeping with Delgado's theory that minorities want to change the world and its thinking in its quest for social justice. The critics argue that the law maintains the status quo in society by handing out occasional but meaningless victories to minorities, for example, Brown v Board of Education (1954). The critic's positive aim is to establish a Utopia in which true community would prevail. Hierarchy would not exist; everyone would be equal. There would be no need for rights - at least not so many as we recognise today. Instead, everyone would share work, goods and responsibilities. Society first has to recognise all as equal members, something it has yet to do.

The CLS theory simply assumes that racism is just another form of class based oppression. I agree with the CLS elements of disparagement of legal rules and rights, its rejection of piecemeal change, idealism, use of the concept of false consciousness but only as applied to Courts, and that racism is another form of class based oppression. I do not agree with the CLS Utopian concept of everyone being equal with the existence of fewer rights. This theory is a bit far fetched in today's society. It will take some time before minorities can change the world to achieve a just society. Piecemeal reforms do not eradicate injustice but only create an illusion of creating rights and addressing the wrongs.

Professor Hepple agrees with the CLS idea in bringing about radical changes. He also sees the Courts as keen to maintain the status quo in society and very reluctant to deviate from the norms of society. Hepple supports Freeman in that race discrimination is not seen in the Courts as a social problem but as an argument dealing with a series of abstractions which alienate the victim of discrimination from his experience. Professor Hepple in his article on 'The Race Relations Acts and the Process of Change' writes:

> *"The respondent must advance good grounds acceptable to right thinking people. The Court of Appeal expects a process of fact evaluation in an area in which no consensus exists among Tribunal Members, even less a social - consensus, as to what is 'acceptable'. In practice they have been willing to go along with the views of 'enlightened management', occasionally being guided by the Race Relations Code of Practice. But it is in the nature of Tribunals and Courts to be norm reflecting and not to set more radical norms which might change the consensus." (Hepple (1987:35)).*

The Courts are very reluctant to deviate from the present norms of society. The RRA is interpreted very narrowly although there is room for a broader interpretation. Professor Hepple (Hepple, 1987) further argues that the traditional form of civil adjudication is unsuitable for solving race issues. Lawyers are not familiar with recurrent patterns of discriminatory behaviour, for example, word of mouth recruitment in employment. In order to attain significant changes entrenched attitudes and behaviour have to be altered. Although some changes have taken place in jobs, housing and services, the ineffectiveness of the RRA 1976 is obvious. He sees the legislation as weak and lacking strength in its powers of enforcement. Professor Hepple sees the imposition of cost-deterrent sanctions on discriminators as having a more significant impact. He advances his argument about the limits of rights-based law. Legal concepts have to be relatively clear and they can be enforced only against identified persons. There is a great deal of technical abstraction, for example, the legal criteria to be fulfilled before discrimination is proved in legal proceedings, for example, 'meaning of detriment', 'justifiability' and 'proof of discrimination'. Race

discrimination is a real social problem, which the Court turns into a technical argument about rights.

The law on indirect discrimination is particularly riddled with technicalities and difficulties. The burden is placed on the complainant to prove that he/she has been discriminated against and further that the 'requirement' or 'condition' was to his/her detriment. This means that there always has to be an identifiable complainant, who has suffered some disadvantage. The issue of justifiability, being a question of fact is left to the Industrial Tribunal. The cases on race illustrate the constraints on the interpretation of the RRA. Courts are called upon to determine and evaluate social facts. Hepple affirms the idea of Freeman to a large extent and he sees the immense problems before rights based law can transform society.

Fitzpatrick also agrees with the CLS theory that racism is another form of class based oppression. He agrees with Hepple that law imposes limits on its competence and scope in what it can achieve. He also agrees that technicalities are imposed by Industrial Tribunals in race cases. Both Fitzpatrick and Hepple perceive the virtually insurmountable problems that are currently present to change society through legislation. Peter Fitzpatrick argues that "in liberal views of the world, law is manifestly incompatible with racism" (Fitzpatrick, 1987). Racism was basic to the creation of liberalism and the identity of the European. Liberal capitalism opposes yet is maintained by racism. Where racist practice infects law, that can only be something aberrant and remediable. Exploring the British situation as a case, he argues that there are certain bounds beyond which law did not proceed in countering racism, for example, the power and autonomy of employers. In this respect racism is compatible with and even integral to law. Law has marked out areas in which the racism of employers could operate. "The very foundational principles of law as liberal legality import racism into law, those principles of equality and universality which stand in their terms opposed to racism". Ibid (note above). The law is within itself racist and therefore compatible with racism and incapable of doing anything about racism. RRA is limited by bounds beyond which it cannot

operate. He claims that liberal rights law cannot eliminate discrimination. Fitzpatrick sees law as compatible with racism and dividing society on a class basis.

Fitzpatrick further argues that racism operates to provide cheap labour and to constitute a sector of "the reserve army of labour". Politically, racism divides the working class. Law, contrary to its claims of universality, is unable assuredly to counter racism. Racism marks boundaries of law and imposes persistent limits on its competence and scope. Being so limited, law proves to be compatible with racism. He maintains that law is compatible as it is individualistic and rights based and therefore can do nothing about racism. He argues that in indirect discrimination cases Tribunals are likely to be more responsive to 'good industrial relations' and are more likely to support the employers. Justifiability is what is considered reasonable, commonsensical or what is acceptable to right thinking people, for example, employers have to decide what is best for business. Commenting on "the experience of adjudication in the first eighteen months of the Act" Lustgarten (Lustgarten (1980 : 196)) notes that "in every case in which there was a split Tribunal decision against the complainant, the non specialist wingpersons (two lay Members who sit on either side of the Chairman in the Tribunal) joined the Chairman to make the majority". That pattern with a few exceptions has continued since. It is very difficult for the Tribunal to be responsive to interests they cannot comprehend; this is reflected in the low success rate of race cases in Industrial Tribunals - only 25% of cases succeed – Employment Law Gazette(1990). This supports Fitzpatrick's contention that Tribunals are more concerned with the employer's aspect of the case than the applicants' allegations of race discrimination.

Fitzpatrick sees the burden of proof placed on the applicant in discrimination cases as a heavy one, direct evidence of discrimination is difficult to obtain, so the evidence is usually circumstantial and never conclusive. This dominance is fostered in the technical nature of the process. Fitzpatrick further argues that Tribunals were supposed to be informal and accessible but instead in reality they have become increasingly legalistic and technical. "The chances of success are very slim without expert assistance" (Kumar, 1986). "The standard

tricks of advocacy serve to exclude evidence of an often subtle and intractable racial oppression" (Paynter (1984 : 14)). The Tribunal sees the hostility to the applicant by the employer as a communication problem, bad management practice or as a result of pressure or health problems. The employee is seen as being paranoid or over-sensitive. Facts and evidence are rarely disturbed on appeal. The Appellate Courts provide precedents which Tribunals have to follow. Filing an application of complaint against a present employer jeopardises the employees' employment situation. The law on victimisation offers little protection and applicants are further deterred from taking action because of the low success rate and low compensation levels in discrimination cases. An important reason why so few victims of discrimination even lodge a complaint is because they are often ignorant of the fact that they have been subjected to discrimination. Evidence is very difficult to establish because of the reluctance of witnesses to come forward. He also affirms the 'false consciousness' theory advocated by the CLS and Freeman.

Equal Opportunities

The educative function of law was to change ideas by influencing behaviour. Changing attitudes requires training. An equal opportunity policy is essential to create a just society. This policy has to extend to employment, education, housing and other facilities. Equal opportunities could be attained by equal opportunity training, by ethnic monitoring, positive action under the Race Relations Act 1976 etc. The benefits of an equal opportunity policy in employment means better staff, better communication within the organisation, better industrial relations, better employee relations, better image in the community, better use of staff, better business, better service and more efficient procedures. Anti-discrimination law provides for a range of areas in the law where discrimination is not permitted. The law provides remedies for the breaches of the law so that equal opportunity is achieved in society. Anti-discrimination legislation has its limitations. Legislation is relevant only if the economic and social climate enables people to develop their potential to compete for opportunities on equal terms. The law must be effectively implemented and translated into practice in order to attain its other objectives. The problem with this educational perspective

is that it rests ultimately on the idea that there is a social consensus about the need to improve equality of opportunity. Social legislation is achieved as a result of conflict between different social groups and their competing ideologies i.e. the law changes nothing in itself, only changes when backed by social force of a new consensus.

Fitzpatrick argues that there is a distance between the law and the employer which set law's limits. He also argues of integral connections between racism and liberalism. Liberal legality is ostentatiously opposed to racism. Law takes identity from its opposition to and separation from racism. It thus operates by containing and constraining law and is thus unable to counter racism. Fitzpatrick argues that laws claims to universalist competence creates and heightens racism. He also perceives the remedies under the RRA 1976 as rights which deal with deviation and racism in liberal societies has to be a deviation. Philip Abrams said:

> *"What any particular group of people get is not just a matter of what they choose or want but what they can force or persuade other groups to let them have." (Abrams (1982 : 15)).* It is extremely easy for the employer to justify his reasons for rejecting the applicant and to convince the Tribunal. The applicant is seen as being rejected on other grounds, for example, demeanour, personality, ability, and performance at interview, etc rather than on grounds of race. (Fitzpatrick, 1987).

Limitations of Judicial Interpretations

The judiciary in failing to bring about effective change further limits the RRA 1976, hence impending the transformation of society through legislation. The RRA 1976 is seen as inherently weak by many lawyers, academics, the CRE, etc. with a need for drastic reforms. The Act is symbolic in many aspects with not enough 'teeth' to effect changes in eliminating discrimination on a larger scale. There are severe limits to the RRA and these limits are further increased by the judiciary's attitude in bringing about effective social change. These

attitudes are reflected in their decisions which imposes constraints on the effective enforcement of the RRA 1976. Judges naturally reflect attitudes of a section of a wider society - this is illustrated in the 19th century judicial views on slavery and on the race legislation of the 1960's.

According to Griffiths (Griffiths, 1985), judges are constrained in their functions because they cannot act neutrally but only politically. This is because the appointment of judges is wholly in the hands of politicians. He argues that the judiciary is a conservative force - it has failed to acknowledge changing social conditions and is to a large extent unwilling and unable to administer the law to a changing British society. The judges have failed to take note of changing social values, economic patterns, class differences and political institutions. With regard to race relations it has been very difficult to alter the entrenched attitudes and thinking of judges. Griffiths cites, for example, a leading race relations case: Ealing London Borough Council v Race Relations Board (1972). Stanislaw Zesko was born and bred a Polish National and joined the Polish Air Force. In 1939 after the Nazi invasion of Poland, he escaped to France, came to the United Kingdom and enlisted in the Royal Air Force. After the war he lived in the London Borough of Ealing in conditions of great hardship for 14 years. Mr Zesko applied to be placed on the housing waiting list of Ealing Borough Council. His application was refused under a Council rule that an applicant had to be a British subject within the meaning of the British Nationality Act 1948. The House of Lords by a majority of four to one decided in favour of the Council on the grounds that 'national origin' did not mean 'nationality' which was what the council's rule was concerned with. This approach is very formalistic. Parliament could have used the word 'nationality'. This reflects the thinking of the judiciary. They choose to interpret the law very narrowly. This decision is reminiscent of the reluctance to rule in old cases on slavery. They do not see themselves as having a role in promoting equality.

Further race cases cited by Griffiths demonstrate the attitudes of the judges. In a case decided by the House of Lords, Charter v Race Relations Board (1973). Mr A.S. Shah

applied to join the East Ham South Conservative Club. The Chairman indicated that he regarded the colour of Mr. Shah's skin as relevant and his application was rejected. The House of Lords by a majority of four to one rejected the appeal on the grounds that the club members were not 'a section of the public'. (The RRA. 1968 provides that it is unlawful for any person concerned with the provision to the public or a section of the public of any services etc. to discriminate.)

In another case: Dockers Labour Club v Race Relations Board (1974) a member of a Dockers club in Preston took in as his guest, Mr Sharrington, a coloured man. Mr. Sharrington was told "we do not serve coloured people". Mr Sharrington was a member of another club, which had no colour bar. The question was whether associates were "a section of the public". The House of Lords held that the club had not discriminated but the Court of Appeal held that they did discriminate. The judges in the two Courts arrived at their decisions by taking two different political views. The conservative view is that Parliament should intervene as little as possible in matters about which people differ in large numbers and that statutes should be so interpreted.

> *"This is a statute, which, however admirable its motives, restricts the liberty which the citizen has previously enjoyed at Common law to differentiate between one person and another in entering or declining to enter into transactions with them. If everyone was rational and humane - or - for that matter Christian - no legal sanctions would be needed to prevent one man being treated by his fellow man less favourably than another simply upon the grounds of his colour, race or ethnic or national origins. But in the field of domestic or social intercourse, differentiation in treatment of individuals is unavoidable" (Lord Diplock in the Dockers Club case). Ibid (see above case).*

Judges are part of the machinery of authority within the State and as such cannot avoid the making of political decisions, and the politics of the Court of Appeal in this case was a conservative one. The judges have the powers to enforce the law by the development of

common law and in the interpretation of statutes. With regard to race relations law, they have been very narrowly interpreted although there was room for wider interpretation. According to Griffiths neutrality is difficult to maintain because personal bias, prejudice, and political views enter into their judgements, for example, the judges tend to protect business interests, preservation of public order and law, despite arguments for legal, political and social change.

Many ethnic minorities feel that the legal system is unjust, oppressive and authoritarian. For them the credibility of the legal system hangs in doubt. Judges ought to represent public interest. Cases on race directly or indirectly involve political issues. It would be almost impossible for judges to interpret the facts of a case without some degree of bias and personal belief and attitudes. It is extremely difficult for an objective view to be expressed. Weber expressed this view and saw it as virtually insurmountable. According to Weber (Weber (1969 : Chapter 3)) "judicial decisions ought to be based on objective criteria not subjective or arbitrary reasoning. but concluded that decisions are arrived at by not only the criteria of law but by religion, ethics and political ideology, i.e. not subjective but extra legal."

Some judges, do, however, in rare instances make 'bold decisions' .This is a desirable possibility whereby changes in legislation can transform society to some extent. A notable example was Lord Atkin who was very bold in creating new precedents in order to bring about changes to society through legislation. He was an exceptional judge who contributed to many changes thus using the law as an instrument to change society. Judges do take 'political' policy decisions but society does not remain silent if the decisions of the judges are not in keeping with public opinion. The public raises questions. No clear rule existed to decide the liability of a manufacturer whose negligence resulted in injury to the consumer of his product. Lord Atkin stated "I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society as to deny a legal remedy where there is so obviously a social wrong": Donoghue v Stevenson (1932). Bold decisions by judges can be a pioneering instrument in this country in changing society. Very

few race cases have been based on novel decisions. Most decisions are 'safe'. A courageous decision by an Industrial Tribunal was Dawkins: T. Dawkins v Property Services Agency (1989), when Rastafarians were regarded as a racial group under Section 3 of the RRA 1976 but the Employment Appeal Tribunal overruled this decision. The Court of Appeal held that Rastafarians were not a distinct ethnic group for purposes of the RRA 1976. There is a reluctance to change to keep pace with society. There is a change in social attitudes but to a very limited extent. It seems to take a very long time before a social wrong is acknowledged and remedied. Judges can contribute significantly in changing society by their novel decisions and not adhering to old attitudes.

It is extremely difficult for a member of the Tribunal to understand, appreciate or relate, for example, to the Rastafarian community who suffer racial discrimination primarily because of their 'strange' appearance. The Rastafarian is seen as someone quite alien to this society and he is regarded with suspicion. When the common sense of the Courts and the thinking of the reasonable person arrive at decisions, it is most unlikely that groups like the Rastafarians are going to be accorded justice. The Tribunal is rather reluctant to detract from the traditional accepted values of society. The Rastafarians were therefore not regarded as a distinct ethnic group for the purposes of the law. Decisions like Mandla v Dowell Lee (1983) are rare because they might offend certain sections of the community. In the Mandla case the cultural habits of an ethnic minority were taken into consideration.

Members of the black community are grossly under-represented in Tribunals (Kumar, 1976). There has been a recent increase in these numbers but they still represent a disproportionately small proportion of the Members of the Industrial Tribunals. Some ethnic minorities view judges as being out of touch with the real world and lacking in sensitivity and understanding of race issues (as evidenced by complainants to the CRE). Once again I refer to the 'De Souza' case: De Souza v Automobile Association (1985) and the meaning of 'detriment' as interpreted by the Employment Appeal Tribunal (EAT). It was held that it must be a disadvantage "in relation to employment", not merely an act of prejudice. In this case

the complainant was referred to as a 'wog'. Innovative and courageous judgements are decided by exceptional judges and Tribunal Chairs who are bold in attempting to reform society. The mood of public opinion and the Government of the day sway most. One ethnic minority Chairman made a historic decision by awarding £40,000 in a Tribunal case to an applicant who was badly maltreated by his employer: Jamie Williams v London Borough of Southwark (1994). He felt very strongly about equal opportunities and he made his mark by this decision, this attempting to bring about social change.

CONCLUSIONS

In a somewhat sweeping generalisation; it has been suggested that:

> *"--------- the achievement of social reform through legal action is less attainable goal in Britain than the United States. It is not surprising that, by and large, it has failed." (Hughes (1987 : 132)).*

There is a difference between the theory of rights and reality. The Government and the law have to intervene to close or narrow this gap by taking active steps to bring about changes. The public is more aware of their rights. Discrimination is emphasised by marches, television media, campaigns, and newspapers in the hope of enlightening the public. The goals set in the RRA 1976 have not been reached. The law has an obligation to deliver rights to individuals. If the Tribunals and the Courts took a more strategic and deterrent view of discrimination law then more changes could be more rapid. As it is, applicants who bring claims against race discrimination often find the damages awarded are restricted and inadequate to vindicate their rights.

According to Nisbet, law can transform society if there is the will and appropriate strategies. Nisbet is positive about laws' capability in bringing about changes. But, Allott acknowledges

the limits of the law and argues that if the enforcement machinery is weak, then changes are difficult to achieve. He is expressing pessimism and does not see much scope for law producing changes in society. Dror sees law as only one component of a large set of policy instruments. He cannot foresee law by itself being used as an instrument of social change. Cotterrell also agrees with this view, in that law is one aspect of a complex social whole affected by many social forces. Legislators have failed to recognise this, leading to disillusionment. The RRA is an excellent example of this. The RRA 1976 has failed in many areas to achieve what the legislators intended. The problem has been largely attributed to the weak enforcement powers coupled with the limits of the legislation.

Pound had long ago noted the limitations; morally important rights or duties defy legal enforcement. This fact was stressed by both Professor Hepple and Freeman in enforcing rights based law, for example, RRA 1976. Fitzpatrick saw the problem with the RRA 1976 in that there are certain bounds beyond which law cannot proceed in eliminating discrimination. Cotterrell nevertheless has hopes for transforming society through legislation. He sees a range of legal strategies for promoting social change i.e. the nature of enforcement agencies, the commitment of enforcement agents in implementing the law and the availability of resources. The Human Rights Act is the incorporation into the United Kingdom of the law of the European Union and is bound to impact on Britain, thus assisting in the transformation of the British society. The Human Rights Act came into force in October 2000. The Judiciary will have to get used to it and they are currently receiving training on EU law. There is bound to be an influence on rights law in Britain. British legislation has shown many examples of the direct use of law to attempt to influence social change through the imposition of legal duties on individuals, for example, the RRA 1976 and the Sex Discrimination Act 1975. Law is capable of achieving a restructuring of social relations through these varied legislative strategies.

If law is to be a significant instrument of social change an enforcement procedure has to be powerful enough to effect changes. Law can modify social patterns and engineer social

change but law is restricted by certain boundaries, which makes it difficult to be drastic in its operation. As Pound stated, all that law can attempt to control is observable behaviour.

To some writers, "legislation and education are not incompatible, legislation is a powerful form of education" (Lester and Bindman 1972 : 86 as cited by Cotterrell p.54). Law can be changed by educational process and this has been partly achieved by changing the attitudes of judges to some extent, hence bringing some changes to society. Given time the educative impact of law, though limited, may induce changes in attitudes within society. The use of strategy, political will, public policy and pressure has all contributed to bring the 'Lawrence Case' to the forefront of British society and its ills. This would hopefully engineer drastic changes throughout society through changes in the legislation. These legislative strategies bring about external changes and through the imposition of penalties. Some changes are brought about indirectly and by the use of incentives. Law still has a long way to go before it can evoke fundamental changes to society. Roach sees legal change requiring "interpretation, application and enforcement". Aspects of law is seen as reflecting social change and law is only seen as one strategy for social reform. I prefer Cotterrell's view to changing society than Roach's because Roach is rather pessimistic and sees a series of obstacles for drastic change. Both Cotterrel and Roach emphasise enforcement as integral to effect change through legislation.

Can law be a pioneering instrument of social change? The RRA is bound by certain limits beyond which it cannot operate. Professor Hepple sees the law as an expression of power relations. According to him anti- discrimination law has failed because rights-based law fails to change the pattern of discrimination in Britain, being riddled with technicalities and difficulties in its interpretation. Fitzpatrick further explains the problems with the RRA in his conclusions - that there are certain bounds beyond which law cannot proceed in eliminating discrimination. Law has thus effectively marked out areas in which the racism of employers may operate. He identified the role of Industrial Tribunal as supporting the employer and being more concerned about 'good industrial relations' than the grievances of the complainant. These constraints of the RRA impose limitations in eliminating racial

discrimination on a larger scale. There is some cause for optimism judging by some recent decisions but there is still ample room for further improvement and greater effect of the RRA. Recent decisions are: Quereshi v University of Manchester (1996), De Souza v London Borough of Lambeth (1997) and Alexander v The Home Office (1987) as discussed in Chapter V.

There should be more ethnic minority adjudicators, Judges and Panel Members. Training and other information regarding cultural awareness are all factors that ought to be addressed as a matter of urgency. Changes in the RRA 1976, for example, the current burden of proof rests heavily on the applicant and this presents immense problems in proving discrimination - if this burden could be shifted or relaxed then it would greatly ease proving discrimination. There are difficulties in obtaining evidence and the exercise of going through the whole experience is humiliating and very stressful for the applicant. There is almost always the pressure to settle the case by the lawyers (generally to save on legal expenses). The applicants' lack of faith in the decisions of the Tribunals is based on previous cases and awards by the Tribunals.

Both Hepple and Fitzpatrick are rather pessimistic about changes to the pattern of discrimination because both are expressing a lack of faith in rights based law. The CLS are not in favour of piecemeal reform, they see it as legitimising oppression and disguising the real problems in society. They do not impact sufficiently in bringing about change. In my view piecemeal reform is better than no reform but it still has its limitations in effecting radical changes to society. I can foresee that with specialist training, Tribunals and judges could be bolder but there is still the huge problem of the political will which is an obstacle. In view of the 'Lawrence Inquiry' and the proposals for the reform of the RRA 1976 put forward by the CRE to the present Government, there is hope for optimism. The real test will be the actual enforcement of the law to attempt to eradicate discrimination from British society.

The judiciary in failing to bring about effective change further limits the RRA 1976. This illustrates, the limits of the legislation, which impose constraints on the effective enforcement of the RRA. The decisions in the De Souza and Dawkins cases reflect the attitude of some Members of the judiciary. This illustrates the insensitivity and lack of knowledge and experience of ethnic minorities by the judiciary. In the Dawkins case the Court of Appeal could have upheld the decision of the Industrial Tribunal. If the Court of Appeal adhered to the decision of the Industrial Tribunal that they were a 'racial group' within Section 3 of the RRA, then they could have been brought within the protection of the law. Discrimination against Rastafarians could have been restrained on a larger scale. The judiciary can play a leading role in establishing precedents, thus acknowledging changing social conditions. Presently the existing limits of the RRA are further increased by the attitude of the judiciary in bringing about effective social changes. Some social theorists, for example, John Rex, argued that black immigrants occupied the position of the 'underclass'. He saw the difficulties for the dark skinned immigrant in assimilating into British society. Decisions by the Industrial Tribunal could be paving the way for acceptance of the black immigrant, thus making the process of assimilation to some extent easier.

One can express some optimism in view of some recent decisions on race cases, for example, when racial remarks are taken seriously - Kulwant Mann v Mrs Moody, DSS and two others (1992). In this case the Tribunal was surprised to hear the suggestion made, that the term 'Paki' was not a racially offensive term in the North East. To accept that argument would amount to an insult to all right thinking people in the region. This decision was distinctly an example in the change in attitude by Tribunal Members when compared to earlier decisions, for example, De Souza case in 1985. The minor changes to the RRA could be attributed to being part of the educational process and changing attitude of society and judges. The changing attitude has resulted in a more flexible interpretation of the law. This is encouraging because it could ultimately lead to more drastic reforms of the RRA. In the 1960's and 1980's the level of damages for injury to feelings very rarely was more than £500. Today there appears to be a distinct increase in the level of damages awarded, for

example, in J.J. Cuffy v British Railways Board (1993) awarded Mr Cuffy, an Afro-Caribbean £1,650 after British Rail had failed to give him the opportunity of applying for a temporary promotion for which he was more qualified than the white colleague, who was given the post without it being advertised. The average amount for injury to feelings is about £3,500 today. So in reality taking inflation into account it has not increased although there have been a few outstanding awards, for example, Quereshi, De Souza and the Alexander cases.

Other changes are worth noting. The equal opportunity policy documents of organisations and the Code of Practice 1984 were given a great deal of consideration in assessing damages for injury to feelings. In Sonia Phillip v Westminster City Council (1993), the applicant was awarded £5,000 - the respondent's equal opportunities statement was a one-paragraph document and the applicant's line manager had had no training in the Code of Practice. Victimisation was very rarely taken into account when assessing damages but in the 1990's, for example, in Singh Sohal v Walsall College of Technology (1993), the Chairman stated "Tribunals over the last 14 years have gone a long way to educate employers in matters of racial discrimination, but perhaps the question of victimisation has not been sufficiently publicised".

There has been an advance in the area of 'class actions', for example, in 1993 20 ethnic minority managers on the London Underground received a favourable settlement which gave £3,150 compensation each. The CRE has become closely involved with judicial decisions in assisting to correct past discrimination, for example, in the London Underground case mentioned above. The respondents were ordered to give the CRE yearly monitoring returns on its performance related pay scheme. Recent decisions are reflecting the assimilation of different cultural values, for example, in Mohammed Azam and others v J H Walker Ltd (1993) refusal of time off for Eid was held to be indirect discrimination. The applicants were only able to give three days notice of Eid (religious festival) and were then told not to take it. When they did take it they were given a final, written warning. The Tribunal found that this was indirect discrimination. Yassin v Northwest Homecare Ltd (1993) held that a long

working week could accommodate an hour at the mosque. The applicant in this case was awarded £3,000 compensation for injury to feelings and loss of potential earnings. These changes in judicial attitude and thinking are very encouraging but it is not enough to bring about the elimination of racial discrimination on a large scale as yet. The result of a bold judiciary and a new social consensus can contribute to transform society, hence law can act as an instrument of social change. In conclusion, if the political will is strong enough, then law can effect changes to society, coupled with reforms and an effective enforcement machinery.

CHAPTER III

SOCIOLOGICAL AND LEGAL ANALYSIS OF RACE AND ETHNICITY

The aim of this chapter is to explore sociological theories on race and ethnicity and to link them to the law. An exploration of these theories can contribute to an understanding of the reasons for discrimination. This sociological aspect is essential for a proper understanding of the RRA 1976; because law cannot be understood in isolation without taking into account the social context out of which the law arises and in which it operates.

Sociological Theories of Race

The Race Relations Bill of 1968 aimed "to prevent the emergence of second grade citizens". The New Elizabethan Reference Dictionary defines 'race' as "a group or division of persons, animals or plants sprung from common stock; a particular ethnical stock (as the Caucasian, Mongolian, etc.); a sub-division of this, a tribe, nation, or group of peoples, distinguished by less important differences." There are a number of explanations for the origin of racism.

W. Lloyd Warner's Theory of Colour Caste (American sociologist)

According to W. Lloyd Warner's theory of colour caste (Warner, 1936), American society included both class and caste divisions. He also acknowledged that skin pigmentation has high sociological significance in the interaction of different racial groups. The white population belonged to a number of strata based on an objective and subjective class assessment (Warner's studies of Yankee City). Warner discussed the assimilation of ethnic minorities of European origin, for example, Poles. As they changed culturally they advanced in status until they were totally assimilated. The 'Yankee City' studies revealed that most European minority groups moved up the stratification hierarchy over two or three generations but the Negro was prevented from associating with whites at an equivalent level despite improving his position, for example, by income. The Negro worker was the most

exploited in the United States. Warner draws an analogy with the Hindu caste system in India. The idea of caste began with the sense of colour superiority on the part of the Aryans towards the darker skinned Dravidians with whom they integrated in the Ganges plain. The caste system was based on occupational specialisation and skin colour. The Brahmins - who were generally lighter skin coloured were priests and the Sudras (lowest labouring class) undertook tasks such as cleaning toilets, etc. The Indian Constitution has made the caste system illegal but the practice still persists.

Warner's theory helps me in that skin pigmentation plays a significant role in the law of discrimination. I prefer Warner's theory (from the legal perspective) to Cox's theory of stratification, which is also useful and is based on social class and status. Class and status are not immutable, therefore this theory is useful to classify people according to racial groups, for example, Chinese and South Asians have moved up the ladder from being termed as 'under class', although it appears that their social mobility is still within racially defined niches. Warner's theory gives a realistic picture of discrimination in present day society because skin colour has high social significance in the interaction of different racial groups. Warner's theories differ from the theories of John Rex except that the 'stratification theory' of Rex can be equated with the 'class division' theory advocated by Warner. Rex does not disagree that skin colour has been a stigma because it is so visible. Rex reinforces Warner's theory of 'colour caste' to some extent. Warner's theory will assist in bringing about social changes if discrimination cases based on colour (which is so in the majority of cases), are brought before Tribunals and courts. Society will be made aware of the extent of discrimination and there is the possibility of invoking further change to society and it could impact on social policy.

Minority Theory by Louis Wirth (American sociologist)

This theory reinforces the reasons for discrimination in society based on racial groups who are minorities. This theory does not pass the test of adequacy for my topic of research. It implies that a change of attitude to minorities will bring about change to society. Change of

attitude alone is insufficient because it does not cover indirect discrimination (one can discriminate without the intention to do so under this kind of discrimination). Further, institutional racism is not addressed by this theory. This theory will not assist to eliminate discrimination because it excludes indirect discrimination and institutional racism. These two areas of the race relations law have to be addressed before significant changes to society can be envisaged.

Louis Wirth defines:

> *"A minority as a group of people who because of their physical and cultural characteristics are singled out from others in the society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination. The existence of a minority in a society implies the existence of a corresponding dominant group with higher social status and greater privileges. Minority status carries with it the exclusion from full participation in the life of the society." (Wirth (1945 : 347))* The group is not necessarily in a numerical minority but in an inferior political position, for example, Africans in the 'old South Africa'. Wirth's theory of physical characteristics for unequal and different treatment reinforces Warner's 'colour caste theory' .

> According to Wagley and Harris in 1964: "*Minorities are subordinate segments of complex state societies, minorities have special physical or cultural traits, which are held in low esteem by dominant segments of the society, minorities are self conscious units bound together by the special traits, which their members share, and by the special disabilities which these bring, membership in a minority is transmitted by a rule of descent, which is capable of affiliating succeeding generations even in the absence of readily apparent special cultural or physical traits and minority peoples, by choice or necessity, tend to marry within the group.Minority groups are discriminated against and perform unwanted tasks and some are singled out as*

scapegoats by the dominant group." (Wagley & Harris (1964 : 10)). Wagley & Harris's theory also relates to the "colour caste theory" of Warner.

Biological Concept of Race

The term 'race' is defined differently by biologists and sociologists. To the biologist race is a large population, which differs from another population in hereditary characteristics. According to biological experts at an UNESCO convention in 1965, the concept that race was solely biologically determined was disregarded (Hiernaux, 1965). The principal conclusions reached at this convention were that "race is a taxonomic (principles of classification) concept of limited usefulness as a means of classifying human beings. Observable human characteristics are in nearly all cases the joint interactive result of biological and environmental factors. The sole difference, which could be attributed to biological heredity alone was that relating to blood groups and the population, which shared the same blood group by no means, coincided with 'races' in the popular usage of the term. The various characteristics commonly grouped together as racial, and said to be transmitted en bloc are in fact transmitted either independently or in varying degrees of association. "All people living today belong to a single species and are derived from a common stock." Even though opinions may differ as to how and when groups diverged from this common stock. Human evolution has been affected to a unique degree as compared with the evolution of other species by migration and cultural evolution. The capacity to advance culturally is one shared by all members of Homo sapiens and, once it exists, is of far greater significance for the evolution of the species than biological or genetic evolution." Ibid (Note above).

These experts concluded that racial differences are not biologically determined, the 19th Century biological theory of race has been immensely influential in popular ideology, because of the prestige of science and of apparently 'natural' science biology. The concept that race was solely biologically determined was disregarded by experts because of it's limited usefulness as a means of classifying human beings. In my view nevertheless, the theory that race was not solely biologically determined is useful to my topic as "natural"

science biology has been very influential among judges. There is hope that judges will interpret the legislation even more flexibly, hence changing society further. Skin colour is very visible and most discrimination cases are based on colour. If biological basis for racial differences is eliminated, then hopefully there will be a reduction of discrimination thus bringing changes to society.

In an article in 'The Independent', London (1995) February 21st, scientists see the concept of race as being out of date with no biological basis. C. Loring Brace, Professor of Anthropology at Michigan University, stated that if people had to be defined in terms of ethnic types, it should be done on the basis of geographical origin rather than physical features. He stated that "dividing people into a handful of distinct races was a historical hangover from the days of colonial conquest and had never been important in the evolution of the human species". According to him the best way to refer to people is to use geographical designations. Thus people could be identified as African, Australian, European, etc. This theory spells optimism for changes to society because the notion of colour and physical features will become irrelevant. Geographical origin will be significant in the attitudes displayed towards people, thus reducing discrimination based on colour and physical features.

Scientists have submitted an updated definition of race based on this concept to the United Nations Education Scientific and Cultural Development Organisation for approval and adoption. Soloman Katz, Professor of Anthropology at the University of Pennsylvania stated that 19th and early 20th century categories of race, which today are thought to have little scientific merit have often been used to support racist doctrines, The Independent, London (1995) February 21st). He added that public misconception about the biological basis of race, especially in relation to the genetics of IQ, have largely gone unaddressed. He argues that people are more alike than different and race becomes a meaningless distinction. Professor Luigi Cavalli-Sforza of Sanford University, an expert on human genetics said: "One of the reasons that we believe races are important is that there are some superficial

characteristics like skin colour, facial traits and body build that are very striking because we see them. There is a very good reason that superficial traits show a big difference - they represent adaptations to different climates." (The Independent, London (1995) February 21st). Professor Sforza further argues that these superficial traits make us think that races are very different while they are not, under the skin. The view of pigment genetic adaptation to climate being distinct from other genetically transmitted traits, which cannot be lumped together accords with the UNESCO view. Skin pigmentation still has a high sociological significance. The biological notion of race from the old science is still influential. The new theory on race and ethnicity makes one look at the previous theories advanced in a completely different light and question more profoundly the differences for racial and ethnic groups. Cavalli-Sforza, Katz and Brace state that the genetic inheritance of skin pigmentation has no correlation with other genetically inherited differences.

According to (The Times, London (2001) February 12th p5), colour is irrelevant according to the genome researchers for predicting physical or mental variations between human beings. (Nature magazine, including Human Genome Project papers). Every person shares 99.99% of the same genetic code and according to the scientists, the difference within racial groups are often greater than between people of different colours. The scientists discovered that variation among black Africans is particularly marked: many Africans or people of recent African descent are closer genetically to Caucasians than they are to other Africans. The scientists also concluded that distinctions between Chinese and Caucasians are virtually insignificant when compared to those between groups from parts of East and West Africa. Four different racial groups were studied and concluded that skin colour was meaningless from a scientific point of view. Race was no longer considered to be a scientific concept. Very few genetic traits are related to what society calls race or ethnicity.

This study and others confirm that skin pigmentation as a social significance rather than the biological concept of race is of greater importance. Reliance on skin colour to distinguish racial groups is now more doubtful. Warner's theory of "colour caste" and also Wirth's theory

have to be re-examined from a different perspective. John Rex, who reinforces Warner's theory of "colour caste" to some extent, also has to be looked at in a different light. This finding by the genome researchers further enhances the view of biological experts at the UNESCO convention in 1965 in that race was solely biologically determined was disregarded. These experts saw race as a limited concept of classifying human beings. The findings in 2001 reject the 19th century biological theory of race, when the experts concluded then that racial differences are not biologically determined. If differences between racial groups are minimal, there is hope for the elimination of racial discrimination, thus bringing about a change to society. Colour is also irrelevant to the genome researchers. Hopefully the terms "race" and "ethnic" would become relegated to history and discrimination will be greatly reduced, hence transforming society.

John Rex

John Rex agreed with the biological experts of the UNESCO convention. He does not disagree that skin colour has been a stigma because it is so visible. He argues that these findings point clearly to one conclusion that the concept of race as used by biologists has no relevance to the political differences among people. He points out that since 1945, false 'biological' theories of race have been discredited, but this by no means spelt the end of racism.

Psychological and cultural differences

If racial differences are not biologically determined then one has to consider the possibility of psychological and cultural differences. None of these possibilities provide an adequate explanation of how it is that people come to be classified as racially different. John Rex addressed the possibility of psychological and cultural differences for racial classification. This analysis proved difficult. Many problems arise in the attempt to assess psychological and cultural differences between races because of the great deal of variation in the socialisation process between cultures.

"So far as the cultural causation of intergroup differences in appearance, behavioural characteristics, institutions, psychic character and so on is concerned, no one would deny it. There certainly are different nations and cultural minorities within nations to be observed in the world. The question is whether the problem of the differences between these groups is coincident with the differences between groups which are said to be racial." (Rex (1970 : 5))

According to John Rex although these cultural differences between ethnic groups become the basis of a race relations structure and of a race relations problem, this need by no means always be the case. In my view it is extremely difficult to rely on psychological differences to classify races. This is a complex area. Cultural perspective can be utilised to classify racial groups but the culture of minorities is constantly changing. This change could impact on change to society. Assimilation may be made easier if the change resembles the culture of the host community.

The Theory of Class

According to Max Weber (Weber, 1968) any differential control of property produces different market situations and the market situations according to him are class situations. Weber believed that although class situations may become interconnected and merged, they need not necessarily do so, so that instead of the single all embracing class struggle in which society becomes divided more and more into two great warring camps, one finds a multiplicity of classes. The Weberian conception of market classes involves essentially power to dispose of resources and deny them to others, thus enabling the propertied to compel the actions of others against their will. In Britain class analysis is based on status, power and market positions. Weber distinguished status as a separate analytic element. This concept refers to distinctions made between two people, who, as a result of these distinctions, live within relatively distinct cultures and societies, between which mobility is restricted. It is these distinct cultures and societies, which form a graded hierarchy, but such a judgement is usually based upon the perceptions of those groups who think of themselves

as upper class. The actual relation between groups within such a 'system' is a complex matter and each group shows partial resentment of and partial adjustment to the system so long as it lasts. Weber based his class analysis on status, power and market position and therefore the black immigrant ought to occupy a position in British society based on those criteria but this is not so. In my view social class backgrounds can be shed by social mobility. Colour plays a significant role in the process of assimilation of the black immigrant. Despite the acquisition of status, power and market position, the black immigrant is outside of British society as mobility is restricted based on colour, hence change to society would be more difficult as assimilation would take years thus impending changes to society, although some change is inevitable. The immigrant is viewed as an unwelcome alien who is going to lower the standard of life for the indigenous population. The word 'black' is synonymous with crime and problems associated with education, housing etc. The 1981 riots in Tottenham, Liverpool and other cities in Britain resulted in the 'Scarman Report' which examined the state of race relations in Britain. Lord Scarman concluded:

> *"There was a strong racial element in the riots - signifying more than skin colour, outburst of anger and resentment by young blacks against the police." (Scarman, 1981).* Race may to some extent involve a problem of class on social division..

Theory of Class/Underclass by John Rex

How does one ascertain the status of the Black immigrant in Britain?

John Rex draws attention to a series of questions to ascertain whether minorities remain an "underclass" or have been accepted into mainstream society. "Are the minority, members of trade unions, and do they enjoy the effective support of trade unions? Do the minority members enjoy equal access to employment in a range of different jobs if they are qualified, and are they able to gain promotion? Are their jobs segregated? Are minority members more liable to unemployment? Do minority members have equal access to housing of differing degrees of desirability and are they segregated in housing which they do acquire? Do minority members have equal access to education and equal chances of getting through the various

selection mechanisms which form part of the educational system? To what extent do they receive education in their own values and culture and in that of the main society? Do minority members have equal protection before the law and is their experience of the police the same?". (Rex (1986 : 69)).

The answers to many of the above questions would be in the negative by many of the minorities in Britain, particularly in the field of employment, housing and in dealings with the police. Minorities may become members of trade unions but they are not in control of the executive bodies (with rare exceptions). To this extent the majority of ethnic minorities in Britain can be viewed as "underclass" (in the special sense used in the British Welfare State model). According to Rex, is an immigrant forced into the position of underclass? Evidence from Racial Disadvantage in Britain 1967 (as cited by Rex 1986 p.73) and from Colonial Immigrants in a British City 1979 (as cited by Rex 1986 p.73), shows that there is no total and complete separation of immigrant minorities on a class basis. The majority who are denied the rights to good housing, education and employment form the underclass. They are discriminated by the host community. "Two important variables affecting the emergence of an underclass are, the closeness of the minority culture to that of the host society and the length of stay". (Rex (1986 : 73)). The racially distinguishable migrant will remain as an underclass for a longer period. Some groups for example, successful South Asian communities are still confined in separate pyramids although there is interaction with the host economy. If the minorities do not undergo a process of assimilation, they will either form an underclass or a separate social and economic pyramid.

The Stratification Theory by John Rex

John Rex puts forward his theory on 'stratification' for determining racial differences. It seems that Rex is discounting psychological and cultural differences and emphasising stratification. His "stratification" and "underclass" theories attempt to rely on his theory of psychological and cultural differences between races, but proves to be difficult. He refers to the East Indian in Guyana who does not rank himself on the stratification scale. They are

descendants of indentured labourers. The view of society adopted by them may vary according to their educational standards, degree of acculturation and occupational roles. In some countries legislation separated the different racial groups, for example, in the old South Africa, class based society was very evident - the white ruling class of the past was totally separate from the African. The Calvinist of the Nationalist Party strongly believes in the destinies which God has ordained for the different racial groups. When a colonial worker enters the metropolitan society his classification is determined by colour if it is a relevant discriminating index. He finds that he is relegated to the unpleasant and unwanted jobs.

> *"Physically they live within the society, and morally they remain outside of it." (Rex (1968 : 211-31))*

In the 1960's, according to John Rex, the American Black rejected stratification and talked of 'black separatism', because the doors to being assimilated were closed. If the immigrants are peasants coming to an urban society, their chances of being assimilated are remote, for example, the majority of the Bangladeshis who basically live 'outside' the society in Britain. John Rex states that 'racism' (the practice of discrimination) by one group against another includes a variety of policies that create racial stratification. "Denial of admission to the full social, political and legal rights of citizenship unfair competition with regard to a facility or the group could be made a scapegoat and could be economically exploited. The group is forced either to assimilate or to be segregated, forced to emigrate or denied the right to emigrate. The group might be subject to punitive policies and might be destined for extermination." (Rex (1970: 121-128)). None of these factors mention psychological differences between races. They are inherited attitudes of the colonial empire reinforced by the practices of the host community and all of them are about exclusion by the host society. They are only about the psychology of perception of colour and cultural differences.

The host society perceives the immigrant in terms of the history, political, economic, and social structure of his country of origin and he/she is given a status accordingly. It is not so

easy to eradicate the thinking and beliefs associated with colonialism. An immigrant from an ex-colonial territory (especially if dark skinned) is accorded a low status - they are perceived as once subjugated people unable to fend for themselves or dangerous. Many of the criteria for racism listed above apply to blacks. Blacks face discrimination with regard to facilities and are economically exploited. John Rex's theory of underclass presents difficulties that arise in assessing psychological differences between races because of the great deal of variation in the socialisation process between cultures. His theories of "stratification" and "underclass" are useful and practical to a large extent. If society perceives blacks as an "underclass" then assimilation will present problems but this theory will not help to reduce discrimination, and bring about changes to society.

Theory of Underclass by John Rex and Sally Tomlinson

"In using the term (underclass) here, we use it in a different sense because (a) the normal social pattern which we assume is not that of 'liberty' so much as welfare guaranteed by class politics and (b) what we want to point to is the situation of immigrant minorities, who do not share in this welfare deal, but who, instead of forming an inert or despairing social residue, organise and act in their own 'underclass' interest often relating themselves to colonial class positions." (Rex and Tomlinson 1979, p.328 as cited in Rex 1986, p67).

Underclass distinguishes between those who do and those who do not share in the 'Welfare State deal' for example, where workers are free to engage in collective bargaining over their wages and conditions, people who will be entitled to basic standard of health, housing, education and other personal social services etc. The individual acquires social rights on top of his legal and political rights. The position of whether the minority groups are part of the working class depends on whether it shares fully in social rights. Denial of full social, political and legal rights is one of the policies that create racial stratification. This aspect is related to being an underclass if a minority group does not share fully in the rights of the working class of the host community. Once again this theory by Rex and Tomlinson emphasises class

which denies full rights of citizenship to some minorities. This creation of racial stratification will impede social change.

Immigrants from the Commonwealth were employed in areas of work which were unacceptable to indigenous workers. The idea that blacks comprise a problem is widespread. According to a survey in 1979 - almost a third of the immigrant workers occupied clearly segregated, low level jobs.(Blackburn & Mann (1979 : Chapter 3)). The chances of moving up the ladder of promotion to skilled labour or supervisory posts were virtually non existent for the early immigrant. The Runnymede Trust (1980), drew attention to the concentration of black workers in unskilled and semi-skilled jobs for which they were initially recruited in the 1950's and 1960's. (Runnymede Trust (1980 : 55)).

Was there a development of a dual labour market? According to (Bosanquet & Doeringer, 1973), a distinction can be made between advantaged and disadvantaged workers and between primary and secondary labour markets. Colour distinguished the advantaged worker from the disadvantaged.

> *"Disadvantaged workers are employed in enterprises where wages are low, working conditions are poor, employment is often unstable, and opportunities for on the job training and advancement are severely limited. By contrast, advantaged workers tend to receive higher pay, relatively secure employment and on the job training that leads to higher wages". (Rex & Tomlinson (1979 : 104)).*

The primary sector seeks the stable worker and the secondary sector seeks unstable employees. The result is a stratified labour market. Do immigrants make up a secondary labour market and are they part of the working class or do they form an underclass? John Rex and Sally Tomlinson see the existence of distinctions in the labour market - "would seem to be a necessary although not a sufficient, condition of the emergence of an underclass". Ibid (note above). During the 1960's black immigrant workers were

experiencing hostility and discrimination in the work place. This led to a series of industrial disputes in the 1970's, for example, the strike at the Imperial Typewriter Company in Leicester in 1974, the British Leyland Plant in 1976 at Longbridge and the "Grunwick Dispute" in 1976. These strikes illustrated the dissatisfaction of blacks in the general working conditions and the treatment accorded to them. Segmented labour markets block the social mobility of black immigrants. It entails "institutional racism" and therefore there is a need to change policies and practices of employment not just attitudes to transform society.

Theory of Stratification (Social Class by O.C. Cox)

Cox is in conflict with Warner but he built his theories on Warner and Wirth and he was very critical of Warner's notion of colour caste theory. (Cox, 1959) advanced one theory of 'stratification'. According to him racist theory and racist practise arise in specific structural situations. His theory is that racism is attributed to stratification (social class and status), but the key concept was ethnicity.

> *"The social class may be conceived as a form of social stratification and differentiation; the caste may be a form of social differentiation only. Castes may have collateral social status; social classes must of necessity be hierarchically superposed". (Cox (1959: 299)).*

According to Cox two different castes may be socially equal and he perceives the general classification is by classes, the detailed one by castes. (Cox (1959: 300)). Cox does not support the belief that the caste system involves a status gradient. Cox's stratification theory is useful to my topic because class and status of racial groups do change with the passage of time in terms of education, economic advancement etc. 'Stratification' is not static. There is hope for the elimination of discrimination. An example of a social structural situation was found in South Africa under the apartheid system, the ruling white minority at the top of the hierarchy, with the African on the lowest rung of the ladder and the Asian and the coloured (people of mixed race) sandwiched in-between. What emerges is a class system based on

colour. The whole society is classified on grounds of race. The opportunities in the job market, the type of education, housing, etc are all determined on the basis of skin colour. Cox adopted what he regarded as a Marxist point of view. He rejected the notion that there was a caste barrier between black and white and suggested that the relations between black and white were based on exploiter and exploited. To justify this point he referred to the Indian caste system showing that it was based on occupational specialisation. Cox, given his Marxist perspective, does not see the situation as one of caste but as that of race relations and race conflict.

According to Cox what goes on within the white groups and within the black groups is status striving (Cox refers to this as 'social class') whereas the relations between the two races are those of economic class. Cox's view poses the question as to whether these are not also relations of economic class conflict within the white and black communities and the relationship between the white working class and the black. Relationship of the various groups to the means of production is the main factor to be considered, for example, in the United States where there were two modes of production and two societies, slave labour and exploitation of free immigrant labour. Cox states that the basis of social class (contrasted with economic class) is not structural but conceptual. According to him no groups exist, only a series of reference points in terms of which men judge one another. The key concept for Cox was 'ethnic' and that the relation between white and black ethnics was one of exploitation, like class according to Marxists, except in this case they are 'ethnic classes'. Warner sees the situation as one of 'caste' and Cox as one of 'class'. The stratification theory by Cox, although it casts hope for the reduction of discrimination, there is still the problem of being accepted by the host society. I can foresee change at an extremely slow pace, especially if colour is used as the index for judgement.

Wallman's "Other Theory"

According to Rex, Wallman does not believe that it is important from the point of view of "boundary theory" to distinguish between race and ethnicity. There is a common theory of

boundaries in which colour and phenotype are on par with differences of culture. "A social boundary is about the organisation of society, no more and no less than it is about the organisation of experience" - Wallman 1979, p.207 as cited in Rex 1986 p.93. It marks the difference between "us" and "them" and it indicates identity. Wallman is attempting to establish as to whether ethnicity or some other factor is the basis of a boundary, the markers for recognition and in what way and it what situation a boundary might move.

Wallman's theory of aspects of boundaries quotes black and white resident units in a housing estate as "us" against the bureaucrats as "them". The second example is Asians of different groups for example, Pakistanis and Indians have a common interest become "we" and the British "them" in the context, although they draw boundaries between themselves. "Ethnicity can be used as a boundary marker in some cases and in others it is not. Wallman suggests that whites might use this boundary to preserve their own sense of identity". Mason & Rex 1986 as cited in Rex 1986 p.95. Ethnicity may or may not be involved as a boundary marker and there is flexibility in boundary marking, but nevertheless ethnicity is always there according to some anthropologists.

According to Rex, Wallman's theory has strong links with the political system. For example, the case of the British "Asians" is indicative of racist thinking by the British. The problem of the Black British is again a problem that arises because of earlier generalisations made about Blacks. Ethnicity or class or both can operate as a boundary thus creating divisions. Wallman suggests in situations involving a conflict of interest, ethnicity becomes active except when it is used as a means of achieving identity - "other".

Wallman's theory reinforces Barker's view that places emphasis on cultural differences between the host and the immigrant. Wallman's “other theory” is not helpful in that it emphasises the difficulty of bringing about the change to society as long as people are divided as "us" and "them". Barker places emphasis on cultural differences between the host and the immigrant. He also reinforces the “other theory” advocated by Wallman. According

to Barker, a cultural racism emerged in Britain after the defeat of the Conservative Government 1970 - 1974. The immigrants who arrived in Britain were seen as a threat, swamping the culture of the British people. Barker identified this as the case of new racism.

> *"A theory of human nature. Human nature is such that it is natural to form a bonded community, a nation, aware of its differences from other nations. They are not better nor worse. But feelings of antagonism will be aroused if outsiders are admitted..... Each community is a common expression of human nature; all of us form exclusive communities on the basis of shared sentiments, shutting out outsiders." (Barker (1981 : 21.2)).*

This is reminiscent of the speeches by the members of Parliament during the passing of the Bills on the Race Relations Acts and of Enoch Powell on immigration. The focus is on a particular ideology. Barker identified this theory of human nature as a form of racism. This emergent ideology dispenses with the notion of biological superiority, inferiority (although not exclusively) and instead considers the 'other' as being different in cultural terms and to have a natural 'home' outside Britain. The centre for Contemporary Cultural Studies (CCS) text agues that it is not a fixed, static ideology, but contradictory and constantly undergoing transformation (CCS (1982: 9-11)). Barker's theory is not very optimistic in effecting change to society as he emphasises the cultural difference and also supports Wallman's "other theory" which divides society rather than unifying it.

Robert Miles

Robert Miles also supports 'the other theory' of Barker, but considers the concept of new racism to be problematic because it is not new. The new ideological content continues to maintain the idea of the 'other'. Robert Miles states "by attributing a population with certain characteristics in order to categorise and differentiate it as other, those who do so also establish criteria by which they themselves are represented" (Miles (1989 : 38)). By defining Africans as 'black' and 'savages' they were excluded from the European who were

presenting themselves as 'white' and 'civilised' (Ibid (note above : 39)). The European created 'the other' by colonisation, for example, Africa and India; some also were created within the state, for example, the Jewish people and further the population of the different parts of Europe. The representation of the 'other' has undergone transformation over time in response to changing circumstances, but the categorisations of self and other populations has continued. Robert Miles acknowledges transformation over time. Miles's theory accepts the differences between races but does shed some hope that society may undergo transformation over time.

Shifting Meaning of Race and Racism by Solomos and Back

Solomos and Back do not see the meaning of race and racism as being static but one that is constantly changing. Solomos and Back perceive racism as flexible and concur with Miles with the perception of the changing meaning of race and racism. Robert Miles perceives transformation spread over a long period of time whereas Solomos and Back see race and racism changing at a faster pace constantly and as flexible. (Solomos & Back, 1996), analyse the role of racism in contemporary societies and account for the changing forms of interaction between racism and other features of contemporary social relations. In recent years there has been the growth and genocide impact of new forms of racial and ethnically based ideologies, for example, in Africa, Western and Eastern Europe and the 'ethnic cleansing' in Kosovo. The rise of extreme right wing and new fascist movements has led to new forms of racist politics and also the rise in anti-Semitism in Western and Eastern Europe. Immigration and race have assumed a new political and social dimension. The idea of 'race', 'nation' and 'ethnicity' are constantly changing as a result of governmental regulations and popular mobilisation. Complex social, political and cultural determinants shape contemporary racist discourses and movements. One finds a combination of arguments in favour of cultural difference along with negative images of the "other" as a threat and as representing an "impure" culture (Gilman, 1985; Enzensberger, 1994) p.209 as cited in Solomos and Back). Solomos and Back see the notions of race changing which needs to be understood in its particular context. If the notion is used to divide nations and

communities, then society can expect a pessimistic future underlining the cultural differences. This will enhance discrimination and change for a better society becomes remote.

David Goldberg argues that "there is no single characteristic form of racism, but also that the various racisms have differing effects and implications..... they have different entailments and ramifications in relation to specific considerations of class, constitution, gender, national identity, region and political structure. But the character and implicature of each racism are also set in terms of its own historical legacy and the related conception of race" thus transforming society (Goldberg, 1993, p.91 as cited in Solomos and Back p.209). The term 'race' will be given a new meaning. Political, social, economic transformations will occur but at the same time the surge of nationalistic feelings will make change difficult. In Britain multiculturalism is not readily accepted by all – there is still the concept of differences in culture. Collette Guillaumin also argues that the "idea of race" is neither rigid nor fixed. Its boundaries and its meanings are flexible, event though the 'core may remain the same' (Guillaumin p.5 (1991), p.209 as cited in Solomos and Back). Culture can be an important factor in relation to politics.

New forms of racism and social movements attempt to use racial and ethnic boundaries as a basis for political action. Contemporary racist ideas are able to maintain a link with the values of classical racism and adopt cultural and political symbols that are part of contemporary societies. (Zizek (1993) p.211 as cited by Solomos and Back) notes the role of contemporary racism and nationalism in providing a basis of certainty and identity, as against 'foreigners' and 'others' who are different and who do not belong to the 'community' or the 'nation'. Zizek is predicting a pessimistic future of genocide and 'ethnic cleansing'. According to Huyssen, (1995) p.212 as cited by Solomos and Back

> *"Racism is an ever changing social phenomenon which recreates itself in new forms all the time."*

'New racism' embraces culture in its definition of 'race'. 'New' does not necessarily help us to understand the complex variety of arguments and ideas that are found within contemporary racist discourse. Henry Giroux argues for the emergence of a 'new racism' in the following terms: "We are now witnessing in the United States (and Europe) the emergence of a new racism and politics of cultural difference both in the recognition of the relations between otherness and difference on the one hand, and meaning and the politics of representation on the other" (Giroux (1993) p.8, p.212 as cited by Solomos and Back). New racism is sometimes called cultural racism. The differences between contemporary and traditional forms of racism are not classified.

Other recent writings have talked of the emergence of meta racism, new racism or more descriptively new cultural forms of racial discourse. (Todorov, 1986 : Taguieff; 1990; Balibar and Wallerstein, 1991; Bhabha, 1994 p.213 as cited by Solomos and Back). New racism is not a uniform social entity as such. Racial discourses are using a new cultural and social language to justify their arguments. No essential notion of race has remained unchanged by wider political, philosophical, economic and social transformations (Gilman, (1993) p.213 as cited by Solomos and Back). Over the years racism has combined different and contradictory elements within specific social and political contexts.

A number of commentators have pointed out the limitations of the legislation and public policy interventions in bringing about a major improvement in the socio-political position of minorities. Nationalist movements are embedded in specific images of landscape and territory (Huyssen (1995) p.214 as cited by Solomos and Back). The question of citizenship, multiculturalism and anti-racism all pose problems for the future and will involve controversy. There is a need to see racism as a flexible and constantly changing ideology. The search for a uniform definition of 'new racism' has proved intractable. 'New racism' has always been present. Emphasis was placed on 'biological' superiority of some races over others in the 19th and early 20th centuries. In my view the new meaning of racism should alter the

attitudes and views of society. This in turn should impact on the legal definition of race and hopefully law will act as an instrument of social change thus transforming society, but only if it can address new forms of racism. Given the changing nature of racism and that it is recreated, theorists of new cultural racism feel that cultural and new racism has to be acknowledged in order to remove racism, for example, that law has to recognise new ethnic groups like the Rastafarians. This is very useful in that the law regarding new ethnic groups will be changed, thus transforming society, hence there will be a reduction in discrimination.

The Policy Implications on the Sociological Literature on Race

According to Rattansi *"There are fundamental similarities in conceptualisation and prescription between multi-culturalism and anti-racism which are flawed... their frameworks and policies share significant and disabling weaknesses"* (Rattansi 1992, p.24). There is an assumption that racism operates rationally but it can be contradictory . Racism is seen as a complex phenomenon not so easy to change through policy intervention. Racism is expressed in different forms and is difficult to challenge. Many feel that a strong race relations law, and more vigorous policy implementation will achieve success. British 'race' relations policy places emphasis in law attacking racism.

This liberal policy framework which emerged in the mid 1960's has been analysed by Banton (1985) and Saggar (1992 a). The element of the notion of racial harmony as a public good (the setting up of Community Relation Councils), the philosophy of community relations, attempts to depoliticise issues of racism and migration and the notion of a multi-racial society. The notion of racial harmony was replaced by the concentration on racial equality. The concept of a multi-racial society has been called one of the 'great undefined terms of British social policy'. (Saggar 1992 a, p.38) Immigrants established a multi-cultural society and the policies of assimilation, integration and equal opportunity were emerging. Miles (1993, pp117-18) perceives the making up the British nation state as partial and incomplete, cultural integration of the British nation has never been achieved and there was no unified British culture in existence. Previous migrant groups eg, Irish, Chinese were seen as

belonging to biologically and culturally different racial groups. Class divisions were associated with culture and race. Rex (1995) saw tensions between 'equal opportunity' and cultural diversity. The recognition of the diversity of forms of ethnic mobilisation and ethnic identification is required. Between 1968-1975 there was limited success in influencing perception and behaviour through public policy on race. British 'race relations policy' emphasised tolerance, equal opportunity and cultural pluralism. These policies covered health, social services, education, housing etc. The emphasis on the infringement of individual rights can counter positive action policies to address past discrimination.

Attention needs to be focused on law in accommodating ethnic minority customs and cultural pluralism. According to Poulter, findings have emphasised that cultural tolerance is bounded by reasonableness and public policy and minority customs will not be recognised if they offend the conscience of the court (Poulter 1992 p.176). The attitude of a universal approach to equal opportunity policy is seen as a barrier. The RRA 1976 has assisted in social policy development but policy development has to be addressed to relate to minority ethnic groups. A balance has to be struck between particular interests and universalistic strategies to create a more pluralistic welfare system. Some groups or communities are excluded from the better opportunities of the mainstream welfare system. The constraints of social policy disadvantages some groups and may be summarised as *"the dominance of economic liberalism, economic decline and public expenditure constraints, the centralising and paternalistic traditions of governmental social policy reluctance to accept diversity of aspirations, needs and culture, and reluctance to acknowledge or confront the distributional effects of those public policies that are not focussed on aiding the marginalized"* (Harrison p.51). Ethnic minorities suffer adverse experiences because of the failure of urban social policies. Social policies very rarely cater explicitly for diversity and minority needs although some inroads have been achieved as a result of pressure and campaigns by minorities.

The Social Movement Theory

Social movements attempt to bring about changes to society. Social movements in relation to black and anti-racist organisations are a very important factor in changing social attitudes and practices beyond the law. According to Porta and Diani (Porta & Diani (1999 : 3)), it is possible to identify four currently dominant perspectives in the analysis of collective movements: collective behaviour, resource mobilisation, political process and new social movements.

"Collective behaviour was in fact defined as behaviour concerned with change (for example, Blumer 1951 : 199 as cited in Porta and Diani (1999) p.5, and social movements as both an integral part of the normal functioning of society and the expression of a wider process of transformation." Social movements attempt to transform existing norms. According to Porta and Diani social movements develop where a feeling of dissatisfaction spreads and institutions are unable to respond. Four levels of analysis were identified by Porta and Diani as fundamental for the study of movements. The conflicts of which they are protagonists, the production of shared beliefs and collective identities, organisations and social networks and political opportunities for protests to develop.

The construction of identity is essential in collective action. People are linked by interests, values, common histories – or else divided by these same factors. Porta and Diani state that social movements declare that they wish to construct a new model of democracy. Some organisations become institutionalised and turn into political parties or interest groups; others become more radical and turn to violent forms of action, some turn commercial or become similar to religious sects. Social movements frequently emerge within the host institutions. "The models of organisation adopted by social movements are continually transformed in a process of 'adopting, adapting and inventing." (McCarthy (1996) as cited in Porta and Diani p.164). The consequences of social movements are changes. A great deal of legislation raised during protest campaigns has been produced.

According to Melucci (a sociologist, 1980) "new social movements try to oppose the intrusion of the State and the market into social life, reclaiming the individuals identify, and the right to determine his or her private and affective life, against the omnipresent and comprehensive manipulation of the system" as cited in Porta, p.12. In his view new Social Movements challenge the notions of politics and of society themselves. There is continuity for the movement over time. Movements often alternate between brief phases of intense public activity and long latent periods. He sees social movements as a relationship between identity and collective action. Collective identity guarantees continuity to experiences of collective action over time. Identity differentiates oneself from the rest of the world and to be recognised by it. Some social movements are directed primarily to value systems while others concentrate on the political system. "The effects of social movements are also connected with diffuse cultural change, the elaboration of "new codes" (Melucci 1982; 1984a as cited in Porta p.236).

According to Touraine (a sociologist in 1981) social movements are not a marginal rejection of order, they are the central forces fighting one against the other to control the production of society by itself and the action of classes for the shaping of historicity (Touraine 1981 : 29) as cited in Porta p.12. In the industrial society there is class conflict and he perceives new social classes replacing the capitalists and the working classes as being central to the conflict. "The sociology of social movements cannot be separated from a representation of society as a system of social forces competing for control of a cultural field." Touraine (1981 :30) as cited by Porta p.46.

Touraine identifies four types of society, agrarian, mercantile, industrial and programmed (post industrial society). He places emphasis on self affirmed identity and collective action. Touraine (1981), in his analysis of social movements, examined new patterns of political action and organisations. These movements for example, women's movements, anti-nuclear and peace movements have become very vocal, militant and politically significant. Touraine uses this theory to examine new patterns of political action and organisation, which have emerged in the overdeveloped countries as their old industrial order has begun to

decompose. Social and political activities based away from the workplace tend to become as vocal and politically significant as the workers movements. According to Touraine these groups may challenge the mode of production and they are also struggling for control over socio-economic development. Social movements aim not only to change public opinion, they also seek support among those responsible for implementing public policy. The movement attempts to change the values of politicians as well as the public. The importance of social movements lies with the increase in resources available for collective action.

Melucci supports the "social movement" theory of Touraine. This theory is used to examine new patterns of political action and organisation. Melucci sees the religious or spiritual elements in society as part of the new social movements, for example, the Rastafarian movement. The Rastafarians are not viewed as a particular black problem by Melucci. The activity of urban social movements and conflicts with urban political movements and state institutions are often attributed to race because of the view that Blacks are a problem in British society.

Political organisations and movements, for example, CARD (Co-ordinating Committee Against Racial Discrimination); Anti Nazi League, Civil Rights and Black Power, have all at various times contributed towards the struggle against racism. Political developments in the United States and the Caribbean as well as violent street protests in urban areas contributed to the political changes of black Britain, for example, the Notting Hill riots. The influx of immigrants in the 1960's, particularly from the Commonwealth was seen as a threat to law and order by the British Government. Governments concentrated more on tight immigration controls, for example, the Commonwealth Immigrants Act of 1968 (there was an earlier one in 1962) than on improving race relations. In short, social movements and organisations were seen as problems of immigration and social disorder.

The manner in which the host society perceives black immigrants determines the pattern of race relations. Paul Gilroy (1987) argues that the core of racist reasoning is based on the idea that blacks are seen as a problem in Britain. There were deep causes of concern about

black immigrants. In nearly every speech made in support of the 1968 Race Relations legislation; it was stressed that new race laws were necessary in order to prevent the kind of civil disorders seen in the United States. The 1968 RRA was undoubtedly seen as one of the ways of heading off the then growing 'black power' movement in Britain. The second generation black youth were seen as a 'particular problem'. The immigration law assumes that the black minorities are a threat to law and order by their mere presence here. According to Paul Gilroy blacks are viewed as comprising a problem, or more accurately a series of problems. Racism itself is seen as something peripheral to British society and a way of life. Blacks are viewed as an external problem. The victims of racism are blamed for racism. Social movements are linked to exclusion and boundary setting. According to (Langer, 1984), Britain's social movements around 'race' exhibit all the characteristics of the social movements, suggested by Touraine and Melucci. These social movements use ethnic and racial boundaries for political action. Social movements meet counter movements of new forms of racism.

Question of Social Mobility

Can a black immigrant acquire a class position in British society? Is it possible to obtain social mobility? A study was carried out in Oxford to ascertain the class position of the Asian petty bourgeoisie in 1992 (Srinivasan 1992) (the immigrants who came to Britain in the 1950's and who are now established as a 'business class'). This survey by Shaila Srinivasan was based on a survey of the population of Indian, Pakistani and Bangladeshi small shopkeepers and restaurant owners in Oxford. Their economic position in terms of income and property, the 'work situation' and finally the 'status situation' was examined. An attempt was made to determine the class position of this entrepreneurial group and to see if the movement onto the petty bourgeoisie implied social mobility.

The study revealed that the market situation of the Oxford small business owners was quite secure. Within the work situation, independence and a certain measure of control in interaction with the major society at large may not be significantly improved, the host's frame

of reference was not the important one for the Asians. Business and financial prosperity contributed to significant status enhancement within their own communities. In this study, the status within the ethnic group was considerably enhanced by entry into small business. The study concluded that the Asian small business owner could now be seen as a well-established section of the middle class. According to (Lockwood, 1958), the social status of occupation depends in part of the social origins of the individuals. In conclusion the Asian immigrant occupies a status within his or her ethnic group. This had no relevance to the class system of the host society. Britain has a long and well-established class system. The immigrant is viewed as an 'alien' and the system of stratification does not apply to the immigrant. According to the survey, the Asian immigrant may perceive himself as working class in terms of the host society, as middle class within his own ethnic group and as upper middle in terms of his/her country of origin. It is very difficult to think of the Indian entrepreneur as an 'underclass'. In my view, they are forming a separate social class but still remaining separate from mainstream society. According to Tariq Modood on a major report by the Policy Studies Institute in 1997:

> *"suggests that the diversity among the ethnic minority groups is as significant as the black-white divide". This report revealed that "all ethnic minority groups continue to be employed and to earn below what is appropriate for their level of educational qualifications, and continue to be grossly under represented as managers in large firms and institutions. Moreover, while Chinese and African Asians have achieved broad parity with whites, Indians and black Caribbeans are relatively disadvantaged and the Pakistanis and Bangladeshis continue to be severely disadvantaged". (Modood (1997 : 341)). He states that a more plural approach to combating racial disadvantage was needed.*

The report also states that the ethnic minorities study much harder and longer than their white peers do and they also work harder and longer in their jobs. These factors have enabled them to progress and to some extent the earning gap with whites has been

narrowed through self-employment especially by Asian groups. Pakistanis and Bangladeshis emerged as a group where poverty was rampant. The factors for this problem were identified as "poor qualification levels, the collapse of manufacturing industries, large families, poor command of English among women and very low levels of economic activity" Ibid (Note above). The report further states that although Caribbeans are less disadvantaged, young men are beset with other problems, for example, unemployment among them is disproportionately high, they are without family stability and they are also involved with the law. The women from this group fare better - young black women are earning more than white women are. The report also concluded "although disadvantage is diminishing across the generations, this is less clearly the case for Caribbeans" (Modood (1997 : 351)).

Modood states that the problems among ethnics are also prevalent among whites and he sees the disadvantage as not simply a division between black and white. One cannot "expect racial disadvantage simply to wane over time". Ibid (note above) states Modood. In the light of the survey by Modood, in 1997, it is not possible to attribute the label 'underclass' to the Asian, African or Chinese. The minority groups are no longer in all the same position. Society has changed. Young black women are progressing better than white women in the employment sector. There are wide differences between minority ethnic groups and some groups can no longer be viewed as suffering from economic disadvantage and as an 'underclass'. Perhaps the label 'underclass' can still be attributed to the Caribbean male, Pakistani and Bangladeshi because they are still economically disadvantaged. The African, Asian and Chinese have not only reached parity with the host community but in some cases have moved ahead. How can they possibly be called an 'underclass' in terms of economic progress? The significant inference one can draw from this is that society can change and hence bring about social transformation but the term 'underclass' can still be attributed to most of the non white populations with exceptions, for example, Chinese and some South Asian minorities.

The use of the terms 'Race' and 'Ethnicity'

This section attempts to set out the distinction between race and ethnicity, and also identifies the area where there is an overlap of race and ethnicity. Race is genetically determined whereas in the case of an ethnic group the characteristics may have been acquired as part of a cultural heritage. This would include, for example, Jewish people and Sikhs in Britain. The unity is based on tradition and sentiment. Ethnic groups are generally recognised by their neighbouring population. An ethnic group does not need to be a genetic group nor rigid nor stable. Migration has meant that millions of people travelled and settled in different parts of the world. They carried with them their genes and their culture and their origins are different. It is this difference which makes them an ethnic group, for example, the Indians in South Africa and Trinidad. As time goes on, ethnic distinctions may break down and genetic distinctions vanish. The view held by Shibutani, is that,

> *"Ethnic minorities are usually highly responsive to the demands of others with whom they identify on the basis of common ancestry, but in most cases each knows on a personal basis only a small percentage of those who make up the category". (Shibutani (1961: 257)).*

Shibutani's concept is based on the inside of the groups' own perception of grouping. The use of the term 'race' and 'ethnicity' varies. In the United States the new European immigrants were referred to as ethnic groups as contrasted with the settled White Americans. The difference between blacks and whites were termed as racial in the United States. In Britain, blacks and Asians are referred to as ethnic minorities.

> *"A categorised description is an ethnic ascription when it classifies a person in terms of his most general identity defined by his origin and background." (Barth (1969 : 13))*

According to Barth, a social anthropologist, ethnic identity classifies people according to their origins and background. The fact that a designation of ethnicity can be a sub categorising (of

a race) is not peculiar to industrial societies. Biological fixing of categorisation is a result of the 19th century science of race but there can be an overlap between 'ethnicity' and 'race', for example, a Sikh belongs to a particular ethnic group and can be termed as 'Asian' racially.

In Banton's view, race refers to the categorisation of people, while ethnicity has to do with group identification. He argues that ethnicity is generally more concerned with the identification of "us" while racism is more oriented to the categorisation of "them". (Banton (1983: 106)). According to Eriksen,

> *"social anthropology refers to ethnicity as aspects of relationships between groups which consider themselves, and are regarded by others, as being culturally distinctive". (Eriksen (1993 : 4))*

He perceives 'ethnicity' as a term that always involves differentiation - i.e. a banding of a group by reference to another - never something in itself. Groups of people are classed as belonging to an ethnic group by various characteristics that are attributed to them as a race or people. The common ties that hold them together are particular customs, language, tradition, culture, religion, particular social practices, etc. These ways of clarifying theories are utilised by the law to establish legal criteria for defining an ethnic group and are vital for a proper understanding of the manner in which race relations case law has evolved. In Section (3), I examine a case on Rastafarians to establish the legal reasoning to define an ethnic group. Gordon (in 1978) suggests that this sense of ethnicity,

> *"because it cannot be shed by social mobility, as for instance social class backgrounds can, since society insists on its inalienable ascription from cradle to grave, becomes incorporated into the self." Gordon, (1964) as cited in Glazer & Moynihan (1975) p.92.* According to this view, ethnicity is seen as a separate entity from class or political factors.

There is a large overlap between race and ethnicity. According to John Rex it is insufficient simply to distinguish between race and ethnicity by saying that one was based upon phenotypical, the other on cultural difference.

> *"Experience of race relations situations suggested that they were usually based upon severe conflict, discrimination, exploitation and oppression, whereas ethnic relations seemed to refer to benign conflict – free situations" (Rex (1986 : 36)).*

That this is misleading is shown for example, by the situation in Northern Ireland and the present problems in Yugoslavia. According to John Rex we might possibly admit that the perception of difference itself is a cause of action with or against the category of people perceived to be different. Barth and Wallman are forced to move from studying the benign to studying the malign and political aspects of both race and ethnic relations. (Rex (1986 : 97)). Ethnic as distinct from racial, attachment arises through culture, individuals may be drawn to others by the principle of 'consciousness of kind' operating through cultural as well as physical characteristics. But those who share the same culture often claim to have a common ancestry. So the distinction between racial and ethnic groups becomes problematic "Racial groups are groups which are thought to have a genetic or other deterministic base. Ethnic groups are thought of as those whose behaviour might change" (Rex (1986 : 17)). John Rex concludes that "a group which has common cultural characteristics only (rather than common physical ones) may be termed a 'race' by those who oppose, oppress and exploit them, while a group which has clearly different physical characteristics may, those characteristics not withstanding, be held by political democrats and liberals to be only ethnically different". (Rex (1986 : 17)). John Rex attempts to clarify the problems between race and ethnicity on one hand and class and status on the other. The meaning of 'ethnicity' as defined earlier in this section by Barth and Gordon still holds.

According to Solomos and Back there is "a choice between either embracing the complex multiple formations of itinerant culture produced through movement and passage; or the

assertion of arborescent traditions that in one way or another rely upon the simplicity of racial or cultural essences". (Solomos & Back (1996 : 155)) Solomos and Back feel that there should be scepticism about primordial definitions of group's identities. Ethnic cleansing is very evident today in, for example, Yugoslavia and the present situation in London following the Stephen Lawrence Inquiry is evidenced by growing forms of xenophobia, violence and racial problems. "Authoritarian claims to territory and space have been used to justify cultural incompatibility and exclusion" Carter et al, 1993, as cited by Solomos and Back p.155. A new and complex theorising of identity and belonging has emerged. Solomos and Back raise the question as to how do groups, which share a common culture, or language maintain connections while separated geographically? Migrant communities develop new forms of identification and feelings of belonging. "The notion of Diaspora has been used to describe the complex modes of belonging where dispersed communities are in but not of particular social formations." (Safran 1991; Boyarin and Boyarin, 1993 as cited by Solomos and Back p.141.) The culture of minorities is constantly changing. Culture is in a constant state of reformulation such as social movement, such as Civil Rights movements in America, anti Colonial struggles in Africa and the newly created Civil rights body in London in March 1999.

Race and Ethnicity as Defined by Case Law

Four Groups have been considered under this heading under the 1976 RRA - Sikhs, Gypsies, Rastafarians and Muslims.

Sikhs

Mandla v Dowell Lee 1983

Mandla (M) and his son were Sikhs. In 1978, the headmaster of an independent school in Birmingham refused to offer the son a place in the school because he insisted on wearing his turban. This was against the school rules, which required all pupils to wear school uniform. M and his son claimed that the imposition of 'no turbans' rule amounted to indirect

race discrimination against Sikhs - contrary to the 1976 RRA. The Birmingham County Court dismissed the application. The Court of Appeal dismissed an appeal, concluding that Sikhs were not a group defined by their ethnic origin.

Section 3 (1) of the RRA 1976:

> *"In this Act unless the context otherwise requires – 'racial grounds' means any of the following grounds, namely colour, race, nationality or ethnic or national origins, 'racial group' means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls."*

The House of Lords considered the meaning of 'ethnic' by referring to a set of characteristics to be met by a group to constitute an ethnic group. They must have a long shared history and cultural tradition of their own and in addition some of the following criteria must apply - common geographical origin, a common language, common literature, common religion and being a minority or being an oppressed or a dominant group within a larger community. In the Mandla case the House of Lords had to determine whether Sikhs constituted a racial group. Lord Fraser concluded that whilst the word 'ethnic' conveyed a 'flavour' of race it could not, within the meaning of the Act, be "in a strictly racial or biological sense", but that it had an "extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin". The legal term 'racial' is extended to include 'associated' with a common racial origin, on the one hand and the sociology which sharply distinguishes biological from cultural difference while reserving 'racism' and racial prejudice for the treatment of cultural distinctions as if they were fixed as biological ones. The House of Lords extended the meaning of 'ethnic'. Ethnic is used in a wider sense than strictly 'racial' or 'biological' by the law. For the law ethnicity has to be objective whereas in sociology ethnicity is a relation; it is inter subjective. This draws a distinction between the law and the sociology of ethnicity. If the law changes, it will be closer to the sociology of ethnicity and

more flexible. The law can then act as an instrument of social change. A group can be defined by reference to its 'ethnic origins' within the meaning of Section 3 (1) RRA 1976 if it constitutes a separate and distinct community by virtue of characteristics, which are commonly associated with a common racial origin. The House of Lords held that Sikhs are a group defined by 'ethnic origins' for the purposes of Section 3 (1) of the RRA 1976. The House of Lords unanimously allowed M's and his son's appeal.

Gypsies

CRE v Dutton 1989

The defendant displayed on the door of his public house a sign or notices which said 'no travellers'. The two vital points raised in this case were. What is the meaning in its ordinary and natural meaning of the words 'no travellers'? If the word or expression is 'travellers', is it synonymous with the word 'gypsies' as intended by the plaintiffs, and are gypsies a racial group within the meaning set out in Section 3 of the 1976 RRA? Chambers 20th Century Dictionary 1983 edition defines gypsies as 'travelling folk, people: the name by which itinerant people often refer to themselves in preference to the derogatory names gypsies or tinkers'. Dr Thomas Acton, one of the two experts called by the plaintiffs, is a sociologist. He said in his report:

> *"In my view in England and Wales today, both amongst travellers and among non-travellers, the words 'traveller' and 'gypsy' (both, of course, English, rather than Romany words) are virtually interchangeable and refer, in their broad sense to four of the ethnic subdivisions of a great international people who resulted from the Romany emigration from India." (Acton, (1986: 1)).*

Judge J. P. Harris, in a County Court decision, rejected the meaning of the words 'travellers' and 'gypsies' as either synonymous or interchangeable and held that they had different and wholly separate meanings. He said;

"Accordingly it would seem to me that the word 'traveller' does not mean gypsy but refers to all travelling persons."

The Court held that the criteria set by the Mandla judgement on long shared history be fulfilled. The criteria on cultural tradition should also be met - their travelling way of life, particular habits in relation to cleanliness, family organisation, etc. These criteria were not established according to Judge Harris and he did not view gypsies as an ethnic group. He drew a distinction between Sikhs and gypsies. The evidence of Dr Acton was not sufficient for the law to draw from. Judge Harris held that there was no easily identifiable group of gypsies as there were of Sikhs. He held that the group, whether you call them gypsies or travellers, are not a group forming a racial group referred to by reference to their ethnic origin as provided by Section 3 (1), 1976 RRA. Some of the criteria as set out by the Mandla decision could be met but not all the criteria could be fulfilled by them:-

J. Okely, a sociologist, takes the view that there is no such scientific entity as a "race". Nonetheless, she asserts firmly "the Gypsies or Travellers -------- while not a separate race (and no such entity exists) ------ are still an ethnic group." (Okely (1983 : 35)) This evidence of Okely was not enough for the law to rely upon. D. Sibley, a lecturer in Geography, writes of Travellers as an ethnic group (Sibley (1981 : 51)).

"The evidence suggests that gypsies are not simply a social group but a cohesive ethnic group with membership based primarily on descent. They are not, as has been sometimes thought, the dropouts from house dwelling society. They have a distinct cultural identity and maintain by intent their separation from the settled society." (Hall, 1975).

The word 'gypsy' meant – 'a member of a wandering race of Hindu origin' according to Lord Diplock in the case of Miles v Cooper (1967). This first definition of gypsies by Lord Diplock refers to the race and racial origin. The Court in that case was unable to accept that the

word 'gypsy' in the Highways Act 1959 meant 'race' because that would have been discriminatory. The Caravan Sites Act 1968 also provides a definition of gypsies as "persons of nomadic habit of life whatever their race or origin". Diplock L. J. defined the meaning of gypsy - "A person without fixed abode who leads a nomadic life dwelling in tents or other shelter or in caravans or other vehicles". Here there is a reference to a distinctive lifestyle. Racial definition and lifestyle definition are not compatible, because they are two very different definitions of gypsy. Putting them together creates a long time dimension during which, lifestyle has to differ, and tends to demand that the lifestyle be unchanged. This creates problems in law to effect changes to society. If a distinction of life style alone were established, this would be more flexible and closer to the sociology of ethnicity. Rastafarians could then also be accommodated as an ethnic group by their distinct lifestyle (as discussed next).

The argument put forward on appeal from Judge Harris in the County Court, by the plaintiffs was that there was an identifiable group of persons who were defined by ethnic origins. This was a question of fact to be determined by the evidence applying the criteria in Mandla v Lee. The Court of Appeal held that gypsies were an identifiable group defined by reference to 'ethnic origins' within the meaning of the definition of the "racial group" under Section 3 (1) of the RRA 1976, thus overturning the decision by Judge Harris who did not accept that gypsies were an ethnic group. 'Ethnic' is used in the RRA 1976 in a wider sense than strictly racial or biological.

Rastafarians

In 1989 the Industrial Tribunal considered the question of ethnicity of another group of people, the Rastafarians. T. Dawkins v Crown Suppliers (Property Services Agency) 1989, Trevor Dawkins had applied for a job as a van driver with Property Services Agency (a Government van service). He wore dreadlocks. At the job interview, the interviewer had refused to consider him further after Dawkins made it clear that he would not cut his hair. The Tribunal heard expert evidence that Rastafarians were not just part of another youth

culture but a distinct ethnic group according to the criteria laid down by Mandla v Dowell Lee. The Tribunal ruled by 2-1 majority decision that Rastafarians are a separate ethnic group protected by the RRA of 1976 and that the applicant had been unlawfully discriminated against. The Property Services Agency appealed against the Tribunal decision on the grounds that the two essential characteristics to establish an ethnic group - a long shared history and cultural tradition - were not satisfied. The EAT upheld the appeal:

> *"It was doubtful whether Rastafarians could claim a group descent or a group history. There was not enough to distinguish them from the rest of the Afro-Caribbean Community so as to render them a separate group. They were a religious sect. A movement 60 years old did not depict a long shared history. On the issue of a cultural tradition, they were a group with little structure, no obvious organisation with customs and practices involved in a rather haphazard way. However, in the context of a previously enslaved people striving for an identity, the cultural tradition test might be satisfied." Ibid (case above).*

The Court of Appeal in February 1993 held that Rastafarians are not a distinct ethnic group for purposes of the RRA 1976 Dawkins, T v Crown Suppliers (1989). I think there is a possibility that the Rastafarians may be regarded as an ethnic group in about another 50 years hence, when their identity as a distinct group from the rest of the Afro-Caribbean community may be established.

Muslims

In 1988 the CRE was asked by the Muslim community to consider whether Muslims could comply with the Mandla criteria and thus claim to be a racial group. Muslim teaching can be traced back to the Prophet to about the 9th century - the long shared history criteria are met. The Muslims have a cultural tradition of their own, for example, diet, religious practices, clothing, etc. However, the criteria of either a common geographical origin or descent from a small number of common ancestors cannot be met. Common language - the Quran is written

in Arabic and Muslims share this language. Muslims have a common literature and a common religion. The Muslims in the United Kingdom are the second largest religious group - they are certainly an identifiable group. The CRE concluded that it is hardly likely that an American Negro, a Bangladeshi and a Bulgarian would consider themselves as belonging to the same ethnic group, although they may be all Muslims. Ties of religion not 'ethnicity' bind them all. The Court is bound to apply the test of reasonableness and conclude that Muslims are not an ethnic group. In the case of Ealing London Borough Council v the Race Relations Board 1972 Lord Simon described the definition of racial grounds in the Act as:-

> *"Rubbery and elusive language. We consider that in determining the application of the term ethnic origins to the facts of this case we must adopt a broad approach. We must not attempt to define clear and rigid boundaries between race and religion, and belief and origin, and chosen characteristics and antecedent or imposed characteristics because to try to find such clear division would be to part from the real world in which these boundaries overlap. At one end there may be a religion, which is so pure in its doctrine that it finds no translation whatsoever in human activity." (Lord Simon).*
>
> *"At the other end there may be a cultural and historical pattern which has gone on for many generations, in respect of which religious belief may be a small or almost non existent factor and between those two virtual extremes in the context of this case the line has to be drawn somewhere". (Lord Simon). There was a need for a realistic interpretation of 'racial group'.* In the same case Lord Kilbrandon said:
>
> *"These characteristics seem to have something in common. They have not been acquired and people of their own choice do not hold them. They are in the nature of inherited features which cannot be changed as religion, politics and nationality can be changed more or less at will, although subject in the case of the last to fairly strict rules laid down by the receiving state." Ibid (case above).* In this case a distinction

between nationality and national origin was drawn and this is preserved in the RRA of 1976. The Court could have interpreted this case more liberally. This is still relevant to the interpretation of the RRA 1976 in that further reforms to the Act can bring about radical changes to race discrimination.

In the Mandla case Lord Fraser stated:

> *"A group is identifiable in terms of ethnic origins if it is a segment of the population distinguished from the others by sufficient combination of shared customs, beliefs, traditions and characteristics, derived from a common or presumed common past even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them a historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief - as to their historical antecedents."*

Lord Templeman said in the Mandla case:

> *"I agree with the Court of Appeal that in this context ethnic origins have a good deal in common with the concept of race, just as national origins have a good deal in common with the concept of nationality."* He also added:

> *"The Sikhs qualify as a group defined by ethnic origins because they constitute a separate and distinct community derived from the racial characteristics I have mentioned."*

An expert, Mr. Mohammed Mashuk Ally (lecturer at the centre for Islamic Studies, St. David's University College) was called as an expert witnesses in the case of CRE v Precision Manufacturing Services Limited (1991) and stated as follows: -

"Ethnicity is essentially a form of interaction between pressure groups operating in a common social context." It defines ethnic group by means of the making of an ethnic distinction (as a minority) not by an intrinsic set of shared customs, history, etc.

"That is why in situations where ethnicity is a relevant issue, labels such as Jewish people, Muslims or Catholics as the case may be are not neutral intellectual concepts but symbols that agitate strong cultural feelings and emotions."

"The term ethnicity refers to the degree of conformity by members of the collectivist to these shared norms in the course of social interaction."

"This separate identity is essential to Muslim perceptions of their ethnic minority status. It seems necessary therefore to have an operational definition of the term 'Muslim' and 'Minority'."

Muslim denotes "any person who affirms that there is only one God and Mohammed to be the last messenger of God and holds his teachings to be true in respect of the extent to which he or she is able to live up to the ideals of Islam".

This was a statement of fact in determining that Muslims were not a 'racial group' but were an ethnic minority.

"Someone can convert into Islam; anyone can convert to Islam. You would not have to be of a particular ethnic background to be a Muslim."

"A British born person who converts to being a Muslim would be in a minority in the country of his birth. If he converts it takes time to absorb everything, a matter of years, but by adopting Islam they become members of a minority ethnic community.

An ethnic community cannot be in a majority. It becomes ethnic when it is not the majority of the state. Its distinctiveness from the rest of society makes them an ethnic community."

"In those countries where Muslims are a majority then they are not an ethnic group. They must be distinct within a larger community and their being a minority enforces their ethnicity."

The Mandla case set out certain criteria, which had to be fulfilled before a group could be regarded as a racial group. The House of Lords considered the criteria of a long shared history. The analysis of Muslims does not quite fit with that to which the Mandla criteria of 'shared history' really referred. Lord Templeman in the Mandla case speaks of 'group descent' and Lord Fraser speaks of "a long shared history of which the group is conscious and the memory of which it keeps alive." According to the evidence of Mr Ally, "the history is long, detailed and extensive, it relates more to the history of the development of Islam than the history of the people who can be said to actually share it." No Muslim regards himself as having descended from the Arabs, except possibly Arab Muslims, as we understand it, and Islam does not claim to create a lineage through its adherence. The history is of Islam, it is not of the Muslims that are followers of Islam, that seems to be the fundamental point as to meaning of "shared history".

Mr Ally dealt with the common geographic origin and that differs from the conclusions reached in Mandla. There was a difference between a group that believes its identity to come from descent from a common geographical origin and the group whose belief comes from a common geographical origin. The RRA is concerned with a person's identity. The Muslims have a common language, which are classical Arabic, Islamic literature and a common religion. The language is obviously not the ordinary language of the Muslim in the sense that English is of the English but it is a shared language none the less. How do Muslims come by their history, their geography and their cultural traditions and all the other

widespread aspects? They come by it, it seems essentially by virtue of their belief in Islam. They do not come to it by virtue of their ethnic origins, even though there is ethnicity in Muslims and even though there are historical, geographic and other origins in Islam. According to Mr Ally, Muslims claim to be an ethnic minority community.

> *"On the basis that they subscribe to a universal body of beliefs, values and norms: a lingua franca: source literature: shared history and a religion which determines their way of life: all of which have ethnic origins in Arabia."*

The Court held that the Muslim is a believer in Islam. He was not a person with ethnic origins as meant by the Act. To discriminate against Muslims, appalling and inexcusable though it may be was therefore not to discriminate on racial grounds. The true nature of Islam is not within the RRA 1976, although for practical purposes the person that discriminates against Muslims probably discriminates indirectly on grounds of race.

CONCLUSION

The question that arises is, will the changing meaning of race reduce discrimination? John Rex attempted to analyse racial differences by considering the possibility of psychological and cultural differences between races but was beset with many problems. The yardstick for measuring discrimination is still very much based on racial grounds which is colour. Skin pigmentation has high sociological significance in the interaction of different social groups. If the biological basis is dismissed, and classification of race is based on geographical origin (as put forward by some scientists), will there be a change? Racial grounds refers to colour, race, nationality, ethnic or national grounds under Section III of the RRA 1976. The present classification embraces a large area of differences to race. If racial differences are no longer attributed to colour, race or ethnicity, there is bound to be a reduction of discrimination. The latest study by the genome researchers found skin colour to be irrelevant for racial

differences. If the biological basis for racial differences is eliminated, then hopefully there will be a reduction in discrimination. If race is attributed to geographical origin, there is a possibility that there may be a reduction of discrimination. This in turn will bring about changes to society. More people would be seen as being similar rather than different and race would become a meaningless distinction. Law will be embracing sociology to act as an instrument of social change thus transforming society.

Warner's theory of colour caste is a good theory as colour is the basis of the most lasting and severe discrimination. This theory shows a possibility of change and it is therefore helpful. It is useful for the analysis of elimination of racism. The law has to change although it may take time before society changes. New forms of racism have to be addressed. John Rex also agrees that skin colour has been a stigma because it is so visible. One of the theories advanced is that superficial traits, for example, skin colour shows a big difference - they represent adaptations to different climates. These superficial traits make people think that they are different while they are not. John Rex's theory is practical and helpful but it would take time to bring about changes to society. Law can play a significant role as an instrument of social change. The attitude and the views of society have to alter to a great extent to eliminate discrimination. The historical hangover from the colonial past is difficult to shed but with time, the reform of the law and the political will, there is a possibility of change to society. The biological notion of race from the old science is still very influential. This is very evident in the discrimination cases that are brought before the Courts. It is extremely difficult to discount skin pigmentation and I can foresee no immediate ways of relying on the other theories for differences in race. The biological definition is still useful and it will take time before society automatically changes. At present people are perceived differently largely based on their colour. Law does rely heavily on biological definition of race and there is hope for law to bring about change. These changes will be brought about by the changes in perception of viewing people of different races. Assimilation is bound to take place but because of historical consideration, the pace of change is bound to be slow.

There is immense diversity between ethnic groups. Some groups are still subjected to serious disadvantage whilst the others are on equal or beyond the footing of the host nation. The term 'class' is certainly undergoing dramatic changes and society is going through social reform. Perhaps one can attribute this to the change in attitude by some sections of the host nation towards immigrants and ethnic minorities but there is still some way to go to achieve significant changes. According to Cox groups exist only by a series of reference points in terms of which men judge one another. Race is ascription from the outside – this is evident when discriminating on racial grounds. There is still a distinction made by sociologist between racial distinction based on traits like skin colour and ethnicity based on cultural traits. Discrimination and victimisation can be based on both racial and ethnic grounds. Ethnicity is a mix of self definition and definition by others. Barker sees primitive racism being replaced by cultural racism. He identified new racism as the inflammation of fear of swamping of culture of the British people by immigrants who arrived in Britain and the whipping up of reaction to these fears. Barker emphasised the representation of "the other" as being different. The categorisations of self and other populations has continued.

Robert Miles also perceives new racism maintaining the idea of "the other". Solomos and Back concluded that race and racism was a flexible and constantly changing phenomenon. "New racism" embraces culture in its definition of race. These cultural difference can become racialised. If we accept new racism as the new definition of race, then we also see a merging of race and ethnicity. This emphasises the overlap of the two as identified in this chapter. Will the new meaning bring about changes to society? There will be difficulties and obstacles because there is still the concept of differences in culture. If the new meaning of racism impacts on the law, then hopefully society will see some transformation from the old entrenched views on race. The arguments advanced by the various sociologists could all contribute to explain the differences between races. The consensus of opinion among biologists appears to be (Hiernaux 1965 p.15) that although the world's population can be classified in terms of a few physical characteristics there is considerable statistical spread

and overlap. There is no evidence of mental characteristics being associated with these physical characteristics.

John Rex argues that the basis of solidarity between members of a racial group is a matter of dispute. Some would deny it altogether; some would attribute it to 'consciousness of kind'. The theory advocated by Lloyd Warner – "the colour caste theory" seems to provide the most probable theory for racial differences from the legal perspective. This is very relevant with regard to Section 1 of the RRA 1976 which addresses discrimination on grounds of colour. Social movements aim to change public opinion and attempt to change the values of politicians as well as the public, thus bringing about changes to society. Social movement has succeeded to some extent in transforming society, for example, legislation has been produced as a result of social movements but there is a capacity to invoke more changes by this method. The new theories on race and racism make one look at the previous theories advanced in a completely different light and question more profoundly the differences for racial and ethnic groups. I concur with Huyssen – "racism is an ever changing social phenomenon which recreates itself in new forms all the time". (Huyssen, (1995) p.212 as cited by Solomos and Back). The term "race" will be given a new meaning. Political, social, economic transformations will occur but at the same time the surge of nationalistic feelings will make change difficult. In Britain multi culturalism is not readily accepted by all – there is still the concept of differences in culture. In conclusion, 'ethnicity' is not distinct from race – there is a large overlap. A person can belong to a broader racial group, for example, a Sikh who is racially an Asian but ethnically a Sikh by a distinctive culture. I think Milton Gordon best sums up 'ethnicity' in the quotation from 1978.

> *"because it cannot be shed by social mobility, as for instance social class backgrounds can, since society insists on its inalienable ascription from cradle to grave, becomes incorporated into the self". Gordon, (1964) as cited by Glazer & Moynihan (1975) p.92.*

Class or other political factors do not influence ethnicity. Stratification does not enter into it, a person is seen as belonging to a particular ethnic group in view of his/her origins and background. John Rex states that it is insufficient to simply distinguish between race and ethnicity by saying that one was based upon phenotypical and the other on cultural difference. He argues that ethnic as distinct from racial attachment arises through culture, individuals may be drawn to others by the principle of 'consciousness of kind' operating through cultural as well as physical characteristics. Solomos and Back are sceptical about primordial definitions of group identities. Political movements stress culture and identity. The culture of minorities is constantly changing. The cultural differences are seen as ethnic and can become racialised. This discussion of ethnicity as a disputable and changing attribute of identity shows the limits of the more fixed definition used in legal practice.

The sociological theories on race and ethnicity impact on social policy. Policy development has to be addressed to relate to minority ethnic groups but this is not often realised. Minority groups have be catered for as a result of pressure and campaigns. There is the underlying tension between "equal opportunity" and cultural diversity. It will take years before Britain becomes a truly multi-cultural society. Public policy on race has achieved very limited success to date.

The sociological theories on race and ethnicity are different from the legal definition of 'ethnicity'. The legal definition of ethnicity is used in a wider sense than strictly 'racial' or 'biological'. The law has not used the criteria for defining ethnicity that could be drawn from various sociological theories of ethnicity. When people from varied ethnic groups are brought within the protection of Section 3 (1) of the RRA 1976, for example, Sikhs and Gypsies this enhances the enforcement provisions of RRA 1976 in eliminating discrimination. Gypsies who previously had no protection under the RRA 1976 for being discriminated against, are now covered by Section 3 (1) of the RRA as a result of the Dutton case in the Court of Appeal, CRE v Dutton (1989). For the law, ethnicity has to be objective whereas in sociology ethnicity is a relation; it is inter-subjective.

The Rastafarians remain as a particular black 'problem'. If they could be brought within the protection of the RRA 1976 as a separate ethnic group, discrimination against them would probably diminish to some extent. Law can help to change attitudes. The wearing of dreadlocks by Rastafarians may in time come to be accepted as part of a distinct culture. The Rastafarians did not fulfil the important criteria of long shared history and cultural traditions based on the Mandla criteria in order to establish them as a separate ethnic group. The Court of Appeal accepted gypsies as a racial group after the presentation of a great deal of evidence. The Courts were reluctant to accept 'Rastafarians', 'Muslims' and more recently 'Bangladeshis' (1993) as separate racial groups. The judges are adhering very strictly to the criteria set in Mandla and there is the danger of opening the floodgates to many sub-groups. The term 'ethnic' is not defined in the RRA 1976. The House of Lords in the case of Mandla v Dowell Lee (1983) clarified the position – Lord Fraser concluded that whilst 'ethnic' conveyed a 'flavour' of race it could not, within the meaning of the Act, be:

> *"In a strictly racial or biological sense", but that it had an "extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin". Ibid (note above case).*

Law does not confine ethnic as strictly 'racial' or 'biological'. Sociology draws a sharp distinction between biological and cultural differences. Dr Acton interpreted the word 'travellers' and 'gypsy' as interchangeable and defined them as ethnic groups who originated from India. Judge Harris who did not view gypsies as an ethnic group rejected this view held by Dr Acton. He drew a distinction between gypsies and Sikhs. In his view gypsies were not easily identifiable because he felt that they did not conform to the Mandla criteria. Ties of religion not ethnicity bound Muslims and therefore they were not recognised as an ethnic group. Rigid boundaries between race, religion and ethnicity cannot be drawn. There is a need for a realistic interpretation of 'racial group'. There is room for ample reform in this area of the law so other groups could be brought within Section (3) RRA, thus offering them

access to bring proceedings for racial discrimination. These changes in the law should impact on society thus acting as an instrument of social change.

The "radical" position on the sociology of law with regard to ethnic groups is linked to the theories of new racism which embraces culture in its definition of race. I discuss the position of the Rastafarian and Muslims in particular because law has to address new forms of racism because the theorists of new cultural racism feel that cultural racism has to be acknowledged in order to remove racism to transform society. New ethnic groups have to be brought within S(3) RRA, thus offering them access to bring proceedings for racial discrimination. In my view if the law is flexible by reducing the number of criteria to be met for ethnicity, then it will be closer to the sociology of ethnicity. The differences between the legal and sociological definition of ethnicity creates problems to effect changes to society. The legal definition of race covers "race, colour, ethnicity, nationality and national grounds". This can be contrasted with the various sociological theories on race as identified and discussed in this chapter. The "colour caste theory" seems to provide the most probable theory for racial differences. This is relevant with regard to Section 1 of the RRA 1976 that addresses discrimination on grounds of colour.

Sociology identifies an overlap between 'ethnicity' and race, for example, Sikhs. Sociology and law are in agreement to some extent. Law relies on the older theories of ethnicity not the new ones. Race and ethnicity defined by law does not match the various sociological theories. The law approached the definition of a 'racial group' realistically by extending the legal term 'racial' to include being associated with a common racial origin. The law as in the Mandla decision and in subsequent cases still defined ethnic rigidly and intrinsically whereas sociology defines ethnic by contra distinction and as being a changing content. The law is strict whereas sociology changes much quicker. Law is inherently incapable of registering change as speedily as sociology. The legal definition of 'ethnicity' could in time embrace several other groups of people with specific identities. This will then bring them within the protection of Section 3 (1) of the RRA 1976 as discrimination on 'racial grounds' includes

discrimination on grounds of 'ethnic origins'. This will impact in bringing a transformation to society in eliminating racial discrimination. If law could be brought closer to sociology then I feel that there is hope for a more rapid transformation of society. In my view, the law has to define "ethnic" more flexibly, then law can change as speedily as sociology thus effecting changes to society.

CHAPTER IV

AN HISTORICAL CONSIDERATION OF LEGISLATIVE INTERVENTION IN RACE

This chapter assesses the effectiveness of anti-discrimination legislation on race. It attempts to explore whether social changes can be effected through legislation. Finally, changes to the RRA 1968 by the RRA 1976 and the present problems of the RRA 1976 are set out. The information on the history of legislation of the RRA 1965 and 1968 has been obtained from my reading of (Lester and Bindman, 1972) (Lustgarten, 1980) and (Hartz, 1968).

Lustgarten points out that regulation of behaviour on racism through the legal mechanism is a process of which our understanding seems to be surprisingly sparse: (Lustgarten, 1986). Some argue that law is a civilising influence whilst others question the intervention of anti-discrimination law. Every statement about the nature of racial discrimination is based upon an idea of the equality of human beings. Britain does not have a written Constitution or Bill of Rights to guarantee the equal protection of the law.

> *"The conflicting arguments about the use of law to combat racial discrimination reflect deep moral and intellectual differences: about the idea of racial equality; the nature of human beings and their social behaviour, the implications of these matters for Government policies, the proper limits to be placed upon law-making; and the best choice of legislative techniques for dealing effectively with problems of discrimination. The outcome of these different arguments provides the yardstick against which the Race Relations Acts may be evaluated." (Lester & Bindman (1972 : 73)).*

The Politico-Legal Context of Race Legislation in the 1960's and 1970's

The Race Legislation of the 1960's

This section traces the attempts made by Parliament to address discrimination and bring about social reform through legislation. The Race Relations Bill of 1965 and 1968 concentrates on the extent of social reform through legislation. The difficulties imposed by limitations are discussed by the Parliamentary debates on the RRA 1968. In 1950, Reginald Sorensen, a Labour MP, had introduced a Private Member's Colour Bar Bill because existing law was inadequate to deal with the situation. The Bill would have made it a criminal offence to discriminate on racial grounds in providing services and facilities in specified public places, or to publish or display notices or advertisements indicating that racial discrimination would be practised in such places. In 1956 Fenner Brockway, (Labour MP) introduced a Racial Discrimination Bill to prohibit racial and religious discrimination in various public places. The Bill also sought to make it illegal for an employer of more than 50 people to discriminate in recruiting, promoting or dismissing workers or in the terms and conditions of employment. Anyone found guilty was liable to a maximum fine of £25. The Bill failed because only the Labour Party supported it.

However in 1958, largely as a result of the Notting Hill disturbances, the Labour Party committed itself to making racial discrimination illegal, and in 1959, the Labour opposition's Front Bench spokesman, James Callaghan, urged the Government to introduce legislation prohibiting racial discrimination in any public place. Fenner Brockway introduced eight Bills and in 1961 a Bill included a clause making it an offence to incite racial hatred, whether by speech or writing, and by increasing the fine for unlawful discrimination to £100. The Bill was counted out because fewer than 40 Members were present for the debate. Legislation would be neither effective nor enforceable and eradication of discrimination should be, they said, through education of public opinion and not by changes in the law. In its manifesto for the 1964 General Election, the Labour Party pledged itself to legislate against racial

discrimination and incitement to racial hatred in public places. The Liberal Party's manifesto also stated that Liberals reject racial discrimination but did not contain any specific commitment to legislation. The Conservative Party's manifesto made no reference to the subject, because they were reluctant to introduce legislation, believing that any prohibition of racial discrimination would be ineffectual.

Meanwhile the Society of Labour Lawyers had set up a Committee on Racial Discrimination. They too proposed that it should be made unlawful to promote racial hatred or to discriminate on racial grounds in public places. In 1964, a multiracial Campaign Against Racial Discrimination (CARD) was set up after meetings between representatives of the main immigrant groups. The CARD resolution stated that the object of legislation should be to alter conduct and provide individual remedies, rather than to punish. As for incitement to racial hatred, CARD accepted that legislation was desirable but warned that it should not encroach upon legitimate areas of free speech. CARD's main proposals were broadly accepted - they were supported by various immigrant organisations including the West Indian Workers' Association (Southall), the West Indian Standing Conference, and the Federation of Pakistani Associations. The voices of members of Parliament, campaign groups and immigrants were at last heeded seriously and steps were taken to bring about changes to British society. The aim to legislate focused on general social movement of protest against discrimination and racism.

The 1965 Race Relations Bill

On the 9th April 1965, Sir Frank Soskice published the Race Relations Bill. Under the Bill, racial discrimination was to be a criminal offence, punishable by a maximum fine of £100, if practised in hotels, public houses, restaurants, theatres, cinemas, public transport and any place of public resort maintained by a public authority. The Bill did not deal with discrimination in employment, and its only reference to housing was a clause dealing with discriminatory restrictions on the disposal of tenancies. Prosecutions were to be brought only with the authority of the Attorney General. There was to be no conciliation agency, and no

civil remedy for those damaged by racial discrimination. Incitement to racial hatred was to be made illegal and punishable by up to two years imprisonment or a maximum fine of £1,000.

The Public Order Act 1936 was to be extended to cover threatening, abusive or insulting words or behaviour, which were likely to cause a breach of the peace. The Society of Labour Lawyers issued a further interim report, recommending the extension of the Bill to discrimination in housing, employment, and certain credit and other service industries, and the establishment of a Conciliation Commission. A Race Relations Board was to be created to investigate complaints of discrimination and settle disputes. If conciliation failed, the matter would be referred to the Attorney General. During the period from shortly before the 1964 General Election until the Race Relations Bill became law, a change occurred in Labour's attitude to 'coloured' immigration. In the 1960's, the number of 'coloured' immigrants had increased further and legal intervention was seen as imperative to curb immigration. Labour concluded that the increase in black immigration threatened race relations in Britain.

The 1965 Race Relations Act – Proposals for Amendments

CARD organised a project using volunteers to test the existence of discrimination and to make complaints to the Race Relations Board. 50 cases were sent to the Board, of which 40 involved young coloured (black) people, born and educated in Britain. The Home Secretary expressed concern at the implications of the growing body of evidence of discrimination against the second generation. In November 1966, the Society of Labour Lawyers published its third report on Race Relations. The report recommended that far reaching changes should be made to the 1965 Act, modelled on North American legislation. The scope of the Act should be extended to all places of public resort, including those maintained by the Crown, and to employment, housing, and the provision of commercial and other services. The Race Relations Board should be enlarged, and it should be empowered to hold hearings and make legally enforceable orders. A Fabian Society Conference on 'Policies for Racial Equality' re-affirmed these principles (Lester & Deakin,1967). Maurice Orbach introduced a

private member's Bill in 1966, which contained the provisions, which had been recommended by both CARD and the Labour lawyers, (Hansard (HC) 1966). He tried unsuccessfully to obtain a stronger undertaking from the Government but withdrew his Bill at the end of the debate without pressing it to a Division. Fenner Brockway introduced an almost identical Bill into the Lords in 1966, which was defeated (Hansard (HL), 1966). Some peers doubted whether it was proper to legislate at all against racial discrimination, or whether such legislation could in practice be enforced.

The Trade Union Congress (TUC) was traditionally hostile to legislative intervention in the field of industrial relations and feared race relations' legislation. It did not regard the problem of racial discrimination as sufficiently serious to justify a special statutory remedy. It believed that the problem would gradually diminish, and that it could be effectively tackled by existing voluntary procedures. And like the Confederation of British Industries, (CBI) it was sceptical about the real strength and about the ability of Members of the Race Relations Board to administer a law against job discrimination in a field in which they were inexperienced. There was a desperate need to reduce the opposition of the TUC and CBI to anti- discrimination legislation. The Political and Economic Planning Institute's (PEP's) report in 1968 revealed that the extent of racial discrimination in Britain ranged from substantial to massive, and that, if left to itself, the problem was likely to grow worse. PEP Report (1968). Most of British Industry was convinced of the need for legislation. The Race Relations Board's own report in 1965 contained strong arguments for extending the 1965 Act and 70% of the complaints received by the Board during the first year were outside the scope of the Act. Further, the procedure laid down by the 1965 Act was unnecessarily complicated and was toothless. Soon after the break-up of CARD, a new organisation, called "Equal Rights" was created (Equal Rights was an independent group. The founders were Nicholas Deakin, John Thirlwell and Roger Warren Evans. The President of Equal Rights was Professor Roy Marshall, Dean of the Law Faculty of Sheffield University). The objective of the organisation was to ensure that the new legislation would be comprehensive in scope and capable of effective enforcement.

In 1967, United Kingdom citizens of Asian origin had come to Britain in increasing numbers from Kenya. On the 9th of April 1968, the Race Relations Bill was published. The purpose of the Bill was "to protect society as a whole against actions which will lead to social disruption and to prevent the emergence of second-grade citizens" (Hansard (HC) 1968). It made it unlawful to discriminate on racial grounds in employment, housing and the provision of commercial and other services. It gave the Race Relation's Board the duty to secure compliance with its provisions by investigation, conciliation and legal proceedings. The Bill also created the Community Relations Commission to promote 'harmonious community relations', and to act in an advisory capacity on behalf of the Home Secretary. On the 20th of April, three days before the second reading debate, Enoch Powell made a notorious speech on race relations. As a result of this speech, the Second Reading debate took place in an atmosphere charged with emotion.

The influx of the Kenyan Asians into Britain presented the legislators with a dilemma. There was a moral confusion of the legislature. The Labour Party manifesto in 1964 pledged itself to legislate against racial discrimination. In 1964 the Labour Party under Mr Callaghan changed its attitude to race relations and decided that there was a definite need to curb black immigration. The Conservatives were reluctant to introduce legislation because they believed that any prohibition of racial discrimination would be ineffectual. Mr Callaghan was concerned with civil rights and was swayed by public sentiment and the majority of the media. The Conservatives, particularly Mr Enoch Powell, were determined to stir up the view that Britain was being swamped with unwelcome, black immigrants and that there was an imperative need to legislate on immigration. In 1968 when the Labour party introduced the Race Relations Bill, it was received with a sober response from the black community. The 1968 RRA endorsed the Commonwealth Immigrant Acts of 1962 and 1968 as discriminatory. Limits were imposed on the RRA 1968 by the legislation on immigration. The Government was more concerned with the laws governing immigration than improving race relations. These limits are present to date and are impeding social reform.

The Race Relations Bill of 1968

The question is whether the debates were primarily concerned with improving race relations in Britain or was immigration of paramount importance? Britain saw these two issues as one issue because all blacks were seen as a 'problem'.

Parliamentary debates on the Race Relation Act of 1968

The analysis of the debates provided an insight into the attitudes, thinking and views on race relations of members of Parliament. It also illustrated their views on 'class' and the question of immigration. On The 9th of April 1968, the Labour Party introduced the Race Relations Bill. Mr Callaghan stated that it was a Bill, which concerned civil rights. Sir David Renton stated that it was a very important Bill. Mr Hogg:

> *"I said that lawyers have a contribution to make to the Bill - it may be an indispensable contribution because the freedom of a society largely depends upon the rights which it accords to minorities." (Debates on RRA 1968)*

Clause 1 - Meaning of 'Discriminate'

Clause 1 dealt with the meaning of 'discriminate'. Mr Ivor Richard stated that one of the defects of the Bill was that nowhere in the Bill was there a general definition of what was meant by discrimination. Clause 1 read "In this Act 'discriminate' means discrimination on the ground of colour, race or ethnic or national origins....". He wished to include the following words to Clause 1:

> *"For the purposes of this Bill, a person discriminates against another if on the ground of race, colour or ethnic or national origins he refuses or fails to afford him like treatment in like manner and on like terms to that which he affords or would afford to other persons in like circumstances, and references to discrimination shall be construed accordingly." (Debates on RRA 1968)*

Mr Bell felt that the analogy with the RRA 1965 was not very sound because the scope of that Act was fairly narrow in its discrimination provisions. Section 1 of the RRA 1965 applied to places of public resort and was concerned primarily with access to them and to being served in them, so that the word 'treatment' was not an inappropriate word when dealing, for example, with hotels, restaurants, theatres, cinemas, public transport and any place of public resort maintained by a public authority. The aim of giving a clearer meaning to 'discriminate' was to remove the technicalities of the 1965 Act and to make the law intelligible to members of the public. It appears that the aim was not achieved, instead it added to the complexity of the Act. The definition introduced the more ambiguous concept of less favourable treatment instead of declaring that the legislation was concerned with equal treatment. The objective of the legislation was not clearly defined. This was like the early provision in the United States Constitution - "separate but equal" facilities satisfied the requirement of 'equal protection of the laws': Plessy v Ferguson (1896). The decision was reversed in Brown v Board of Education (1954) which held that separate educational facilities are inherently unequal, even if they are equal in all material respects. The Government therefore were recommended to add a clause (Section 1(2)) declaring that, for the purposes of the Act, 'segregating a person from others' on 'racial grounds' is 'treating him less favourably than they are treated'. Mr. Alexander W Lyon agreed and stated that:

> *"This Bill is necessary, so that we shall create a situation in which equality before the law can be a reality even for a coloured man, even for a man who has come to this country and not been born here." (Debates on RRA 1968)*

It was simply that those who are coloured or of different racial origins would be treated in exactly the same way as anybody else. They will have no privileges and they will have no disadvantages, compared with those who are white or who were born in this country. In those circumstances, therefore, it is not simply to confer privilege on the minority, as has been argued in the Press recently. Enoch Powell, MP, and a few other MPs felt that the law

created an unfair preference in favour of racial minorities and thereby discriminated against the majority of the population, for example, Quinton Hogg argued:

> *"If we are to create a series of acceptable social conditions in which discrimination does not take place, we must not .. create a privileged class. But (the Bill does create) a privileged class, because if we legislate by relation to race, only, we re-create a privileged class of victims." (Official Report (HC) 9th May 1968).* Mr Dunwoody stated that:
>
> *"The RRA is seen as legislation designed to protect only the black sections of the community. Many whites feel alienated and feel that the laws on race work to their disadvantage. The present rise in racial attacks is emphasising the presence of deep racial problems in today's Britain." (Debates on RRA 1968).* Mr. Hogg:
>
> *"The practice of discrimination is one thing, but to try to discern what may be motive of a man's heart is, I should have thought to embark upon a wild goose chase. It is a great mistake for people to think that, by tightening up a Bill to the point at which people react against it, we shall improve relations between races." (Debates on RRA 1968).* Mr Hogg was expressing a very real concern - he foresaw the difficulty of changing attitudes through legislation. He was expressing very little confidence in achieving a just society by the imposition of laws to control behaviour. These doubts have been confirmed by the extremely slow progress of legislation in improving race relations in Britain. Sir Frederick Bennett summed up the three principles on race legislation. The impossibility of legislating about human feelings is stressed - this emphasises the difficulty of legislating on race issues. A balance has to be achieved so that the laws on race do not offend the host community. Race legislation cannot be seen as favouring black people to the detriment of white people. The 'racial balance clause' was linked very closely to these thoughts behind legislation on race.

Racial Balance Clause

The "racial balance clause" was seen as an essential part of the Act. The clause was designed to help employers with significant numbers of immigrant workers. It was introduced as a result of negotiations with the Confederation of British Industry and the Trade Union Congress to protect employers who feared that white workers might object and perhaps even leave their employment if the number of coloured workers were further increased. The Government saw this as a means of dispersing coloured workers throughout industry and discouraging their concentration in particular firms. The Government also pointed out that the clause did not apply to indigenous coloured workers, but was limited to those who had not been wholly or mainly educated in Britain. Mr Grieve felt that there was a need to make the objectives of the legislation clear to the public. Mr Quinton Hogg attempted to extend the definition to other forms of discrimination (for example on the grounds of sex, language, religion, etc.) at the Committee stage but failed. This was because the Bill's long title confined the Committee's discussions to discrimination only on racial and similar grounds. Lord Gifford saw the provision of special nursery schools for immigrant children not as a racially segregated facility. Some felt that it was dangerous since it might be interpreted as justifying the provision of racially segregated facilities. Lord Alport and Lord Barnby foresaw difficulties in interpreting the legislation and the problems of enforcing the law in race relation matters. There was an immense conflict of opinion and attitudes regarding the debate on the Bill.

Clause 6 – Race Relations Bill 1968

Advertisements and Notices

This Section of the Bill attempted to address discrimination at the roots. Removal of discriminatory advertisements if they were regarded as unlawful would prevent the discriminatory act from taking place. This was seen as reducing acts of discrimination on a large scale. A notice stating 'no travellers' was a test case before the Courts in 1989 - this explored in Chapter III. The advertiser need not intend to discriminate. It was sufficient that the advertiser has published or displayed an advertisement or notices, which could

reasonably be understood to indicate an intention by someone to do an act of discrimination. It did not matter whether anyone suffered personally as a result of the discriminatory advertisement or notice. It was an unlawful act even if no individual was identified as an actual victim. Parliament wished to prevent discrimination through the medium of advertising whether or not the discrimination was itself unlawful.

Further Comments on the Race Relations Bill 1968

Baroness Gaitskell:

> *"Fears have been expressed both in this House and in another place, that the definition of 'discrimination' which now appears in the Bill is open to the interpretation that the separate but equal treatment of different racial groups would be lawful. It has been argued that this could lead to the development in this country of a form of apartheid or segregation." (Debates on RRA 1968)* This statement expressed fears of creating a society similar to the old South Africa. The argument for 'separate treatment' and 'segregation' were put forward and the difficulty of establishing separate but equal treatment of different racial groups were questioned and also its legality.

The Debate on the Immigration Issue

The Commonwealth Immigrants Bill was introduced in February 1968 as an urgent measure designed to deal with a grave national emergency. Throughout the late 1960's and early 1970's United Kingdom citizens of Asian origin had come to Britain in increasing numbers from Kenya because their position had been made precarious by the Kenyan Government's policy of 'Africanisation'. Duncan Sandys and Enoch Powell (Conservative MPs) mounted a campaign to deprive them of their right to enter and settle in Britain. The speeches, which followed, were very reminiscent of the pattern, which had developed during the debates on the 1965 Race Relations Bill. Once again, the 'black immigrants' were viewed as a threat to British society and this reinforced their status as an 'under-class'. Earl Jellicoe:

"This is a subject of deep concern to me, as I think it must be to anyone who is concerned with the health and quality of life in these islands. I believe that we must control and curtail immigration to this country a great deal more stringently than we have done in the past. I believe equally strongly that we must do all in our power to see that there is no discrimination against those immigrants who are here or who may come here. It is quite clear to me from the PEP (Political and Economic Planning) report; from the Street Report and from my own experience that substantial discrimination at present exists. If it persists, and above all if it extends to the children of the immigrants - to the second and third generations - these islands will be an extremely unpleasant place for our descendants to live in. Finally I believe there is a place for legislation here." (Debate on Immigration, 1968)

The above was prophetic according to some sections of the host community. The immigrants were regarded and still are, as rather unwelcome aliens. There was a notion that the quality of life of the British people would be lowered in standard by the influx of immigrants. Immigration has been and still is controlled and curtailed very stringently by successive pieces of legislation. The general policy was to stop any further black immigration. Discriminatory immigration law had undermined the effectiveness of the RRA 1968.

Lord Strange expressed his deep concern about Britain being swamped with immigrants. He felt that they were totally different and would experience difficulty in being assimilated into the British way of life. He viewed the immigrants as "a problem". The Race Relations Acts were therefore won against formidable odds. They were the products of skilful lobbying by interested pressure groups. The legislators yielded to a pressure group, which was urging them to give a lead before the problem of racial discrimination grew worse. However, the RRA of 1968 was ineffective and there were several weaknesses. There was a need to bring about changes in the legislation. The members of Parliament were faced with a dilemma

situation. There was a conflict between improving race relations for the people already in the country and the question of whether to restrict further black immigration. The fact that blacks were seen as a problem was still very significant. The thinking of most of the members of Parliament was still based on colonial ideology that immigrants were 'aliens' with totally different cultural habits and behaviour. They could not foresee them as assimilating into the British way of life. The statements made by the different members of Parliament during the debates on the RRA 1968 affirm these views. The attitudes, prejudices and views on immigrations were clearly stated, for example, in 1964 the Labour Party changed its attitude to improving race relations and stated that there was a definite need to curb black immigration into Britain. There was even a sense of fear expressed that the blacks might be accorded with more privileges. Mr Enoch Powell and a few other MPs felt that the race laws would give an unfair preference to the minorities and discriminate against the majority of the population. Mr Quinton Hogg felt that the Bill would create a privileged class.

Mr Dunwoody stated that laws on race would work to the disadvantage of the white and make them feel alienated. He also felt that the law would protect only the black sections of the community. The racial attacks emphasised the deep racial problems in Britain. Mr Hogg argued that attitudes could not be changed through legislation. He could not foresee law controlling behaviour. Mr Hogg's thoughts are reflected in the attitude to race relations by the different Governments. Some foresaw the difficulties of interpreting the legislation and the problems of enforcement. Enforcement of the race legislation still remains a major problem in 2001. The immigration issue was closely linked to the debate on the 1968 RRA Bill. The Commonwealth Immigrants Bill of 1968 (although blatantly discriminatory) was passed to curtail and control the influx of Kenyan Asians who held British passports. The RRA of 1968 was eventually passed but was limited in scope and did not bring about the changes to society as envisaged.

Race and Law in the United Kingdom up to the 1970's

This section addresses the problems encountered by attempting to bring about changes to society through legislation. The RRA 1976 attempted to eradicate the defects of the RRA 1965 and 1968. The Political and Economic Planning Institute (PEP) study of racial disadvantage in 1974 showed that the level of racial discrimination remained very high despite the existence of the 1968 Act (Smith, 1974). In the same year, a white paper estimated that a 'coloured' (Asian, African and Afro-Caribbean) unskilled worker had a one in two chance of being discriminated against when applying for a job, a coloured skilled worker a one in five chance, and a coloured white collar worker a one in three chance (White Paper on Racial Discrimination : 1975 Cmnd 6234, para 7). Asians and Afro-Caribbeans applying for unskilled jobs faced discrimination in 46% of cases. These findings implied that there were tens of thousands of acts of discrimination of this kind in a year. By contrast, the Race Relations Board (RRB) dealt with only 150 complaints of discrimination relating to recruitment to employment in 1973. The general conclusion from these findings was that the number of cases of discrimination that were dealt with by the law formed a very small proportion of the number of acts of discrimination that actually occurred (McIntosh & Smith (1974 : 35-36)).There was discrimination in housing as well. Applicants for rented accommodation faced discrimination in 27% of cases, and estate agents discriminated against house buyers in 17% of cases (Home Office Select Committee 1974-75).

One of the factors prompting the 1976 Act had been the obvious ineffectiveness of the 1968 Act. Another factor prompting the 1976 Act was the Government's aim to harmonise the powers and procedures for dealing with sex and race discrimination so as to secure genuine equality of opportunity in both fields.

The provisions of the RRA 1976 (Sex Discrimination (see appendix 5)) were therefore modelled closely on those of the existing Sex Discrimination Act of 1975 which in turn drew heavily on the experience of the 1968 RRA and was designed to avoid some of the

weaknesses revealed especially in the enforcement provisions of that Act. In particular the CRE was given similar functions and powers to those conferred on the Equal Opportunities Commission (EOC) by the Sex Discrimination Act. It was hoped that the two bodies would co-operate closely and exchange relevant information and experience, so as to strengthen their respective roles. Some Members of Parliament expressed doubts and they could not see legislation bringing about racial harmony. MPs' obviously felt that if the possibility of legal redress for legitimate grievances were not available, people would sooner or later take things into their own hands. For example, there were 'Asian strikes' in industrial situations in which racial discrimination played an essential part. Many were in the textile industry. Either there were discriminatory pay rates, discriminatory work practices, or as in the Mansfield Hosiery strike, a racially defined promotion structure in which the best jobs were reserved for whites (Moore (1975 : 75-77)) as cited in Report of RRB (1972) – para 42). One report had described the prevailing situation in the hosiery industry as follows:

> *"At the heart of the structure of the hosiery industry is white élitism." (Pulle, 1972 : p.6 as cited in MacDonald, 1977 p.5)*

The 1976 RRA was partly inspired by the need to prevent a repetition of the Asian strikes of 1972-1975 and to contain the problem of second generation black youth. Very often, the discriminatory structure of the industry was matched by discriminatory attitudes by the trade unions involved. Not only were there strikes, but they were often without union backing or were even in direct confrontation with the combined forces of union, management and the elite of white workers. Pleas by Asians for unity with white knitters at Mansfield Hosiery achieved little. Strikers were relying on their own communities and ethnic organisations for support rather than the unions. This raised the spectre of separate black unions. The strikes and their aftermath certainly had an effect on the attitudes of the official trade union movement to the question of race. Prior to 1973, there had been lots of fine words of opposition to racism spoken by unions but no action was taken. The TUC General Council set up an Equal Rights Committee and a Race Relations Advisory Committee in 1973, and

adopted the TUC Model Clause on equality of opportunity and treatment at work to be included in collective agreements.

"To fail to provide a remedy against an injustice", said the Government in its White Paper 'strikes at the rule of law'. 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." (Racial Discrimination Command 6234-para23). Throughout the reports, the speeches and the literature urged changes in the law. The problem of black youth was always singled out for special mention. The harmful effect of racial discrimination, said the Select Committee:

"Is aggravated by growing lack of confidence among the ethnic communities, specially the young - the second generation non-immigrant population." (Immigration Session, Select Committee on Race Relations : 1974-75). The PEP concluded:

"The first signs of a more profound disillusionment, which might eventually form the basis for a new political force, are to be found among West Indian teenagers, an alarming proportion of whom are unemployed and homeless. The seriousness of these feelings, and the acuteness of the conditions from which they spring, should not be under-estimated..." (Smith, 1976). The aims of the new law were set out in the White Paper:

"The Government's proposals are based on a clear recognition of the proposition that the overwhelming majority of the coloured population is here to stay, that a substantial and increasing proportion of that population belongs to this country, and that the time has come for a determined effort by Government, by industry and unions, and by ordinary men and women to ensure fair and equal treatment for all

our people, regardless of their race, colour or national origins. Racial discrimination, and the remediable disadvantages experienced by sections of the community because of their colour or ethnic origins are not only morally unacceptable, not only individual injustices for which there must be remedies, but also a form of economic and social waste which we, as a society, cannot afford." (Command 6234 para 4)

Race Relations Bill (Clause 5) Exception for Genuine Occupational Qualification

This clause is especially relevant to my research on discriminatory advertisements. It is not unlawful to publish an advertisement if it falls within Section 5 because it comes under the exceptions to Section 29 (1) – RRA 1976 on discriminatory advertisements. One can argue that the debates on race relations legislation were merely symbolic. The concern as in 1965 and 1968 was not to improve race relations or combat discrimination but the main thrust of the debates were concerned with the number of black immigrants entering Britain. For instance, Marcus Lipton, a Tory MP, stated that the legislation on race:

"Will not in its practical application contribute to racial harmony." (House of Lord's debate on RRA 1976 Bill)

The aim of the debates ought to have been concerned with remedying the defects of the RRA 1968. This was a difficult period in race relations, when there was "more tension and more uncertainty than for some time past". (House of Lord's debate on RRA 1976 Bill).

One of the arguments put forward was that race legislation was a moral issue and that legislation could not enforce morality. Black people were still regarded as a 'problem'. There was an argument that the ethnic minorities would make unjustified complaints and would abuse race legislation. These arguments were very similar to the comments made during earlier debates. Black people were still regarded as a 'threat' to Britain. The incitement to racial hatred clause was seen as infringing free speech. It was a fundamental issue of civil liberties that the Commission;

"Should be fair, reasonable and open and not invested with authoritarian, sweeping and draconian powers." (Hansard 1623 per Ronald Bell).

Clause 5 of the RRA 1976:- "in relation to racial discrimination, this section does not apply to any employment where being of a particular racial group is a genuine occupational qualification for the job, for example, if a social worker of a particular racial group (Asian) is required to provide services to the Asian community which has to be a 'personal service promoting their welfare'."

Some Illustrative Legal Repercussions of Clause 5 of the RRA 1976

Baroness Vickers stated that the Bill intended to do away with race distinctions not emphasise racial differences. In the course of the debates on Section 5 (2)(d) Baroness Vickers argued that the person, if well trained, should be able to deal with any race and the ability and qualifications were of greater significance than the racial group of the person for the post. She felt that the Race Bill was long and complicated and the introduction of exception clauses like Section 5 (2)(d) would do little to contribute to racial harmony. During the course of the debates the definition and interpretation of 'personal services promoting their welfare' was not clarified. The Bill offered no guidance, hence the problems when eventually, the CRE v London Borough of Lambeth (1990) and Tottenham Green Under Fives Centre v Marshall (1989) cases came to Court. Lord Jacques (during the debates on the Genuine Occupational Clause) argued that certain jobs, for example, that of probation officers would be more effective if the offender and the probation officer were of the same racial group.

The Race Relations Board

The Race Relations Board (RRB) which was set up in 1965 had a duty of ensuring compliance with Section I, RRA 1965 with Mr Mark Bonham-Carter as the Chairman. It was 18 years after the arrival of the 'Empire Windrush' from the West Indies. This ship brought immigrants in large numbers to Britain. Race relation's problems were emerging and there

was a need for action to address the concerns of the host community and the immigrants. The 1965 Act was very limited in scope and dealt with discrimination in public places and incitement to racial hatred as a criminal offence. Incitement to racial hatred was a matter that was to be dealt with by the Attorney General and not the RRB. Discrimination in the field of employment and housing were not addressed by the 1965 Act and there was a need for radical revision and extension of the provisions to the Act. The Home Secretary was Sir Roy Jenkins who stated that evidence had to be provided by the Board to justify changes to the Act. Following the Second World War, immigrants from the West Indies and the Indian continent were recruited because of labour shortage in Britain. After the war when the West Indians returned to the Caribbean, they found high unemployment and a low standard of living. In 1952, the McCarran-Walter Act restricted immigration to the United States (to which West Indians had traditionally migrated). Immigration started first from the Caribbean and was followed in the later 1950's and early 1960's by immigration from the sub-continent of India. Immigration was encouraged by the Government and industry, for example, London Underground and Ministry of Health. As the numbers of immigrants increased problems based on colour and cultural differences arose.

In the 1950's demands for immigration control came from the House of Commons. In 1958, there was the Notting Hill riot and a Gallop Poll in 1961 found that 73% of the electorate were in favour of immigration control. All these pressures led to the Commonwealth Immigration Act (1962) but this was not repealed by Harold Wilson when he became Prime Minister. There was a contradiction between the immigration policy, which was discriminatory, and the race relation's policy, which was based on equal treatment irrespective of race. These factors put the debate about race relation's policy high on the political agenda. The RRB undertook conciliation work but the scope of the Act remained unchanged. There was only the possibility of civil proceedings with the consent of the Attorney - General. The RRA 1965 was very limited and so were the resources to the Board. The Home Secretary accepted the principle of extended legislation. The RRB felt that their high hopes were not fulfilled. They were not getting the support from the

Government as expected in terms of bringing about changes to the legislation and resources for work in the field of race relations. Massive unemployment among young blacks contributed to the fact that legislation in the area of race relations had been a failure. Perhaps, the position would have been worse without the law. To this extent, the RRB had a moderate degree of success. The political will was lacking to convince the Local Authorities, nationalised industries, trade unions and private industry to take the RRA 1965 seriously. The Government was more concerned with immigration control than race relations. There was no focus or serious concern about race relation's policy displayed by the Government. There was a feeling of inertia rather than interest in tackling race issues brought to light by the RRB. The powers of the RRB were limited.

The Community Relations Commission 1968 to 1976

The Community Relations Commission (CRC) established under the provisions of the RRA 1968 was the first statutory body created to promote good community relations by a variety of means. It was set up and given the task of encouraging "harmonious community relations" (RRA 1968 Section 25). The CRC was also empowered to advise the Secretary of State and to make recommendations on any matter which the Commission considered should be brought to his attention. The CRC was exposed to criticism as it was reluctant to tackle racial discrimination and political issues and their advice to Government carried no weight. The CRC was concerned with education, housing and employment. It attempted to develop practical policies and to change attitudes through public education. The CRC was not meant to be an agency for enforcing the law. It was an official liaison committee for co-ordinating voluntary efforts at reducing racial tension. In 1976, the CRE was established to replace both the RRB and the CRC. It was an amalgamation of the duties of the CRC and the RRB comprising of research, law enforcement, complaints, promotional work, etc. The 1976 Act came into force in June 1977 and superseded the 1965 and 1968 RRA Acts. The CRE has the following duty: to work towards the elimination of discrimination; to promote equality of opportunity, and good relations between persons of different racial groups generally; and to keep under review the working of the 1976 Act and if necessary, submit proposals to the

Home Secretary for amending it. The CRCs are now called Race Equality Councils (REC's). These are independent voluntary bodies funded in the main, jointly by the CRE and Local Authorities. The constitution of the REC's has recently been revamped to express a commitment to working towards the elimination of racial discrimination and the promotion of equality of opportunity. A new planning arrangement with the CRE was introduced so that there is a common purpose. This is referred to as 'partnership'.

A New Partnership for Racial Equality

The 'New Partnership' was the official response by the CRE to the report of an independent study of the roles and objectives of CRCs by the Policy Studies Institute. In 1989, following consultation, a broad agreement was reached with most CRCs on a package of reforms that would significantly affect both the CRC movement as well as the CRE.

> *"The main principles of the New Partnership are that we share a common purpose and objectives with CRCs, and that while retaining our separate identities and spheres of influence, we will exercise (our) relative independence within the framework of an agreed common strategy and programme of work. We would plan our work jointly, so that our individual roles complemented each other: the Commission is informed and enhanced by the experiences of CRCs, and that of CRCs expressing national and regional as well as local perspectives. We also agreed that CRCs should 'reconstitute' themselves with the sole purpose of working to eliminate racial discrimination and to promote racial equality and good race relations". (CRE (1989 : 32)).* The CRE and the CRCs although retaining separate identities agreed to work together to eliminate racial discrimination. The New Partnership aimed to break with the past. Greater professionalism, better local management and more effective targeting of resources in tackling racial discrimination, both locally and nationally was perceived. The area of work for the CRCs was to be clearly identified - policy development, community development, casework (including Tribunal representation) and public education.

The Commission for Racial Equality (CRE)

The Labour Government decided that the RRA of 1965 and 1968 were deficient and legislation had to be reformed to give the CRE more powers, for example, the power of formal investigation, right to pursue individual complaints, etc. In the first five years, it was an uphill task. Advances were made by members of ethnic minority communities, despite all obstacles in areas of industry, commerce, education, Local Government, the professions, arts and entertainment, etc. What did the CRE achieve in its first 5 years? The CRE helped to create a more positive mood about the country's approach to racial problems. People were aware of the difficulties facing ethnics and of the need for more action, but it was difficult to dispel the negative attitudes. Law enforcement was successfully used by conducting formal investigation in industry, housing, clubs and pubs. The CRE assisted over 5000 complainants although the success rate was very low. Without the assistance of the CRE, these complainants would have encountered problems in pursuing their cases. Financial grants were made available for projects and self-help schemes including ethnic minority art and culture. Promotional work was high on the agenda especially in the field of education and employment. Promotional documents were published and many organisations were persuaded to improve race relations. Local authorities were getting involved in a big way to combat race discrimination and trade unions also took an active part. Central Government made a start with ethnic monitoring in the Civil Service upon the advice of the CRE. The Code of Practice in employment was drafted and sent to the Secretary of State. Solid foundations were laid for further progress in the next five years.

Why was more not achieved? This was blamed on internal inadequacies of the CRE, the modest resources, and the limits of the RRA 1976. Ethnic minority critics were rather impatient that discrimination was not tackled more vigorously. The CRE was criticised as well as receiving support and encouragement. The initial work programme proved to be over optimistic. In 1979 by a change of Government, it became clear that the expected increase in resource would not be forthcoming. It became apparent that it would be wiser to

concentrate on a smaller and more selective list of priorities. The main problem for the CRE has been that no Government had attached sufficient importance to the improvement of race relations and racial justice in Britain. The CRE has constantly urged that central Government must see the improvement of race relations as a major priority. Successive Governments have failed to take a firm lead in dealing with race discrimination. The CRE has felt and still feels that if the Government took a more vigorous stand on race issues then attitudes throughout society would have been more positive and the task of the CRE would have been made easier. Both the Labour and Conservative Governments in the past made courageous speeches full of promises but did not carry it through. Margaret Thatcher did not make a single major speech denouncing racial discrimination.

The economic recession of the late 1970's and early 1980's contributed to large scale unemployment and tensions in race relations. Increased extremist groups organised marches and in 1981, the inner city riots further hampered the goal to attain racial harmony in Britain. The CRE was functioning with very limited resources because of public expenditure constraints. The 1976 Act was proving to be 'cumbersome' and unduly restrictive and did not reflect the intentions of Parliament regarding the CRE's use of its strategic powers. Between 1982 and 1987 the CRE was having a greater impact under the leadership of Sir Peter Newsam in persuading other organisations to attack race discrimination. Peter Newsam recognised the solid hard work that had been achieved by the CRE in the first five years and realised that the work had not received proper public recognition. By the end of 1982, the CRE had started more than 40 formal investigations. The conduct of formal investigations was difficult in practice because of the limits of the RRA 1976. The legal difficulties forced the CRE to reduce it's emphasis on formal investigations and concentrate more on promotional work. The CRE had a new administrative structure in place in 1982 one dealing with employment, another education and housing and finally one dealing with legal administration and services. The extent of CRC's funding by the CRE was dependent on them producing and implementing satisfactory work programmes. The CRCs played an important role in supporting the CRE's promotional campaigns locally and aiding

individual complainants. The CRE provided funding to many minorities-run self-help groups to combat racial disadvantage.

The Code of Practice in employment came into effect in April 1984 and Industrial Tribunal were bound to take it into account regarding decisions. Staff from the CRE have gone to work at senior levels in other organisations, for example, London Transport, the Bar, Cabinet Office, Sports Council, Christian Aid, etc. and have been directly instrumental in promoting equal opportunity. The CRE has put forward proposals to the Home Secretary for amending the RRA 1976. It has only achieved piecemeal reform in certain areas. Apart from the changes made within the CRE and the changes it has promoted, progress towards the elimination of race discrimination has been undeniably slow. A number of private agencies and companies are now genuinely equal opportunity employers. Local authorities are taking equal opportunity policies more seriously than in the past. Central Government has recently begun to operate a systematic equal opportunity policy. This is encouraging but much more needs to be done. The CRE, despite it's modest resources, has funded cases especially those, which are considered difficult and important, for example, establishing a principle of law. Industrial Tribunals are supposed to be informal in which legal representation is unnecessary. Discrimination cases are so complex, factually as well as legally that, legal representation is often essential in the interests of justice.

Changes to the RRA of 1968 by the RRA 1976

The RRA 1976 was the third such Act and entirely replaced the RRA 1968 and what remained of the Act of 1965. It came into force on the 22nd November 1976. There were 3 main changes from the 1968 Act. First, the Act extended the definition of discrimination to include not only intentional racial discrimination which was covered by the 1968 Act, but also victimisation of anyone who makes a complaint and indirect discrimination where practices and procedures which applied to everyone have the unjustifiable effect of putting people of a particular racial group at a disadvantage. Second, the Act created a new right, subject to five exceptions, to complain directly to an Industrial Tribunal in employment cases and to a

County Court in all others. Under the 1968 Act, all complaints had to be processed by the Race Relations Board (RRB) one of it's nine conciliation committees, or in employment cases by the special joint industrial machinery where this had been set up. The RRB and the Community Relations Council (CRC) had been shown to be unable to deal with discrimination effectively. This change was necessary because the minority groups had lost faith and confidence in both these organisations. The White Paper on the 1976 RRA discussed the replacement of both these bodies by the CRE, an entirely new body with wider powers of enforcement. The third major change was the disappearance of the RRB and the CRC and the replacement by the CRE with much stronger powers of investigation and enforcement. Under the 1968 Act, the RRB could not initiate any investigation unless either a complaint had been made or racial discrimination was suspected. Where complaints or information came from was very much a matter of chance and it was therefore impossible for the Board to formulate any coherent strategy for the investigation and elimination of discrimination. No such limits were placed on the Commission, and unlike the old Board, it was to be able to obtain documents and subpoena witnesses. The Act therefore envisaged a wider strategic enforcement of the Act 'in the public interest', as the Government's White Paper on the RRA of 1976 put it. Individuals with complaints were left to their own devices to bring legal proceedings though they could obtain an undefined amount of help from the Commission.

Present Problems of the RRA of 1976

The effectiveness of the 1976 RRA depends on the Commission's enforcement in the public interest and how they are prepared to help would-be 'victims'. The burden of collecting the evidence necessary to prove discrimination rests with individual complainants. Without help, they will very often not have either the time, experience or money to deal with it. So far, neither the Industrial Tribunal nor County Courts have shown themselves to have the training, experience, or inclination to deal boldly with discrimination. This was established by a study by the Policy Studies Institute 'Racial Justice at Work in 1991' (see later in Chapter VI. Industrial Tribunals have a limited jurisdiction to deal with issues of discrimination and the

results are not encouraging. On the whole only cases with overwhelmingly strong evidence of discrimination have succeeded. (See Chapter VIII).

> *"Law must be comprehensive in its scope. It's enforcement procedures must be capable not only of redressing individual grievances, but also of detecting and eliminating unfair discriminatory practices. But in addition to the law, the policies and attitudes of central and local Government are of critical importance." (MacDonald (1977 : 7,8)).* It is doubtful whether many individual victims of discrimination will be able to prove their cases, either in the Courts or Tribunals:

> *"Most of the discrimination which occurs is hidden and indirect, and it is very doubtful if individuals will have the time, energy or resources to collect the sort of evidence which will be necessary to prove the kinds of indirectly discriminatory practices referred to in Section 1 (1)(b) of the 1976 Act. Enforcement does therefore, depend on the kind of resources, financial and personal at the disposal of the CRE and how it is prepared to use them. Money is also a pre-requisite of the extra legal measures referred to in the White Paper." (1975 Command 6234, para 26).*

The most important problem however is the moral confusion of the legislature. According to I. A. Macdonald, a Race Relation's law assumes that the black minority are part of the community and are here to stay. An immigration law assumes they are here on sufferance and that if things get bad they should go. A race relation's law assumes that the threat to law and order comes from denying the black minority the protection of the law. The immigration law assumes that the black minority is a threat to law and order by their mere presence here. Even within the Government far greater emphasis was placed on maintaining tight immigration controls than on improving race relations. "The price for the RRA of 1968 was the Commonwealth Immigrants Acts of 1962 and 1968, and the price for the RRA 1976 was the Immigration Act of 1971 and the British Nationality Act of 1981" as cited in Hepple 1987

p.36. "The 1976 Act endorsed all the discriminatory practices of the Immigration Act." (MacDonald (1971 : 8)).

The Civil Rights Act - United States of America

The Civil Rights Act (1964) was a comprehensive statute. The first objective was to end racial discrimination. Race relations in Britain has been influenced greatly by the United States. Britain has adopted ideas and learnt from the American experience on race relations to a large extent and can continue to do so. The Civil Rights Act in the United States was a model for bringing about social change, in conduct. "Whilst there are major differences, Britain and the United States have a substantial common heritage. Race attitudes are affected by memories, old legends even myths, and history also influences the very way law is brought to bear on race relations" (Bindman, 1980). The efficacy of anti-discrimination legislation in the United States and Britain has been questioned by several lawyers and sociologists. Some perceive the intervention of law in a very sensitive area has probably done more harm than good. Others see the law as not getting to the root cause of racial discrimination.

Affirmative Action

Affirmative action was introduced in an attempt to remedy past discrimination. Various problems were encountered in achieving this goal. During the second half of the 20th century, the United States has made an historic effort to overcome racial discrimination and secure equality for all its citizens. At the heart of the effort is a process known as "affirmative action". Affirmative action requires all employers to take specific actions that work for the benefit of blacks and members of all other racial and ethnic minorities as well as women.

The implementation of affirmative action stirred up controversy especially when it allocated benefits solely on the basis of race or gender and strictly on a numerical basis setting specific quotas and timetables. Affirmative action has given blacks access to areas that

were previously closed to them and has accelerated integration in the work place. Whites see this action as a form of reverse discrimination. Affirmative action sought to compensate for past discrimination from recurring in the future. It had to break through walls of resistance and apathy, increasing the number of minorities in career tracks in proportion to their numbers in the population, beyond tokenism.

The Morality of Affirmative Action

In recent years the morality of "affirmative action" has been questioned. At the School of Law of the University of Washington, minority persons gained admission under a complex evaluation and points scheme. Mr Defunis, Defunis v Odegaard 1974, a white applicant, who was rejected one year, ascertained that persons less qualified than himself had been admitted. He unsuccessfully challenged the University, seeking to reverse the decision on his application. Affirmative action commenced to acquire a notorious name of "reverse discrimination".

The University of California had a special admissions policy sanctioning the allocation of sixteen out of one hundred places to socially and economically disadvantaged or deprived persons. This commitment resulted in a quota, based on "race", in practice for minority persons only. None of these places had ever gone to a white applicant. It was clearly understood that under this policy the University was to train physicians who would be expected to work among their own people and by virtue of their background would have the appropriate empathy for effective understanding and communications.

Mr Bakke, Bakke v Supreme Court 1978, a white applicant for admission to the medical school experienced rejection on two occasions. His situation, he concluded came about from the reservation of the sixteen places for racial minorities - hence denying him access to this public, state supported institution mainly because he was white. Legal action followed in the Californian court, Bakke charging the University with discrimination in violation of his rights under the Equal Protection clause of the Fourteenth Amendment ("No state shall

make or enforce any law which shall . . . . deny to any person within its jurisdiction the equal protection of the laws"), California Constitution and Title VI, United States Code. Litigation in California turned out in his favour, and the State Supreme Court ordered the University to admit Mr Bakke to the medical school. The goal of achieving an equal society is far from near. It takes years to put right the wrongs of centuries. Blacks and ethnic minorities continue to overcome the decades of social and economic neglect and discrimination. What is important is the fact that legislation has contributed significantly to bring about racial equality and social change.

The Effects of Legal Intervention in the United States

According to Louis Claiborne in "Race and Law in Britain and the United States", the United States has made certain strides towards racial equality mainly through the intervention of the law. Dramatic progress has been made in the political field. All the important posts, legislative, executive and judicial were a white monopoly. Today blacks hold offices in the South as legislators and mayors, as they do throughout the country. There is a true revolution forced by law - black people now vote freely everywhere. It attests a new dignity, commands a new respect and has required a change of attitude. There is an increase in the participation of the black community in the legal process as policemen, prosecutors, lawyers, court officials, jurors and judges. Another major accomplishment is the elimination of racial segregation. Blacks were kept apart, literally from the cradle to the grave. Vestiges of these remain - the law has successfully destroyed these walls of separation. The black ghetto remains and voluntary self segregation prevails in some areas. A lesser claim of success must be recorded for the critical areas of education, housing and jobs. The disparity between the races in employment remains, yet important barriers have been removed in private and public employment as well as in the trade unions. Although the numbers are small, it is significant that the blacks are now to be seen, however occasionally, in every job, in every profession. Nor is the appearance of black faces in leading roles in films and on the television a wholly empty symbolism. While modest, the emergence of so-called "black capitalism" is encouraging.

Perhaps most significant of all is the revolution of attitudes that has occurred as a direct or indirect consequence of massive legal intervention in race relations. Black liberation won during the short decade of the 1960's will be seen as one of the truly remarkable events of history and a unique tribute to the efficacy of law. Law acted as the instrument - most especially bold and creative invention by the Supreme Court and others invoking a written constitution.

It is appropriate to stress the limited role of anti-discrimination law. Civil rights statutes, much less, court decisions cannot build houses, create jobs or remake society. The American experience does indicate that anti-discrimination legislation can achieve a great deal but there is certainly room for further improvement in administration and enforcement. If the law is properly administered and enforced it can control discriminatory conduct in public life and affect attitudes. The Civil Rights Act of 1964 USA, was a comprehensive statute. The first objective was to end race discrimination. The Civil Rights Act was a model for bringing about social change through conduct. Britain followed the pattern of the United States in adopting an action to counteract the effects of past discrimination by enabling members of ethnic minorities to develop their potential and "catch up" with white applicants and employees. This was termed "positive action". The provisions for positive action are contained in the Race Relations Act of 1976

Positive Action

Positive action is necessary to redress the effects of past discrimination and disadvantage. Positive action is a means of developing the potential of ethnic minorities so that the gaps between the white and black employee can be bridged. Ethnic minorities are grossly under-represented in managerial and supervisory positions. Quotas are not permitted under the RRA nor is discrimination allowed at the point of selection. Positive action can improve industrial relations and ensures that the workforce is using its full potential. In America, affirmative action (also called reverse discrimination) has given blacks access to areas that were previously closed to them. Whites see this as a form of "reverse discrimination". The scope for affirmative action is definitely far wider than position action. "Reverse discrimination" is unlawful in Britain. This is sometimes mistaken as "positive action" by employers.

Reverse Discrimination

An argument has been presented for "reverse discrimination" in order to redress the balance. Although reverse discrimination would be beneficial to ethnic minorities it would be seen as unjust to the indigenous population. Numerical "goals" also called "quotas" were regarded as affirmative action in the early 1970s in the States. The quota system is illegal in Britain - it would give preferential treatment to blacks. In 1989, the Courts in the States handed down several controversial decisions and to date the legality has been challenged. Today there is no consensus on the economic impact of affirmative action, but there is no denying that affirmative action has had a profound impact on American life. The U.S. judges seem to have a better understanding of discrimination and arrive at "bold" decisions as compared to the British judges, while British judges tend to interpret the law very narrowly and do not see their role in the broader social context. Blacks are represented in every job, and in every profession in the States - this goal has not yet been attained in Britain.

CONCLUSION

This chapter has begun to explore whether social changes could be effected through legislation and the limits of the legislation on race discrimination. There are inherent limits to the judicial process because of the tradition of English judges. Apart from the disapproval of slavery, English judges did not declare acts of racial discrimination as against public policy during the pre-legislation days. There was a general reluctance on their part to get involved. The series of cases involving race discrimination in the colonies demonstrated the reluctance of the British judiciary (Privy Council and House of Lords 1900-1965) to make statements regarding slavery and the legality and morality of racial discrimination. There is no judicial tradition in this country of ensuring racial justice through case law. The Privy Council took it for granted that there could be lawful discrimination solely on racial grounds.

The attitude of the United Kingdom domestic Courts in discrimination cases before the RRA 1965 showed the same lack of consideration for equality or individual justice.

During the early 1960's the Labour Party saw the Commonwealth Immigrants Bill as blatantly discriminatory and objected to many of its provisions. By 1964 the Labour Party changed it's attitude and decided that there was a definite need to curb black immigration into Britain. Race relations law is thus closely related to immigration. Immigration issues overshadowed the debates on the Race Relations Bill of 1968. The aim of race legislation was to prevent the emergence of second class citizens. Britain's experience of Race Relations was acquired as an Imperial power and past and present manifestations of racial discrimination and prejudice reflects that experience. Social stratification (meaning social class and status) to a large extent affects the history and enforcement of the RRA. The debates foresaw the difficulties of interpreting the legislation and the problems of enforcing the law in race relations matters. MP Quinton Hogg predicted the difficulty of changing attitudes through legislation. He was expressing very little confidence in achieving a just society by the imposition of laws to control behaviour. These doubts have been confirmed by the extremely slow progress of legislation, for example, piecemeal reforms in improving race relations in Britain. The concerns during the debates in Parliament on the 1965, 1968 and 1976 legislation was not to improve race relations or combat discrimination but the main thrust of the debates were concerned with the number of black immigrants entering Britain.

The Race Relations laws were claimed to have been passed to reduce racial tension and maintain social stability. However, the contradictions between the Race Relations law and the immigration laws defeat the aim of the 1976 law as set out in the White Paper. On one hand, the Government recognised the fact that a large number of immigrants intended to remain in Britain permanently. Fair and equal treatment was to be ensured regardless of their race, colour or national origins. Racial discrimination was morally unacceptable and was seen as a form of economic and social waste. On the other hand, however, it was the status of the black immigrant in British Society and the fact that blacks were viewed as 'a

problem', that determined the pattern of race legislation in Britain. The propaganda value of the RRA, as MacDonald commented in 1977:

> *"Will be constantly undermined by the far heavier flow of propaganda in favour of immigration controls that is given out in the press, in Parliament, on television and from practically every official platform." (MacDonald (1977 : preface iv)).*

The philosophy of the Race Relations Acts is in direct contradiction to that of the Immigration Acts. The effective enforcement of the RRA 1976 will continue to be undermined by the discriminatory immigration legislation. Legal intervention was seen as essential in an attempt to influence social behaviour and attitudes. According to Geoffrey Bindman, the British experience is distinctly feeble and unadventurous - the damages awarded are "derisory". He states that equal opportunity policies can be stimulated by three principal means. "If the law against discrimination is rigorously enforced, there is a strong motivation to avoid legal action; the adoption of suitable policies can itself be made a legal requirement; and the government can use its own commercial and executive powers to stimulate equal opportunity policies". The approach of the British courts to race legislation is seen as "timid" when contrasted to the United States. There is definitely room for further improvement in anti-discrimination legislation. If the law is properly administered and enforced it can control discriminatory conduct in public life and affect attitudes and behaviour. The main lesson to be learnt by Britain from the American experience and models is the limited role of anti-discrimination law. Legislation cannot totally transform society but if administered forcefully it can substantially affect attitudes.

CHAPTER V

THE LAW RELATING TO DISCRIMINATION AT WORK AND THE LIMITATIONS OF THE RRA 1976

This Chapter outlines the limitations of the RRA 1976 and its capacity to change society through reform of the legislation.

Limitations in the Legislation

The Law Relating to Discrimination by Employers Under the RRA 1976.

The main provisions of the law relating to employment are Direct, Indirect Discrimination, Victimisation, Section 4, Section 29 and 30/31 of the RRA 1976.

The Present Law Enforcement Powers of The Commission

The powers of the CRE are discussed in Chapter I and in Appendix I. The Commission's law enforcement powers fall into three categories: Power to assist individuals alleging discrimination; Section 66 RRA 1976; power to bring legal proceedings in respect of allegations of pressure or instructions to discriminate; Section 30/31, unlawful advertisements; Section 29 and persistent discrimination; Section 62. It also has the power to conduct formal investigations, Section 48, enforcement of non-discrimination notices, Section 58 and the bringing of judicial review.

Direct and Indirect Discrimination

Direct discrimination consists of treating a person less favourably than others are or would be treated in the same circumstances on the grounds of race, colour, nationality or ethnic origin. Indirect discrimination is applying a requirement or condition which adversely affects

a particular racial group considerably more than others. If this requirement cannot be justified on non racial grounds then it is indirect discrimination, for example, if a firm had a rule that it would provide its services only to people who had lived in Britain for a certain length of time. Regarding motive in indirect discrimination the correct test is not subjective but objective. In James v Eastleigh Borough Council (1990). Lord Goff said:

> *"If it were necessary for the purpose of Section 1 (1)(a) to identify the requisite intention of the defendant, that intention is simply an intention to perform the relevant act of less favourable treatment. However, in the majority of cases it is doubtful if it is necessary to focus upon the intention or motive of the defendant in this way and the simple 'but for' test avoids, in most cases at least, complicated questions relating to concepts such as intention, motive, reason or purpose, and the danger of confusion arising from the misuse of those elusive terms."*

The Legal Criteria for Discrimination

This section will discuss how case law has affected changes in legislation and brought about changes to society. The cases discussed in this chapter illustrate the difficulties experienced by applicants in proving discrimination in the Courts. If certain legal criteria, for example, 'detriment' is not met then discrimination is held not to have been proved. In examining the practice of discrimination at work, I shall examine the legal criteria in order to prove discrimination in legal proceedings, for example, 'meaning of detriment', 'justifiability', 'proof of discrimination' etc. Some acts may not be construed as discrimination from a legal point of view but indicate patterns of discriminatory behaviour which contribute to other evidence. The interpretation of these cases will demonstrate the strength of the present legislation. A comparison between the older decisions of the Courts and the more recent ones will reflect the extent of flexibility and the attitude of the Courts in their interpretation of the legislation.

Requirement for Condition

In Malik (M) v British Home Stores (BHS) (1980), M, a Muslim woman of Pakistani origin, was turned down for a job by BHS because they would not accede to her request to be allowed to wear trousers as part of her uniform. M claimed that she had been discriminated against on the grounds of her race contrary to the 1976 RRA in the Industrial Tribunal. BHS's requirement that their sales staff should wear a uniform consisting of an overall over a skirt amounted to indirect discrimination under Section 1 (1)(b) RRA 1976 in that a smaller proportion of Pakistani Muslim women as compared to non Muslims could comply with it. BHS could not justify the requirement on the grounds of commercial necessity that their sales staff must wear a neat and tidy uniform in order to present a good image to the customers. This need was outweighed by the detriment suffered by M as a result of the requirement. It was also a comparatively simple matter for BHS to modify their uniform regulations so as to permit M to wear a pair of trousers beneath her overall. The Tribunal accepted that this discriminated against Muslim women who are obliged to wear clothes that cover their legs. This case took into consideration the cultural values of ethnic minorities for the first time.

In Orphanos (O) v Queen Mary College (1985). This is not an employment case but if followed by Tribunals it would allow employers to exclude from jobs "anyone who came from the EEC" and had not fulfilled a justifiable condition of length of residency in the EEC. O, a Greek Cypriot, was classed as an overseas student and charged much higher fees than United Kingdom or EEC nationals, because the Government defined a home student as one who had been ordinarily resident in the United Kingdom or other EEC State for at least 3 years before the start of the academic year. O's test case claimed that this fees policy amounted to unlawful indirect racial discrimination on grounds of nationality. The three year residence requirement meant that people of his national group had more difficulty in meeting that requirement and because of this he suffered the detriment of higher fees. The Court held that the college had not discriminated on racial grounds because it was justified due to

economic grounds. The Court of Appeal dismissed O's appeal and he appealed to the House of Lords. The House of Lords held that the requirement that students not ordinarily resident in EEC area for three years should pay higher fees was unlawful indirect discrimination under Section 1 (1)(b)(1) of the RRA 1976. This case illustrates the flexibility of the law on indirect discrimination adopted by the House of Lords in bringing about changes to the legislation, hence to society.

A Significant Case on Requirement or Condition

In Greater Manchester Police Authority v Lea (1990), it was decided that in order that the objective balance between the discriminatory effect of a condition and the reasonable needs of the person who applies it is carried out, there has to be a nexus established between the function of the employer and the imposition of the condition. A pool for comparison does not have to be shown to be statistically a perfect match of the persons who would be capable of filling and be interested in the post offered. In the above two cases the meaning of 'requirement' or 'condition' were interpreted rather liberally as compared to the earlier cases, (Malik v British Home Stores and the Orphanos case) denoting a more flexible interpretation of the law.

Justifiability

Even if the complainant has proved a requirement of the right category and a detriment in employment, the employer may escape liability by proving that the discrimination is justifiable. Here the judges have veered first to a strict, but later a more relaxed test.

Cases on Justifiability

One of the first test cases was Steel v UPW (1978). A system for the delivery of mail agreed between the union and management, gave the better 'walks' to senior post office employees. A post woman complained that this operated unfavourably to her because seniority was measured by membership of the permanent staff, which was not available to women until

1975. Phillips J. insisted that the onus of proving justification was on the employer, he must prove the case is genuine and necessary. The continuing effect of the discrimination must be weighed against the discriminatory requirement, and the discrimination must be shown to be necessary, as against a practice that is convenient. The touchstone is business necessity. This was a test frequently applied. The Scottish EAT and the Court of Appeal both relaxed the standards in cases concerning a works rule prohibiting beards at work, a rule clearly discriminatory indirectly against Sikhs; but in both the rule was upheld as 'justifiable' irrespective of the colour, race, nationality or ethnic or national origins (RRA Section 1 (b)(ii). As Lord Fraser put it in a later decision, it was "purely a matter of public health and nothing whatever to do with racial grounds": Singh v Rowntree Mackintosh Ltd (1979). The judges treated the question as one of fact.

In Ojutiku v MSC (1982), the Manpower Services Commission (MSC) had restricted access to certain management training opportunities to those who had specified educational qualifications and work experience in a post of commercial, administrative, professional or industrial responsibility. The applicant who came from Nigeria was unable to fulfill the requirement for work experience. The qualifications disadvantaged black applicants and the employers concerned may have been intending to discriminate. The 'necessity' test was displaced. The rule might be justified by 'good grounds'. Here the prospects of would be managers would not be enhanced by such persons attaining the paper qualification of a diploma; secondly, the rule maintained the standard of that qualification. Because of its limited funds the MSC was entitled to limit places in the course to those likely to benefit in their careers. The Orphanos case held where the need for economy leads a body to differentiate directly by race or national origin with regard to fees charged for courses is unlawful. The Ojutiku decision allows for subjective preferences. In the Orphanos case it was held that it was unlawful to discriminate on racial or national grounds in the need for economy. Eveleigh L.J. said the test was whether the reasons for the action would be "acceptable to right-thinking persons as sound and tolerable reasons". This weak

interpretation of 'justifiability' was approved in 1983 by the law lords: it need not be a "necessary condition" but "in all the circumstances justifiable without regard to the ethnic origins of that person": Home Office v Holmes (1984). 'Justifiable' connotes a lower standard than the word "necessary".

More Recent Case on Justifiability

In Hampson v Department of Education and Science (1988), it was decided that there is no valid distinction between a test or yardstick and a requirement or condition. In this case, the test of justifiability requires "an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applied the condition". The circumstances when indirect discrimination is justifiable have decreased somewhat since the Court of Appeal restated the law in Hampson. This falls short of a test of 'necessity' but is an improvement on Ojutiku view that a reason accepted as 'tolerable' by a 'right thinking person' would be sufficient. Ojutiku v MSC (1982). The recent decisions illustrate the flexibility and changing attitudes that the Tribunals can utilise and can play a very important role in eliminating discrimination on a larger scale. There is ample room for extension of this flexibility and change of attitude to be exercised by the Tribunals.

Meaning of Detriment

I am now going to examine the interpretation advanced by the Courts as to the meaning of 'detriment'. In the case of Kirby v Manpower Services Commission (1980), an interviewing clerk at the defendant's Job Centre (who had passed on information about racist practices by employers) was transferred to less interesting filing work - it was held to be a detriment. Kirby complained of victimisation under Section 2 and discrimination under Section 4, RRA 1976. Kirby lost his case for the reason that he had not been treated 'less favourably' than another clerk would have been who disclosed confidential information. Anybody who had done that would have been moved in the same way. What had to be considered under Section 2 (1)(d) is whether the allegation of disclosing confidential information, which for this

purpose must be assumed to be true, does amount to an act which would be a contravention of the statute.

In Showboat Entertainments Centre Ltd v Owens (1984), a white manager of an amusement centre was dismissed because he refused to carry out an instruction to exclude all young blacks from it. Direct discrimination on racial grounds within Section 1 (1)(a) of the Act was capable, it was held, of including a person who had been disadvantaged by reason of resistance to racial instructions. Section 1 (1)(a) RRA covers all cases of discrimination 'on racial grounds' whether the racial characteristic in question are those of a person treated less favourably or of some other person. Therefore, dismissal of an employee because he refused to carry out racially discriminatory instructions to exclude the blacks, was 'on racial grounds' within the meaning of Section 1 (1)(a) notwithstanding that the employee was white. It was impossible to believe that Parliament intended that a person dismissed for refusing to obey an unlawful discriminatory instruction should be without a remedy.

In Ministry of Defence v Jeremiah (1978), 'detriment' was nothing more than "putting under a disadvantage", - a question of fact to be answered by the Tribunal. This was a case under the Sex Discrimination Act. A male employee complained that he was being discriminated against compared with female employees doing nominally the same job in that he and other men were required to do a particularly dirty part of the job which their female colleagues were not. The question arose as to whether the man was being subjected "to any other detriment". Brandon L.J. said:

> *"I do not regard the expression subjecting to any other detriment" as meaning anything more than "putting under a disadvantage."* Brightman L J said:
>
> *"detriment exists if a reasonable worker would or might take the view that the duty was in all the circumstances to his detriment."*

In De Souza v Automobile Association (1985), one manager had said to another "get your typing done by the wog" The Employment Appeal Tribunal (EAT) held that there must be a disadvantage "in relation to employment", not merely an act of prejudice. Prejudice translates itself into discrimination in employment. The Court in interpreting the legislation very narrowly here is showing a total disregard for social experience and imagination. The judges tend to arrive at 'safe' decisions. They were not bold enough to detract from the current trends and norms of society. Popplewell J. declared:

> *"However deplorable it may be to describe a coloured person as a 'wog' to a third person, it is not and cannot be construed as putting her under a present or future disadvantage in relation to her employment."*

This case narrowed the meaning of 'detriment'. This view is out of touch with reality yet the Court of Appeal agreed. Racial insults were not enough by themselves to be a 'detriment' to 'working conditions' within the meaning of the RRA. It must be such that the "putative reasonable employee could justifiably complain about his or her working conditions or environment". This judgement reflects the lack of sensitivity on the part of judges. On dismissing the appeal it was held that to:

> *"Racially insult a coloured employee is not enough by itself, even if that insult caused him or her distress; before the employee can be said to have been subjected to some 'other detriment'. The Court or Tribunal must hold that by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work."*

More Recent Case on Detriment

In Barclays Bank PLC v Kapur (1989). The applicant's pension entitlement was less favourable than that of other employees. The bank's refusal to credit the applicant with his past service with banks in Africa as pensionable service was unlawful discrimination. This disadvantage continued throughout his period of employment.

> *"Bingham LJ stated, subjecting him to any other detriment in Section 4 (2)(b) RRA 1976 is to be given its broad, ordinary meaning, it is plain that almost any discriminatory conduct by an employer in a relation to an employee's employment will be rendered unlawful by Section (4) (2)(b)."*

In this case the meaning of 'detriment' was given its broad, ordinary meaning, and almost any discriminatory conduct by an employer in relation to an employee's employment was rendered unlawful. Ibid (note above case). This is a significant change compared to the De Souza case in 1985. A large number of complaints in employment cases received by the CRE involve racial insults. In some cases racial insults are coupled with some other form of discrimination. A complainant who bases his complaint on a series or pattern of racial insults only, would find it impossible to satisfy the Courts that he or she is being discriminated against, (from observation whilst working as a complaints officer at the CRE and from the De Souza case). The Barclays Bank PLC v Kapur case creates a feeling of optimism in establishing 'detriment'. In the past racially offensive remarks were ignored by the Courts unless it amounted to a 'detriment'. In Kulwant Mann v Mrs Moody, DSS and two others (1992), the term 'Paki' was held to be racially offensive, yet the Courts still seem to insist on a link between the offensive remarks and employment. Mere racially offensive insults do not constitute discrimination.

In another recent case Kandhar and Others v National Leisure Catering (1992) the term 'black slaves' was held to constitute an injury to feelings. The Court held that the remarks

were connected to the employee's jobs and to their future. It is not always possible to link the racial insult to the job in question. The Tribunal could adopt a wider and more flexible interpretation of the law when racial insults are involved in discrimination cases. The recent cases most definitely illustrate a change in the flexibility of the interpretation of the criteria of detriment for discrimination. The cases reflect a changing attitude and better understanding of racial problems by the Tribunals, but it is still restricted by the necessity of a link to employment.

Proof of Discrimination

The burden of proof is on the complainant. It is not an easy task, there is the difficulty of assembling the evidence. In many cases proceedings could not be brought because informants did not want to be identified. In cases of indirect discrimination the burden of showing 'justifiability' lies on the employer, but that is after the initial case has been made out by the claimant. Where an issue of comparison arises, the claimant may be required to put forward sophisticated statistical evidence. Discrimination is very difficult to prove and is often subtle. There are indeed cases where the sight of the witness in the flesh matters a lot, but more often there will be little concrete proof for the reason why the job was refused or the promotion denied. RRA 1976 Section 65 enables a complainant to serve a Questionnaire on the employer asking certain standard and useful questions - the replies are admissible evidence and a refusal to reply without reasonable excuse permits the Tribunal to draw adverse conclusions.

In Science Research Council v Nasse (1978), unsuccessful applicants for promotion or transfer sought discovery and inspection of confidential documents (i.e. disclosure) about others who were considered by management for the same posts. The Court of Appeal set aside orders for discovery, Lord Denning stressing that confidential documents should rarely be subjected to such an order. The law lords agreed with the result but on narrower grounds; the test was whether discovery was needed in order to fairly dispose of the proceedings and

the Tribunal itself should look at the documents to decide whether as a last resort, confidential reports should be disclosed. Restrictive conditions could be placed upon discovery, such as the 'covering' up of passages or holding a hearing in camera (excluding the public). Lord Fraser recognised that the relevant;

> *"Confidential information is almost always in the possession of the employer and.....may be of vital importance to the complainer."* Lord Scarman added:
>
> *"If a document is necessary for fairly disposing of the case, it must be produced, notwithstanding its confidentiality."*

There is no principle of law by which documents are protected from discovery by confidentiality of itself. In British Library v Palyza (1984), complaints of two library employees of racial discrimination that caused them to be passed over for promotion by an interviewing board led the Tribunal to accept their applications for disclosure of the reports on fellow employees subject to the exclusion of some passages. It is necessary to do justice to the complainant.

> *"The decision of an Industrial Tribunal as to whether or not it is necessary for fairly disposing of the proceedings, that confidential reports should be disclosed in cases of alleged discrimination is one which the EAT is free to review and to substitute its own view. The decision whether discovery should be ordered is of such importance as to make it highly desirable that its review by the appellate Court should be unfettered. The procedure of discovery is designed to offset the probative disadvantages which the complainant would otherwise suffer. It is designed to do justice to the complainant." Ibid (note above case).*

More Recent Case on Proof of Discrimination

In Baker v Cornwall County Council (1990), it was held that if discrimination takes place in circumstances which are consistent with the treatment being based on grounds of sex or race, the Industrial Tribunal should be prepared to draw the inference that the discrimination was on such grounds, unless the alleged discriminator can satisfy the Tribunal that there was some other innocent explanation. The earlier cases reflect a narrower interpretation of the law as regards 'proof of discrimination' as compared to the more recent decisions, for example, in ibid (above case), it was held that Industrial Tribunal could draw the inference that discrimination had taken place unless the alleged discriminator could offer an innocent explanation. This direction is vital because of the difficulty of obtaining evidence in discrimination cases.

Pressure And Advertisement Cases Under The Race Relations Act Of 1976

Pressure Cases - S30/31 RRA 1976

Section 30/31 of the RRA deals with instructions/pressure to discriminate - the law under this section makes it unlawful to give discriminatory instructions or exert pressure on an individual to discriminate. A significant case on 'instructions to discriminate' was CRE v Imperial Society of Teachers of Dancing (1983). Here the respondents were looking for a young person to act as a filing clerk and to carry out general office duties. The respondent's secretary telephoned the Camden School for Girls and spoke to the Head of Careers at the school. It was alleged that the secretary had told the Head of Careers that she would rather that the school did not send anyone coloured (Asians, Africans and Afro-Caribbeans) for the job, because that person would feel out of place as there were no other coloured employees.

The CRE brought a complaint against the respondents claiming that Section 30/31 of the RRA had been contravened. The CRE alleged that the secretary had attempted to induce the Head of Careers to do an unlawful act contrary to Section 31 and that she had attempted to procure her to do an unlawful act contrary to Section 30. An Industrial Tribunal found that the secretary had used the words in question, but held that there had been no contravention of either Section. According to the Industrial Tribunal there was merely a request that no coloured applicants should be sent. The EAT allowed the appeal in part and declared that the Society was in contravention of Section 31 of the RRA and not Section 30 RRA. The words 'procure' and 'attempt to procure' in Section 30 of the RRA have a wide meaning and include the use of words which bring about or attempt to bring about a certain course of action. Therefore, an expression of preference for applicants from a particular racial group is 'an attempt to procure' within the meaning of Section 30. The EAT interpreted Section 30 very rigidly by treating it as a 'request' and not an 'instruction' to discriminate.

The word 'induce' in Section 31 of the RRA covers a mere request to discriminate. It does not necessarily imply an offer of some benefit or the threat of some detriment. The ordinary meaning of the word 'induce' is "to persuade or to prevail upon or to bring about" and there is no reason to construe the word narrowly or in a restricted sense. Therefore, a request by the respondents secretary to a Head of Careers at a school that "she would rather the school did not send anyone coloured" to fill a job vacancy constituted an attempt to induce the Head of Careers not to send coloured applicants for interview in contravention of Section 31.

The Imperial Society of the Teachers of Dancing was an important case because the Court did not interpret Section 31, RRA 1976 narrowly or in a restricted sense but was construed widely. If Section 30 had been widely interpreted the request not to send anyone coloured would have been construed as an instruction to discriminate and the CRE would have succeeded under Section 30. Wider interpretations of the law under Section 30/31 RRA means that more cases of racial discrimination could be brought under these heads. A

significant case on pressure to discriminate was the case of the CRE v Mr John and Alassio Restaurant (1991).

The respondents in this case placed with the job centre an advertisement in respect of a vacancy which they had for a waiter or waitress. A Mr Olagami, (black), was sent for an interview and subsequently reported to Mr McNally, one of the officers at the job centre, that he had felt that he had not been given a fair hearing. Mr John, the manager is alleged to have told Mr McNally that the vacancy was still open but said that he would not employ black people; that it was all white people who used his restaurant; and they did not want to see black people and that black people did not speak properly. Later he said that he would employ black people in the kitchen but not in the restaurant because of the attitudes of the local people and he made some passing reference to the National Front. Mr John denied the conversation which he had with Mr McNally and said that he was not prejudiced. A claim under Section 30 failed as the respondents were not in a position of authority over McNally and McNally was "not accustomed to act in accordance with the respondent's wishes". The Tribunal held that the applicant's complaint against the first respondent under Section 31 was well founded. "As the first respondent was either an employee or an agent of the second respondent, by virtue of the provisions of Section 32, RRA 1976, the second respondent was vicariously liable for his actions and accordingly the complaint against the second respondent under Section 31, RRA was also well founded." This is a typical case of a breach of Section 30/31 RRA. Very often the applicant who has been discriminated against is totally ignorant of the discrimination because the employer gives discriminatory instructions to the job centre staff. This case establishes that discrimination could be widespread in the employment recruiting process because the discrimination is not overt but subtle.

Another significant case on pressure to discriminate was the case of CRE v Precision Manufacturing Services Ltd (1991). The respondents instructed the job centre not to send Muslims for interview for a post which was under discussion with the job centre for possible

advertisement. The question whether 'Muslim' fits within Section 3, RRA 1976. This is discussed in Chapter III where race and ethnicity are defined by law. The Court held that Muslims were not within Section 3, RRA but there was a breach of Section 30/31. The Tribunal also made reference to the case as falling within the ambit of indirect discrimination as Muslims could not comply with the 'requirement' or 'condition' imposed.

Employers recruitment practices are one of the fundamental causes of discrimination in employment. The CRE is severely restricted in its resources, hence, only cases that involve a significant point of law will be the subject of legal proceedings. The drastic reduction in the number of proceedings under Section 29, 30/31 RRA is bound to allow for the increase in discrimination in this area. This can be remedied by increasing the financial resources of the CRE.

Advertisement Cases - Section 29 RRA 1976

Section 29 of the RRA deals with discriminatory advertisements. The law under this section makes it unlawful to publish or display an advertisement which indicates, or might reasonably be understood as indicating, an intention to discriminate on grounds of colour, race, nationality or ethnic or national origin. A significant case on discriminatory advertisement was CRE v Dutton 1989. The facts were that a public house in Hackney displayed a 'No Travellers' sign. This was a test case brought by the CRE in the Westminster County Court. It was held that despite the criteria set out in Mandla v Dowell Lee (1983), gypsies were not an ethnic group protected by the RRA.

On appeal by the CRE, the Court of Appeal established two points. First, that gypsies are an ethnic group for the purposes of the RRA (and, incidentally, for the purposes of the law on incitement to racial hatred). The law does not define an 'ethnic' group. It was held that a 'No Travellers' sign in a public house was indirectly discriminatory and had to be justified. The Court of Appeal referred the question of justifiability back to the County Court. No further proceedings were brought as Mr. Dutton had retired in the meantime and the public house

was under new management. The key objective to establish that gypsies were entitled to the protection afforded by the RRA had been achieved. Its effect will be wide ranging, affecting not only public houses but also the provision of all services to the travelling community including, in particular, education, town planning and health care. Gypsies are an identifiable group defined by reference to 'ethnic origins' within the meaning of the definition of 'racial group' under Section 3 (1) RRA 1976. Exemptions under Section 5 (2)(d) RRA 1976 (below) are linked to Section 29 RRA.

Exemption Provisions under Section 5 (2)(d) RRA 1976

The exemption provisions under Section 5 (2)(d) RRA 1976 was a major cause of enquiries by employers and the public. In certain circumstances this enables employers to appoint persons of particular racial groups to posts providing personal services for people from that group. This provision has always provoked controversy. Employers approach the CRE before publishing any advertisements for advice on the law.

CRE v London Borough of Lambeth (1990)

A significant case on Discriminatory Advertisements was the case of the London Borough of Lambeth v CRE (1990). The London Borough of Lambeth advertised for two jobs under Section 5 (2)(d) in its housing benefits section in 1988. The advertisement asked for 'Asians' or 'Afro-Caribbeans' specifically. The CRE started proceedings in the Industrial Tribunal and the advertisement was held to be unlawful. The Lambeth Council appealed and lost at the Employment Appeal Tribunal. The Court of Appeal in April 1990 also dismissed it. Leave to appeal to the House of Lords was rejected. It was decided that there was no point of law in dispute. "The Court held that in exercising their jurisdiction in Section 5 cases, Tribunals should take a broad common sense approach on matters which are largely issues of fact. It should not be too difficult to identify genuine defences, and to distinguish specious defences which cloak undesirable discrimination."

Lambeth decided to settle all the complaints in accordance with the Court of Appeal's interpretation of Section 5 (2)(d) and to pay the greater part of the CRE's legal costs. The CRE received a further 15 complaints regarding the use of Section 5 (2)(d) by the London Borough of Lambeth. The use of the word 'personal' in Section 5 (2)(d), where the holder of the job provides 'personal services' indicates that the identity of the giver and the recipient of the services is important and appears to contemplate direct contact between the giver and the recipient - mainly face to face or where there could be susceptibility in personal, physical contact. If a person is providing persons of a racial group defined by colour (for example black people) with personal services promoting their welfare, it is open to an Industrial Tribunal on the particular facts of the case to find that those services can be most effectively provided by a person of that colour, from whatever ethnic group he comes, and even though some of his clients may belong to other ethnic groups.

Tottenham Green Under Fives Centre v Marshall (1989)

Another case under Section 5 (2)(d) was Tottenham Green Under Fives Centre v Marshall (1989). The applicant who was white applied for a job as a nursery worker at a centre for young children of varying ethnic origin to replace an Afro-Caribbean worker who was leaving. The post was advertised as requiring a personal awareness of Afro-Caribbean culture. The applicant was not offered the job and complained to an Industrial Tribunal that he had been unlawfully discriminated against on the grounds of his race. The centre raised the defence under Section 5 (2)(d) of the RRA that being of a particular racial group was a genuine occupational qualification for the job. The Tribunal found that the personal services to be provided by the worker, such as maintaining the cultural background, reading in dialect, and general health care, need not be provided by an Afro-Caribbean, and they upheld the applicant's complaint. The centre appealed and the appeal was allowed. It was held that the phrase "can most effectively be provided" in Section 5 (2)(d), RRA posed the question whether the services would be less effective if provided by others and should not be read as meaning 'must' or 'can only be provided'. It was held that the Industrial Tribunal

had misinterpreted the phrase and that accordingly the case would be remitted to the Tribunal for re-consideration. It was held that in construing Section 5 an Industrial Tribunal needs to carry out a delicate balancing exercise, bearing in mind the need to guard against discrimination and the desirability of promoting racial integration. It was important not to give Section 5 (2)(d) too wide a construction which would enable it to provide an excuse or cloak for undesirable discrimination. On the other hand, where genuine attempts are being made to integrate ethnic groups into society, too narrow a construction might stifle such initiatives.

Where a defence is raised under Section 5 (2)(d), the holder of the post must be directly involved in the provision of the services although this need not necessarily be on a one to one basis. If the post holder provides personal services to the recipient, the defence is established provided one of those genuinely falls within Section 5 (2)(d). The phrase 'promoting their welfare' in Section 5 (2)(d) is a very wide expression and it would be undesirable to seek to narrow the width of those words. The phrase "those services can most effectively be provided by a person of that racial group" in Section 5 (2)(d) assumes that the personal services could be provided by others. The words are not 'must be provided' not 'can only be provided'. Whether the services can be 'most effectively provided' by a person of that racial group and whether they would be less effective if provided by others is a matter of fact for the Tribunal. The large number of cases for breach of Section 29 are settled by obtaining an assurance not to breach the Act in future. The terms of such settlements typically include an admission of the contravention and undertakings about future conduct.

The present Section 29, RRA 1976, has revealed that the defects that were predicted when the Race Relations 1968 Bill was discussed are still presenting problems today. Proceedings under Section 29 might enhance the enforcement provisions of the RRA 1976 in eliminating discrimination on a larger scale, for example, gypsies who previously had no protection under the RRA 1976 for being discriminated against are now covered by Section 3 of RRA

as a result of the Dutton case. If other groups, for example, Rastafarians could be brought within the protection of the RRA as a separate ethnic group, discrimination against them may be diminished to some extent.

CONCLUSION

The cases discussed illustrate the difficulties experienced by applicants in proving discrimination. There are strict rules laid down as to 'criteria' to be fulfilled before discrimination is proved. The Tribunals could interpret the law widely thus removing the present constraints on the law. The success rate of race cases in the Tribunals will be greatly increased if Tribunal Members departed from the rigid interpretation of the law and arrived at 'bold' decisions. Success rate in race cases in Industrial Tribunals is very low: Employment (1990), Tribunals have often failed to face up to the reality of discrimination that it is highly prevalent in society and occurs in all sorts of subtle and not so subtle forms. Unless the general public's awareness of how racial discrimination occurs is raised far beyond the present level, it is unlikely that Tribunal Members will develop that awareness despite the presence of special 'race' Members. Race cases are not heard by particular Members to develop expertise inside the Tribunal system. The Chairs and Panel Members adjudicate on a variety of cases dealing with sex discrimination, unfair dismissal, disability, breach of contract, equal pay, etc. It would be ideal for certain Chairs and Panel Members to be allocated only race cases so that they can establish vast experience in this area of the law. Without that awareness it is all too easy to regard complainants as 'trouble makers', or 'over sensitive', or 'mistaken', when the truth is that they have been treated less favourably on account of their race. The objective therefore must be to build up expertise in discrimination matters and give people with the responsibility for adjudicating, the opportunity to become familiar with the issues. A better success rate can also be attained by bringing about changes in the present legislation. It is enlightening to note that the Courts

are exercising a certain degree of flexibility and change of attitude in the interpretation of the legislation but there is ample room for greater flexibility, and change of attitude. The changing attitude of the Tribunals could be attributed to the recent increase in the appointment of Members of ethnic minorities to the Tribunals. The Members of Industrial Tribunals have been made more aware of race issues by compulsory training programmes. There has been a recent trend for flexibility and understanding of different cultures and social changes in Britain. The limitations of the law with reference to the criteria to be established for proof of discrimination, are gradually being eroded by changes in the decisions. This would contribute to proving cases on race discrimination easier. There are positive indications that these changes will bring about transformation to society, although at a very slow pace.

The present problems that arose under Section 5(2)d were predicted during the debates in Parliament on Clause 6, Race Relations Bill 1968. Problems were seen as inevitable where particular qualifications related to ethnic or national origins regarding advertisements. Section 5 (2)(d) RRA presented a lot of problems with regard to discriminatory advertisements, for example, in the case: London Borough of Lambeth v CRE (1990), which went as far as the Court of Appeal. It was held that Tribunals should take a broad common-sense approach in interpreting facts. The law has not been clarified in this area and further problems are bound to arise in the future. Advertisements are concerned with recruitment of employees. Discrimination in employment recruitment in the study (Brown & Gay, 1985) revealed that the level of discrimination was high. Pressure and Advertisement cases involve recruitment. Discrimination under Section 29, 30/31 RRA is generally very covert and in many cases the individual is not aware of being discriminated against. If this area of the law is strengthened then the CRE will certainly be in a position to tackle discrimination in this area with greater vigour and success. Discrimination has to be tackled at the recruitment stage because that is the first rung of the ladder for entry into the job market. If positive steps

are taken in relation to recruitment then changes can be effected in bringing about reform to recruitment and changes in society.

This chapter identified the limits to the law and the difficulties encountered in eliminating discrimination on a larger scale. The rigid interpretation of the RRA 1976, for example, the criteria to be fulfilled before discrimination is proved, are seen as major hurdles to be overcome. The research on Industrial Tribunals (Chapter VIII) uncovers further problems that are encountered by applicants in race cases. These problems account for the low success rate of race cases in Industrial Tribunals. Changes to the RRA 1976 is imperative so that there is more flexibility in the law, thus bringing about changes to society. It is extremely difficult for applicants to be aware of discrimination; (usually very covert) under Section 29, 30/31 RRA. The limitation of the law in this area can only be addressed by the strengthening of the legislation to tackle discrimination in employment at the recruitment stage. This in turn will enhance the powers of the CRE so that changes to society could be effected more rapidly.

CHAPTER VI

RACE IN THE WORKPLACE

The aim of this chapter is to examine the extent of discrimination in the workplace, in order to ascertain the pattern from the 1970's to the present day. Employment is the pivot upon which hinges the other aspects of life namely housing, education, social services, etc. Race discrimination in the workplace is therefore very significant. This chapter will also trace the extent of discrimination in the workplace by an examination of a series of studies that were conducted in the 1970's. These findings will be compared with the research conducted in the 1980's, 1990's and 2001 in the same field, to ascertain the changing extent and pattern of discrimination in the workplace, if any, to transform society.

Table 1: Ethnic origin of people of working age by area of residence; Great Britain; average summer 1999 to spring 2000, not seasonally adjusted

Thousands and percent

	Great Britain (000s) (=100%)	Inner London	Outer London	West Midlands Metropolitan County	Greater Manchester	West Yorkshire	Rest of Great Britain
All ethnic groups[a]	35,248	5	8	4	5	4	74
White	32,874	4	7	4	5	4	77
All ethnic minority groups	2,364	22	26	12	4	6	30
All Black groups	703	38	26	7	3	3	24
Black Caribbean	330	31	26	11	2	4	25
Black African	239	50	27	*	*	*	18
Other Black	66	47	29	*	*	*	19
Black Mixed	68	18	19	11	*	*	42
Indian	635	8	34	16	3	3	36
Pakistani/Bangladeshi	531	17	14	20	9	15	25
Pakistani	389	5	16	21	1	19	29
Bangladeshi	142	50	9	15	5	*	16
All other groups	495	25	30	3	3	3	35
Chinese	101	18	22	6	*	*	47
Other ethnic groups	394	37	33	3	2	4	32

Source: Labour Force Survey

* Sample size too small for reliable estimate
[a] Includes those who did not state ethic origin

Ethnic Minority Population

According to the Labour Force Survey, in 1999/2000, 2.6 million adults in Great Britain (5.8 percent of the population aged 16 and over) identified themselves as members of ethnic minority populations. There were 2.4 million men and women of working age from ethnic minorities (see table 1).

Race Discrimination at Work in the 1970's

The PEP study in 1973-74 comprised a series of tests in six towns and cities in England to assess the discrimination faced by people of West Indian, Indian, Pakistani, Italian and Greek origins when trying to obtain jobs, buy houses and obtain private tenancies. The employment tests covered a broad range of jobs from unskilled manual work to accountancy and revealed that there was considerable discrimination against the West Indian (West Indian of dark pigmentation) and Pakistani applicants. One third of employers rejected the black applicants while offering to take the white applications further. Part of the research design was a comparison of the effect of being an immigrant and the effect of being black. The much lower level of discrimination faced the Greek and Italian applicants (about 1 case in 10). It showed that discrimination was more related to colour than to overseas origin. Comparisons between the results of the tests using West Indian, Indian and Pakistani applicants showed that there was no significant difference between the levels of discrimination faced by West Indians, Indians and Pakistanis. The findings revealed a high level of discrimination faced by the black immigrant applicants. This finding is linked to the theories of race and ethnicity in Chapter 3. The applicants were discriminated on the basis of colour rather than on the basis of being immigrants. The Second PEP Report on Racial Discrimination in 1974 discovered that there was a considerable concentration of immigrant workers in particular industries and particular plants due to discrimination. The policies and practices of racial discrimination were revealed in a study of a bakery in London in 1974. A

Report on Racial Disadvantage in Employment studied employment practices in a bakery: Report (1974) Chapter 11.

> *"In a study of a bakery in London in 1974 a large number of casuals were Indians. The managing director stated that race was the main factor in deciding whether a man should be offered 'permanent' or 'casual' work. It would not be legal to keep them on one-hour notice or to consider them ineligible for redundancy payments. There was also a serious element of racial discrimination. When the bakery was modernised half of the 'casual' workers, all of them Indians, had been dismissed. There was a lack of awareness of the implication of the law - the managing director admitted readily to practices that were unlawful." Ibid (Report above).*

In this study and from several other studies it was established that the practice of maintaining racial balance was obvious. The report concluded that certain groups were excluded not on racial grounds but for other reasons, for example, West Indians were thought of as being very slow and Indians because of their problems with the language. Discrimination in recruitment was difficult to prevent especially in organisations that were accustomed to relying on 'word of mouth recruitment'. The role of the immigrant labour force was undergoing reform in certain areas. A survey of black graduates revealed that they encountered less success in seeking a job than similarly qualified white students. (Ballard & Holden, 1975).

In a survey, Smith (1977), immigrants were found to be strongly over-represented in the categories of shipbuilding and vehicle manufacture, textiles, and in the residual group labelled 'other manufacturing industry', as well as in transport. Men were under-represented in the service industries, but West Indian women were strongly over-represented in the health service. Between a third and a half of the immigrant workers of the West Midlands appeared to be working in hot, dirty industries, marked by shift work. Nearly one third of the

New Commonwealth immigrants were working in forges, furnaces and foundries, or as labourers elsewhere. The white woman typically became a secretary or shop worker, the black immigrant woman worked in a factory, or in a hospital, and rather less frequently in service industries. Black immigrants constituted about one in ten of the economically active population in Birmingham but they were carrying double their appropriate share of unemployment. In the above survey black immigrants were relegated to jobs which were rejected by the indigenous white population. Immigrants from the Commonwealth were employed in areas of work, which were unacceptable to indigenous workers. Immigrant workers occupied clearly segregated and low-level jobs. They were concentrated in areas of unskilled and semiskilled jobs.

The Study of the Comparison of General and Coloured Employment in Birmingham and Handsworth in 1977 researched the industrial distribution of Handsworth by ethnic origin. It showed over-representation of immigrants in the manufacture of metal goods and in transport, but not in the other sorts of manufacture, nor in the professional groups taken as a whole. The study also showed that Asians and West Indians tended on the whole to work longer hours than white British workers. The extreme case was an Asian bakery worker who worked as many as 84 hours a week.

Two fifths of skilled manual Asian workers and a third of West Indians earned less than £50 per week. The low income amongst semi and unskilled manual white workers was due to the fact that they tended to work fewer hours. In the study over a third of the Asian and West Indian sample that had not been offered promotion believed that this was due to racial discrimination. In Handsworth there were fewer black immigrants in white-collar employment than there were whites and there were far more semi-skilled and unskilled workers amongst the black immigrants than amongst the whites. It seemed clear from this study that although there was some overlap between the employment of black and white workers in the skilled manual occupations, black immigrants were employed predominantly in less attractive

industries and in less rewarding jobs. They were accepted as a replacement labour force only, and one in three of them were conscious that racial discrimination and prejudice barred the way to promotion.

In Nottingham between 1977 and 1979 the local Community Relations Council (CRC) conducted a set of tests for non-manual jobs advertised in that city, (Hubbock & Carter, 1980). For each vacancy three written applications were made, one by a white person, one by a person of West Indian origin and one by a person of Asian origin. The results showed that the level of discrimination faced by blacks in Nottingham was even higher than that found in the PEP study 1973-74: over 40% of employers rejected the black applicants whilst offering the white applicant an interview. The above study illustrated the role of black immigrant labour and the pattern and extent of discrimination. Discrimination in the field of employment remained at a very high level. The RRA of 1976 was proving to have very little impact in curbing discrimination in employment. The limitations of the Act were becoming very obvious.

Ethnic Minority Businesses

Minority owned businesses generate many employment opportunities for ethnic minorities particularly in the field of catering, ethnic foods, manufacturing, etc., for example, Greek Cypriots work, live and socialise within their own community, imprisoned from the outside world where they might be subjected to discrimination. This practice is also quite common among Indians, which enables them to maintain their culture and preserve their identity as a separate group. (As evidenced by my work and social experience). This aspect was discussed in Chapter III on sociological theories of race and ethnicity. It would seem that these groups were seeking only a limited acceptance into British society. This statement may reflect the thinking of the earlier immigrant though not the 'second generation of immigrants' (these are the children of immigrants born in Britain who are still referred in

some instances as 'second generation immigrants'. The policies and practices of the employers determine the role of the immigrant worker.

The Extent and Nature of Ethnic Business

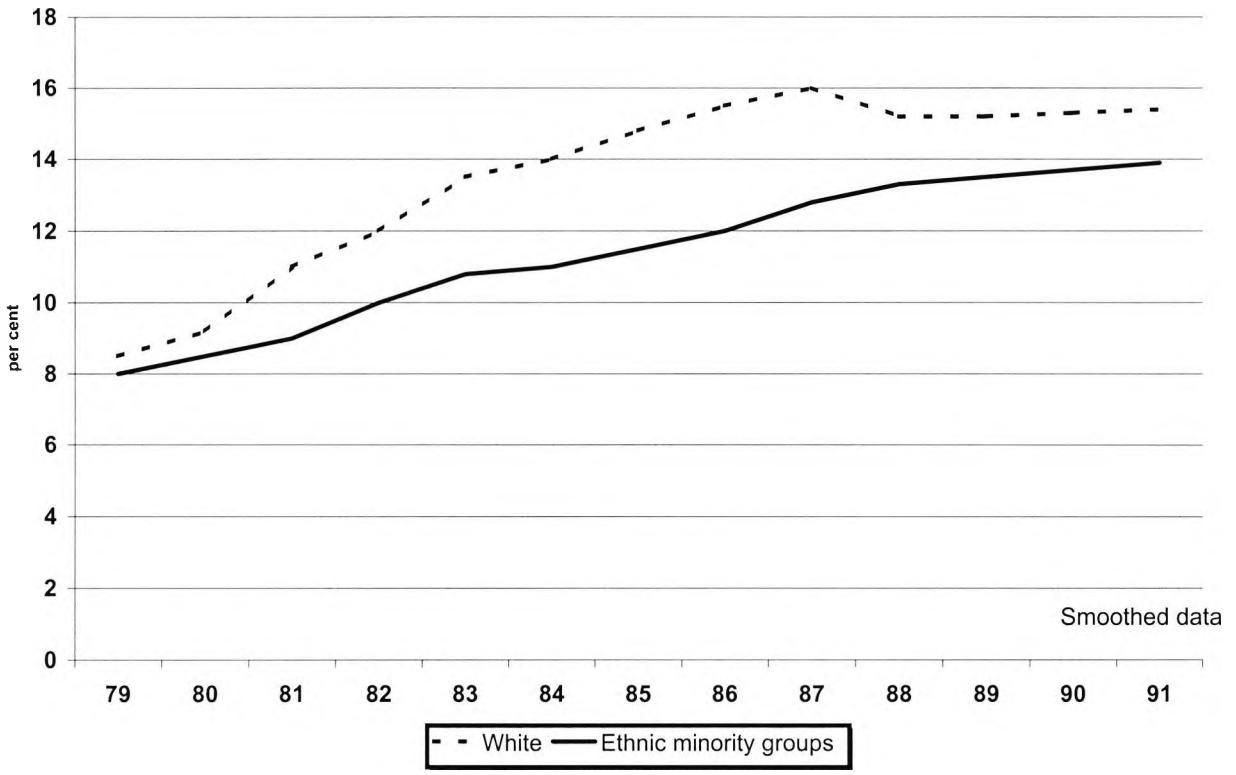
The following summary is based on the study 'Ethnic Minorities in Business' (Monder & Jones, 1998). Explanations for the formation of ethnic minority business tend to stress the importance of cultural resources (particularly family and community ties) and discrimination. Evidence suggests that limited opportunities for many ethnic minorities continue to be an important influence on the decision to become self-employed. Afro-Caribbean under representation in self-employment is explained by the socio-economic context than pure culturalist explanations. Ethnic minority firms rely on co-ethnic markets in the provision of ethnic products. There is some debate on whether the problems that ethnic entrepreneurs are reported to have with the banks are 'business related or race related'. What is clear is that under funding remains one of the biggest problems facing ethnic minority small business owners. Since the 1970's the number of independent firms in Britain owned by immigrants has multiplied spectacularly. During the 1970's ethnic minority self-employment rates overtook those of the native origin population (Brown 1984) and subsequently the gap has continued to widen. In Ward's opinion (1991: 51) "by the year 2000 a significant segment of the small business population will be within the ethnic sector" Indian, Pakistani and Bangladeshi are now claimed to own no less than half of the nations independent retail outlets. (Aziz 1995). They are also a significant and growing presence in other service branches like catering, hotels, certain branches of manufacture such as the clothing industry (Phizacklea 1990). Asian business activity and self-employment rate amongst Indians and Pakistanis is now strikingly higher than that of the general population as (Fig 1.2) indicates. There are equally high levels of self-employment among the Chinese, Greeks, Turks and Italians.

The Scarman Report (Scarman, 1981) identified economic deprivation and social alienation as the underlying causes and recommended special measures to promote enterprise and self employment among minorities to "an economically dispossessed black population" (Scarman 1986, Barrett 1995). A network of enterprise agencies which support bodies were set up wholly or partially dedicated to ethnic minority enterprise following the Report. The Asian business momentum is sustained by a belief in the group's own philosophy that Asians have a predisposition to become entrepreneurs. Lack of decent alternatives in a racist society and unemployment rate steers the Asians towards self-employment. Afro-Caribbeans exhibit significantly below average self-employment rates. Many of the explanations accounting for this under representation appears to be the apparent lack of cultural resources that are so evident in other ethnic minority groups. They include the different value base of the African-Caribbean family unit, which apparently does not predispose them to running a family business (Reeves and Ward 1984). The legacy of slavery, which had a deleterious effect on Afro Caribbean culture (Rex 1982) and the absence of the extended and community network (Blaschke et al 1990).

Afro Caribbeans were essentially a 'replacement' workforce who came from working class backgrounds to fill occupational and residential niches vacated by whites (D. Basu 1991: 102). Asian immigrants to Britain appeared to have a broader socio-economic profile, and therefore, greater access to class resources. Ethnic identity is cross-cut by class background, for example, the greater entrepreneurial success of the more affluent blacks who migrated to the United States (former 1979) would seem to bear out the importance of class. Negative stereotyping of Afro-Caribbeans in British society infringes upon their capacity to mobilise resources potentially useful in business. The Afro-Caribbean is also emerging as a competitor in the small business scene (Curran and Blackburn 1993; Ram and Deakins 1995). According to Metcalf et al (1996); Virdee et al (1996) the rising generation of Asians seems increasingly set on professional career rather than self-employment. Some Indian school children (in common with Chinese and Africans) are out

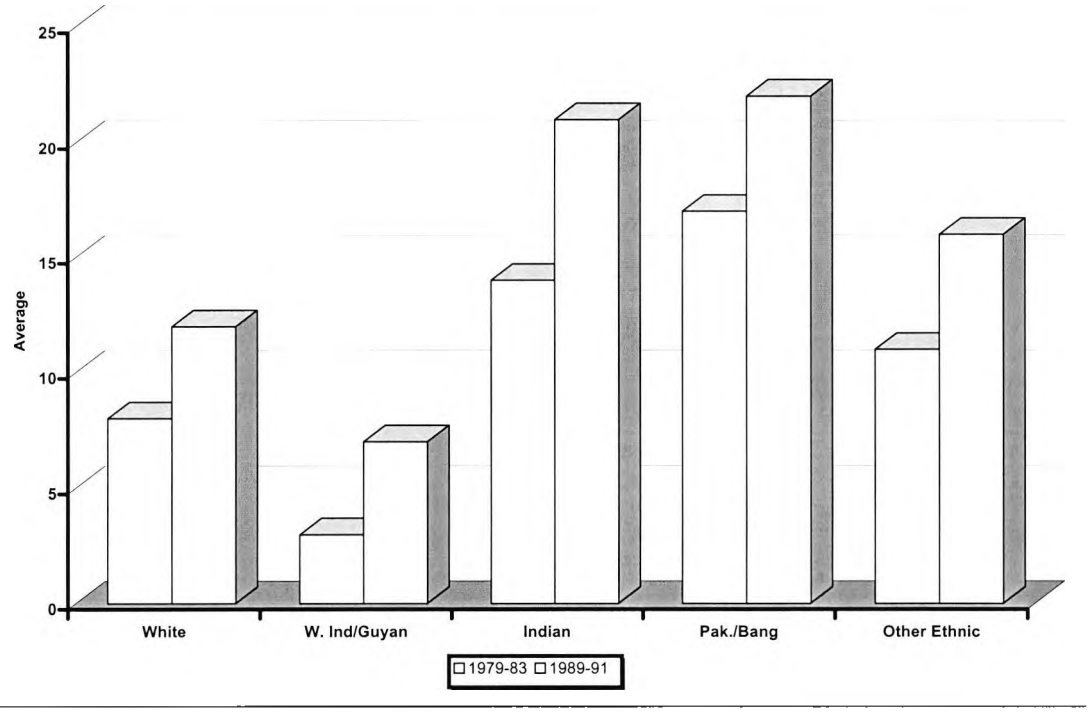
performing their white peers in education (Peach 1996); this seems an understandable strategy. This pattern which exists in the United States is spreading in the case of particular ethnic minority groups in the United Kingdom today.

Fig. 1.1 **Self-employment by ethnic origin**



(Source: Employment Gazette, June 1992)

Fig. 1.2 Self-employed as a proportion of all employees (male & female)



(Source: Employment Gazette, June 1992)

Significant Surveys on Discrimination in Employment – 1985-2001

Study No. 1

Racial Discrimination: 17 years after the Act (Brown & Gay, 1985)

The aim of the 1985 study by the Policy Studies Institute (PSI) was to obtain an estimate of the extent of racial discrimination in employment recruitment. This was compared with the 1973/74 PEP Study and the 1977/79 Nottingham study on job discrimination against young blacks. This study dealt with direct discrimination only; it provided no measure of the extent to which black people are further disadvantaged in the job market by indirect discrimination. When genuine applicants for jobs surmount the first obstacle of obtaining an interview, they may still be treated unfairly on the grounds of race at the interview or during the actual

selection process. It was therefore likely that the actual level of direct discrimination faced by black job applicants was greater than was reported. 'Three applicants tests' were used in the study by the PSI - one white, one Asian and one West Indian. The tests were carried out in London, Birmingham and Manchester. The research aimed to cover a range of jobs in the non-manual and skilled manual fields with an even spread between sets of male and female applicants, and a good balance between jobs for people about 30 years old and for people of 18 to 20 years old. Only private sector jobs were included in the study, partly for continuity with the previous studies and partly because recruitment and selection procedures in the Civil Service and in Local Authorities were as a rule more complex than in the private sector.

In nearly half of the cases all three applicants received positive responses, that is to say they were offered interviews or sent application forms. In nearly a quarter of all the tests, two applicants received positive responses, while the third was rejected although in only 4% of all cases this was the white applicant, compared with 10 % for the West Indian applicant and 10% for the Asian applicant. This was evidence of substantial racial discrimination against both the Asian and the West Indian applicant for each type of job. It also shows that a small group of employers discriminated against applicants of Asian origin but not against those of West Indian origin and a further group vice versa. The total impact of discrimination on the Asian and West Indian applicants was the same, taking all the valid tests together. 90% of the white applications were successful, compared with 63% of the Asian applications and the West Indian applications. The white applicant was therefore over a third more likely than either of the Asian and West Indian applicants to receive a positive response. The gap between the overall success rates of the Asian and West Indian and white applicants was greatest in Birmingham and least in London. The brutal fact was that despite the law, direct discrimination persisted as an additional and powerful impediment to any economic progress by blacks. Comparisons between this and previous studies showed no evidence of a decrease in the extent of the discrimination over the past decade. The levels of discrimination found in this study were in fact higher than those found in the PEP study of

1973/4, but the differences were not statistically significant. The test results were very likely to be underestimates of the true extent of discrimination.

> *"We also do not have the necessary information about the vacancies for which black applicants compete with white applicants annually. Even a conservative estimate would put the figure at tens of thousands of acts of racial discrimination in job recruitment every year." (Brown & Gay (1985:31)).*

The applicant in such cases had no reason to suspect he or she was a victim of racial discrimination and even if there were such a suspicion, there would be no immediately available evidence to support it. The individual illegal act of discrimination was often invisible to the victim. When the PSI study was compared with 1973/4 PEP study and the Nottingham CRC study 1977/9, there was no evidence to denote that the level of discrimination had decreased since 1973. The conclusions to be drawn were that both the 1968 and the 1976 RRA had little impact to decrease incidents of discrimination. It would suffice to state at this stage that employer's recruitment practices were one of the fundamental causes of discrimination in employment. It was very difficult for an unsuccessful applicant to detect if he or she has been discriminated against. The CRE does have powers to carry out investigations into the policies and practices of organisations. The problem of financial resources has seriously curtailed the number of formal investigations it can undertake. This study had revealed that there was no reduction in the extent of discrimination and further that discrimination had become entrenched in British society. This research was very significant in that it uncovered the extent of the problems of racial discrimination in employment. It also brought to light the enormous failure of attempting to establish good race relations in Britain by the RRA 1976.

Study No.2

The Race Relations Code of Practice In Employment: Are Employers Complying?

CRE (1989)

In 1989, the CRE conducted a significant piece of research on the Code of Practice in Employment. The CRE's Code of Practice in Employment (Section 47, RRA 1976) for the elimination of racial discrimination and the promotion for the equality of opportunity in employment came into effect in April 1984. The Code provides practical advice and guidance on the adoption and implementation of equal opportunity policies and on the responsibilities of employers, trade unions and individuals for the elimination of racial discrimination and the promotion of equal opportunities in employment. The CRE wished to test the effectiveness of the Code. This aspect is significant to my research because my Questionnaire survey includes questions on whether the employer has adopted the Code, and also questions relating to equal opportunity policies and monitoring. It's central recommendations relate to the adoption of formal equal opportunity policies, the ethnic monitoring of the outcomes of recruitment and selection procedure for possible bias, guidance and training for selectors and decision makers, and meeting the training and other needs of ethnic minorities. The Commission has used the Code in its recommendations to employers following formal investigations and compliance with its provisions has been recommended in a number of Industrial Tribunal proceedings.

The adoption and implementation of an equal opportunity policy is one of the central recommendations of the Code. The sample of employers covered a wide range, very small employers (less than five employees) and larger employers were selected (more than 500 employees). The sample was selected from areas with a sizeable ethnic minority population. Of the 229 employers (taking part in the 1989 survey) who had either read through it or glanced through part of it were asked, whether they had such a policy. About three-quarters

(73%) of them said that they had an equal employment opportunity policy with a further 4% saying that one was in the course of preparation. Public sector employers were more likely (81%) than private sector employers (71%) to have a policy, and employers in banking and finance more likely (78%) than those in manufacturing (63%). The majority two thirds out of the 73% of employers with policies said that these were formally written down. 18 of the 75 policy statements analysed went beyond good intentions and discussed implementations of the policy and 8 of them were comprehensive codes of practice developed by the employers themselves, providing for a fairly wide range of specific actions for such implementations.

The main reasons given by the 67 employers who did not have a formal written policy were that they "had not got round to it or thought of it", "wasn't needed because they hired and promoted on performance and ability" and "wasn't needed because there had been no problems". Among the two thirds of employers who had written equal employment opportunity policies, broad responsibility for the policy tended to be vested in personnel managers. Less than half the employers interviewed (47%) had consulted with trade union or employee representatives over the introduction, content, implementation or review of the policy. 86% of all employers interviewed said that deliberate discrimination was a disciplinary offence and 92% said that racial harassment was also a disciplinary offence. Less than half (45%) made this clear in their written equal opportunity policy. 25% took a variety of steps including issuing employees with a copy of the policy and 20% displayed it on notice boards, re-printing it in a house newsletter (11%) and issuing copies to heads of branches and departments (11%). Of the employers with a written policy, 14% did not communicate this to applicants at all. Only 18% communicated this policy so that it might reach potential external applicants through job advertisements. A very startling finding was that only 30% of all employers interviewed had informed job centres, careers offices and other agencies on at least one occasion about the policy.

The Code of Practice recommends that employers regularly monitor their equal opportunity policy to see that it is working, with the aid of analyses of the race and ethnic origins of their workforce. Of the 229 employers interviewed 40% had conducted one analysis of the race and ethnic origin of their workforce. About half of them had used the system of classification then recommended by the Commission. 25% of employers interviewed said that managers collected ethnic origin information through visual assessment, while 11% used a self-assessment Questionnaire. Choice of method was indicated largely by practical considerations. Cultural, religious and linguistic needs were taken into account by some. The great majority of employers with ethnic minority employees allowed saris, shalwar, trousers, turbans and beards to be worn at work. 23% of all employers interviewed reported having employees who did not speak English very well. Three methods of improving communications had been adopted: interpreting/translating terms and conditions of employment, procedural agreements, etc - (14%), translations or pictorial presentations of safety signs and conditions - (11%); and English language training and communication - (6%), (some employers had adopted one or more of these methods). 13% of employers said that they had provided facilities enabling ethnic minority employees to observe prayer times and 21% provided for religious holidays. About 90% of all employers interviewed allowed extended leave to visit relations abroad. About 6% of them restricted the arrangement to particular groups. 23% of employers had introduced written equal opportunity policies in 1984 or 1985. Out of these 18% had drawn them up as a result of the Code of Practice. About 28% of employers had pre-1984 policies, which also had been recently revised; 21% of these were said to be as a result of the Code. 51% had reviewed their recruitment methods for indirect discrimination, 38% said that this review had taken place after receiving the Code. Having read the Code or having some knowledge was preliminary to the survey. Of the 59% of employers reviewing their selection criteria, 27% did so after receiving the Code.

12% of employers said that the proportion of ethnic minority employees in their workforce had increased as a result of action taken on the Code and a further 16% thought that it would increase in the future. 57% said that it had not and that they did not expect any increase - most of these claimed that they had done enough or that there was a lack of applications from qualified ethnic minorities. Public sector employers were more likely (25%) to report increases in ethnic minority representation than private sector employers (8%). Only 4% of manufacturing employers reported that the proportion of ethnic minorities in their workforce had increased as a result of action on the Code, compared with 23% of 'other services' employers. Increases were more likely to be reported by employers who had written equal opportunity policies which they monitored (29%) and by employers who reported having taken a 'great deal' of action (43%). A further 17% of this last group anticipated future change as a result of the Code. An actual or expected increase in the ethnic minority workforce was also more likely to be reported where the employers had reviewed recruitment methods - 33% of respondents who had done so compared with 18% of those who had not. Clearly therefore those who were most likely to see the Code as effective were those who said they were doing a great deal.

Case Study of Eight Employers

As part of the CRE's 1989 study a case study of eight employers was undertaken to assess the extent to which full implementation of the main recommendations of the race relations Code of Practice increases employment opportunities for ethnic minority groups. All the case study organisations recognised the importance of monitoring and despite some initial difficulties had succeeded in implementing it. In recruitment, emphasis was placed on contact with the community, schools and advertising in the ethnic minority press. Some organisations recognised the importance of making selectors more directly accountable for the decisions they made by asking them to record their reasons for selecting or rejecting a candidate. This also enabled more effective reviews of selection decisions to take place. Some employee specifications contained vague, subjective criteria such as 'good

personality', 'flexibility', 'reliable' etc. An employee specification required criteria, which are specifically related to ability to perform the job in question, if it was to introduce greater fairness in the selection process. With regard to equal opportunity training case studies in the research project showed that training could not on its own bring about equal opportunities within organisations. A very significant factor is that this could only happen when there was strong commitment to the policy at senior levels, and the training supports this. Without this commitment any training initiatives in equal opportunity would not succeed, and could be seen as 'window dressing'.

Equal Opportunity Training

Equal opportunity training comes in a variety of forms, but there was still very little information available to most organisations as to the effectiveness of the various training approaches. None of the organisations was monitoring the wider question of overall attendance or job training courses by ethnic origin. (This is an important area as it tells managers which courses ethnic minority staff attends, and whether there are any problems or unmet needs).

Positive action under the Code

The Code states that positive action is "allowed by law, to encourage employees and potential employees and to provide training for employees who are members of particular racial groups which have been under-represented in particular work areas". Positive action, then, can essentially take two forms: encouragement and training, for example, by placing job advertisements in the ethnic minority press; using schools, job centres and careers offices in areas where ethnic minority populations were concentrated; and active encouragement from line managers to existing ethnic minority staff to apply for promotion opportunities. The Code's recommendations on positive action encouragement had been accepted by organisations, and were being practised with beneficial results. The main area of concern was the apparently low incidence of positive action training. There would appear

to have been some reluctance to engage in such initiatives, perhaps because they were felt to be discriminatory in nature or because of a possible reaction or backlash from white employees. The CRE concluded that there was definitely scope for wider action here.

Targeting

If an equal opportunity policy is to achieve anything, changes can be expected in the proportion and distribution of employees throughout the organisation by setting targets for the employment of ethnic minorities. A target specifies the proportion of ethnic minority people that an organisation would like to employ by a particular date. (Targets differ from quotas in that they are not rigidly fixed but instead define an objective, which is desired to be attained by a particular time.) For example, if ethnic minorities made up 20% of the local population this was seen to be a reasonable overall target for the organisation to achieve. Targets are gradually becoming established as a means of focusing attention on selecting fairly and keeping the equal opportunity policy objectives to the fore. The element, which is often missing, is the setting of a time-scale by which the target is intended to be met. Time-scales are generally ignored and not seen as a crucial factor in attaining goals that are envisaged.

Benefits of an Equal Opportunity Policy

What are the overall benefits of an equal opportunity policy? It had been argued that the Code of Practice represents a Code of good management practice. The benefits of an equal opportunity policy meant better staff, better communication within the organisation, better industrial relations, better employee relations, better image in the community, better use of staff, better business and better service and more efficient procedures. The views of all the organisations in the study was that the Code of Practice needed to have more bite and the need to emphasise the area of 'ethnic monitoring' and 'positive action' more strongly. It was also felt that the Commission should emphasise the benefits of the Code and highlight the reasons why it is in an organisation's self-interest to develop such policies. The greatest

changes had occurred at the lower grades rather than at senior levels so that the main concern of most of these organisations now was to ensure that ethnic minorities progress to middle and senior management positions. Changes in middle and senior management are occurring at a very much slower pace. In some cases very little actual change had occurred in the numbers of ethnic minority staff employed and their distribution had altered very little. This 1989 survey concluded that "five stages in the development of effective equal opportunity programmes in employment had to be identified. The first stage involves the acknowledgement of the need to take action to adopt an equal opportunity policy. Secondly to recognise that the processes need to be implemented to make equal opportunity policy work. Issuing good practice guidelines to managers in recruitment, selection, and employee development usually carries this out. The recognition of the need for factual information about the effectiveness of the company policy, normally through the collection and analysis of ethnic origin information on applicants and employees. The evaluation of facts to identify barriers to equal opportunities including those caused by current management practices, the effects of past practices, social or educational disadvantage or racial discrimination. The fifth stage is crucial. It required the acceptance and adoption of specific measures to remedy the effects of such barriers and to change manager's behaviour within a clear framework of management objectives. The research shows that no significant improvements in equal opportunities will take place until stage five is reached. Most employers in the interview survey were at stage one. Between 25% and 40% were at stage three (data collection). Fewer had reached stage four (evaluation) and only a small number were at the crucial fifth stage (specific remedial objectives)." CRE (1989).

According to the research some success had been achieved by the implementation of the Code. It still had some way to go before it could achieve its objective of eliminating racial discrimination and promoting equal opportunities in employment. The Courts did not pay much heed to the 1989 Code. A change of attitude could herald a significant transformation to race relations. For example in West Midlands Passenger Transport Executive v Singh

(1988). Mr. Singh had applied unsuccessfully for the post of Senior Inspector. He argued that he was better qualified and more experienced than the successful candidate was. The Tribunal ordered the employer to produce a summary of the number of white and non-white applicants for the post and how many of each group was appointed during 1984-85. The Court of Appeal judgement upheld an Employment Appeal Tribunal ruling that an employer in proceedings must produce a summary of ethnic monitoring data because it would be of probative value as to whether the employer was operating a discriminatory policy. Following this case there had been a change in the attitude of Tribunals to some extent. There was an urgent need for the Code to impose a legal obligation - this can only be achieved by changes in the legislation. Some large organisations are today following the Code in the implementation of equal opportunity policies, monitoring, positive action and 'targeting'. Some measure of success can be attributed to the Code although the imposition of a legal obligation would achieve better results.

Study No. 3

Racial Justice at Work - Enforcement of the Race Relations Act 1976 in Employment

(McCrudden & Others, 1991)

The Policy Studies Institute (PSI) conducted research in 1991 on the enforcement of the RRA 1976 in employment entitled 'Racial Justice at Work'. This project dealt with formal investigations and complaints. My research will add to the information on the effectiveness of enforcement of the RRA 1976 in the field of employment. As shown already, between 1976 and 1985 there is evidence that discrimination continued at the same level as in the early 1970's (Brown & Gay, 1985). Many problems and difficulties arose in the interpretation of RRA 1976 and in the process of enforcement. The primary aim of the research was to assess the effectiveness of the process of enforcement of legislation against racial

discrimination in employment. The procedures used for bringing individual complaints before Industrial Tribunals and the procedures used in formal investigations were investigated. The 1976 RRA had been intended to tackle institutional discrimination by extending the law to cover 'indirect discrimination'. According to the 1991 findings the attempt to extend the law to cover something wider than direct discrimination had not worked, and this had been one factor limiting the success of the strategic approach to combating institutional discrimination. The vast majority of cases heard by Industrial Tribunals were concerned only with direct discrimination. The CRE also concentrated on direct discrimination in assisting individual complaints, and in formal investigations.

Between 1977 and 1982 the CRE made it a top priority to use its formal investigation powers. A total of 46 investigations were started in employment, many of them wide ranging and complex. Many ran into difficulties, essentially for two reasons: resources that turned out to be inadequate because of poor planning and a lack of focus; and a series of legal challenges. There were delays on a number of investigations coupled with loss of morale. Before 1983 it was assumed that formal investigation was the central method of bringing about change. From 1983 onwards the attitude was that formal investigations should not be undertaken, unless there were adequate resources. From 1983 promotional and advisory work was considered as an alternative and often this was given consideration before commencing on a formal investigation. The decision in Prestige Group PLC (1984) meant that formal investigations against specified organisations could only be mounted where the CRE reasonably believed beforehand that unlawful discrimination had occurred. In response to a judicial review, the emphasis moved from investigations of specified organisations to general investigations. The total number of investigations into specified organisations has been greatly reduced. There is an increased emphasis on advisory and promotional work.

The 1991 Research Concluded as Follows:

Individual Complaints

The 1976 RRA gave the complainants of racial discrimination direct access to the Courts or Tribunals. The number of complaints of racial discrimination made to the Tribunals had increased substantially over the period since the 1976 Act and the number of complaints upheld had also increased. There was a particularly sharp increase after 1985. This could be attributed to the recession and many employees were restructuring their organisations. The complaints were from a broad cross-section of the population belonging to non-white ethnic minorities. More race cases are heard than cases on sex discrimination at Industrial Tribunals. The CRE was better equipped than any other organisation to provide advice and it was the major source of competent free representation. The CRE had a limited budget to spend on individual complaints but applicants granted assistance by the CRE had a substantially better chance of success than others. This is because the CRE tried to select the stronger cases, it was likely to provide more effective advice and representation than any other body and provided moral support during the stages to the applicant, thus reducing the chances of the applicant withdrawing. Three quarters of cases that were heard at the Industrial Tribunals took up to 6 months from start to finish. Tribunals are supposed to be more informal, speedy and friendly yet the objective of creating an informal system had not really been achieved. Success was heavily dependent on presenting specific kinds of evidence. The CRE's success in assisting complainants was its most notable achievement. Enforcement was substantially different from what was envisaged in 1976. Formal investigations were not playing the central role now as it had been expected.

The research has shown that much remains to be done and much more can be done, even within the present framework of legislation. The form of the current legislation limited enforcement. It was a central conclusion from this research that much more could be done through the individual complaints system to achieve justice for individuals. The success of the CRE in this field had discouraged the development of alternative sources of support to

individual complaints: in particular, campaigning organisations. The CRE had been aware of this problem and throughout the 1980's had been trying to develop alternative sources of advice and representation. It was found that various training activities reached very few people who are actually going to advise or represent complainants. There was now a more concentrated desire within the CRE to develop alternative sources of advice and representation, for example, community relations officers, officials of trade unions, use of law centres and to develop a complainant aid organisation. Alternative sources of representation for individual complainants could not be developed unless they can be funded. The best way to deal with this was to extend legal aid to applicants in cases of racial discrimination in Industrial Tribunals.

According to the research there was room for increasing the expertise of Tribunal Members. Consideration should be given to the establishment of a more formalised 'equality tier' within the existing Tribunal structure. Training should be provided for Tribunal personnel to maintain and improve understanding of the legislation and the difficulties thrown up by discrimination cases. The Chairman and Members should not sit in race discrimination cases without having received special training in discrimination law. The Tribunal remained essentially adversarial, even if it was less formal than a Court. A rational person would not embark on the process of making a complaint of racial discrimination purely for the prospect of a monetary compensation, which amounts to a 18% chance of obtaining a sum of £500 or more after a procedure lasting six to twelve months. There was clear evidence that honour and self-respect are at stake. A further substantial increase in number of applicants could probably be obtained by increasing the size of the damages awarded.

The 1976 RRA had not succeeded in carrying through its aim that standards should be continually articulated and reiterated in public, and developed and explained in the context of the policies and practices of particular employers. A number of elements lead to this conclusion, the absence of indirect discrimination cases in Tribunals, the absence since

1984 of re-interpretation and re-development of indirect discrimination through CRE formal investigations, the absence of non-discrimination notices from recent formal investigations and the infrequency of reports on investigations of specified organisations. An important feature of the arrangements for dealing with individual complaints of racial discrimination was that the Advisory, Conciliation and Arbitration Service (ACAS) had a duty to seek to conciliate between applicant and respondent before the matter reached a hearing. In the eyes of the parties the notion of conciliated settlement has a much lower status than a Tribunal hearing, it also had a lower status in setting a public standard. One factor that could improve the status of conciliated settlements was a rise in the level of awards.

The employers credit the formal investigations system with little legal clout, perhaps because there was no judicial body involved: the Tribunals, despite the relatively low sums of money involved in the remedies, were taken more seriously because they usually have the trappings of a Court hearing - solicitors, barristers, witnesses, formal evidence and so on. Employers were worried about bad publicity emerging from an investigation, and they did not find the analysis and advice helpful in developing anti-discrimination and equal opportunities measures.

The study also indicated that the CRE gave assistance to complainants primarily to help individuals seek justice for themselves. There was little indication that the CRE uses complaints as part of a wider strategy of law enforcement, except to the extent that a number of cases were supported by the CRE in order to clarify legal issues and matters of interpretation of the legislation. In principle, the research concluded there were two ways in which complaints to Industrial Tribunal might become part of a wider strategy of law enforcement. First, the CRE could mount much of its advisory, promotional and investigator work on the back of individual complaints. Advisory, promotional and investigatory work had to be planned to a large extent as a follow up to individual complaints. The CRE's assistance to complainants ought to reflect the priorities for bringing about change rather than the merits of the individual

case. The CRE could actively seek out complaints in sectors where it decides there is the greatest need for change. There was little scope, as matters now stand, for Tribunal proceedings in Britain directly to influence the behaviour, policy or practices of employers towards racial minorities. Tribunals ought to be permitted to order that practices be amended so as to end any discriminatory practice affecting groups of people in addition to the complainant. The research found that the CRE had no well established system of holding and analysing information relevant to law enforcement activity. An efficient filing system would relieve some of the pressure on the conduct of formal investigation and enable a tighter management approach to be taken. Within the CRE there was a serious lack of skills, experience and facilities needed to process information from large-scale inquiries of the kind involved in general investigation. If formal investigations were to achieve change, then the balance must shift back from advisory and promotional work towards legal enforcement.

A revised statutory structure of the RRA would follow more closely the enforcement structure of the Fair Employment Commission for Northern Ireland, brought about in the recent changes in the Fair Employment Act 1989. Employers should have a duty to provide equality of opportunity over and above the elimination of discrimination. Increased remedial powers could be made available to the Commission including the ability to require positive action remedy where appropriate, coupled with the imposition of goals and timetables for carrying out these remedies and the loss of Government contracts and grants for failure to comply.
The prospects for effective enforcement would be strengthened if employers over a certain size were required to monitor the ethnic composition of their workforce. According to the study on the Code of Practice in Employment, 40% of employers interviewed monitored their workforce. No reference was made to the size of the organisations that monitored the workforce based on ethnic analysis. This would both speed formal investigations and help Industrial Tribunals in analysing individual cases and prescribing remedies directed at bringing about change in the employing organisation.

The survey concluded that on a number of issues, there was a need for stronger evidence for further research. There was scope for further action to provide racial justice at work through legal enforcement and related policies. Although much can be done within the current framework of the law, a lot more can be achieved through reform of the legislation. This study had identified changes of strategy and practice of the law in attempting to eliminate discrimination in employment. The research also concluded that the scope for achieving 'group justice' was limited by the form of existing legislation. The research emphasised the limits of the RRA 1976 as the greatest handicap in bringing about reform to discrimination in employment.

The Effects of the Recession on Black Workers in 1990 – CRE (1991).

Finally, the effects of the recession on black workers was examined by the National Council for Voluntary Organisation and by the CRE to ascertain whether there were any changes in the levels of discrimination in the field of employment. The recession had a particularly hard impact on minority racial groups for a number of reasons. Black workers were disproportionately represented in the geographical areas and industrial sectors that had experienced the worst effects of the economic problem, (National Council for Voluntary Organisations, 1991). Black people who were already suffering the consequences of these economic disadvantages faced a further block of getting a job: substantial racial discrimination. When recruiting staff, an employer now had more opportunity to discriminate because the number of white applicants from which to choose from was greater, and some employers were also more inclined to discriminate during the recession because they may have felt that white applicants were more 'deserving' than black applicants. The recession had made it more difficult for employers to increase ethnic minority recruitment or promotion rates. Even employers with well-developed equality programmes failed to reach equality targets because of low recruitment and limited promotion opportunities. Some reported that redundancies or restructuring reduced the numbers of ethnic minority employees in the workforce. This particularly affected lower grades and reduced the long-term prospects of

increasing the proportion of ethnic minority staff available for promotion to management. Also reductions in graduate recruitment will affect ethnic minority access to senior levels in future years – CRE (1991). Black people were losing out when it came to training opportunities provided by the Government funded Training and Enterprise Councils (TEC's). (National Council for Voluntary Organisations, 1991). The Black Training and Enterprise Group (BTEG) said that many black people were in 'permanent' recession, pointing out even in times of economic boom, black unemployment remained far higher than for any other group. The survey of 46 of the 82 TEC's in England and Wales called on the Government to ensure that all TEC's achieve "a minimum level of performance on race equality". Ibid (note above). It said that less than 50% of the TEC's surveyed had undertaken research to identify the training, enterprise and education needs of black communities. Only 22 TEC's had a racial monitoring policy, despite the fact that 37 TEC's had contracts with training providers, which required such monitoring.

Study No. 4

'Ethnic Minorities in Britain: Diversity and Disadvantage in relation to employment'. (Modood, 1997).

The following summary is based on the Policy Studies Institute's study on the above.

This significant survey revealed that some minority groups still face serious disadvantage whilst others have caught up with the white population. The survey showed a mix of poverty and progress. Some groups were no longer considered to be economically disadvantaged. Race prejudice, discrimination and harassment are still problems which concern all minority groups. Africans, Asians and Chinese are more likely than whites to earn more than £500 per week and their unemployment rates are as low as or lower than the general population. Indian men are well represented in professional and managerial occupations, although their average earnings have not caught up with white men. The gap is narrower than it used to be. Both Indians and Caribbeans are more likely to be in poverty than whites or Chinese.

Half of Caribbean families with children are headed by a lone parent, increasing their risk of poverty and social exclusion. Many black and Asian people are in worse jobs than white people despite having similar qualifications. The education system is failing young black men and Bangladeshi and Pakistani men and women who continue to be disproportionately without qualifications. "It has been argued that the process of racial discrimination in employment has become so routine and subtle as to be invisible even to those engaged in discriminatory practices." Wrench and Solomos (1993 : p.159 as cited in Modood, (1997), p.84.

The earlier PSI studies found that the initial effect of migration was downward social mobility, the majority of migrants even with degrees could only get manual work. Daniel (1968) 60-61; Smith (1977) as cited in Modood, p.142. Minorities are substantially under-represented in most elite jobs, namely as employers and managers in large establishments. The Chinese are more advantaged than whites; African Asians are broadly similar to whites. The Indians are somewhat disadvantaged but are close to whites. Caribbean men are more disadvantaged in relation to job levels and unemployment. The Pakistanis are in all respect more disadvantaged than the Caribbeans except that owing to their much higher level of self employment they score slightly higher for their presence in the professional, managerial and employers category. The Bangladeshis rank as the most disadvantaged group.

Discrimination is found not just in face to face encounters or in telephone calls, but also in tests using written applications, where it is clear from the applicants name or biographical details that they are not white: Noon (1993) Esmail and Everington (1993) as cited in Modood p.144. Ethnic minorities have to be not just as good but better than the white competitors to qualify for more competitive better jobs. Iganski & Payne (1996) as cited in Modood p.145. There was an increase in the perception of discrimination and over four fifths of ethnic minority people thought the present laws on racial discrimination should be enforced more strictly. In recent years it has been argued that anti-Muslim prejudice is a

central and growing strand of racism . Modood (1992) as cited in Modood (1997) p.134). In the 1960's to the 1980's migrants were overwhelmingly in manual work, in jobs below the level to which they were qualified and confined to a limited number of industries: Daniel (1968) 61-63 as cited in Modood p.339. This pattern has changed and there is a diversity of pattern between the different racial and ethnic groups. Some employers flatly refused to employ any 'coloureds' and generally, the Caribbeans and Asians were employed only where there were insufficient white workers to fill the posts.

According to a survey: Brown (1984), as cited in Modood, p.83, some progress in relative job levels and earnings had occurred, the ethnic minorities were suffering disproportionately from high levels of unemployment despite some groups being engaged in self-employment. Racial discrimination in the labour market seemed as prevalent if not as overt as before in 1985: Brown & Gay (1985) as cited in Modood, p.83. The Labour Force surveys of the late 1980's and the 1991 Census confirmed the trends of the early 1980's: the minorities were upwardly mobile and expanding in self employment but had much higher levels of unemployment than whites. According to Tariq Modood, some minority groups are upwardly mobile and ethnic difference should not be equated with disadvantage. He perceives racial disadvantage, and also the differing circumstances of minority groups.

The Present Role of Black Immigrant Labour

Many black immigrants with qualifications and special skills found their skills being totally disregarded or undervalued. Discrimination was experienced when it came to promotion prospects. There was an over-representation of immigrant doctors in unpopular geographical areas and in medical specialisation, such as geriatrics. This had changed to some extent in 1997 as doctors appear to be more evenly dispersed throughout the country.

Significant Case on Role of Black Immigrant Labour

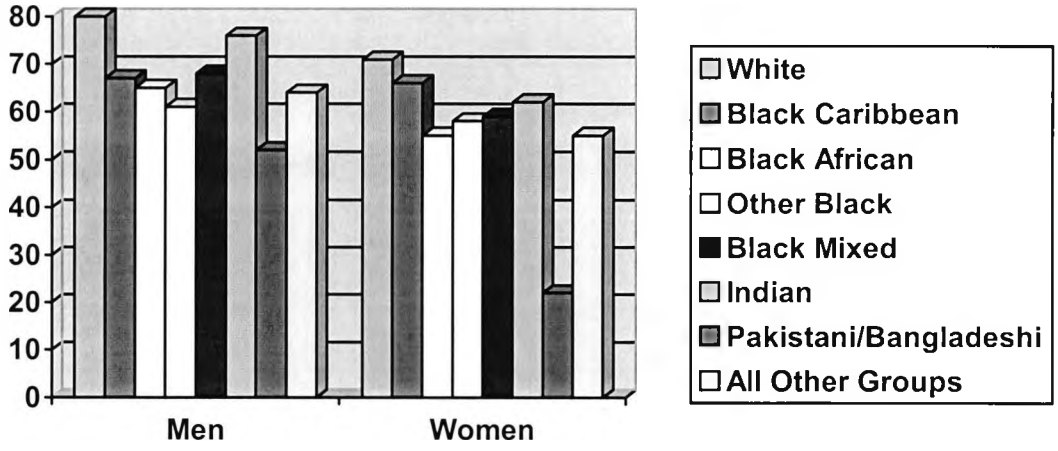
This case highlighted the discrimination at work encountered by professional educated blacks but were denied promotion to senior levels in their particular fields. In 1985 a doctor applied for promotion. This case went as far as the Court of Appeal. Noone v North West Thames Regional Health Authority (1988), alleged that the respondents discriminated against her in that they deliberately omitted to offer her employment as a Consultant microbiologist at the Ashford Hospital, Middlesex. The Tribunal awarded Dr Noone £5,000 compensation for injury to feelings and had recommended that the Secretary of State be asked to set aside the statutory requirements, so that Dr Noone could be offered the first available appointment.

In 1986 The Regional Health Authority (RHA) appealed on the grounds that the Tribunal had failed to direct itself properly. The case was remitted to a fresh Industrial Tribunal for rehearing and granted Dr Noone leave to appeal to the Court of Appeal. The Employment Appeal Tribunal (EAT) reduced the award to £1,000. In 1988 the Court of Appeal awarded Dr Noone compensation of £3,000 and upheld the Tribunal decision that the RHA had discriminated against her. In a second case brought by Dr Noone the RHA appealed to the Employment Appeal Tribunal (EAT) against the decision of the Industrial Tribunal in London that it had unlawfully discriminated against Dr Noone on the grounds of her sex and race in respect of its omission to shortlist her for an appointment as Consultant Microbiologist at the May Day Hospital, Croydon. South West Regional Health Authority v Noone (1985). The EAT unanimously dismissed the appeal and refused leave to appeal to the Court of Appeal. These two cases brought by Dr Noone illuminate the extent of discrimination, which is prevalent not only in areas of unskilled labour but also in the professions. These cases illustrate the significance of the patterns of discrimination present in Britain.

Study No.5

Labour Force Survey 2001

Table 4 (Figure 1): Employment Rates for people of working age by sex and ethnic origin; Great Britain; average summer 1999 to spring 2000, not seasonally adjusted.



Source: Labour Force Survey

Employment rates follow a similar pattern to economic activity rates, altered slightly by the different rates of unemployment in each group. *(Table 4, Figure 1).* The employment rate for Black Caribbean women at 66 percent for the year up to spring 2000 was close to that for White women at 71 percent. Employment rates for women in other ethnic groups were all below 60 percent. Pakistani/Bangladeshi women had the lowest employment rate at 22 percent, which can largely be explained by the low economic activity of women in these groups. Indian men had the highest employment rate at 76 percent after White men at 80 percent, followed by Black Caribbean men at 67 percent. Bangladeshi men had the lowest employment rate at 52 percent.

According to the latest Labour Force Survey 2001, black people still encounter widespread discrimination in employment which shows that discrimination has not diminished since the end of the recession in the early 1990's. The statistics are as follows for spring 2000:-

- The unemployment rate for white men was 6.9% of the workforce while the rate for all ethnic minorities was 13%.
- Black men from countries other than Africa or the Caribbean have the highest unemployment rate at 26.6%. Bangladeshi men are next
- at 20.4%.
- Indian men have the lowest unemployment rate of any ethnic minority, at 7.2%.
- The unemployment rate for white women was 4.7%, while the rate for all ethnic minority women was 12.3%.
- Bangladeshi and Pakistani women have the highest rates of unemployment among ethnic minority women at 23.9%.

Britain has enjoyed a steady economic growth for eight years and has succeeded in reducing the unemployed figure to just over one million, a 20 year low. The number of some groups of black men unemployed stands at 27% compared to 6% of white men who are unemployed. Labour market experts state that equal opportunities legislation has not brought about reform in challenging racism in the workplace. According to government data although black men are likely to have better qualifications that white men they experience problems in finding suitable employment. According to David Blackaby, an expert on the labour market at the University of Swansea; the position of black people in the labour market has got worse despite the Race Relations Act of 1976. According to a report published by the Industrial Society, employers are not taking equal opportunities seriously. The policies or equal opportunities are not implemented and there is a lack of commitment. The Code of Practice in employment is virtually ignored by employers.

CONCLUSION

Ethnic minority owned business is now an established and growing feature of Britain. This fulfils an important economic and social role for the minority communities and ethnic enterprise has made a significant contribution to the revival of small business population. Particular areas of economic activity such as retailing, clothes, manufacture and catering have been transformed by the presence of minority communities. South Asians, Chinese and Greek-Cypriots have contributed enormously to self-employment. There is immense diversity; there are differences between ethnic minority groups; between different generations; between different sectors; and between different stages of development. Ethnic minority business has made a significant contribution to the economy of Britain, for example, at least 200 millionaires have been listed from the Asian community. Their contribution is acknowledged and welcomed by the Labour and Conservative Governments. The various businesses of the variety of ethnic groups are reflected in the multi-cultural life style of Britain and adds to the diversity of cultures.

The research by Tariq Modood identified the diversity in the pattern of discrimination in employment with regard to the various ethnic groups. A new pattern of discrimination was emerging in 1997 when contrasted to the 1970's and 1980's. Certain groups, particularly the Indians and Chinese sought refuge from discrimination through self employment and education. These groups could no longer be termed as 'underclass' – they were emerging as 'middle class' and successful. This by no means indicates that discrimination was diminishing but they were no longer within the environment where they could be subjected to discrimination (self employment). The educated and professional groups still encounter discrimination – some on a large scale, for example, in the legal profession especially the newly qualified solicitors and barristers. (Times, London 2000).

The pattern of discrimination traced through the various studies from the 1970's to 2001 indicates that the level of discrimination in employment remains high despite the reforms of the 1968 RRA. When the PSI study in 1985 was compared with the 1973/74 PEP study and the Nottingham CRC study 1977/79, there was no evidence to denote that the level of discrimination had decreased since 1973. The Code of Practice had achieved a limited success in eliminating discrimination, but it did not impose a legal obligation. Ethnic minority business has contributed significantly to the British economy particularly in the field of retailing, manufacturing, clothing and catering and there is ample room for further development. There is immense diversity between the different business ethnic groups. The effects of the recession between 1986 - 1990 added to the problems of discrimination faced by blacks in the field of employment. The survey 'Racial Justice at Work' concluded that there was scope for further action to provide racial justice at work through legal enforcement, related policies and through reform of the law.

According to the Labour Market Survey 2001, there is a great deal of diversity in the labour market situations of different ethnic groups. Demographic, cultural and educational differences account for the diversity to some extent. The survey highlighted the higher rate of unemployment among ethnic minorities compared to white people. There is a wide variation between groups and the reasons for this are complex. Some explanation may be attributed to different age profiles, qualifications and the occupational and geographical distributions of the ethnic groups. The Labour Force Survey Data is unlikely to explain differences which have not been accounted for. In conclusion the 1968 and 1976 RRAs have had little impact to decrease the incidence of discrimination in employment. In 1997 a new pattern of discrimination is emerging as identified above in the PSI study of 1997, by Tariq Modood. This new pattern in no way signifies that discrimination has been eradicated. The new pattern has allowed certain groups to escape from the discrimination experienced by the early immigrant, through self-employment in particular. They do not have to encounter the problems of mainstream society at work. These groups have emerged as successful groups

over the years who are no longer viewed as a 'problem'. The success of these groups is in no way linked to the fact that discrimination at work has been addressed in attempting to bring about changes to society. Both the RRA 1968 and 1976 have been limited in their scope in bringing about radical transformation in the workplace. The Labour Force Survey in 2001 reinforced the conclusions of the previous surveys that discrimination in employment has not diminished and legislation has not improved conditions in the workplace.

CHAPTER VII

THE QUESTIONNAIRE SURVEY

SECTION 29 and 30/31 RRA 1976

Introduction

This chapter will test as to whether the enforcement of the RRA Section 29, 30/31 can bring about a reform to society. The aim of the first empirical research was to investigate discriminatory advertisements and pressure cases under Sections 29, 30/31 of the RRA 1976 in order to ascertain the impact on employer's as a result of either legal proceedings against them or by being reported to the CRE; and to investigate the extent of the compliance with Equal Opportunity Policies. A survey of employers' policies and practices within the framework of the RRA 1976 was conducted to uncover the problems encountered by employers and also to identify examples of good practice. Research into employers difficulties, attitudes and views were included. The purpose is to set out the implications of the respondents cases, indicating the areas of strength and weakness in the current state of legislation and to make recommendations. These recommendations are discussed in Chapter IX. It will deal with further changes that can be implemented to achieve a greater success rate in eliminating discrimination under Sections 29, 30/31 of the RRA 1976. A total of 166 employers were targeted. The investigation was conducted by means of postal Questionnaires followed by telephone interviews with employers. My survey was designed to reveal the weaknesses and gaps in the legislation on Section 29, 30/31 of the RRA 1976. There is no evidence to assess the impact on organisations as a result of CRE intervention. My research aimed to discover any changes that were brought about as a result of being reported to the CRE for possible breaches of Section 29, 30/31 of the RRA 1976. The Policy Studies Institute (PSI) conducted more general research in 1991 on the enforcement of the RRA in employment entitled 'Racial Justice at Work'. This is dealt with in Chapter VI. This

project dealt with formal investigations and individual complaints. My research adds to the information on the effectiveness of enforcement of the RRA 1976 in the field of employment.

Figures for pressure cases prior to 1985 were in 1982: 2, 1983: 11 and 1984: 15 cases. After 1985, the CRE dealt with significantly more cases each year. The increase was the result of promotional work with employment agencies who had been persuaded to refer cases to the CRE. The most prominent had been the job centre network. The remainder is referred by careers services, YTS schemes, individuals and others. As already mentioned, discrimination in large employment organisations may be covert and/or unintentional and not expressed as explicitly discriminatory instructions. Only a minority of cases go to a full hearing. The majority are settled by having a settlement agreed with the respondent registered with the Tribunal. The terms of such settlements typically include an admission of the contravention(s) and undertakings about future conduct. In some cases informal assurances are sought or no further action is taken. At present the CRE is very selective about authorising legal proceedings under Sections 29, 30/31 RRA 1976. The criteria used are if the allegations have to refer to large employers, for example, Local Authorities or the alleged contravention is blatant, persistent and there are no other sanctions, for example, the withdrawal of the job centre services. If the allegations refer to an issue of principle, for example, indirect discrimination (which is more difficult to prove than direct discrimination). The CRE would support proceedings under Sections 29, 30/31 in joint proceedings for individual complaints.

Almost all the employers involved in the past were very small (less than five employees) or small (approximately 20 employees). In 1988 there were 18 proceedings under Section 30/31 and in 1987 there were 22. In 1994 only four complaints were initiated by the CRE under Sections 30/31 and none under Section 29 (CRE 1994). Please see table below.

Table 1. Advertisement Cases

Year	Reported	Proceedings
1985	71	Nil (o%)
1986	12	2
1987	39 (100%)	Nil (0%)
1988	36 (100%)	3 (8%)
1989	NA	NA
1990	NA	5 (NA)
1991	100 (100%)	3 (3%)
1992	62 (100%)	2 (3%)
1993	57 (100%)	Nil (0%)
1994	116 (100%)	Nil (0%)
1995	NA	NA

Note: NA = Not Available Source: CRE Annual Reports 1987 - 94

Table 2. Pressure to Discriminate Cases

Year	Reported	Proceedings
1985	45	14
1986	24	20
1987	46 (100%)	22 (48%)
1988	39 (100%)	18 (46%)
1989	NA	5 (NA)
1990	NA	6 (NA)
1991	28 (100%)	12 (43%)
1992	39 (100%)	3 (8%)
1993	25 (100%)	1 (4%)
1994	35 (100%)	4 (12%)
1995	NA	NA

Source: Ibid

The CRE's powers under Sections 29, 30/31 are discretionary and if the CRE takes no action there can be no enforcement of the Act under these Sections. My survey will hopefully provide valuable information for the CRE to reconsider its present policy with regard to this area of the law. Dr Crispen Cross sums up the importance of employment as follows:-

> *"It could be argued, and with considerable justification, that the issue of unemployment is the most critical determinant of the state of community relations in the country as a whole, ... This is because it is bound up with the daily basis of life of the community as a whole and with the expectations of members of ethnic*

minority communities..... It is also crucially important because it clearly reflects the attitudes of the host community to immigrants who seek employment in order to maintain themselves and their families." (Cross (1977 : 38)).

Methodology

Different methodologies were explored in order to find the most suitable approach for my research. For qualitative research, data is gathered by means of interviews, observations, documents, books, etc. My study is about organisational functioning (employers) and this methodology would be suitable. The PSI study and conclusions are set out in Chapter VI. The PSI study in 1991 used information held in individual case files rather than carry out surveys of applicants or respondents. The information from the individual case files of the CRE, Industrial Tribunals and ACAS were investigated. The analysis of the files was supported by observation of Tribunal hearings and by a study of the CRE's policy and practice on support of individual complainants. Its research was also carried out through informal interviews with CRE staff and the close co-operation of the Commission. Information on applicants in a race case is more readily available than information on respondents. The PSI study dealt with the extent of the enforcement of the RRA 1976 in the field of employment, and dealt with formal investigations and complaints. The primary aim of the research was to assess the effectiveness of the process of enforcement of legislation against racial discrimination in employment. The conclusions reached were that the current legislation limited enforcement. The PSI research has shown that much remains to be done and much more can be done, even within the present framework of the legislation. It was a central conclusion from this research that much more could be done through the individuals complaints system to achieve justice.

My surveys on discriminatory advertisements and pressure cases and the survey on Industrial Tribunals also tested the effectiveness of the RRA 1976 regarding the extent of enforcement of the RRA 1976. Both these studies complement the PSI study in that they add to test the effectiveness of enforcement of the RRA 1976 in the field of employment.
Postal Questionnaires followed by telephone interviews was the methodology utilised for the study on discriminatory advertisements and pressure cases after rejecting the qualitative methodology and the case study method. For the research on Industrial Tribunal both qualitative and quantitative methodology coupled with personal observation of cases in progress at Tribunals was undertaken.

According to (Strauss & Corbin (1990 : 17)), qualitative methods can give intricate details of phenomena that are difficult to convey with quantitative methods. It is extremely difficult to obtain basic details from employers about their equal opportunity policies. Intricate details will hardly be forthcoming based upon the sensitivity of my study (as experienced by me as an employee of the CRE. It would have been ideal to follow my Questionnaire survey with in-depth personal interviews with employers. Several attempts were made to arrange interviews with employers following their reply to the Questionnaires but this proved fruitless, apart from one large organisation. The qualitative approach would have presented problems of revealing the true feelings of employers. The interview would have presented the difficulty of breaking through bias, prejudice and stereotypical preconceptions held by them. The employers would have expressed external human behaviour and statements that were expected of them and those that were accepted as politically correct. The qualitative method would not be suitable to my area of research because the respondents would be inhibited in talking freely because of a threat of being implicated in a legal matter. However, the presence of an interviewer may also inhibit some respondents from taking time to look up information or cause people to answer inaccurately. There would be a fear that the data might be identifiable in the published statistics. It is hardly likely discussion will be spontaneous since the respondents interviewed will be employers against whom

proceedings were brought by the CRE or they were reported to the CRE for breaches of Sections 29, 30/31 RRA 1976. The respondent is bound to be reticent about a lot of his/her views and attitudes on race. My being an employee of the CRE and the sensitive nature of the area of my research made it impossible to pursue a qualitative approach and therefore this method was rejected.

Case study could have been utilised for my research. The 'decisions' are the major focus of case studies. According to Yin, (1989) the traditional prejudices of case study methodology are that bias could influence the findings of the conclusions. Also, case studies take too long and result in massive, documents. On the other hand, through case studies "concepts can be tested, concepts can be discovered" (Miller, (1991 : 22)). This method was considered and rejected because the information on the cases reported to the CRE was sparse and it was not easy to obtain further information. In many instances, the only information available was the name of the respondents who had allegedly breached either Section 29, 30/31 RRA 1976.

The Postal Survey Method

The postal survey method was chosen. According to Delbert Miller. "this means of gathering information is very popular because it promises to secure data at a minimum of time and expense". The most significant advantage of the postal survey method is that it "permits wide coverage for minimum expense, both in money and in effort". (Miller (1991 : 141)) Postal surveys can reach isolated areas. The respondents can think about the questions asked and refer to other information before answering. The respondents do not feel that they are being hassled to provide answers as in a personal interview. On the other hand: "The response rate to postal survey method usually do not exceed 50% when conducted by private and relatively unskilled persons" (Miller, (1991 : 141)). My biggest problem was the lack of responses to the Questionnaires. Efforts made to remedy this situation included sending employers reminder letters to reply to the Questionnaires. The efficiency of postal

surveys may be enhanced, as long as an adequate list of addresses exists from which to sample. Postal surveys can be used in conjunction with personal and telephone interview surveys. First the postal Questionnaire method, followed by personal interview, then telephone interviews were considered. This is what I would have liked to do ideally for the survey. Following the responses to the Questionnaires, I telephoned the employers concerned and there were mostly negative responses to my conducting personal interviews (with the exception of one large employer). Employers were prepared to answer questions over the telephone more readily than being interviewed 'face to face'. In many cases the employers stated that they did not have the time for long interviews (one - two hours).

The next best method to personal interview was the telephone interview, I was therefore compelled to resort to this methodology. The postal Questionnaires followed by telephone interviews was the methodology undertaken and I consider this as adequate for the aim of this chapter. The telephone interview method did have some disadvantages over the personal interview method. I could not observe the interviewees' reactions and expressions when the questions were being answered as in personal interviews. The major advantage of the telephone interview over the personal interview was the cost and time. It was considerably cheaper to telephone employers especially outside the London area than to interview them personally. According to Dillman: "... comparison of response rates for mail surveys with telephone surveys favours the telephone." Dillman reports " ... an average response of 91% for 31 surveys, a full 17% higher than the average for 48 mail surveys." Dillman (1978) as cited in Miller 1991 p.162).

According to Groves and Kahn many studies involving embarrassing or sensitive data produced no or only a slight difference between telephone and personal interviews (Groves & Kahn (1979 : 216)) as cited in Miller, 1991 p.166. Once I had established a rapport with the interviewee, I did not experience any obvious problems of rudeness or reluctance to the responses. The response was more spontaneous and did not give the interviewee much

time to ponder too deeply. In some cases when the interviewee displayed signs of hostility because of the sensitive nature of the questioning, I was able to handle the situation by tactful explanation and the reasons for the kind of questioning. Sometimes it was not possible to interview the manager or a senior member of staff, for example, my interviews with public houses. When I was confronted with someone with little education or knowledge of the English language, I was able to simplify the questions for easier understanding. I also had to simplify the questions when I spoke to public house staff, restaurateurs, hairdressers, etc.

Eighteen employers who did not return the Questionnaires agreed to be interviewed over the telephone because they felt more comfortable talking than putting information down in writing and also it was less time consuming for them (as evidenced by their statements). The telephone Questionnaire had to be modified in some cases by omitting some of the questions. This was usually done when the interviewee did not have enough time or did not understand the questions. The one major factor that bothered me was the speed of my interview (especially when I was told that the interviewee did not have much time). The pace of my questioning would have been more controlled with personal interviews. The opportunity to visit the employers premises was denied by the telephone survey rather than with personal interviews. This would have given me the opportunity to gauge the general environment and the composition of the workforce. Another problem with the telephone interview was that the interviewees were in the midst of carrying on their duties. This sometimes caused anger, annoyance and even hostile reactions to my telephone call. In conclusion, the postal survey method was chosen because of the sensitive nature of the area of my research. The answers would hopefully be more considered as they would have ample time to reflect and check before answering. This was followed by telephone interviews. The absence of face to face contact with employers may enable them to answer more freely on equal opportunity issues.

The Questionnaire was designed to obtain as much information as possible to investigate the kind of equal opportunities policies that were in force as a result of CRE intervention in relation to Section 29, 30/31 RRA. The questions were modelled to some extent on the Code of Practice investigation on employment by the CRE. The kind of data that I was seeking was to establish whether any changes had taken place in relation to employment policies in particular recruitment and advertising as a result of CRE intervention. The questions were also designed to elicit problems that were encountered by the employer in attempting to implement an equal opportunity policy. I could have included more questions but the employer may fail to respond because they may find the Questionnaire tedious and time consuming. As most of the employers were small organisations, staff would not be available to devote time and energy in responding to the Questionnaire (unless there was an equal opportunities officer as in large organisations). I had to ask the questions that I thought were most relevant to establish a pattern in the change of policies of the employer in order to analyse the data. Some of the questions that I had to ask were sensitive and pertinent, therefore I had to formulate the questions as inoffensively as possible. I had to approach open questions with extreme politeness. I foresaw the employer as perceiving some of the questions as objectionable but those questions had to be asked for my study. I had to exercise caution in the manner that they were formulated. As most of the employers were small organisations there was the problem of the employer taking the questions as personal criticism of the company. The possible threat of legal implication was allayed to some extent by my covering letter promising confidentiality of information given by the employers.

Pilot Study

The pilot study was conducted in November 1991 to test the response of employers to the Questionnaire. The major problem of dealing with Section 29, 30/31 RRA as a legal officer was the lack of information because of the reluctance of co-operation from employers. The

CRE had to depend on job centres, employment agencies, etc to provide the initial information. Sometimes the only piece of information available was the name of the respondent who had allegedly breached Section 29, 30/31 RRA. A large number of cases were settled by obtaining an assurance (in these cases there was generally only limited information). It was only when the cases proceeded to full hearing (very few) that sufficient information became available to the CRE. My pilot study covered pressure cases reported to the CRE around 1985-1988 (66 Questionnaires were sent out of 228 pressure cases). This included cases that were reported to the CRE and cases which proceeded to hearing. I chose pressure cases because more pressure cases than advertisement cases were reported to the CRE in this period and more information was available on pressure cases at this stage. Further the procedure and remedies for both pressure and advertisements were identical. The Questionnaires were sent out in November 1991 to employers who had allegedly breached Section 30/31 RRA. The employers were selected based on the cases that were reported to the CRE with addresses that were available. The proportion of the total was determined by the extent of information available in each case. The cases that contained the most information were utilised. Some cases merely listed the name of the respondent and no other information (these were ignored). Cases with scanty information were also ignored. The Questionnaires were sent out with a covering letter which read as follows:- See Appendix (2), see Appendix (4) - for the Questionnaire.

The Questionnaire was designed to embrace the significant areas of Equal Opportunities Policies as laid down by the CRE. As I have mentioned, a large number of employers were small organisations (less than 20 employees), for example, hairdressers, restaurants and family businesses. Some cases were omitted because of the lack of information or administrative difficulties such as files being mislaid by the CRE. Very small organisations (less than five employees) were deliberately omitted because of the difficulties encountered in obtaining information. They were family run businesses generally employing relatives and friends. The information on their business policies and procedure was not available.

Sometimes it was not possible to ascertain the size of the organisation and these were included in the survey. The job centres or employment agencies did not have the necessary information and the employers refused the information. All the cases involved the granting of an assurance not to breach the Act in future. Confidentiality has to be preserved by the CRE.

The pilot study produced a large negative response - only three employers responded. Their responses were extremely poor - not all the questions were answered. I attribute part of the poor response to closure of business due to the recession (Seven letters (10%) were returned by the Post Office Return Package Centre). The Post Office confirmed that the addresses were not in existence. There was a possibility that among the 56 non responses to the Questionnaires, a large number could have been affected by the recession because most of them were small employers (family run businesses with less than five employees). I thought that a significant contributory factor might be due to the mention of the CRE in my covering letters to the employers. This might have had an effect because the CRE is viewed as a powerful law enforcing body (as evidenced by my experience as a legal officer). The problems which I encountered in the pilot study were certainly more than I had envisaged. The pilot study gave me an indication of the immense difficulties I was going to face in gathering data. Obviously, I did foresee some problems in reluctance on the part of the employers in responding to all the questions in the Questionnaire, chiefly because of the sensitive nature of the research and the possibility of legal implications (as evidenced by my experience as legal officer). Deleting the name of the CRE from my covering letter and offering anonymity would hopefully overcome the fear of legal implications to some extent by employers. The big change to the empirical study as a result of the pilot study was to abandon old cases (1985 to 1988) on Sections 29, 30/31 RRA and to concentrate on more recent cases (1989 - 1992) under these Sections, and I was still hopeful at this stage of conducting personal interviews with employers. I was going to abandon personal interviews if the employers failed to co-operate and opt for telephone interviews. It was very difficult to

envisage any problems with the type of answers in the three poor responses. I therefore did not alter the Questionnaire.

Replies to Questionnaires in the Pilot Study

Of the three replies to the Questionnaires, one of the Questionnaires (from a restaurant) was returned with the words: "I don't think this is applicable in our situation." Another from a large organisation was returned with the words; "No comment." Only one organisation (a hairdressing salon) answered the Questionnaire around December 1991 but the answers reflected a lack of understanding of the questions. The Questionnaire response was in the negative to all the questions - there was no equal opportunity policy in operation, no monitoring, no information on the ethnic composition of the work force. In short, it showed a total lack of compliance with equal opportunities policies, but this was placed in doubt by the subsequent telephone interview. When the organisation was approached about a possible interview, the manageress declined but was prepared to be interviewed over the telephone. The lady had difficulty in understanding English. She stated that they were a very small company. (Very small employers were omitted but this information came to light only during the telephone interview). She said that she understood the policy on equal opportunities and that they operated an equal opportunities policy. She also said that they recruited anyone as long as they were suitable for the post advertised. I tried telephoning about 20 employers (who did not reply) at random and received a dead tone or no reply to my call.

My experience as a legal officer advising on Sections 29, 30/31 RRA at the CRE and the pilot study emphasised the biggest problem, which was coping with the defensive behaviour of employers and the reluctance to provide information. The survey would have been regarded as an intrusion into their organisation. Suspicion was raised when the Questionnaires were received by the employers. It appears that many just treated the Questionnaires as 'junk mail'. The major problem with race relations surveys is obtaining access to information (as experienced by the research division of the CRE). The CRE

engages the services of market research agencies or other external research agencies to conduct surveys on its behalf. This method of conducting surveys does not involve the CRE in direct contact with respondents. This method enables access to all kinds of information in race relations. When the surveys are conducted by agencies, the respondents are generally not aware of CRE involvement with the research.

Empirical Study - Fieldwork

A very significant factor in the selection process was the extent of information on the cases. The cases with the most information were selected. In many cases the CRE had only very limited information.

Postal Questionnaires

This survey was conducted between February and June 1992. Before sending out my second batch of Questionnaires I deleted the following words from my covering letter. (See appendix 9 for letter). "In particular, I am attempting to follow the cases reported to the CRE for possible breaches of Section 30/31 of the RRA, that is the reason for my writing to you."
I also sent out Questionnaires to those employers who had allegedly breached Section 29, 30/31 of RRA 1976. On this occasion I received a better response. I sent out 100 Questionnaires and 25 replied. 100 cases were selected out of 265. The 100 selected included the cases that proceeded plus the ones that were reported to the CRE. A range of organisations were targeted from Local Authorities to public houses to restaurants.

Response to the Questionnaires

A very large public organisation returned my Questionnaire with a covering letter which read as follows:-

> *"After careful consideration we would advise you that we have decided to decline your offer to join your survey, and return your Questionnaire. For your information, as a result of our embarrassing error, caused through a combination of ignorance and the then General Manager's limited knowledge of the English language, the undersigned has been placed in charge of all staff appointment matters. The nature of our company so far does not involve specific promotions. We now fully comply with Race and Sex Legislation and would much prefer to forget our one mistake, rather than rake it over again."* One very conservative medium sized public organisation telephoned me to complain about the nature of my questions. She was particularly concerned about question 8 - which read:-

> *"How many promotions or recruitment to senior positions (managerial, supervisory, professional or technical posts) have you made since the proceedings against you?"*

I referred her to the words "please ignore questions that do not apply to you", in my covering letter. She seemed very concerned that by taking part in the survey she would implicate her organisation. She was very irate and stated that her organisation would not be participating in the research. Four organisations responded anonymously. The size of the company and whether they were public or private could not be determined. The second anonymous reply seemed deeply offended by the questions and stated:

> *"I find this language offensive and sufficiently inappropriate to discourage me from assisting you. The range of questions is huge requiring considerable time to answer -*

but also 'loaded' as if you are not only trying to obtain information but to prove a point? am I right?" He or she also felt that the names of employment agencies used by the organisation was a private matter. It was not possible to assess the size nor whether they were a public or a private organisation. It would appear from their reply that they had no EO policy and were not complying with equal opportunities. A third anonymous reply stated that they were complying with an equal opportunities policy. They were a small organisation and private. They relied on 'word of mouth' recruitment exclusively. The fourth anonymous reply stated that they had no problem. This was a medium sized private company. Another organisation responded with a letter as follows:

"I'm afraid I'm unable to help you as I had no involvement of any sort with an inquiry following a comment made by someone who happened to answer a telephone. This was not an employee but an independent consultant. I work extensively overseas with many ethnic and racial groups in Europe and the Middle East and I find no particular problems result from this. Good luck with your project." This was a medium sized manufacturer, a private company.

Another organisation commenced answering the questions and then decided that the Questionnaire was not relevant as he had a workforce of only eight. This was a small sized private restaurant. A huge public District Council returned my letter with the following words:-

"I refer to your recently submitted correspondence in respect of the above matter and regret to inform you that this organisation is unable to participate in your survey." No reasons were given for not participating in the research. Only 10 Questionnaires were returned with answers to practically all the questions. Of these only two organisations, one a Health Authority and the other a Housing Association, provided very comprehensive replies supported by documents. All of these organisations were

telephoned but there was no change to their responses. This further indicates a lack of co-operation by employers.

(1) Equal Opportunity Policy Document

Q. Do you have a written equal opportunity policy or similar document? (This question is vital as it indicates an intention by employers to bring about change to the organisation). Five out of the 25 replying organisations had a written Equal Opportunity Policy or similar document. Four of these organisations enclosed copies of their equal opportunity documents. Three of the documents were very comprehensive detailing many aspects of equal opportunities. They covered details on employment, recruitment policy, positive action, interviewing and monitoring, etc. All four documents also dealt with discrimination on grounds of sex, disability and sexuality. Two also covered age discrimination and one went so far as to cover discrimination on trade union grounds. This was a large hospital. One stated that they had an equal opportunity document but failed to enclose it - a simple standard monitoring form was sent instead. The form asked questions about ethnic origin, sexuality and disability. The respondent to the Questionnaire stated that she tried to fill the form but was unsure of the meaning of many questions and the relevance to their organisation. She stated that it was difficult to segregate race from other policies as they addressed other issues as well in their policy. Another stated that they did not possess a written equal opportunity policy but that they did have an equal opportunity policy. Another said that although there was no written policy, they included a statement on the application form in use since October 1991. Only two organisations listed the date of issue of their equal opportunity documents (as 1988 and 1975). One stated that the policy document was due to be reviewed. Of the five organisations with written EO policy one was a hospital, (large), another a Health Authority (large), the third a Housing Association (large), the fourth a brewery (large) and the fifth was a Action Group (small) and private. With the exception of the Action Group (private) they were all public organisations. They were all aware of EO policies.

(2) Means of Monitoring

Q. Have you devised a means of monitoring equality of opportunity in your recruitment and your promotion? This question denotes an implementation of the EO policy which is essential to bring about change. It is not sufficient just to be in possession of an EO policy. Six organisations of the 25 had devised a means of monitoring equality of opportunity in recruitment and promotion. One organisation perceived advertising in Asian and Afro-Caribbean Press for vacancies as a means of monitoring of equal opportunity in recruitment and promotion. Another answered "*yes through advertising*". One added as they were a small company it is easier to monitor equality of opportunity. Another stated that applicants for jobs completed forms and figures and these were produced at the end of every recruitment campaign. Three answered in the negative and a fourth stated that "*a working group is currently looking at a system of monitoring which will then be followed by that of promotion"*

(3) Difficulties in Monitoring

Q. Have you had difficulties in Monitoring E.O. in Recruitment and Promotion? When asked about particular difficulties encountered in monitoring equality of opportunity in recruitment and promotion, six organisations said that they encountered no problems. The question was misunderstood by one organisation whose reply to the question was "*no because if we advertise for a black worker, older worker, lesbian worker, etc. that is what we require even if we have to re-advertise until we get the right women for the job".*

One had no problems as yet because they had not started monitoring of equal opportunity. Another organisation stated "*training of staff is a slow process as internal pressures mean low priority*". Two left blanks in the space provided for the answer to the question. Of the six organisations monitoring equal opportunities, four were large public bodies, one a small private company and the sixth was a medium sized private manufacturing company. They were all carrying out monitoring to ensure that their EO policy was being implemented.

(4) Labour Market

Q. How closely do you think your workforce reflects the ethnic composition of the labour market from which it is drawn? This question will provide information on ethnic recruitment. Discrimination at the recruitment stage is a very common factor. The response was very varied. Two organisations said that the workforce reflected the ethnic composition of the labour market. One reply was as follows: *"We draw staff from all over Britain and I am not sure what the exact United Kingdom composition of the labour market is. I think our workforce reflects the local labour market."* Another said: *"We are far from reflecting the ethnic composition of the labour market."* Another said: *"Too small to be relevant."* Another replied: *"Reasonably"* Another said: *"Not very because we tend to recruit via word of mouth rather than the labour market"* One said: *"We don't know"* Another replied: *"Better than it was - but still under represented."* One simply said: *"None."* The two organisations which provided positive answers to this question were the large public bodies. The others were medium to small organisations and generally private and could not furnish accurate answers. The smaller organisations were relying on "word of mouth recruitment" which is not complying with EO policies.

(5) Training

Q. Do you provide instructions or training to those responsible for the following?

(a) recruitment

(b) interviewing

(c) training

(d) promotion

Training in equal opportunity for staff by the employer is one of the important factors in ensuring the EO policy is seriously acknowledged by the organisation. Four organisations

answered yes to all the questions. A large Housing Association provided full details of their employment and recruitment policy. They stated that selection criteria and procedures will be regularly reviewed and monitored to ensure that individuals are selected, promoted and treated on the basis of their relevant merits and abilities and the training requirements of all employees will be given equal consideration. Their policy is designed to be effective in terms of black and other ethnic minority groups, women, disabled people and on sexual orientation. The policy with regard to black and other ethnic minority groups *"will aim to combat the effect of racial discrimination in employment generally. Equality of opportunity regardless of race is vital, both to give individuals a fair and equal chance of bringing their skills, developing their abilities and realising their expectations. We welcome applications from all black and other ethnic minority groups".* They also enclosed information on 'positive action' – *"the paper consists of an explanation of positive action and the process that (the organisation) wants to adopt information on legislation which will need to be considered when progressing positive action and a check list for managers to follow when considering a post for positive action".* This paper was very informative and gave detailed information on *'positive action'.* This organisation is most certainly taking the implementation of an equal opportunity policy seriously.

Once again the four large public organisations undertook training of staff in recruitment, interviewing, training and promotion to ensure that their EO policies were properly implemented. The information on recruitment and selection was also very comprehensive. The following matters were detailed:- recruitment and selection policies, recruitment and selection process, person specification, advertisement, short-listing procedure, interview and after the interview. They also included their monitoring form. A large Health Authority stated that their recruitment policies were going to be revised and that emphasis was placed on Race Relations in their training courses. They had also produced a Code of Practice about recruitment and selection. Person specification and job description was used for each of their jobs advertised. With regard to interviewing, instruction was given during management

courses. They were provided with training courses and all promotions were based on the principle of equal opportunities in employment. This was very encouraging as the intervention by the CRE produced drastic changes to equal opportunities policies. All this was put in place after they were reported to the CRE when they undertook to carry out and implement the advice of the CRE. Five admitted to providing no instructions in recruitment, interviewing, training and promotion. One just left blanks in the spaces provided for the answers.

(6) Q. Difficulties experienced in making changes in procedures of recruitment, interviewing, training and promotion Four admitted to having no difficulties. Three failed to provide answers and two wrote *'not applicable'*. Only one organisation provided a detailed reply to this question. On recruitment the reply read as *"this particular section is not easy to answer because we have not as yet given out our Code of Practice about recruitment and we have not equally started a monitoring* system. There is under-representation and an action plan needs to be in place to address this imbalance". "On the question of training the reply was that it was difficult to answer in relation to the RRA. On promotion "as earlier stated we do not currently monitor those staff who are successful in gaining promotion and we anticipate taking this on board". Of the five who admitted to providing no instructions in interviewing, recruitment, training and promotion, four were medium size private organisations and one was an anonymous reply so the size and type of organisation could not be gauged.

(7) Ethnic Composition of Workforce

Q. According to your information, what is the ethnic composition of your workforce by reference to race, colour, nationality, ethnic or national origin? This question will provide information on whether an EO policy was in operation or not. One organisation stated that 40% of the workforce was non-white and non-European, another provided details which were very positive. The composition of the workforce reflected an equal opportunity

policy in operation. The large organisations were taking a serious view of ethnic monitoring to ensure conformity with an equal opportunity policy. Another stated that 50% of the workforce was white, 25% was black and the remaining 25% was Asian. Another stated that 4.9% were black/ethnic employees. Another quoted "out of 90 staff we have one employee of Asian origin and one African", another said "nil % at present, we have employed four coloured chaps out of a workforce of 40". Another listed "Irish origin, English, Australian origin, African origin, Chinese origin". Another listed "one Jamaican, two West Indian , Romanian, white" but no mention was made of the total workforce. One said "none" and another was left blank. The four large public organisations, five medium size private organisations and two small public houses (private), gave information on the ethnic composition of the workforce. One anonymous reply also provided this information.

(8) Promotions & Recruitment

Q. How many promotions or recruitment to senior positions (managerial, supervisory, professional, or technical posts) have you made since the proceedings against you? This question will assess the changes that are brought about as a result of CRE proceedings against the respondent. One answered "*none*" (large, public), two said *"not applicable"* (medium, private), two were left blank (small, private), one wrote *"do not understand",* (large, public) one stated *"we have not had any proceedings against us"* (large, public) and one said *"we are a collective everyone is equal"* (small, private).

(9) Review of Job and Person Specification

Q. For reasons of the proceedings against you, have you reviewed job and person specifications? This question assesses changes to policies by the employer after proceedings against them. One organisation answered "*not applicable*" (large, public), one was left blank (small, private), one answered "*each interview is taken on its own merits*" (small, private), another said "*person specs reviewed regularly*" (medium, private) and one stated "*we are more vigilant in the interviewing stage*" (large, public). One small public house

(private) stated "yes" as did 2 large public bodies. One medium private company said "yes". The word 'proceedings' appears to have acted as a deterrent.

(10) Educational Qualifications

(a) Q. What is your policy regarding educational qualifications in general?

This question is relevant as the applicants for jobs can be discriminated indirectly in this area. The answers read as follows *"as relevant", "a good general education is important", "it depends on our client requirements", "during training sessions we encourage participants not to specify qualifications which are not required for carrying out certain jobs. Where it is deemed essential for some jobs, or entry requirements for training then qualifications are required", "we require most applicants to have formal qualifications. The bulk of our staff work in our software department and these people, must be graduates", "we don't ask for formal qualifications but transferable skills", (anonymous reply) one was left blank, one said "none", "we do not aim for qualifications on our application form - courses relevant to the part i.e. finance we put more emphasis on life experiences."* Three large public organisations had EO policies in this area, as well as four medium private companies and three small private ones.

(b) Q. What is your policy with regard to overseas qualifications in particular? This question is also relevant to indirect discriminatory practices. Ethnics can be discriminated covertly in this area. The following replies were :- "*as we do not aim for any "O", "A" level, degrees, C Q SWS, etc. this is not relevant", "I might not be correct here although I believe that where overseas qualifications are approved by certain validation boards then those qualifications are acceptable", "as relevant", "we would accept overseas qualifications if to the same level as our requirements for United Kingdom qualifications", "it depends on our client requirements*". Two answered as "*non applicable*", two said "*none*", and one was left blank. Five large public organisations, one medium private company and two small private

organisations recognise overseas qualifications. One medium private company had no policy in this area.

(c) Q. What is your policy with regard to segregation according to language or ethnic group? This question will test discriminatory practices by the organisation. This was answered as follows:- *"no segregation unless a particular language is required other than English", "there is no segregation", "I am not aware of any practice of segregation because of language or ethnic group", "don't understand what is meant". One said "none", one replied "non applicable" and three left blanks in the space for replies. Two large public organisations stated that there was no segregation, one small private public house said "none".*

(d) Q. What is your policy on word-of-mouth recruitment? This was a very significant question to test discriminatory practices by organisations. *One replied "not ever done", another "we encourage it", "no we don't do this as this is not our practice and not equal opportunity", "we discourage this form of recruitment as this type does not give equality of opportunity", "no, advertise, interview team short list selection",* one replied *"non applicable"* and three organisations failed to answer the question.

(11) Names of employment agencies used

Q. Please provide the names of employment agencies used by organisations.

The replies were:

"We are the employment agency", "press and other relevant organisations", "Austin Knight", "we normally advertise in the "Voice, City Limits and other refuges", four replied "*none*", and two organisations left blanks. Three large public organisations replied "none", one anonymous reply was "none" and the fifth reply came from a medium sized private organisation. One small private public house stated that they used "word of mouth" recruitment.

(12) Others steps to bring about equality of opportunity

Q. Please mention any other steps not mentioned so far which you have taken to bring about equality of opportunity in employment? This question tests the commitment to equal opportunity by the organisations. Seven organisations failed to respond to this question. One replied *"none"*, and another *"we have always had a policy of equal opportunity"*. Another replied *"we* have re-established an equal opportunities employment group, Membership of which requires ratification and the aims of this group (hopefully to be chaired by an executive member of the Authority) is to look at ways of bringing about equality of opportunity in employment. Membership will include outside agencies and trade union representatives". Three large public organisations have taken other steps to bring about equality of opportunity, one medium private company stated that they train staff in equal opportunities.

(13) Q. Any other difficulties not mentioned so far which were encountered in complying with the proceedings under the RRA.

One large organisation replied *"as stated there have been no proceedings against our Authority under the RRA". Another wrote, "we do not have any problems. The complaint against us was that one of our clients required a candidate whose mother tongue was English and who could also speak French. Our client was not prepared to accept an application from someone whose mother tongue was French and who spoke English. A French national complained. Our client was a French national".* Another responded *"it is my opinion that ethnic groups have become so concerned with equal opportunity they do not accept that they can lose a job for any other reason but colour". One reply read "because we are positively active in recruiting we do come up against criticism from the media which we have to challenge and we always win",* and another *"CRE investigation on 1st Black Post Cleared".* One said *"none"* and four organisations left blanks.

Telephone Survey

The telephone survey was carried out between March and December 1992 as soon as a reply to the Questionnaire was received. I identified myself as an independent researcher carrying out a survey on CRE cases on discrimination. The purpose of the telephone interviews was to follow up the response to the postal survey Questionnaires. This was aimed to focus on any gaps or ambiguities in the answers to the postal Questionnaires. I was also hoping to obtain responses from organisations that did not answer the Questionnaires. I had hoped that this would increase my survey sample. I telephoned 70 of the 100 organisations to which Questionnaires had been sent including those who had responded. I started off by telephoning the employers who had responded to the postal Questionnaires. The telephone interviews proved to be a very helpful exercise. They most certainly helped to close gaps and ambiguities in the answers to the postal Questionnaires. The telephone survey also increased my survey sample of positive responses to 43 in all. There were 18 organisations who initially did not respond to the postal Questionnaires but were prepared to answer questions over the telephone. This was not the best method when used in conjunction with the postal survey. Ideally, personal interviews followed by telephone interviews to clear up ambiguities would have been the most suitable method, but the telephone interviews did increase my survey sample.

Telephone interviews with ten organisations who answered practically all the questions in the Questionnaire

I telephoned the ten organisations who answered practically all the questions in the Questionnaire. I dealt with these separately because I was hoping to obtain further information to their replies such as more recent changes. I received a very positive response from all of them. They answered all my questions and were very helpful. When I asked about further changes to their equal opportunity policies since responding to my postal Questionnaire, eight of them had nothing to report. The time lapse involved was about one

year. One very large organisation, a Housing Association sent me their draft report for 1992 on a formal investigation conducted by the CRE. This report was sent to me in response to my telephone call.

Recommendations for Future Action of the Housing Association by the CRE

As a result of CRE intervention, significant changes were introduced by the Association in 1993. The role of the Equal Opportunities Officer was reviewed to ensure that changes would be brought about in key policy areas. The Management Board were encouraged to attend specialist race equality training. The Association introduced positive action, employment monitoring, an open recruitment/selection process, equal opportunities training and their racial harassment procedures were going to be reviewed in 1993/94. An Equal Opportunities Steering Group was to be formed. In 1994 I telephoned the Equal Opportunities Officer of the Association to ascertain what further changes had occurred as a result of the formal investigation. She was extremely helpful in co-operating with me and giving me the opportunity to discuss equal opportunity changes in detail. The Association was taking equal opportunities very seriously and they were determined to see it properly implemented. This is a significant example of a large organisation which responded very positively as a result of CRE intervention in implementing changes. The changes were not only in relation to Section 29, 30/31 RRA 1976 but to the organisation as a whole.

Another large organisation, (Health Authority) also responded very favourably. The Equal Opportunities Officer said that their policy was being reviewed. The process of monitoring was not in operation but a draft document was in the process of being discussed. There was still under-representation and an action plan was needed to be in place to address the imbalance. Another respondent said that their equal opportunity policies were working. There were no problems implementing the policies. A large organisation which responded initially by absolving itself from blame was very co-operative on the telephone. They responded to all my questions and they seemed to have a fairly good equal opportunity

policy. The overall response from all ten of the organisations was very encouraging. Equal opportunity policies were taken seriously particularly by the large organisations (more than 100 employees). The small organisations still had a long way to go in achieving equal opportunities.

Telephone Interviews with 15 Organisations that did not answer all the Questions

The telephone interviews with 15 employers (usually the manager/manageress) around August 1992 produced a response that was difficult to comprehend. The telephone interviews were in contradiction to the answers in the postal Questionnaire. The response was not convincing and it was difficult to ascertain as to what was the truth, for example, the postal Questionnaire stated that there was no equal opportunity policy but the answer over the telephone was that there was definitely one in operation. There seemed to be an underlying fear of being implicated legally hence they gave the answers they thought they were expected to give. There was a feeling that I was a person connected in some way to the legal mechanism. (This was stated by many interviewees and was also evidenced by me as a legal officer when seeking information from employers). Some expressed a fear of being identified.

Telephone Interviews – 18 Organisations who did not initially respond to the Postal Questionnaire

A large number of public houses that were alleged to be in breach of discriminatory advertisements were reported to the CRE. Among these were eight public houses who did not initially respond to the Questionnaires. They were approached around August 1992 for possible interviews. Many had put up notices excluding 'travellers' from the public houses. CRE v Dutton (1989), a significant case on discriminatory advertisements established gypsies as a racial group. The telephone interviews with them proved very difficult. They were very reluctant to answer questions. One said "*why should I answer your questions?*" and "*who are you?*". After some persuasion the manager agreed to co-operate but the

answers were not in the least convincing by the contradictory statements. He gave me the impression that he was providing me with the answers he thought he was expected to give. This is a problem of the methodology that was foreseen. One public house stated that they were an all-white organisation and had no equal opportunity policy. Another provided answers to a few of the questions and it appeared that they were eager to get me off the telephone as soon as possible. A large responded well to my questions although there was no response initially - they stated that they had an equal opportunity policy and no problems. Another public house stated that the policy did not apply because they were a family organisation. Two more public houses stated that they had no time to answer questions but were polite.

Another public house said that they were an all-white establishment and that the policies did not affect them, (a different public house from one mentioned above). One Hotel/Restaurant stated they were a very small organisation, only four, and all the staff were of English origin. A Local Authority which initially ignored my Questionnaire provided a very comprehensive telephone interview detailing many aspects of their equal opportunity policies. They stated that ethnic minorities were not in senior posts although they had a fair distribution of ethnic minorities. Two further organisations of medium size also provided details of their equal opportunity policies. They answered practically all the questions and were adhering to 80% of their equal opportunity policies. An Italian restaurant stated that they were all white and small (family business with up to five employees) and answered emphatically that they did not possess an equal opportunity policy. An estate agent stated that they were a small organisation and that they had no equal opportunity policy as such but nevertheless employed people of different racial groups. A further four organisations all claimed to be operating an equal opportunity policy. They answered practically all the questions and seemed to have little or no problem in adhering to over 70% of the equal opportunity policies. Small organisations with less than 20 employees (this includes public houses) showed a lack of understanding of the questions. The Questionnaire was answered by

someone who either had very little or no knowledge of equal opportunity policies. The larger organisations responded by providing very comprehensive replies, detailing many aspects of equal opportunities. The reply in many cases came from an equal opportunities officer (generally equivalent to executive or higher executive officer in the Civil Service).

Organisations who refused to take part in the Telephone Interview Survey

27 organisations refused to take part in the interview. They did not always give reasons for their refusal to participate. Fifteen said that they could not spare the time. Some were angry and felt that I was encroaching on their privacy, and a few were rude and offensive. One stated that race relations policies of the organisation was a private matter. Some felt that the Questionnaires posed questions that were embarrassing. A few were highly secretive and refused to divulge any information. Others felt that the interview was an attack on their organisation and I was attempting to implicate them legally. (Some stated this). Many as previously stated were in awe of the CRE. They did not know that I was working for the CRE but the very fact that they were reported to the CRE placed them on guard. Employers refused to answer, in my opinion, because they were afraid of legal implications to their organisation and publicity.

Problems of Survey and Conclusion

Survey research is not, and cannot be, a precise measuring instrument. Surveys underestimate the complexity of human behaviour and attitudes and can only paint a sketchy picture. So many unseen factors can affect the accuracy of a survey. *"On the surface, behavioural data, for example, should be easier to interpret than attitudinal data, but this is not always so: memory can be faulty, definitions can be ambiguous and answers can be deceptive. Wrong conclusions can be drawn if insufficient account is taken of the factors governing behaviour. Interpretation becomes still more problematic in surveys about*

intended or future behaviour. In attitudinal research, the primary cause of errors in interpretation is the temptation to read too much into the data or to ignore their shortcomings." (Brook as cited in Hoinville and others 1978 p.182).

Problems encountered in the Survey

The greatest problem was one of confidentiality, which had to be maintained by the CRE when an employer undertook to give an assurance not to commit further breaches under Section 29, 30/31 of the RRA. This presented immense problems in obtaining information on the cases that were reported to the CRE. The problems which I encountered in the survey were certainly more than I had envisaged. The pilot study gave me an indication of the immense difficulties I was going to face in gathering data. Obviously, I did foresee some problems in reluctance on the part of the employers in responding to all the questions in the Questionnaire, chiefly because of the sensitive nature of the research and possibility of legal implications.

My observations for the lack of a better response to the Questionnaires were many. There seemed to be a threat of being implicated in a legal matter. There was a fear that the data might be identifiable in the published statistics. There was a reluctance to answer all the questions - the responses revealed varying degrees of attitudes. Some of the replies to the questions were contradictory and some answers could have been deceptive. Some gave the answers they thought they were expected to give (especially in the telephone interviews). The telephone interviews revealed immense contradiction to the postal survey Questionnaires. The Questionnaire was seen as an invasion of privacy. Race relations policies of the organisation was a private matter. Some felt that the Questionnaire posed questions that were embarrassing. Smaller organisations showed a lack of understanding of the questions. The Questionnaire was answered by someone who either had very little or no knowledge of equal opportunity policies. Some felt that it was a time-consuming effort and they would be wasting their valuable time in participating in the research, for example,

Questionnaires were returned with the words 'no comment'. A few were secretive about their policies regarding employment agencies. They were not prepared to divulge any information.

A few felt that the Questionnaire was an attack on their organisation. They replied by an explanation of the racial incident, thus absolving themselves from blame. Some felt that the Questionnaire did not apply to them. They declined to participate in the survey and returned the Questionnaires. Four organisations decided to respond anonymously - once again revealing the underlying fear of being legally implicated in any way. Some respondents were deeply offended by the nature of the questions and were very irate and accused me of trying to elicit information from them. The response from large organisations was definitely better than from smaller organisations but I was rather surprised by the response from a few large organisations who refused to participate in the survey and offered no explanation, for example, "I refer to your recently submitted correspondence in respect of the above matter and regret to inform you that this organisation is unable to participate in your survey". No reasons were given for refusal to participate.

Graphs – Analysis of Questionnaires

First Batch of Questionnaires (Pilot Study)

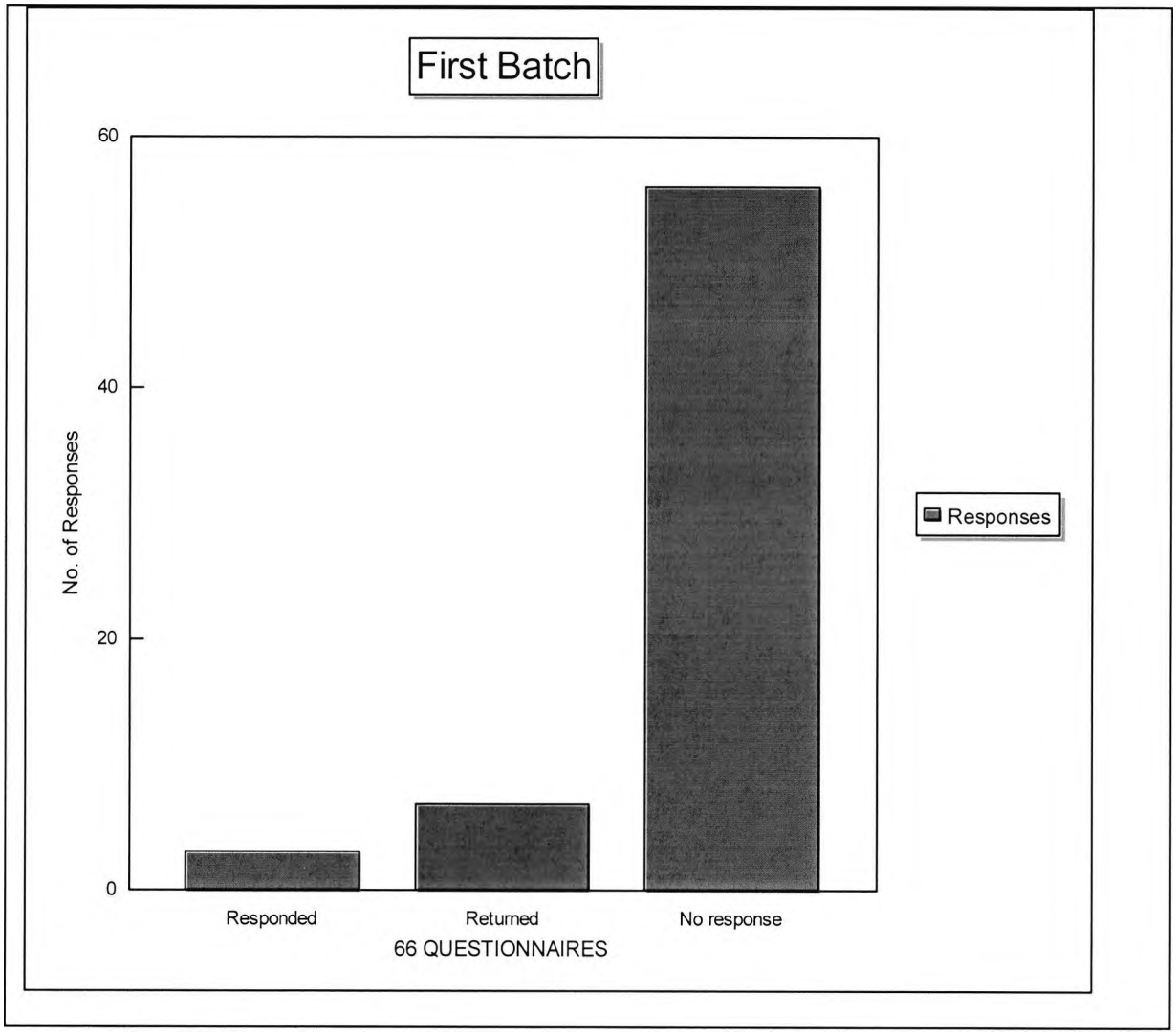
Pressure cases that were reported to the CRE around 1985 - 1988.

66 Questionnaires sent out

3 Responses

7 Letters returned by Post Office Return Packet Centre

56 Did not respond



Second Batch of Questionnaires

Pressure and Discriminatory Advertisement cases reported to the CRE between 1989 - 1992

These were sent with amended wording of covering letter – "In particular, I am attempting to follow the cases reported to the CRE for possible breaches of Section 29, 30/31 of the RRA, that is the reason for my writing to you" - these words were deleted from the original letter on this occasion. (Appendix 3).

100 Questionnaires sent out

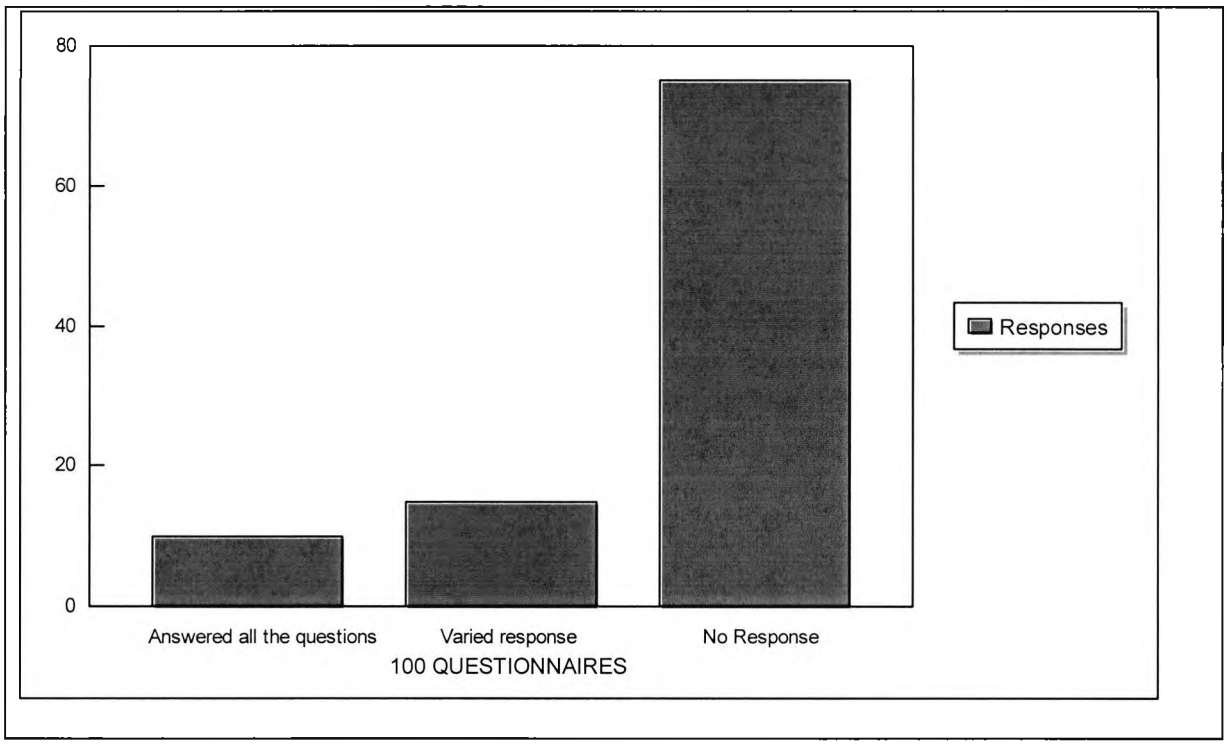
25 Responded

10 Questionnaires returned with answers to practically all the questions

15 Produced varied responses

75 Did not respond

Second Batch



Telephone Interviews

70 Organisations telephoned

10 Answered practically all the questions in the postal Questionnaire

8 No change to Equal Opportunities Policy

1 Very detailed changes as a result of the CRE formal investigation

1 Reported slight changes to Equal Opportunities policy

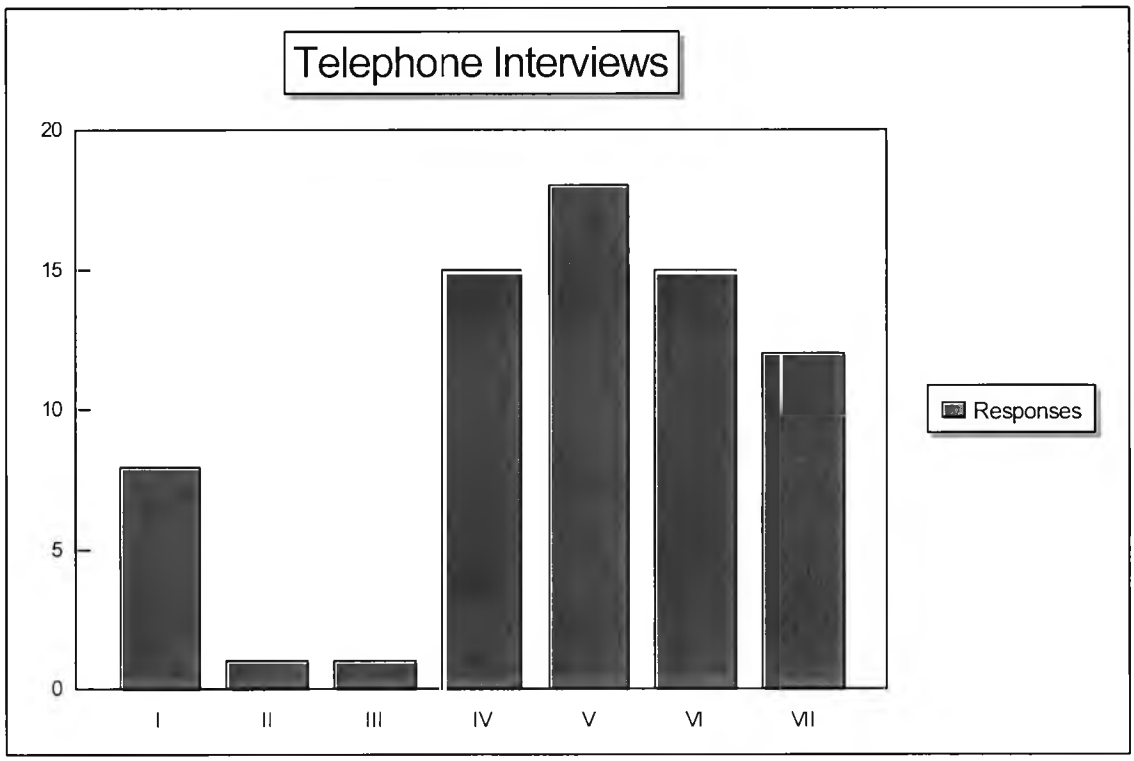
15 Organisations who did not answer all the questions in the Questionnaire

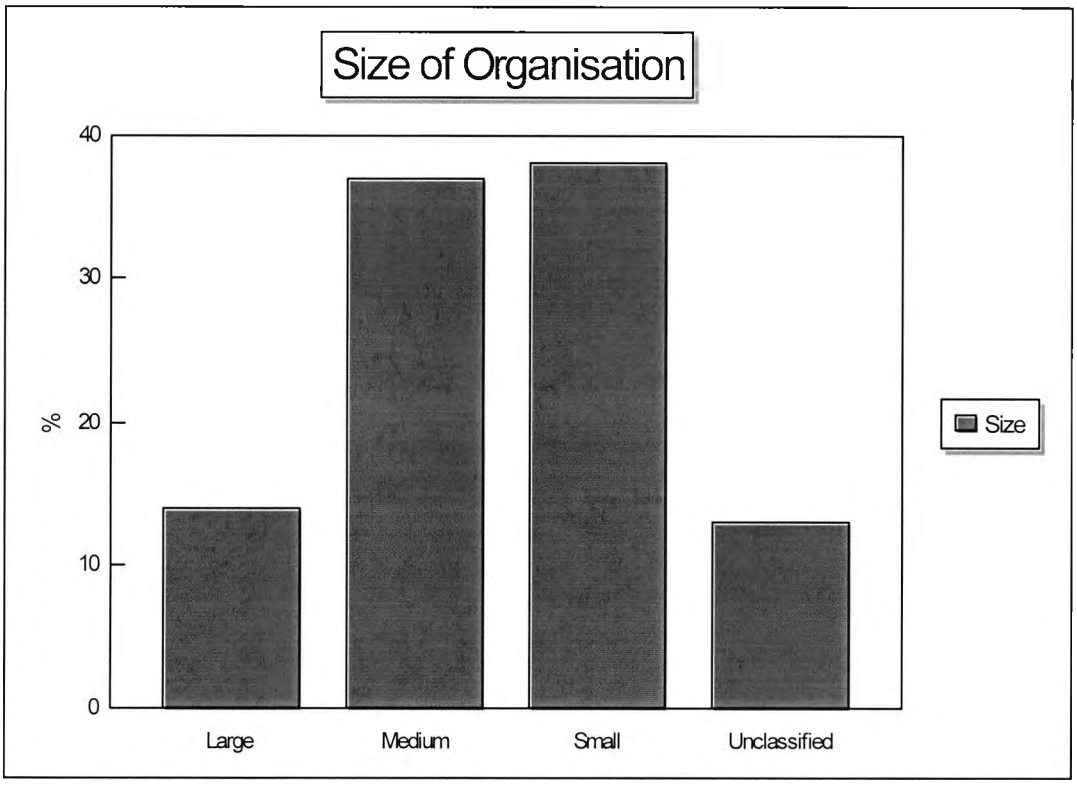
18 Organisations who did not respond initially to the postal Questionnaire but provided answers over the telephone.

27 Organisations that refused to take part in the telephone interview survey

15 Said they could not spare the time

12 Gave other excuses



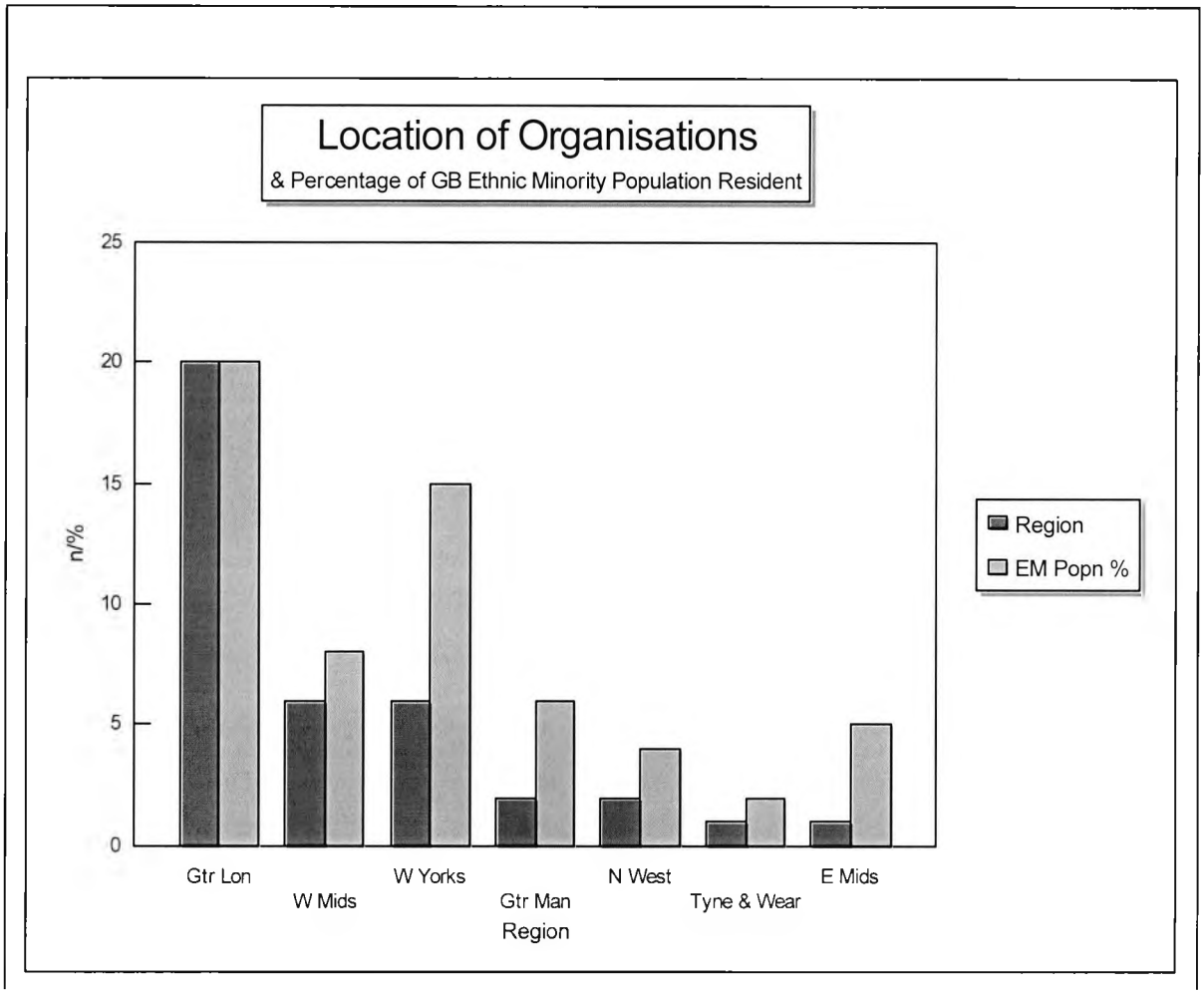


Small: Less than 20 employees

Medium: 100 employees

Large: Over 100 employees

Unclassified: Not possible to ascertain the size of the workforce



Summary of Result of Survey

My results are based on 43 responses (this includes both postal Questionnaires and telephone survey) out of one hundred Questionnaires.

15 Varied Responses (Five were medium ten were small organisations) of the 15 varied responses to the postal Questionnaire - 11 had no equal opportunity policies. (This was established by follow up telephone interviews). The telephone interviews were in contradiction to the answers in the postal Questionnaires. The kind of response was difficult to comprehend. The response was not convincing and it was difficult to ascertain as to what was the truth, for example, the postal Questionnaire stated that there was no equal opportunity policy but the answer over the telephone was that there was definitely one in operation.

18 Responses from organisations who did not initially respond to the Postal Questionnaire but who took part in the Telephone Survey

(Ten were small, six were medium and two were large). This group also produced a varied response. The response from four small organisations was not very convincing and there was a reluctance to answer the questions. eight (six medium and two large) organisations claimed to have an equal opportunity policy and six (four small and two medium) had no equal opportunity policy.

Twenty seven organisations (20 were small, six medium and one large) refused to take part in the telephone interviews for reasons as stated in Chapter VII. The majority of the small organisations were public houses or restaurants.

Ten Organisations who answered practically all the questions in the Questionnaire

Ten organisations responded by answering practically all the questions. eight reported no changes to equal opportunity policy and two reported changes to equal opportunity policies (one reported very detailed changes as a result of the CRE formal investigation and the other reported slight changes to equal opportunities policies). Five organisations in all had a written equal opportunity policy. Of these three were large and two were medium sized organisations. The response from large organisations was definitely better than from smaller organisations. Only four organisations enclosed copies of their equal opportunity documents. Three were very comprehensive and from large organisations, for example, Health Authority and a Housing Association. Details of recruitment, selection policies, selection process, person specification, shortlisting procedure and interviews were provided. Six organisations (four large and two medium) had devised a means of monitoring equality of opportunity in recruitment and promotion. Two organisations (both large) stated that the workforce reflected the ethnic composition of the labour market from which it was drawn, four organisations (all large) provided training on equal opportunities in recruitment, interviewing, training and promotion. On the question of the ethnic composition of the

workforce the answers were varied and only three organisations (large) seemed to have a fair proportion of ethnic minorities in the workforce. On the question of promotion or recruitment to senior positions the response was negative from all ten organisations.

With regard to reviews of jobs and person specification as a result of proceedings, the answers were in the negative mainly with the exception of two (large) (one stated that person specification were reviewed regularly and another stated that they were more vigilant in the interviewing stage). On the question regarding the policy on educational qualifications the answers were varied, six organisations did not require specific educational qualifications. On overseas qualification, two stated that they were acceptable in the United Kingdom if approved by certain validation boards. On the policy on segregation according to language or ethnic group, six said that it did not apply. (three large and three medium organisations) The policy of word of mouth recruitment was a significant question to test discriminatory practices by organisations - only one admitted to encouraging this form of practice. When asked about the names of employment agencies used, only two replied positively. Seven organisations (three large, two medium and two small) failed to respond to the question on other steps to bring about equality of opportunity in employment, one stated *"we have always had a policy of equal opportunity"* and another stated that they *"had re-established an equal opportunities employment group."* The last question asked for information on any other difficulties not mentioned so far which was encountered in complying with the proceedings under the RRA. Only six (three large, three medium) stated that they experienced no problems, one said that there were no proceedings against them and three offered irrelevant answers.

The response from the ten organisations who answered practically all the questions (following the telephone interview) was encouraging. Equal opportunities was taken seriously or was at least on their agenda. The survey revealed no uniformity in the response to the Questionnaires, hence the difficulty in analysing the information. The replies were so

diverse and varied and no pattern on equal opportunity policies emerged. Of the 10 organisations who answered practically all the questions in the Questionnaire, five of them were large public organisations with very good equal opportunity policies. They usually had an equal opportunity officer and they were aware of the policies and were complying as effectively as possible. Three of the organisations in this group were private medium companies and two were small and private organisations. The three medium groups were attempting to comply as effectively as possible but were experiencing difficulties in some areas, for example, monitoring and word of mouth recruitment in the past was sometimes used. The two small organisations were making an effort to comply and they were not fully implementing their policies and there were difficulties being experienced because of their resources.

Of the 15 poor respondents to the Questionnaires who provided varied responses, two were large public organisations, one was a medium sized public organisation and two medium and private, eight were small and two were anonymous replies (size nor whether public or private could not be ascertained). They had no EO policies. One of the large organisations stated that they were complying with equal opportunity policies while the other refused to participate with no given reasons. One medium sized company gave a negative response and the other two medium sized organisations stated that they had no problems. It is not absolutely clear as to how to interpret this response. One small company stated that they were complying but relied exclusively on "word of mouth" recruitment. The remaining seven small organisations did not have an equal opportunity policy and were neither aware nor complying with EO policies. The greatest problem with my research was coping with non-response from employers. I did foresee some difficulty because of the sensitive nature of my research but did not envisage the scale of the lack of participation. Reminder letters (in some cases three reminders), failed to raise the response level that I had anticipated. My telephone interviews (which employed a shortened version of the Questionnaire in some cases) helped me to collect basic information on equal opportunities. The shortened version

of the Questionnaire was used when respondents stated that they could not spare the time. It was very difficult to distinguish between the size of the organisations because of the lack of information on the composition of the workforce. The larger organisation had the resources to implement equal opportunity policies, for example, the appointment of equality officers.

CONCLUSION

The aim of this study was to assess the extent of compliance by employers with equal opportunities in relation to Sections 29, 30/31 RRA 1976 as a result of CRE intervention. My sample was small (only 43 responses) but despite this, changes were observed. Two large organisations responded to extensive changes as a result of CRE intervention. The small and middle size organisations also stated that some changes took place. The small organisations had a problem with resources when compared to the larger organisations. The large employers usually had an equal opportunities officer. Having an equal opportunities officer was not enough, equal opportunities had to be implemented properly to attempt to eliminate discrimination. There is a huge gap between having an equal opportunity policy and actually implementing it. Since the recession a large number of equal opportunities officers were made redundant. (As evidenced by my work as a Complaints Officer at the CRE). Many large authorities, especially Local Authorities have abolished their equal opportunities department when restructuring the organisation or merged them with other sections. Changes were implemented as a result of CRE intervention and most of the public houses attempted to follow the guidelines issued by the CRE on equal opportunities. This was carried out by the CRE as part of their follow up work. Several public houses especially in the London area were reported to the CRE for alleged breaches of Section 29.

The impact of the case CRE v Dutton (1989) meant that public houses could no longer discriminate against gypsies. The upper limit for compensation payable to victims of

discrimination was abolished in 1994. This remedy has not been extended to Sections 29, 30/31 RRA 1976 for breaches by employers (the maximum fine for breach of Sections 29, 30/31 RRA 1976 is only £400). Two large Local Authorities against whom proceedings were brought did not bother to return the Questionnaires. It appears that CRE intervention has had little or no effect on these two Local Authorities. My research has revealed that discrimination is still high because of the limited success achieved by the CRE (under Section 29, 30/31 RRA). My survey reinforces the earlier study by (Brown & Gay, 1985). It also highlights the problems identified in the Code of Practice (CRE, 1989) and the PSI study (McCrudden & others, 1991). The survey concludes that there are inherent problems in enforcing Sections 29, 30/31 RRA 1976 adequately because of the limited scope of the legislation. Certain significant cases, for example, CRE v Dutton (1989) included gypsies as a racial group. This proceeding brought about a change in that gypsies are now protected by the law for being discriminated against, but, compliance is virtually un-enforced. The decision of the case shows how little effect it is likely to have had. A reformed RRA 1976 may be effective for small businesses to some extent, but I cannot envisage a drastic change in this area because the question of resources of small businesses would place equal opportunity policy as a very low priority. The survey revealed a pattern in the differences to the responses by the type of organisations. Small organisations, for example, hairdressers, family run businesses and public houses did not take equal opportunity policies seriously. Large organisations, for example, Local Authorities, Health Authorities took a more serious view of equal opportunities generally.

The conclusion to be drawn from this survey is that the impact on employers as a result of either legal proceedings against them or by being reported to the CRE for breaches of Sections 29, 30/31 of the RRA 1976 is extremely limited. The CRE has only attained a limited success by either instituting legal proceedings or taking some other form of action, for example, (advice or promotional work) for breaches of the above Sections. It has failed to tackle the policies and practices of employers on a larger scale. The CRE did resort to

limited promotional and advisory work in cases that were settled by obtaining assurances not to breach the Act in future. The survey brought to light the immense difficulty of enforcing equal opportunities policy both by the employers and the CRE. The survey reinforces the initial difficulties encountered with the RRA 1976 in its passage through Parliament and the present defects in the legislation.

Further, this survey concludes that Equal Opportunities is taken seriously only by few employers. The majority either disregard the policies or give them low priority. The remedies under Sections 29, 30/31 are not sufficient to act as deterrents to employers who are practising discrimination. Changes in legislation and increased resources to the CRE will assist to a great extent as the Health and Safety Executive and Health and Safety Committee successes indicate. Equal opportunities is vital for good business practice but the survey revealed that so few organisations were conducting monitoring. Even if there was a policy on paper it was not adhered to (this was also identified in the study on Industrial Tribunal in Chapter VIII). The commitment to ensuring racial equality was not taken seriously. Many companies felt that a simple statement of commitment was sufficient to meet the criteria of having an EO policy. Very few were seriously committed to ensure that the policy was followed in terms of recruitment, monitoring, etc. In order to ensure good employment practice, the organisation has to give EO a high priority and it has to involve senior management to ensure delivery of EO policies. Preventative measures are better than waiting for an employee to allege discrimination against the employer. This could lead to bad publicity and the image of the employer being tarnished if they are found guilty of discrimination.

A significant conclusion is the low scale of ethnic monitoring. This is a very vital procedure that has to be undertaken to ensure that the EO policy is being implemented. Problems ought to be identified and rectified. Monitoring allows organisations to check their recruitment procedures, assess their impact of race equality programmes and most important of all to

assess what changes have been achieved in their work force regarding the targets that were set to bring about changes, hence changing society. The equal opportunity policy document is vital as it indicates an intention by employers to bring about changes to the organisation. The survey found that only five out of 25 had a written EO policy document. The conclusion to be drawn from this is that EO policy is not taken seriously by many organisations and was given a low priority in relation to other practices of the company. Public organisations were more likely to be aware of EO policies as compared against private organisations.

The question on the labour market concluded that smaller organisations were relying on 'word of mouth recruitment'. From this we can conclude that EO policies were not complied by them, hence discrimination at the recruitment stage is likely to be very high in small organisations. With regard to training, the success of any policy depends on it being put into practice. Training denotes that EO policy is seriously acknowledged by the organisation. The survey concluded that large public organisations undertook training in recruitment, interviewing, training and promotion to ensure that EO policies were properly implemented. The composition of the workforce is a vital factor to assess whether an EO policy was in operation. The conclusion to be drawn on this aspect of the survey was that once again the large public organisations were taking a serious view of ethnic monitoring to ensure conformity with an equal opportunity policy.

The question on promotion and recruitment concluded that some changes were effected as a result of CRE proceedings against the respondents. The question on educational qualifications was asked to assess the impact of indirect discrimination in recruitment. The conclusion is that large organisations have EO policies in this area as did medium and some small organisations. The conclusion to be drawn is that some organisations, large, medium and private do recognise overseas qualifications. The last question related to information on difficulties not mentioned which were encountered with the proceedings under the RRA. It is difficult to conclude anything from the answers received because they were so diverse.

Another significant conclusion to be drawn from the survey is the methodology. This survey has revealed that postal survey followed by telephone interviews is not the best means of securing valid and reliable findings. This information might be of use to future researchers in this area of law. I would also adopt an additional methodology, (I would also use in-depth personal interviews with employers), greater resources and prior confirmation of access to information if I were to start this same study now. I would also seek funding from the CRE for my project and perhaps work with a research agency. This would place me in a better position in gaining the information that I experienced immense difficulty in obtaining. Access to information is the biggest problem when conducting race relations surveys. I encountered immense difficulties in attempting to gain access to information as an individual. If the CRE funds a research agency, information may have been more readily available. I experienced deliberate attempts by employers to avoid, suppress and censor information. If the CRE allocates sufficient resources for a study of discriminatory advertisements and pressure cases, then proper fieldwork (personal interviews) can be conducted by an independent agency with an assurance that confidentiality would be maintained.

This is the only study on pressure and advertisement cases to date - therefore my survey is of some value to the CRE. The CRE ought to rethink its policies in relation to Sections 29, 30/31 RRA 1976 and allocate more resources to this area of law. Pressure and Advertisement cases ought to be given a higher priority than at present by the CRE, but I would not put it above individual complaints. The CRE is placed in a special position with regard to Sections 29, 30/31 RRA 1976 of the law because only the CRE is empowered to bring proceedings under these Sections of the Act. This would attempt to eliminate discrimination in recruitment. The implications of the findings conclude that the enforcement powers of the CRE under Sections 29, 30/31 of the RRA 1976 have not attained their objective. The CRE can boast of only a modest success in the area of discriminatory advertisements and instructions/ pressure to discriminate. There is room for greater

improvement. However, further achievements in this area of the RRA are severely restricted by the current legislation. In addition the number of legal proceedings under Sections 29, 30/31 has been severely curtailed since 1994 by the CRE because of financial resources; the CRE is giving priority to individual cases and formal investigations before discriminatory advertisements and instructions/pressure to discriminate cases. The CRE has not been very successful in attaining change in this area of the RRA 1976 to impact on social reform.

CHAPTER VIII

SURVEY ON THE CONDUCT AND PERFORMANCE OF INDUSTRIAL TRIBUNALS IN RACE CASES THROUGHOUT ENGLAND, WALES AND SCOTLAND

This chapter will enhance Chapter VII – (survey of discriminatory Advertisements and Pressures cases), in attempting to ascertain to what extent the RRA 1976 can bring about changes to society in the elimination of race discrimination. The aim of the research is to evaluate and monitor the performance and conduct of Industrial Tribunals in race cases throughout England, Wales and Scotland.

Purpose

The research project is intended to gather evidence on the conduct and performance of Tribunals with a view to suggesting improvements in the system by identifying inconsistencies in the way Tribunals have approached cases, for example, is the Tribunal proactive in its approach to accumulating and sifting evidence; is there any indication of Tribunals being pre-disposed to giving more weight to the evidence of one party over the other. It will seek to establish to what extent Tribunals are using their discretionary powers to draw inferences of discrimination. It will also compare and contrast the amount of compensation awarded by the various Tribunals. It will also seek to establish if, and to what extent, the Chairman/Panel appear to be informed on race issues. Inconsistencies in results will be identified, if any, between different regions and Tribunals. The research will attempt to ascertain what effect, if any, the CRE Code of Practice has on the Tribunals in making decisions in individual cases.

It will also try to determine to what extent the absence of equal opportunity policies have on the decision making of Tribunals.

Quantitative methodology coupled with personal observation of cases in progress at Industrial Tribunals was undertaken. The research was conducted predominantly through analysis of the full written decisions of the Industrial Tribunals in race cases. This involved a detailed study of 430 full written decisions from the different regions of the Tribunals between 1996/97 period. This provided the pool from which the cases were selected. The analysis was conducted by the use of Questionnaires with questions based on 29 statistical indicators (Appendix 7).

Qualitative methodology was conducted by attending the hearing of cases in the various Tribunals. This assisted to pick up on certain aspects of the proceedings which were not immediately apparent from reading the cases. Amongst other factors the ethnic origin of Tribunal Chairpersons/Members, the attitude of the Tribunal to applicants and respondents evidence and general comments by the Tribunal Chairpersons/Members on the conduct of the applicants/respondents' case were observed.

The statistical indicators in the Questionnaire were examined and analysed by reading of the full written decisions of the Industrial Tribunals in race discrimination cases. The total number of cases for the period 1996/1997 listed for Tribunal hearing were 2749. Following discussions with the colleague who participated in the questionnaire exercise and the computer analyst, it was decided that 400 cases would be a sufficient number from the different regions to obtain a good result. The reason for the extra 30 cases was because I was aiming to increase the total to 500, but was advised by the computer analyst that 400 cases would suffice. He nevertheless included the 30 extra cases that I had worked on, making a total of 430 cases out of 2749. My colleague and I did undertake a trial run of ten cases between us to compare our style of filling out the information on the questionnaires. My colleague filled out the proforma in the same way as me because we agreed on what aspects of the case we would be looking for. We did not work on the same cases.

A careful note of the kind of questions posed by the Chair and the Panel provided the answers to the questions. With reference to Q18 the nature of questions posed by the Chairman and Panel to the applicant and respondent and the answers given, will indicate the attitude of the Tribunal to the evidence. With reference to Q22 – once again, the Chair and Panel would ask direct questions as to whether the respondent had an equal opportunity policy, was the Code of Practice in employment implemented and the composition of the workforce etc? With reference to Q25, if there is no compelling evidence, the Tribunal can rely on circumstantial evidence to draw inferences. With reference to Q26, the Chairman/Panel will appear to be informed on race issues once again by asking salient questions pertaining to race issues. This was evidenced by the nature and quality of questions posed by them to the applicant, respondent and witnesses. The cases were divided into different Tribunal regions, placed in a pile and I selected every third case. I read through 230 cases in detail and my colleague read the remaining 200. My colleague also worked as a complaints officer like myself at the CRE. We worked independently and did not discuss conclusions. The forms were processed for data entry after the information was filled in on the Questionnaire forms.

Tribunals at seven different locations were observed. The London North, London South Tribunals and the Birmingham Tribunal dealt with a larger number of race cases, therefore, more cases were observed at these locations. The major problem was the possibility of cases settling although listed for hearing. In many instances, cases were settled before my arrival at the Tribunal or a few days before the scheduled hearing date. The ten cases were selected from seven different Tribunals. When a distinct pattern was emerging, it did not appear appropriate to conduct further observations and also there was the element of the cost for the CRE to pay for my staying at hotels and train fares.

My yardstick for measuring the Chair's sensitivity to race and ethnicity was based on the kinds of questions that were asked of the applicants, the respondents and witnesses, their

attitudes, conduct of the proceedings generally and the display of knowledge of the RRA 1976. Questions were also asked about employers equal opportunity policies, this reflected on the extent of race awareness of employers towards their employees. Q22 explored employers' knowledge/awareness of race issues. This was drawn out by ascertaining whether there was an equal opportunity policy in place and whether it was implemented. In the course of reading the decisions the composition of the work force could be identified in some cases. In Q10, duration does not include postponement and reservation of decision. The percentage for direct discrimination is always high because practically all cases on race discrimination rely on Section 1 of the RRA 1976 which deals with discrimination on grounds of race, colour, nationality, ethnic or national origins. Less favourable treatment on grounds of race has to be established before a case for race discrimination is proved.

The Industrial Tribunal Procedure

The Chairpersons of Industrial Tribunal are appointed by the Lord Chancellor. Appointments could be on both full and on a part basis. The Chairs of Industrial Tribunal must be barristers or solicitors of seven years standing since qualification. Part-time Chairs are appointed in the first instance for a period of up to one year but thereafter may be renewed for up to three years at a time, at the discretion of the Lord Chancellor. The administration of Tribunals is the responsibility of the Secretary of State for Employment. There are a total of 24 Industrial Tribunal in England, Wales and Scotland.

Applications to an Industrial Tribunal alleging racial discrimination are usually made on an IT1 form called an originating application and sent to the respective Tribunal according to the post codes. Alternatively a complaint can be lodged by means of a letter by providing the name and address of the respondent and full details of the complaint. The application must be lodged within three months of the date of the incident complained about. If the application is received outside the three months' time limit, the Tribunal will not generally consider it. However, the Tribunal has a discretionary power to consider late applications depending on the reason for

the delay. A preliminary hearing may be held to consider why the application was late and whether it can proceed further. Sometimes the race discrimination claim is coupled with redundancy, unfair dismissal, breach of contract, sex discrimination, etc.

A copy of the application is sent to the respondent and the respondent receives a 'notice of appearance' form. The respondent should reply on the form (IT3) stating the reasons for denying their allegations within 21 days. In most cases a copy is also sent to ACAS - Arbitration and Conciliation Advisory Service which is an independent body and will try to assist both parties to resolve the dispute without the need to proceed to a hearing. If an agreement is reached through ACAS and if either party fails to honour it, the parties can sue in the County Court for breach of agreement. If the respondent fails to respond to the notice of appearance form within 21 days, the respondent will not be allowed to defend the application. The Tribunal might still allow the respondent to defend the claim but the applicant may be entitled to costs because of the delay. If the respondent does not give enough information to clarify the reasons for defending the claim, the applicant can write to the respondent seeking more information. If the respondent refuses, the applicant can write to the Tribunal seeking an order to provide the information to the applicant and to the Tribunal. The Tribunal will decide whether the respondents ought to provide some or all the information. The Tribunal can refuse the order if the applicant does not act within a reasonable time of the respondent's failure to supply the information before the hearing date.

Documents pertaining to the hearing should be exchanged between the parties. If the respondent refuses to co-operate, the applicant can seek an order for the documents from the Tribunal. If the respondent does not obey the Tribunal's order, the Tribunal will give the respondent an opportunity to explain as to why the order was not complied with and may allow the respondent time to comply. If the Tribunal is not satisfied with the respondents' application, the Tribunal can prevent the respondent from defending all or part of the application. The Tribunal may order 'further particulars' if the information is relevant and necessary to deal fairly

with the case. The Tribunal may also order either party to disclose to the other party relevant documents.

The RR65 Questionnaire

A Questionnaire under the RRA will help the applicant to find out more about the respondents. The procedure enables a worker to ask the employer any relevant question, which will be useful in finding out why the applicant has been treated in a particular manner and whether discrimination can be proved. The applicant decides what information is required and devises the appropriate questions which are written down (usually on the standard 'RR65' form) and sent to the employer. The employer is expected to answer the questions in writing within a reasonable time. The questions and answers can be used as evidence at the Industrial Tribunal hearing if the case goes ahead. Sending a Questionnaire to the employer does not start any legal action. If no originating application (IT1) is ever sent to the Tribunal, then no legal claim will be started. If no claim is started, the Questionnaire and any reply will remain only as private correspondence between the parties. Quite often, a worker is unsure whether or not he or she wants to start a full legal case. If an answer to the Questionnaire can be obtained before the time limit for starting a claim, this will assist in deciding as to whether to go ahead with the full case. A worker who is still employed should be aware that an employer is likely to be upset by a Questionnaire, even if no legal case is started. Where there is little initial evidence of discrimination, but the worker wants to find out more, it may be wiser to ask questions in an informal letter first.

Is a Questionnaire necessary? – it is obviously essential where a worker needs more information to decide whether to embark on a Tribunal case. It is possible to start a case on race discrimination without having served a Questionnaire, but this deprives the employee of an opportunity to gather the necessary evidence to prove the case. It is very difficult to succeed in a race case where no Questionnaire has been served. This places the employee at a tremendous disadvantage because he/she has no idea what the employer will say about vital

aspects of the case. Evidence can be gathered by other methods but they are more limited means. Information can be obtained by discovery. This is a process whereby the employee can ask the employer to supply relevant documents. The applicant can apply for further and better particulars of the Notice of Appearance. This is a process whereby the worker can ask the employer to expand upon the vague wording of the Notice of Appearance. It is far more limited than a Questionnaire because it can only ask for the skeleton of the employers case and cannot ask for matters of evidence. The applicant can also use interrogatories to ask certain factual questions but they are also limited as to what questions can be asked. There is a tactical advantage in using a Questionnaire where an employer does not wish to supply a document or particulars, the applicant can ask the Tribunal for an order which the Tribunal may refuse. With the Questionnaire procedure, the Tribunal can draw an adverse inference against the employer for failure to reply to the Questionnaire. The replies to the Questionnaire should be carefully compared with the documents and particulars supplied and with the oral evidence of witnesses. There are often contradictions and it is these contradictions which may persuade any Industrial Tribunal to find race discrimination. There are strict time limits for serving a Questionnaire – it must be served upon the employer within 21 days of lodging the originating application.

If the time limit has been missed for serving a Questionnaire, a request can be made to the Tribunal by the applicant to serve the Questionnaire out of time. It is possible for the applicant to send out second Questionnaires to the employer with the permission of the Industrial Tribunal. An employer cannot be forced to answer a Questionnaire and the Tribunal cannot order the employer to answer. According to Section 65 (2) of the RRA if it appears to the Tribunal that the employer "deliberately and without reasonable excuse omitted to reply within a reasonable period or that his reply is evasive or equivocal, the Tribunal may draw any inference from that fact that it considers just and equitable to draw including any inference that he committed an unlawful act." In practice, an Industrial Tribunal is unlikely to conclude there has been race discrimination purely because the employer has not answered the Questionnaire, but it will be a very persuasive factor to add to the other evidence against the employer. The

Industrial Tribunal is more likely to draw an adverse conclusion when the applicant makes several unsuccessful attempts to persuade the employer to reply.

Tribunals expect disclosure of information of a wide ranging and confidential nature. It is usually impossible to look at the comparative evidence necessary in a direct discrimination claim without detailed and confidential information about other workers. The most important case about confidentiality in relation to disclosure of documents in Nasse v Science Research Council (1979). and Vyas v Leyland Cars (1979). In this case, the House of Lords said – "confidential documents must be disclosed if it is necessary to dispose fairly of the case or to save legal costs, unless there is another way of obtaining the necessary information." The purpose of the Questionnaire is to gather evidence useful to prove race discrimination, find out about the employer's case, so that there are no surprises at the hearing, to find out, what key facts are accepted by the employer and what are in dispute.

The Code of Practice

The CRE issued its first Race Relations Code of Practice in Employment in April 1984. The Code is aimed mainly at employers, trade unions and employment agencies. It includes guidance or recruitment, promotion and training and gives advice on setting up and monitoring equal opportunities policies. If there has been a breach of the Code, this should be referred to at the hearing. The RRA states "A failure to observe a Code of Practice shall not of itself render liable to any proceedings, but in any proceedings under (the RRA) ..... (the Code) shall be admissible in evidence, and if any provision of such a Code appears to the Tribunal to be relevant to any question arising in the proceedings it shall be taken into account in determining that question."

The Hearing

The Tribunal notifies all parties 14 days before the date of the hearing. If the date is not suitable for the applicant, the Tribunal has to be informed immediately including proof, for example, if

the applicant is ill. The Tribunal will decide whether a hearing should be postponed. If the Tribunal refuses the application for a postponement, there is a right of appeal to the Employment Appeal Tribunal. The Tribunal will not normally postpone a hearing unless you ask within 14 days of the date the Notice of Hearing. The respondents can also request a postponement of the hearing date. If a witness cannot attend the Tribunal a written statement of the evidence can be sent to the Tribunal and the respondent at least a week before the hearing date. However, evidence from a witness, who attends the Tribunal usually carries more weight. If a witness's evidence is crucial to the applicant's case the party can request a postponement, if the witness cannot attend on the stipulated date. The Tribunal may advise the respondent of the request for postponement and the respondent can agree or disagree with the application. The Tribunal will decide whether to postpone the hearing. If postponement is refused, the applicant has a right of appeal to the Employment Appeal Tribunal. The respondent also has a right to request a postponement if a witness cannot attend on a particular date.

The applicant should ensure that all witnesses are informed of the time and place of hearing. The applicant should agree with the respondent which of them will provide copies of documents for the Tribunal - the Tribunal usually needs five copies with the pages numbered. If agreement cannot be reached, the applicant should bring five copies of his/her documents to the Tribunal. The documents should include items such as contract of employment, pay slips, correspondence between the parties, grievance procedures, etc. The applicant has to ensure that the respondent has a copy of the applicants' documents either by sending one to the respondent beforehand or bringing an extra copy to the Tribunal on the day of the hearing. It also helpful if witnesses write or type what they are going to say when giving evidence and should bring five copies to the Tribunal on the day of the hearing. When the witnesses are reading out their statement, the Tribunal and the parties can follow what is being read.

If a witness cannot or will not come to the Tribunal hearing, either party can ask for a witness order by writing to the Tribunal explaining briefly what evidence you expect the witness to give

and why it is relevant. The Tribunal will then decide whether to order the witnesses to attend or not. The applicant can withdraw his/her application before the hearing by writing to the Tribunal. If the applicant withdraws at the last minute, the Tribunal might order costs to the other party for preparing the case. The applicant must also inform the respondent about the withdrawal of the case. A case can also be decided at other types of hearing beside a final hearing to decide the case. There could be an interlocutory hearing, pre-hearing review, preliminary hearings and review hearing. The hearing is open to the public, the complainants could well invite along friends relatives, etc. if it helps to make them feel more at ease. The Tribunal clerk will come and ask if there are any likely reported cases that will be quoted by both parties. The clerk will ensure that the Tribunal has copies to refer to. The Chairman will generally be responsible for seeing that the correct procedure is followed and for interpreting points of law. If anyone has trouble in being understood in English, for example, one of the witnesses, then an arrangement can be made for an interpreter to be present.

Order of Proceedings

In the majority of cases of racial discrimination, the order is as follows: An opening statement of the complainant's case is made. The complainant gives evidence. The complainant is then cross examined by the respondent. The complainant can be asked questions by way of re-examination by his own representative. The Tribunal Members can put any questions they may have to the complainant. The complainants' witnesses are called in turn and questioned by the complainants' representative. The respondent cross examines the witnesses. The complainants' representative can re-examine them if necessary. The respondent goes through 1 - 7 but the roles are reversed i.e. the complainants' representative will cross examine. The respondent sums up the case and the applicants' representative then delivers the closing speech on behalf of the applicant. If in the course of cross examination the question is so involved as to be unfair to the complainant and the Tribunal does not point this out, the complainants' representative should do so. Intervention should be sparing only to prevent unfairness, not to hamper the respondent. When the respondent has finished asking questions

the complainant can be re-examined by his representative. New issues should not be raised but it is a chance to clarify any point where the complainant might have been misunderstood or did not do himself/herself justice. The respondents will have the first chance to sum up the case. In the summing up, the respondents will be trying to convince the Tribunal that they had not discriminated against the complainant and that the Tribunal should come to that decision and dismiss the complaint. The respondents will try to bring out the weak points in the complainants' case. The complainants' case is then summed up. The complainants' case should emphasise the strong points, refer to evidence, witnesses or documents which will go towards the Tribunal deciding in the complainants' favour. Any inconsistencies in the respondents' evidence should be pointed out.

The Tribunal will consider the evidence and come to a decision. If it is a complicated case, the Tribunal may think that it will be better to come to a decision later, when it has had more time to consider and in that case notification of the decision will be by post. If the Tribunal thinks that it can come to a decision on the same day, the parties will be asked to go into their respective waiting rooms. The parties will be called back and told the decision and the reasons for the decision. A record of the decision will be made in the Register and copies will be sent. Times vary but a decision can take up to 5 - 8 weeks after the hearing or even longer in some cases.
If the case is won the Tribunal can make certain orders which it considers 'just and equitable' that is right and fair in the circumstances and allowed by the RRA 1976. The Tribunal can make an order declaring what the complainants' rights are, in relation to the discrimination complained of. It can order that the respondent should pay compensation for any loss of earnings or other financial losses, which the complainant has been shown to have suffered as a result of the treatment and in addition, some compensation for injury to feelings. A recommendation that the respondent should take action which will remove or reduce the effects of the discrimination can also be made.

If unfair dismissal has been claimed and found proved the Tribunal can in certain circumstances order reinstatement or re-engagement. If there is failure to comply with such an order in respect of a dismissal which is also an act of racial discrimination then a higher additional award is payable unless it was not practicable to comply with the order. If the respondent fails to carry out the Tribunal's order within a reasonable time or the complainant finds he/she is being treated less favourably as a result of making his/her complaint, this gives ground for a new application to the Tribunal based on victimisation. If the respondent does not comply with the recommendation made by the Tribunal and does not have a reasonable excuse, then the Tribunal has the power to award or increase compensation to the complainant. If the case is lost then the complainant may be able to appeal to the Employment Appeal Tribunal but this can only be done on a point of law. The complainant must show that the Tribunal misunderstood or misinterpreted the law, misunderstood the facts, or did not apply them properly and could not possibly have reached the conclusion it did on the evidence available or did not take into account essential factors in the case, or took into account factors it should not have considered. A Notice of Appeal must be given to the Employment Appeal Tribunal within 42 days of the decision being registered with the Tribunal.

Costs

Sometimes applicants are worried about going to an Industrial Tribunal because they think that they may face costs at the end of the day. Normally, a Tribunal will not award costs, but it may do if it considers that one side has acted 'frivolously', 'vexatiously' or 'unreasonably', for example, if a complainant brings a case which is completely hopeless that the complainant knows that there was no chance of winning (frivolous) or bringing a hopeless case out of spite for the employer (vexatious). Another situation where costs may be awarded is where a hearing is postponed or adjourned and costs are incurred. This does not mean that an adjournment or postponement requested by the complainant will automatically incur costs: a lot depends on the circumstances, for example, if the complainants' case is not well prepared and involves unnecessary delays. If the situation could have been avoided and the Tribunal feel the

complainant was not really serious about the claim, the Tribunal may well order the complainant to pay the respondent's costs for that day on the grounds that the complainant acted unreasonably. If there is a good reason for not proceeding with the case, for example, illness, the complainant should not be penalised by having to pay costs if the complainant did all he could to inform the respondent or the Tribunal being inconvenienced. The imposition of costs is at the discretion of the Tribunal. Provided that the complainant has acted fairly and responsibly there should be no worries.

Review

It is possible to get the Tribunal to reconsider its decision in certain circumstances. This is known as a review and the complainant or the respondent can apply for a review within 14 days after the decision is sent out. A Tribunal can review its decision if it came to a wrong decision because of a mistake by its staff, either the complainant or the respondent were not notified of the proceedings, for example, if a Notice of Appearance or Notice of Hearing was not received, someone who was entitled to be heard was not there at the hearing, if the Tribunal unreasonably refused to grant an adjournment to enable a key witness to attend, unless it was a fault of the parties or if new evidence which was not available at the time, has come to light since the decision was made. The evidence must have an important bearing on the case, but it will not be accepted if the evidence was known about at the time of the hearing but was not mentioned. If the Tribunal agrees to a review, it can vary its previous decision or revoke it and order a fresh hearing. If the same Tribunal which heard the case cannot deal with the review, a new Tribunal will be given the case.

THE QUESTIONNAIRE ANALYSIS

The results are summarised according to the numbered questions on the Questionnaire form. Questions 17, 23 and 24 were deliberately omitted because the data did not reveal any significant facts to tabulate.

Question 1 – Location of Tribunal

London (22%) and the Midlands (20%) are the main locations where race cases are heard by Industrial Tribunals. This could be accounted for by the large number of ethnics resident in these areas. This was followed by the Southern areas (14%) and the North West (13%) which also deal with a significant number of race cases as compared against Tribunals in other parts of the country. Race cases are also heard at other locations as indicated by Table 1 but not to such a large extent. The table below shows data for cases heard by various Tribunals by region.

Table 1

tribunal	London		
location	Southern	Count 60	Col % 14.0%
	Wales&West	38	8.8%
	Midlands	87	20.2%
	Anglia	42	9.8%
	NorthWest	55	12.8%
	Yorks-Lincs	31	7.2%
	NorthEast	11	2.6%
	S&W Scotland	4	.9%
	N&E Scotland	6	1.4%
Total		430	100.0%

Question 2 & Question 3 – Sex and ethnic origin of applicant

These questions related to the sex and ethnic origin of the applicants. The majority of applicants were males (58%) and (42%) were females. The majority of applicants classified as 'European' (5%) are Irish. The ethnic origin of applicants was not available in many instances 55% (230 cases) because this information was not available to be recorded on the forms.

Decisions that were out of time, out of jurisdiction or settled, etc, do not record this information in the decisions. Settlements are generally negotiated in strict confidence and sometimes only the name of the applicant and the name of the respondent is divulged. The largest number of applications were received from black other and African-Caribbean populations.

Table 2

Ethnic origin and sex (of applicants)

		sex of applicant					
		male		female		not known	
		Count	Col %	Count	Col %	Count	Col %
ethnicity of applicant	African-Carib	13	5.4%	12	6.8%	4	33.3%
	Black Other	36	15.0%	20	11.4%	0	.0%
	White	9	3.8%	4	2.3%	0	.0%
	Indian	3	1.3%	8	4.5%	1	8.3%
	Pakistani	12	5.0%	5	2.8%	2	16.7%
	Bangladeshi	2	.8%	0	.0%	0	.0%
	European	11	4.6%	10	5.7%	2	16.7%
	Other Asian	11	4.6%	4	2.3%	0	.0%
	Mid-East	8	3.3%	2	1.1%	1	8.3%
	African Asian	0	.0%	1	.6%	1	8.3%
	Other	9	3.8%	6	3.4%	1	8.3%
	not recorded	126	52.5%	104	59.1%	0	.0%
Total		240	100.0%	176	100.0%	12	100.0%

Source: CRE

Question 4 Employment sector – public or private

This question was utilised to establish as to whether the employment sector was public or private. 92% of employers were in the public sector whereas 7% were in the private sector. One would expect public sector employers to be generally large organisations with a comprehensive equal opportunity policy. The large number of respondents in the public sector could indicate that applicants had a greater chance of succeeding than when proceeding against private sector organisations.

Table 4

		Count	Col %
employment sector	private	30	7.0%
	public	395	91.9%
	no information	5	1.2%
Total		430	100.0%

Question 5 - Nature of complaint

This question related to the nature of the complaint. Table 5 revealed that 70% of the total were dismissal on grounds of race. Of these 24 were black, 9 South Asian and 37 were classified as 'other'. Other grounds of complaint were based on not being short-listed or appointed on racial grounds (12%), not interviewed on racial grounds (1%), unfair selection for redundancy (.5%) and failed to gain promotion/transfer, etc. on racial grounds (2%).There is no significant difference in type of complaint between the regions. There is no distinct pattern emerging, therefore it is not possible for a regional breakdown of figures.

Table 5

Q5 Nature of Complaint

		Ethnic Group						Total	
		Black		South Asian		All other			
		Count	Col %	Count	Col %	Count	Col %	Count	Col %
complaint type	unfair dism	22	25.6%	6	18.2%	64	20.6%	92	21.4%
	dism on race grnds	24	27.9%	9	27.3%	37	11.9%	70	16.3%
	not s/listed or appntd	10	11.6%	10	30.3%	31	10.0%	51	11.9%
	not interviewed	2	2.3%			3	1.0%	5	1.2%
	unfair redundancy					2	.6%	2	.5%
	other employment condtns	15	17.4%	4	12.1%	93	29.9%	112	26.0%
	not promoted etc	5	5.8%			5	1.6%	10	2.3%
	other	8	9.3%	4	12.1%	76	24.4%	88	20.5%
Total		86	100.0%	33	100.0%	311	100.0%	430	100.0%

Source: CRE

Question 6 – General area of the complaint

This question related to the nature of discrimination claimed : 77% claimed direct discrimination, 16% brought actions under victimisation, only 1% (4) alleged indirect discrimination, 6% cited other factors. The largest number of claims was attributed to direct discrimination.

Table 6

		Ethnic Group						Total	
		Black		South Asian		All other			
		Count	Col %	Count	Col %	Count	Col %	Count	Col %
complaint area	victimisation	24	27.9%	6	18.2%	36	12.4%	66	16.1%
	direct discrim	62	72.1%	27	81.8%	228	78.4%	317	77.3%
	indirect discrimntn					4	1.4%	4	1.0%
	other factor					23	7.9%	23	5.6%
Total		86	100.0%	33	100.0%	291	100.0%	410	100.0%

Question 7 – Reference to the RR65 Questionnaire

The RR65 Questionnaire was referred to in only 4% of cases and it was not mentioned in 96% of cases. Neither questions 6 or 7 can be broken down by region because data is so limited as to be meaningless.

Table 7

		Count	Col %
RR65 used	yes, it is referred to	19	4.4%
	no, not mentioned	411	95.6%
Total		430	100.0%

Question 8 – The Code of Practice

This was an important question. Only in 2% of cases was reference made to the Code of Practice. 98% did not mention the Code at all.

Table 8

		Count	Col %
Code Referrred	Code referred to	8	1.9%
	Code not mentioned	422	98.1%
Total		430	100.0%

Question 9 - Mediation

93% of cases did not resort to mediation and only 7% did use mediation as a form of resolution.

Table 9

		Count	Col %
mediation?	yes	32	7.4%
	no	398	92.6%
Total		430	100.0%

Question 10 – Duration of Hearing

This question referred to the duration of the hearing. 79% of cases lasted between one day and one week and only 2% of cases lasted over four weeks.

Table 10

Q 10 Duration of hearing

		Col %
duration of hearing	LT 1 week	78.8%
	1-4 weeks	4.9%
	over 4 weeks	2.1%
	no details	14.2%
Total		100.0%

Source: CRE

Question 11 – Real time taken by the case

The total number of days (real time) taken by the cases ranged from one day (54%) and 4% took approximately two weeks. Nearly 80% of hearings are concluded within one week – with the majority dealt with in just one day.

Table 11

Q11 Actual number of days taken to hear the case

		Count	Col %
number of days	one day	233	54.2%
	two days	68	15.8%
	3 days	29	6.7%
	4 days	15	3.5%
	5 days	6	1.4%
	approx two weeks	16	3.7%
	no details	63	14.7%

Source: CRE

The data is not robust enough to break down into regions.

Question 12 – the Decision of the case

77% of the cases were decided by a unanimous decision and 9% were divided by a majority decision. In 22% of cases it was not indicated.

Table 12

		Count	Col %
decision	unanimous	331	77.0%
	majority	4	.9%
	not indicated	95	22.1%
Total		430	100.0%

Question 13 - Outcome of case

This question dealt with the outcome of cases - 15% were upheld, 62% were rejected and 20% were settled.

Table 13

Outcome Col% Col% Col%	no details Upheld Rejected Settled	3.3% 15.1% 61.6% 20%
Total	Col %	100%

The data did not show any significant variation to evaluate regional differences.

Question 14 - Awards

This question tried to ascertain the variety of awards that were granted by the Tribunals. A large number of awards fell into the 'other' category – 62%, for example, costs, awards for unfair dismissal. Only 6% were awarded for injury to feelings and 28% were awarded loss of earnings compensation.

	No.	%
Injury to feelings	3	5.56
Aggravated Damages	0	0.00
Loss of earnings	15	27.78
Personal injury	1	1.85
Loss of prospective earnings	2	3.70
Other	33	61.1
TOTAL	54	100

It was not possible to ascertain the awards after outcome according to regions because of the small number of cases that are considered for awards. This reflects the immense difficulty of proving and succeeding in race discrimination cases. In many cases the amount of the awards are generally low with a few exceptional awards of £20,000 or more for injury to feelings. The larger awards fall within loss of earnings and loss of prospective earnings.

Question 15 – Reference to RR65 by the Chairman/Panel

Was there any reference to the RR65 by the Chairman/Panel. 9% made reference to the RR65 Questionnaire and 91% made no reference at all.

Table 15

		Count	Col %
Reference To RR65	yes	39	9.1%
	no	391	90.9%
Total			100.0%

Question 16 – Weight of facts versus points of law

This question was attempting to establish as to whether facts or points of law were more important. 35% placed emphasis on factual disputes and 15% on points of law. 24% relied on both.

Table 16

		Count	Col %
Facts or law	factual disputes	149	34.7%
	points of law	63	14.7%
	both	104	24.2%
	cannot conclude	108	25.1%
Total		430	100.0%

According to the table, there is nothing to suggest regional inconsistencies. The differences are insignificant.

Question 18 - Attitude of Tribunal to evidence

This question tested the attitude of the Tribunal to the evidence. 48% were influenced by the respondents evidence and only 13% were swayed by the applicants evidence.

Table 18

		Count	Col %
tribunal attitude	appl's evidence influentl	56	13.0%
	resp's evidence influentl	207	48.1%
	no clear cut indication	167	38.8%
Total		430	100.0%

Table 18

		tribunal attitude						Total	
		appl's evidence influentl		resp's evidence influentl		no clear cut indication			
		Count	Row %	Count	Row %	Count	Row %	Count	Row %
geographical region	London & South	29	18.6%	52	33.3%	75	48.1%	156	100.0%
	Midlands & Wales	18	10.8%	81	48.5%	68	40.7%	167	100.0%
	Northwest + Yorks	7	8.1%	57	66.3%	22	25.6%	86	100.0%
	Scotland + Tees/Tyne	2	9.5%	17	81.0%	2	9.5%	21	100.0%
Total		56	13.0%	207	48.1%	167	38.8%	430	100.0%

No significant differences by region because the small number of cases vitiates what appears to be significant.

Question 19 – Weakness in either parties' evidence

This question tried to establish any weakness in either parties' evidence - 16% identified the applicants' evidence as being weak whereas 5% of the respondents evidence was found to be weak. In 79% of the cases there was no mention of any weakness in the evidence.

Table 19

		Count	Col %
weakness in evidence	apps evidence weak	70	16.3%
	resp evidence weak	20	4.7%
	no weakness mentioned	340	79.1%
Total		430	100.0%

Question 20 – Racial/abusive comments

Was racial abuse part of the applicant's claim? 18% of cases specified racial abuse and no comments on abuse was made in 46% of the cases. Abuse was not applicable in 36% of the cases.

Table 20

		Ethnic Group						Total	
		Black		South Asian		All other			
		Count	Col %	Count	Col %	Count	Col %	Count	Col %
abusive comments?	yes	28	32.6%	7	21.2%	44	14.1%	79	18.4%
	no	45	52.3%	19	57.6%	133	42.8%	197	45.8%
	not applicable	13	15.1%	7	21.2%	134	43.1%	154	35.8%
Total		86	100.0%	33	100.0%	311	100.0%	430	100.0%

The data cannot be broken down by region because it is not robust enough for analysis.

Question 21 – Poor presentation of case by either party

In 6% of the applicants' cases and in 1% of the respondents' cases, poor presentation appeared to have a bearing on the case. This factor was not applicable in 93% of the cases.

Table 21

	Count	Col%
Presentation? Poor presentation pp appl	25	5.8%
Poor presentation pp resp	5	1.2%
Not applicable	400	93.0%
Total	430	100%

Question 22 – Respondents familiarity with race issues

This dealt with the issue of the respondents' race awareness. 22% of employers were aware of equality issues and 50% were not aware. In 28% of cases it was not possible to establish the degree of knowledge of Equal Opportunity issues of the employer.

Table 22

		Count	Col %
respndnt race aware?	yes	93	21.6%
	no	216	50.2%
	dont know	121	28.1%
Total		430	100.0%

Table 22

		respndnt race aware?						Total	
		yes		no		dont know			
		Count	Row %	Count	Row %	Count	Row %	Count	Row %
geographical region	London & South	26	16.7%	73	46.8%	57	36.5%	156	100.0%
	Midlands & Wales	40	24.0%	83	49.7%	44	26.3%	167	100.0%
	Northwest + Yorks	23	26.7%	43	50.0%	20	23.3%	86	100.0%
	Scotland + Tees/Tyne	4	19.0%	17	81.0%			21	100.0%
Total		93	21.6%	216	50.2%	121	28.1%	430	100.0%

There is no significant difference by region-there is a degree of uniformity across the regions.

Question 25 – Power of Tribunal to draw inference

This question tested the power of Tribunals to draw inference. In 22% of cases, the Tribunal clearly drew inferences but in 33% of cases there was no need to infer. The Tribunal was reluctant to infer in 2% of cases.

Table 25

		geographical region								Total	
		London & South		Midlands & Wales		Northwest + Yorks		Scotland + Tees/Tyne			
		Count	Col %	Count	Col %	Count	Col %	Count	Col %	Count	Col %
drawn inferences?	clearly drawn inferences	34	21.8%	34	20.4%	24	27.9%	4	19.0%	96	22.3%
	reluctant to infer	2	1.3%	4	2.4%	2	2.3%	2	9.5%	10	2.3%
	no need to infer	40	25.6%	65	38.9%	24	27.9%	14	66.7%	143	33.3%
	IT keen to infer	2	1.3%							2	.5%
	sympathies neutral	1	.6%	1	.6%	4	4.7%			6	1.4%
	cannot conclude	77	49.4%	63	37.7%	32	37.2%	1	4.8%	173	40.2%
Total		156	100.0%	167	100.0%	86	100.0%	21	100.0%	430	100.0%

There was no significant difference by geographical region and there is a degree of uniformity across the regions. The figures for Scotland and Tyne/Tees are insignificant because of the very small number of cases as compared against the other regions.

Question 26 – Chairman/Panels knowledge on race issues

To what extent the Chairman/Panel appear to be informed on race issues? 67% of them appeared to be well informed and in 33% of cases, one cannot comment.

Table 26

		Count	Col %
chair race-informed?	well informed	287	66.7%
	cannot comment	143	33.3%
Total		430	100.0%

Table 26

		chair race-informed?				Total	
		well informed		cannot comment			
		Count	Row %	Count	Row %	Count	Row %
geographical region	London & South	103	66.0%	53	34.0%	156	100.0%
	Midlands & Wales	112	67.1%	55	32.9%	167	100.0%
	Northwest + Yorks	54	62.8%	32	37.2%	86	100.0%
	Scotland + Tees/Tyne	18	85.7%	3	14.3%	21	100.0%

There was no significant difference by geographical region.

Question 27 – Applicant's legal representation

58% of applicants were represented by males and 20% by female representatives. 1% were self-represented.

Table 27

Q27 Applicants' legal representation

		Count	Col %
appl's legal rep	male	209	57.7%
	female	71	19.6%
	solicitor	4	1.1%
	self represented	5	1.4%
	dont know	72	19.9%
	99	1	.3%
Total		362	100.0%

Table 27

		geographical region								Total	
		London & South		Midlands & Wales		Northwest + Yorks		Scotland + Tees/Tyne			
		Count	Col %	Count	Col %	Count	Col %	Count	Col %	Count	Col %
appl's legal rep	male	70	52.6%	79	56.8%	47	67.1%	13	65.0%	209	57.7%
	female	35	26.3%	27	19.4%	3	4.3%	6	30.0%	71	19.6%
	solicitor			4	2.9%					4	1.1%
	self represented	2	1.5%	1	.7%	2	2.9%			5	1.4%
	dont know	25	18.8%	28	20.1%	18	25.7%	1	5.0%	72	19.9%
	99	1	.8%							1	.3%
Total		133	100.0%	139	100.0%	70	100.0%	20	100.0%	362	100.0%

There is no significant difference by geographical region. Scotland and Tyne/Tees dealt with a small number of cases as compared to the other regions.

Question 28 – Respondent's legal representation

58% of the respondents legal representatives were male and 18% were female.

Table 28

Q28 Respondents' legal representation

		Count	Col %
resp's legal rep	male	214	58.3%
	female	66	18.0%
	barrister	1	.3%
	solicitor	4	1.1%
	multiple represntn	13	3.5%
	other	5	1.4%
	dont know	64	17.4%
Total		367	100.0%

Table 28

		geographical region								Total	
		London & South		Midlands & Wales		Northwest + Yorks		Scotland + Tees/Tyne			
		Count	Col %	Count	Col %	Count	Col %	Count	Col %	Count	Col %
resp's legal rep	male	90	63.8%	71	52.2%	44	62.0%	9	47.4%	214	58.3%
	female	31	22.0%	24	17.6%	5	7.0%	6	31.6%	66	18.0%
	barrister	1	.7%							1	.3%
	solicitor			2	1.5%	2	2.8%			4	1.1%
	multiple represr	2	1.4%	6	4.4%	3	4.2%	2	10.5%	13	3.5%
	other	1	.7%	2	1.5%	2	2.8%			5	1.4%
	dont know	16	11.3%	31	22.8%	15	21.1%	2	10.5%	64	17.4%
Total		141	100.0%	136	100.0%	71	100.0%	19	100.0%	367	100.0%

There was no significant difference by geographical region because once again the number of cases dealt with by Scotland and Tyne Tees is very small in comparison to the other regions.

Discussion of Results

The aim of this project was to gather evidence on the conduct and performance of Tribunals and one of the criteria was to identify inconsistencies between Tribunals in different regions. The inconsistency theory was tested through the Questionnaire by attempting to explore the way the Tribunals approached the sifting of evidence, whether they were predisposed to giving more weight to the evidence of one party over the other and more generally the conduct of the proceedings. The observation of cases at Tribunals ensured that the written case decisions were not overlooking aspects of Industrial Tribunal proceedings which may not be immediately apparent from the written decisions. I shall return to this aspect at a later stage.

The attitude of the Tribunal to the evidence was tested in question 18 as to their influence on the applicant and the respondent. Question 19 tested the weakness in either party's evidence. The study concludes that the Tribunals are generally consistent in arriving at their decisions. Another significant area of the conduct of Tribunals was tested by question 25 - dealing with the powers accorded to the Tribunal to draw inferences of race discrimination. Question 25 clearly establishes that in 22.3% of cases Tribunals used their power of inferences but in 33.3% of cases there was no need to draw inferences because the evidence was apparent. The Tribunals were reluctant to infer discrimination in 2.3% of cases. So Tribunals are using their discretionary powers to draw inferences of discrimination. This destroys the belief that Tribunals were reluctant to draw inferences. Having stated this fact, the Tribunals still look for evidence before an inference is drawn. With regard to the applicant, he/she has the burden of proof to establish discrimination. The study affirms that where the evidence is weak or contradictory it will not draw an inference of discrimination.

The RR65 Questionnaire (Question 15) was referred to only in 9.1% of the cases and no reference was made to it in 90.9% of cases. This information raises an important question because the RR65 is a very important document in assessing the evidence in a case. Many

significant pieces of information can be obtained from a reply to the Questionnaire, for example, the criteria for a job vacancy, how they were selected for the post, the number and qualifications of each candidate, as to how they were assessed by the Panel. The applicant can obtain a lot of information to explore as to whether he/she was discriminated or not on grounds of race.

The Code of Practice (Question 8) was referred to only in 1.9% of cases and not mentioned in 98.1%. This illustrates the lack of knowledge of the general workforce and the absence of the implementation of equal opportunity policies in the workforce (Question 22) 21.6% of employers in the study claimed to be aware of race issues and 50.2% had no awareness and 28.1% stated that they did not know. The study also identified that 91.9% of the respondents were in the public domain. One would expect public sector employers to be generally large organisations and to have a comprehensive equality opportunity policy finally in place. The findings of the research concludes that the CRE's Code of Practice has had little or no effect on the Tribunals in making their decisions. The Tribunal has taken into account the presence or absence of equal opportunity policies to some extent in arriving at its decisions. The Tribunal can certainly place more emphasis in this area. In one of the cases observed by me at a Tribunal (Case No. 5), the Chair refused the applicant's solicitor to question the respondent about their equal opportunity policy. The Chairman stated that this was irrelevant as it was not part of the allegations of the applicant in her originating application. The applicant's solicitor thought that this was crucial evidence and I felt that the Chairman ought to have allowed this line of questioning in a race case to find out whether the respondents were an equal opportunity employer. Further the respondents had drawn up an equal opportunity policy in 1992 and it had not been reviewed to date. This is a significant issue that ought to have been determined by the Tribunal.

The research concluded that the Chairs and the Panel Members appear to be well informed on race issues (Question 26). This revealed that 66.7% of them were well informed. This issue is

further borne out by my observation of cases that Tribunals in all the cases (Cases 1 - 10) showed a knowledge of race awareness. In some instances the knowledge was extremely good as evidenced by the quality of questions that the Chair and the Panel asked the applicant, respondent and their witnesses. One of the Panel Members is supposed to have specialist knowledge and experience on race issues. Chairs and Tribunal Panels do receive training on race issues upon appointment. This was confirmed by the body that conducts courses for Tribunal personnel.

It was not possible to ascertain the awards after outcome according to regions because of the small number of cases that are considered for awards because of the difficulty in finding a case for comparison of each complaint upheld. 15.1% of applications were upheld and awards were mainly for loss of earnings resulting from dismissal and redundancy. In cases that were settled it was difficult to establish as to what different heads of damages were awarded. Generally settlements are negotiated in confidence and the parties sign a confidentiality clause. The cases analysed were sometimes combined with other aspects of the law namely unfair dismissal, sex discrimination, Wages Act, breach of contract , etc. The awards were sometimes given as a lump sum with no specific mention, for example, to injury to feelings, personal injury, loss of earnings, loss of prospective earnings, etc.

The Tribunal has a discretion to rule whether the application can still proceed to hearing although it is out of the three month time limit set by the RRA 1976. The applicant may have valid reasons for lodging the originating application late - he/she may have been ill, out of the country, or in some cases was wrongly advised, etc. The Tribunal will generally listen to the arguments put forward by the applicant or on his behalf and the Tribunal has wide powers in the interests of justice to allow the applicant to proceed with the hearing. The CRE in its Third Review of the RRA put forward the proposal that the time limit for lodging complaints of discrimination in employment should be extended to six months in employment matters. This recommendation was rejected by the Government. The study found that 61.6% applications

were rejected. Cases were dismissed because of the lack of evidence, applications were out of time, applications were out of jurisdiction, applications were withdrawn by the applicant and other miscellaneous reasons, for example, neither party attended etc. Only 15.1% of cases were upheld and 20% were settled. The Tribunal has to establish evidence of discrimination before a case is upheld in favour of the applicant. A large number of applications were lacking in merit to establish race discrimination. It appears that many applications are lodged on the basis of race when, for example, the reason for their dismissal is for some other reason, for example, gross misconduct. Many applications are rejected on points of legal technicalities. There are a large number of weak applications which fail to establish even a prima facie case of race discrimination.

The ethnic origin of applicants was not available in many instances (55.29%) because this information was not available in cases that were settled, out of time and out of jurisdiction. The majority of applicants classified as 'European' were Irish. The largest categories of applicants were termed as 'black other' and 'Afro-Caribbean' (19.47%) so the survey can conclude that these two groups felt that they were discriminated against in the work place more than the other racial groups. The study found that 77% claimed direct discrimination. (16.3% alleged dismissal on grounds of race). 16% felt that they were victimised on grounds of race and only 1% alleged indirect discrimination. So the survey concludes that the majority of complaints are brought under Section 1 of the RRA 1976 which states less favourable treatment on grounds of race, colour, nationality ethnic or national origins. Only 1% alleged indirect discrimination whereby a condition or requirement could not be adhered to by a person of a particular racial group and which cannot be shown to be justifiable irrespective of the colour, race, nationality, ethnic or national origin of the person to whom it is applied and which is detrimental because he/she cannot comply with it. Indirect discrimination is still too difficult to prove because of legal technicalities that have to be surmounted, for example, 'Condition of requirement', 'justifiability' and 'proof of discrimination'. There also has to be some form of 'detriment' suffered by the applicant.

The survey also concluded that 92.6% of cases did not resort to mediation and only 7.4% did use mediation as a form of resolution. Mediation especially through ACAS (Arbitration and Conciliation Advisory Service) can play an important role in resolving disputes before resorting to a hearing at the Tribunal. This saves time and public money. Applicants are reluctant to resolve their complaint through this means because they are not in a very powerful bargaining position when compared against the employer. The employer generally puts forward a ridiculous amount as compensation for the applicant to accept. Many applicants prefer to go to the Tribunal to have their allegations addressed rather than accept the offer of compensation through ACAS. The applicant generally feels that he/she is pressurised to accept the offer - some accept because they do not have legal representation or in some cases just to avoid the stress of proceeding with the case.

There were no significant differences geographically as identified in Tables 18, 22, 25, 26, 27 and 28. Tables 5, 6, 7, 10, 13 and 14 can not be broken down by geographical region because the data is limited as to be meaningless. The research hypothesis that Tribunals are inconsistent in their findings and that this may unfairly disadvantage applicants is not substantiated. This finding is further affirmed by my observation of cases at Industrial Tribunals. Tribunals in the London area and across the country were observed to ascertain their conduct and performance to identify inconsistencies.

Observed Cases

The biggest problem encountered was that there was always the possibility of the case settling although it was listed for hearing. The settlement could be negotiated at any time varying from a few days before the actual hearing to any day during the course of the proceedings. The appendix marked 8 has a list of ten cases that were observed very closely. In my view, practically all the cases observed, could not be faulted in any way. The proceedings were conducted very fairly, both the applicants and the respondents were accorded equal treatment.

In cases (No.2 and 9) where the applicants represented themselves, the Tribunal Chairs provided a lot of support, for example, by advising the applicants as to how to pose a particular question in cross examination, etc. Case No. 2 was a very complicated case and the Chair exercised a great deal of patience and assisted the lay applicant throughout the conduct of the proceedings. In consideration of the length of the case (30 days) and the number of documents involved, I found not only the Chair but the Panel exercising a great deal of understanding and they interrupted the proceedings on several occasions to ask pertinent questions of the respondents, the witnesses and the applicant. I spoke to the applicant when she was eventually given a reserved decision. Her case was dismissed because the Tribunal felt that a case for discrimination was not established. The applicant informed me that the behaviour and attitude of the Tribunal was totally different on the days that I was not present as an observer (I revealed my identity as an observer from the CRE to the Tribunal Panel). The applicant was critical of the Chair, but based on my observation, the Chair offered the applicant a great deal of assistance in presenting her case.

In Case No. 9, the applicant was at a total loss in presenting his case to the Tribunal despite the assistance offered by the Chair. In Case No. 6 the applicant was represented by a lay colleague. The applicant's representative was very inexperienced in his attempt to prove the allegations by the applicant. The Chair was once again exercising great patience when the applicant's representative was virtually trying to present the whole case during re-examination of the applicant. I certainly could not find any inconsistencies in the proceedings between different regions and Tribunals that were observed by me. In one case only (Case No. 5), I felt that the Chairman ought to have allowed a question relating to the equal opportunity policies of the employer by the applicant's solicitor. The Chairman felt that this was irrelevant, as it was not part of the allegations of the applicant in her originating application. This is a significant issue in a race cases and I felt that the Chairman had erred on this particular point in the conduct of his proceedings. One of the purposes of the research was to determine to what extent the absence of equal opportunity policies affect the decision marking of Tribunals, therefore the

issue of equal opportunity policy is very relevant to the Tribunal. In this particular case observed the presence or absence of an equal opportunity policy would have made no difference because the case was weak and the probability of the applicant succeeding was very remote. The evidence to establish race discrimination was not present and there was insufficient evidence for the Panel to draw an inference of discrimination.

Another significant purpose of the research was to establish if, and to what extent the Chairman/Panel appeared to be informed on race issues. The quantitative data established that 66.7% of Chairs and the Panel were well informed on race issues. My observation of cases substantiates this point. I found the Chairs and Panel Members well informed on race issues. This was evidenced by the nature and quality of questions posed by them to the applicants, respondents and witnesses. I found that their line of questioning was very pertinent and indicated a very good knowledge of race issues. The Chairs have to be singled out as being in most cases, extremely well informed when compared with the Panel Members. Some Panel Members also displayed a very high degree of knowledge on race relations and the RRA 1976. With the exception of two cases (Case No. 7 and 8) there was always one member from the ethnic minority community on the Panel. This is significant because of the accusation of bias against applicants and not understanding race issues by the Tribunal is reduced to some extent. The majority of cases are brought by people from the ethnic minority groups and the applicants feel that ethnics on the Panel will be able to identify with their problems.

In my observation of cases I can identify only one case where reference to the CRE Code of Practice was made. The quantitative data found that only 1.9% of cases made reference to the Code. This finding is substantiated by my observation of cases that the reference to the Code is virtually nil and has little or no effect in making decisions in cases at Tribunals. The research sought to establish to what extent Tribunals are using their discretionary powers to draw inferences of discrimination. From my observation of cases, the Tribunals would have drawn inferences if the applicant had established a prima facie case of race discrimination. Some

evidence has to be cited before the Tribunal can draw an inference, for example, in (Case No.5) the applicant was experiencing extreme difficulty in attempting to establish a prima facie case. After listening to the case on the first day I was convinced that she was not treated unfairly and discriminated against under the RRA 1976. The research concluded very convincingly that the requisite points of law had to be complied with before a case could ever proceed to hearing. Applications that did not comply with the procedures of the law failed. The question of establishing evidence and less favourable treatment under the RRA 1976 was of paramount importance. The applicant was expected to provide the Tribunal with comparative evidence demonstrating less favourable treatment under the law.

CONCLUSION

Tribunals do recognise the difficulties of proving race discrimination and they are willing to draw inferences of racial discrimination (22% of cases) but in 33% of cases there was no need to draw inferences because the evidence was apparent. Where the evidence is weak or contradictory it will not draw an inference of discrimination, so the applicant still has the immense difficulty of establishing discrimination. Overt racist acts or words are seldom found in employment situations. Covert racism can operate but the applicant generally experiences a total inability to convey this to the Tribunal. The conclusion is that Tribunals still expect concrete evidence, preferably in some written form by way of letters or other documents. Substantial evidence is still vital to establish race discrimination. 48% of the Tribunal were influenced by the respondents evidence and only 13% were swayed by the applicants evidence. The conclusion to be drawn from this is once again the difficulty of proving race discrimination and also the applicants evidence is often inadequate or is poorly presented.

The Questionnaire procedure RR65, was referred to in only 4% of cases. The Home Secretary has agreed to the CRE's proposal to draw inferences from the failure by respondents to reply to the RR65 Questionnaire. This present power of the Tribunal which is discretionary may be

made obligatory by a change in the RRA 1976. The reply to the Questionnaire can be fabricated and discrepancies can occur. It is doubtful as to whether the Tribunal will place more emphasis by referring to the RR65 Questionnaire because the document is unreliable. I feel that the present trend of reluctance to draw inferences from the failure to the reply to the RR65 Questionnaire will continue and I cannot envisage a drastic change in this area.

With regard to mediation, in most cases the applicant is the weaker party in terms of representation and resources. 93% of cases did not resort to mediation. Greater use of this aspect of resolving disputes will certainly reduce the workload of the Industrial Tribunals and also public expenditure. The conclusion that can be drawn from this is that applicants are reluctant to enter into mediation seriously because the offer of compensation from the employer does not reflect the gravity of the discriminatory act alleged. There is pressure put upon the applicant to accept the offer of a settlement even if it is unsatisfactory. One can also conclude that the employers have no desire to resolve the issue through mediation because they have no problems with resources to proceed with the Tribunal hearing unless they are small employers. Some large employers prefer to settle to avoid bad publicity even if they have reasons to believe that they will succeed against the applicant.

The study found Tribunal Panels to be generally well informed on race issues. This is further substantiated by the observation of cases at Tribunals. We can conclude that race issues are taken more seriously than the past by Tribunals. The Tribunals were also consistent in arriving at their decisions and this disperses the myth of regional inconsistency among Tribunals. The large number of applications that are rejected by the Tribunals is because of the lack of evidence or being out of the time limits or out of the ambit of the RRA 1976. This raises the question of the quality of advice that is given to applicants. There could be an argument to suggest that much of the legal advice available to applicants is of poor quality. Some represent themselves or are represented by a friend or relative (this knowledge is gained from my experience as a complaints officer). In view of the low success rate of race cases, (15% upheld

according to the study), applicants face immense difficulties in establishing their cases. This is largely due to the legal technicalities as already discussed in the results and the limitations of the RRA. Several criteria has to be fulfilled before race discrimination can be established. Complainants rely on their assumption that they have a good case – they have no idea of the criteria that the law requires to establish race discrimination. One can conclude that many applicants fail to comprehend the complexities that are involved in bringing proceedings under the RRA 1976.

The CRE's Code of Practice was referred to in only 2% of the cases. This illustrates how few employers have a race equality programme in place. The study uncovered that 50% were not aware of race equality issues – this is a significant finding to learn that equal opportunities is not taken seriously by half the respondents. One can also conclude that the CRE's Code of Practice is given very little weight, if at all, by the Tribunal or the employers. One would expect public sector employers to be generally large organisations with a comprehensive equal opportunity policy. There is still a long way to proceed before discrimination in the workplace is tackled seriously.

A significant majority of all applicants were male, one can conclude that more males in the workforce are readily prepared to take on their employers in order to establish their rights. The majority of applicants classified as 'European' are Irish, so one can conclude that there is widespread discrimination against Irish as compared to the other white racial groups. 80% of the hearings are concluded within one week – this is because the study found that over 60% of applications were rejected on grounds of legal technicalities on the first day. Once again one can conclude the difficulties that applicants encounter when they bring proceedings on racial grounds. They cannot proceed unless they can conform to the procedures of the law rigorously, for example, time limits, jurisdiction, legal criteria, etc. The largest number of claims is attributed to direct discrimination. Only four cases were brought under indirect discrimination. The conclusion to be reached on this fact is that it is extremely difficult to prove indirect

discrimination. One has to get over several legal technicalities before one can succeed in establishing indirect discrimination, for example, condition or requirement, justification, etc.

Where cases are upheld, awards are mainly for loss of earnings resulting from unfair dismissal and redundancy. Awards for injury to feelings are made in around only 6% of cases. The conclusion to be drawn is that awards in race cases are made only in very few instances. The awards are more substantial in cases that are settled. Evidence is generally in the hands of the employer. This can be substantiated by the observation of cases in Industrial Tribunals (appendix 8 (1-10). Once again the difficulty of establishing race discrimination is concluded. In question 19 the respondents evidence was more likely to be considered as more convincing. This confirms the previous point about the applicants' evidence as being weak or poorly presented. In 16% of the cases the Tribunal has commented on the weakness of the applicants' case, whereas only 5% of the respondents' evidence was identified as being weak. The results identified the immense difficulty encountered in proving discrimination. The applicant still has the huge burden of establishing discrimination. The Tribunals are faced with the inadequacies of the RRA 1976. The difficulties of proving discrimination ties in with the fact that the RRA 1976 is rights based law. This aspect is discussed in Chapter VII. Rights are discussed in formal courtroom settings thus alienating one from real human experience.

Race discrimination is a social problem which the Court turns into an argument about rights. Race legislation creates an illusion of eliminating discrimination. The real experiences of discrimination are translated into highly technical language which bears very little resemblance to the practical realities of discrimination, for example, the legal criteria to establish discrimination. The law on indirect discrimination is even more complex to address in discrimination cases. The outcome of the results of the study coupled with my experience as a complaints officer affirms the notion held by the critical legal studies writers that legal proceedings do alienate. The formal procedures in the Courts have very little connection with the actual experience of the discrimination experienced. The whole process in the Tribunal is

formal, abstract, oppressive and riddled with technicalities. The Tribunals are contributing to piecemeal reforms of eradicating injustice in society. When an applicant succeeds he/she believes that a wrong has been addressed but this is only an illusion that a right has been established.

Both Professor Hepple and Alan Freeman (critical legal writer) agree that discrimination is not seen as a social problem but as an argument dealing with a series of abstractions which alienate the victim of discrimination from his experience. Can reform bring legal proceedings closer to the applicants experience? Tribunals are compelled to adhere very closely to the present RRA 1976 (which was in desperate need of drastic reform until the Race Relations (Amendment) Act 2000). If the burden of proof shifts to the respondent after a prima facie case of discrimination has been made out, applicants will be assisted by this change in their attempt to establish discrimination. At present the onus is placed very heavily on the applicant to discharge the burden of proof.

The powers of the Tribunal are further limited by the RRA 1976 in the time limit set for bringing proceedings in employment cases. There is a need to extend this to six months so that the applicant can overcome the problems of lodging an application late for a variety of reasons, for example, fear of being dismissed, victimised or other reprisals. The RRA 1976 reforms to include other areas of public service will enable the Tribunals to cover a much wider ambit and address race discrimination on a wider scale. Even if the reforms to the RRA 1976 pertaining to Tribunals are addressed, then there is still the problem of legal criteria being established before a race case is proven. The Tribunal procedure has to be simplified so that it can be understood by the lay man. At present the applicant, if un-represented by a legally qualified person is pitted against a respondent who is generally legally represented.

There is an urgent need for legal aid to assist the applicant. Tribunals are legalistic and technical, they ought to be more informal, accessible and less adversarial. There should be

more ethnic minority Chairs and Panel Members, this will to some extent inspire the applicants that their cases are being dealt with fairly. The presence of an all white Panel can sometimes alienate the applicant even further as many applicants lack faith in the decisions of the Tribunals based on the low success rate and awards by the Tribunals. The Tribunals are very reluctant to deviate from the present norms of society. Courts are called upon to determine and evaluate social facts. The RRA 1976 imposes limits on its competence and scope in what it can achieve. Tribunals are supposed to be more informal, speedy and friendly yet the objective of creating an informal system has not really been achieved. I cannot foresee dramatic changes by the suggestions put forward but change is a real probability in the light of the reform to the Race Relations Act of 1976 (The Race Relations (Amendment) Act 2000). If changes are implemented, it will be a slow process and may take time before the procedures at Tribunals are altered to bring the proceedings closer to the experience of applicants.

CHAPTER IX

REFORMS TO RACE LEGISLATION

Reforms to race legislation can effect changes to society if the legislation is effectively enforced.

The Code of Practice

The recommendations of the Code of Practice for the elimination of racial discrimination and the promotion of equality in employment are discussed. The Code does not impose any legal obligation itself nor is it an authoritative statement of the law. The Industrial Tribunal in the past did not take the Code seriously until 1988 in Singh v West Midlands Transport Executive Case (1988). Following this case there has been a change in the attitude of Tribunals. My survey of employers who were either in breach or possible breach of Section 29, 30/31 of the RRA of 1976 showed that Equal Opportunity policy is not taken seriously by many organisations. Some of the large organisations did attempt to bring about a comprehensive equal opportunity policy. My survey revealed that small employers had done very little in this area. The Code of Practice, if fully implemented, can achieve change and be very effective. It was extremely difficult for the Code to have widespread impact as long as it was voluntary in nature.

Other factors to bring about changes under Section 29,30/31 RRA 1976

When an employer breaches Section 29 or 30/31, most of the cases are settled. The terms of such settlements typically include an admission of the contravention and undertakings about future conduct by the employer. To most employers the undertaking has little or no significance. If the settlement included a substantial fine, then perhaps it would be taken

seriously. At present a person is liable on summary conviction to a fine not exceeding £400. It appears from my survey on pressure cases and advertisements that the granting of an undertaking and admission has had little or no impact on most of the employers. There is a need for the CRE to pursue these employers and monitor their progress in equal opportunities.

Recruitment methods which excluded or disproportionately reduce the numbers of applicants of a particular racial group and which cannot be shown to be justifiable is unlawful. There is a pressing need for tighter and more effective legislation under Section 29, 30/31 of the RRA 1976. The present law is weak with limitations. The law is inadequate to check on breaches of Section 29, 30/31. The Race Relations (Remedies) Act 1994 abolished the upper limit for compensation payable to victims of discrimination. This remedy has not been extended to S29,30/31 RRA. There is an urgent need for a much heavier penalty. Changes in legislation in these areas will improve the effectiveness of the law enforcement process. Strong enforcement powers coupled with a great deal of promotion work would certainly achieve better results than at present. The Commission's power to bring law enforcement proceedings are still limited in scope. There is no general right to take law enforcement action or bring class actions. The number of cases under Section 29 in the designated county Courts is very low. The delays coupled with low potential award of damages act as disincentives in bringing cases to the County Courts. At present the penalty for breach of Sections 29, 30/31 do not reflect the seriousness of the offence nor does it act as a deterrent to employers who are discriminating.

Defence under Instructions/Pressure to Discriminate

Section 32 (3) of the RRA 1976 provides a special defence, where an employer can show that he or she took "such steps as were reasonably practicable to prevent the employee from doing that act, or doing in the course of his employment acts of that description". Yet Section 32 provides that an employer is liable for the acts of his or her employee, whether or not the

unlawful discrimination occurs with the employers knowledge. The defence under Section 32 (3) of the RRA 1976 should be removed. Where a defence under Section 32 (3) succeeds individuals should be held liable for their own acts and ordered to pay compensation. This presents difficulties regarding the financial resources of individuals.

Ethnic Monitoring

Monitoring is essential to achieve equal opportunities. Professor Hepple says:

> *"One of the paradoxes of the existing legislation in Britain is that an employer who voluntarily monitors may find that statistics are used against him or her in litigation while an employer who fails to monitor cannot be compelled to do so. So there is a disincentive to monitoring" (Hepple, 1987).* This occurred in the West Midlands Transport Executive v Singh (1988). Compulsory ethnic monitoring is needed very urgently. Statutory ethnic monitoring would assist employers in assessing performance on equal opportunities. According to (McCrudden, 1991), the Secretary of State should be given powers to prescribe ethnic record keeping of employees. The Commission should be empowered to require returns to be made where record keeping has been prescribed. The Commission may have major problems in dealing with such a vast accumulation of data. On ethnic monitoring the Consultative Paper on 'Second Review of the RRA 1976" recommends that the Commission should have the power to require the data on demand, instead of every employer returning the data to the Commission annually.

> *"The Commission is, subject to this consultation, minded to conclude that in Britain there ought now to be a statutory ethnic monitoring requirement on all employers; a framework of legislation in which the provision of equality of opportunity becomes the objective, with goals and timetables backed by appropriate administration enforcement (and in this we are supported by the conclusions of the Policy Studies*

Institute Research, Racial Justice at Work); and that the economic power of both central and local Government should be used in support of this policy" (CRE,1991).

The CRE's Third Review of the Race Relations Act 1976 and Proposals for Reform (1998)

The CRE in its Third Review of the RRA put to the Home Secretary that the shift of the burden of proof should be on the respondent after a prima facie case of discrimination has been made out. The Home Secretary has given conditional support for this proposal as he is keen to maintain consistency between the Sex Discrimination Act and the RRA. This change in the law should make the onus of proof which lies on the applicant solely at the present moment an easier task. This would hopefully assist applicants who represent themselves and are faced with the difficulties of establishing discrimination. This problem is further compounded by the lack of witnesses or reluctant witnesses who are served with witness orders. The witnesses are generally fellow employees who are afraid for their job situation in their organisations. This may be a covert factor. I did find in the course of observation of cases at Tribunals that applicants who represented themselves or were being represented by someone who was not legally trained did experience severe difficulty in communicating the issues to the Panel (Case Nos. 2, 6 and 9). Large numbers of applications (65.21%) were rejected on grounds of legal technicalities, for example, for not lodging an application within the three months time limit, want of prosecution, or out of jurisdiction and for lack of evidence of race discrimination. The high rate of rejection questions the quality of advice given to applicants and also the perception held by applicants about race discrimination. My experience as a complaints officer affirms the notion that every applicant who comes to the CRE with a complaint strongly believes that their case is very strong and will definitely succeed at the Tribunal. They generally do not pay much heed to advice that evidence of discrimination is a crucial factor and it has to be established on the balance of probability before a case based on race discrimination succeeds.

The Home Secretary has agreed without reservation to the CRE's proposal that there should be a duty on Courts or Tribunals to draw inferences from the failure by respondents to reply to RR65 Questionnaire. The Home Secretary also recommends a statutory 8 week time limit for replies to the Questionnaire. With reference to 'institutional racism', cases are brought at Industrial Tribunals which are based on unintentional prejudice, ignorance and largely on stereotyping of different racial groups. The Home Secretary has made a statement "to tackle discrimination wherever it is found". The Prime Minister also stated his commitment for change. There is a need for changes in the legislation especially the Race Relation Act 1976. What are the implications for the Industrial Tribunal with reference to the Stephen Lawrence Inquiry? The Inquiry accepted the CRE's submission that 'institutional racism' exists in many institutions in Britain. The RRA (Amendment Act) includes other areas of public service not previously covered under the Act, the Tribunal will now have more cases to deal with. Tribunals will have to acknowledge the widely prevalent concept of 'institutional racism' in the cases that it has to decide. The study (Chapter VIII) identified a very good knowledge of race issues by the Chairs and the Tribunal Panel - there is a possibility that this awareness will be increased even further and taken on board pursuant to 'The Inquiry' and changes to the RRA.

The Industrial Tribunals are already playing a part in bringing about a change to society by upholding cases where racial discrimination is established but this power is limited by the RRA. The greatest contribution to reforming legislation can be brought about by addressing 'institutional racism'. The Tribunals will be now be covering a much wider ambit and addressing race discrimination on a wider scale. If changes are brought about to areas of the public service, then a marked change in the pattern of discrimination will be emerging. Hopefully, old prejudices and ignorances will start diminishing to some extent. Changes to legislation in other areas namely the shift of the burden of proof on the respondent after the prima facie case of discrimination is made out, the duty to be placed on Tribunals to draw inferences from failure by respondents to reply to the RR65 Questionnaire and by placing a legal obligation of adherence to the Code of Practice in employment, will assist greatly in the elimination of race

discrimination, thus attempting to change society. A dramatic and immediate change cannot be envisaged for the near future but a change is a possibility for a better society based on equality for all in a longer term. The recommendations of the MacPherson Report coupled with the Proposals for Reform put forward by the CRE in its Third Review of the RRA 1976 will impact on Tribunals in the future. These aims will only be achieved if the proposals for the reform of the RRA 1976 are addressed as a matter of extreme urgency. The radical changes to society could only be brought about through changes in the legislation. Hopefully, the MacPherson Report and the Proposals for Reform put forward by the CRE will assist the Tribunals further in bringing about changes to society by attempting to eradicate racial discrimination from this society. There is a general feeling of optimism by the CRE and the Government to bring about a major charge to race relations in Britain.

The Government's Response to the CRE's Third Review of the RRA – Proposals for Reform 1998

The CRE's Proposals for Reform was published by the CRE on 11 August 1999. The CRE's First Review of the RRA in 1985 received no response from the Home Secretary. In 1992 the CRE submitted it's Second Review to the Home Secretary and in 1994 everyone of the Commission's proposals were rejected. The Third Review was submitted to the Home Secretary in 1998 which took into consideration important legal and political changes, for example, EC law and the then proposed Human Rights Act. In February 1999 following the Stephen Lawrence Report, the Prime Minister and the Home Secretary declared a positive commitment by the Government to tackle race discrimination. The Stephen Lawrence Inquiry accepted the Commission's proposals that the RRA should be extended to cover all aspects of policing and also to bring all public bodies within the scope of the Act.

The Home Secretary has agreed to many of the Commission's proposals for reform. Among the proposals agreed by the Home Secretary are the public sector responsibility to promote racial equality. This could be achieved by both legislative and non legislative means. The CRE

should have the power to issue new Codes of Practice under the RRA without the need to amend the Act on each occasion. A new definition of indirect discrimination set out in the EC Burden of Proof Directive should be adopted for cases of racial discrimination. The levels of compensation for indirect race discrimination should be amended to bring them on par with this aspect of the law on sex discrimination. Section 57(3) of the RRA prevents compensation being awarded for unintentional indirect race discrimination. The CRE should be able to undertake formal investigation without prior evidence of discrimination. It should be able to enter into legal binding undertaking. This would enable the CRE to enter into an agreement with an organisation that is believed to have committed acts of discrimination and the organisation agrees not to discriminate in future and to take action to promote racial equality. There should be a duty on Courts or Tribunals to draw inferences when the respondents fail to respond to the RR65 Questionnaire. The Home Secretary also recommends a statutory 8 week time limit for the replies to the Questionnaire. The Civil Service Nationality Rules should be modified to allow wider access to employment in the Civil Service.

The Home Secretary has given conditional support to the shift of the burden of proof to the respondent after a prima facie case of discrimination has been made out. The Home Secretary sees merit in the CRE's recommendation that the law should be clarified in the area of positive action. Definitions of victimisation and the exception for employment in private households to be brought more in line with provisions in the Sex Discrimination Act. Clarification of the position of volunteers so that in certain circumstances voluntary work is brought within the definition of 'employment'. The CRE amendment proposes to bring all volunteers within the Act to be treated in the same way as employees. The Home Secretary has not accepted the need at present for statutory requirement on private sector employees to monitor their work force by ethnic origin. Statutory ethnic monitoring requirement was one of the most urgently needed changes.

The Home Secretary has not commented on the proposals for giving priority for discrimination legislation using the Human Rights Act as a precedent. No comments were made on. Positive rights - the Act should affirm the right of every person not to be discriminated against on racial grounds by any public body. On procurement - tendering and award of contracts - the CRE proposed that there should be prohibition on discrimination and that positive action should be defined in the Act. The CRE recommended that office holders should have the same protection as employees under the Act and also recommended a new definition of 'Genuine Occupational Qualification' (The Home Secretary has not commented on these. The Act should apply to all partnerships (not as at present to those with six or more partners) and also recommended the removal of required reference to the Secretary of State for Education and Employment in cases of discrimination in education. Another proposal put forward by the CRE was that serving Members of the armed forces have direct access to Employment Tribunals and that Employment Tribunals should have wider powers to make recommendations regarding future conduct of the respondent and future treatment of the applicant. It was proposed that the time limit for lodging complaints of discrimination in employment should be the same as that for complaints of discrimination in other areas, namely six months. The CRE has put forward a recommendation for the bringing of 'class actions' in Tribunals and Courts and that the CRE should be accorded powers to assist individuals in proceedings under the Human Rights Act where they are alleging discrimination on racial grounds in the enjoyment of rights under the European Convention on Human Rights. No comments were made on the above proposals.

The Macpherson Report – Proposals for Reform RRA 1976 - Impact on Race Cases

To what extent will the Macpherson Report on the Stephen Lawrence Inquiry and the Proposals for Reform put forward by the CRE to the Government, impact on future Industrial Tribunal decisions in race discrimination cases?

"The Report defines institutional racism 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, thoughtlessness and racist stereotyping which disadvantage minority ethnic people." The Inquiry accepted the CRE's submission that institutional racism exists not only in the police services but also in other institutions.

The Prime Minister declared his commitment for change. Legislation or other national measures will be necessary to implement some of the recommendations and organisations should take immediate action to change policies and practice. The Report prescribes a wide range of detailed measures to achieve institutional change within the police force. The CRE advises that other institutions should be considering measures to ensure that they are providing an "appropriate and professional service" to all sections of the community. The Reports' findings are a reminder that to every organisation good policies on paper are only the first step and that these need to be put into practice throughout the organisation.

These recommendations for reform will only achieve its aims if they are properly implemented. All the proposals for the reform of the RRA 1976 has to be addressed as a matter of extreme urgency. The Report is very optimistic in its recommendations but needs to be translated into reality by tackling racial discrimination on a national scale. If radical changes are brought about only then will the RRA succeed in transforming society through legislation. The CRE is very hopeful through the recommendations of the MacPherson's report and the reform of the RRA 1976 of attaining its objectives. The Inquiry and the Report on Stephen Lawrence is bound to have a profound effect on race relations in Britain.

The CRE in 2001 and its Future

The CRE's reviews of the Act published in 1985 and 1992 highlighted areas to be reformed. Unfortunately both reviews were ignored. The CRE is proposing significant changes, including the introduction of a positive right not to be discriminated against and a specific duty on all public bodies not to discriminate and to promote equality of opportunity which should be enforced by a requirement to 'equality proof' all their policies and actions. But, law enforcement alone is not enough. According to the Chairman of the CRE, responsibility for racial equality should be placed with the leaders of institutions. Many leaders in our society including the Prime Minister signed up to the 'CRE's Leadership Challenge'. Discrimination in the coming years can only be tackled effectively by the CRE's proposed changes to the RRA in 1976. The success of the CRE hinges to a large extent on the reforms envisaged. The Prime Minister has indicated that further Government action was on the agenda. He has made a personal commitment to promote racial equality. Signatories to the Challenge have introduced equal opportunities policies, reviewed their monitoring procedures, and initiated mentoring and recruitment programmes and provided equal opportunity and diversity training for staff.

Following the 'Stephen Lawrence Inquiry' and recommendations of the Macpherson Report, the CRE's powers are greatly enhanced. The Inquiry secured a commitment from the Government to combat 'institutional racism' which the report acknowledged not only in the police force but also in many organisations in Britain. Sir Paul Condon, the ex-Police Commissioner, talked of his 'sense of shame' and promised to transform the police force into an anti-racist force. The Home Secretary, Jack Straw shared Sir Paul's 'sense of shame'. He stated "the very process of the Inquiry has opened all our eyes to what it is like to be black or Asian in Britain today. I want this report to be a watershed in our attitudes to racism" (Guardian, London (1999) February 25th, p.4). The Government's proposal for reforms have promised to tackle racism at its roots inside the country's public institutions. Lord Scarman's

report in 1981 on the Brixton riots and its recommendations were largely ignored by the Conservative Government. The Lawrence case highlighted the perception of 'stereotyping' of black youth by the police in particular. They are presumed to be guilty of criminal acts even before one is committed. Jack Straw has announced the extension of the RRA 1976. Many bodies that were excluded from the Act would now be brought within the Act, for example, the police force, the Civil Service, immigration service, National Health Service and other public services.

Is the CRE the right body to be entrusted with the recommendations of the Macpherson Report and the Race Relations (Amendment) Act 2000? A retired Commissioner of the CRE, Ms Blondell Cluff accused the CRE of "destructive and dangerous approach to race relations". She stated that much of the Commission's budget was spent on ensuring the CRE's continued existence rather than resolving race issues. Ms Cluff's allegations were that there was "friction between Afro-Caribbean and Asian members that leads to a 'discriminatory atmosphere' within the Commission itself. She also alleged poor management of the annual budget, and the promotion of an aggressive and hostile race relations ethos and greater encouragement being given to litigation than to conciliation. Commissioners were unrepresentative with too many from affluent families who are ignorant of the problems of the young and the poor. She also noted an unwillingness to embrace 'self help' solutions to problems faced by ethnic minority groups." Daily Telegraph, London (1998) December 15th.

With reference to the first allegation, the CRE was found guilty of victimisation under (Section 2, RRA 1976) in the case of Raj Naidoo v CRE (1997). At this Tribunal hearing the Chief Executive said in evidence "at any given time there are one or two complaints outstanding of race discrimination against the CRE". With reference to the second allegation, the Home Office has recommended improvements in its "business planning" and stated that it was "very happy at the way the body is being run". (Daily Telegraph, London (1998)

December 17th). With reference to the 3rd allegation, the recent poster campaign was seen by many as a deeply offensive racist message, and was condemned by the Advertising Standards Authority and the CRE became the first organisation that must have its adverts vetted on grounds of decency and taste. With reference to the fifth allegation, this criticism has been remedied to some extent by the appointment of some young Commissioners.

But the question remains whether the CRE is the correct body to police discrimination? My comment is that the CRE does have a long history of experience and some members of staff who are well qualified to tackle the problems. Having said this, I think that the CRE needs a complete overhaul. It is in the process of transformation on a major scale.

Following Ms Cluff's criticism of the quality and qualifications of the staff there is a need for retraining of some existing staff and the introduction of 'new blood' to revitalise and set a positive agenda for the CRE to go forward. This was currently addressed by the recruitment of more staff. The priorities of its areas of work have been addressed. Further, the new Chairman is bound to bring about changes to the CRE as a body established to eliminate race discrimination.

The Race Relations (Amendment) Act 2000

[This Act strengthens and extends the scope of the 1976 Race Relations Act. It does not replace it. It's main provisions came into force in April 2001.] This first major reform of the 1976 Act is targeted at the public sector - hospitals, schools, police, local councils. The Act also introduces other important changes. The Act has strengthened racial equality legislation and outlaws discrimination in public sector bodies, placing a new statutory duty on them to actively promote equality in every aspect of their work. The Act also introduces other important changes:

- It makes Chief Officers of Police liable for acts of discrimination by officers under their direction or control.

- It allows complaints of racial discrimination in certain immigration decisions to be heard as part of 'one-stop' immigration appeals.
- It prohibits discrimination by ministers or government departments in recommending or approving public appointments, and in the terms and conditions, or termination, of such appointments, or in conferring honours, including peerages; the Act will apply to any new arrangements for appointing members of the House of Lords.
- It allows complaints of racial discrimination in education to be brought directly before county or sheriff Courts without; as now, having to be referred first to the Secretary of State for Education.
- It limits the circumstances in which 'safeguarding national security' can be used to justify discrimination.

The following are exceptions outside the Act :

- Parliamentary functions
- Judicial proceedings
- Functions of the security services
- Decisions not to prosecute
- Certain immigration and nationality functions, where it will remain lawful to discriminate on grounds of nationality or ethnic or national origin – but not race or colour.

CONCLUSION

My Recommendations for reform on Sections 29, 30/31 RRA 1976.

Pressure and advertisement cases are given a low priority. The CRE is very selective in bringing proceedings under Section 29, 30/31 RRA 1976. My concern is the present policy of the CRE with regard to this area of the law. At present a major part of the resources are allocated to individual proceedings. The CRE generally supports cases against large

organisations and where an important principle of law, for example, indirect discrimination is involved, which is more difficult to prove than direct discrimination. The CRE should reconsider it's policy under Sections 29, 30/31 especially with regard to small employers. CRE intervention has to be more significant and robust to bring about changes and to practices of recruitment. The CRE has to give a higher priority to pressure and advertisement cases and it has to have a change of policy in allocating more resources to Section 29, 30/31 RRA 1976.

The upper limit for compensation payable for victims of discrimination was abolished in 1994 by the Race Relations (Remedies) Act. This remedy has not been extended to Section 29, 30/31 for breaches by employers. The maximum fine for breach of Section 29, 30/31 RRA is £400. The maximum amount for fines for breaches of Section 29, 30/31 RRA 1976 should be abolished and remedies should be brought within the Race Relations (Remedies) Act 1994. The penalties do not act as a deterrent against employers. Inherent problems are present in enforcing Section 29, 30/31 RRA adequately because of the limited scope of the legislation, for example, although gypsies are now protected by the law for being discriminated against (a lot of cases against public houses involved gypsies), compliance is virtually unenforced. There are weaknesses and gaps in the legislation that have to be remedied. This section of the law has to be strengthened and stricter measures of compliance has to be enforced. Small organisations do not take equal opportunities seriously. The success of the CRE in these areas of the law is very limited. The CRE has to take more drastic measures to ensure enforcement of the RRA. The CRE should ensure greater concentration on promotional work, monitoring and legal follow up work in this area. The number of legal proceedings under Section 29, 30/31 are severely curtailed since 1994 because of the financial resources of the CRE. I recommend that the CRE ought to redistribute it's financial resources to encompass proceedings under Section 29, 30/31 more widely.

My recommendations for raising the success level of race cases in Industrial Tribunals

These were discussed in detail in the conclusions to Chapter VIII. The main recommendations are that the Tribunal procedure has to be simplified. At present, Tribunals are too legalistic and technical, they ought to be made more informal, accessible and less adversarial. Many applicants lack the resources to instruct barristers and solicitors to present their cases against respondents (who are generally represented by legally qualified personnel). Legal Aid should be made available to applicants. The changes to legislation; namely the shift of the burden of proof on the respondent after a prima facie case of discrimination is made out and extending the time limit to 6 months in employment cases should be implemented. A legal obligation should be imposed to the Code of Practice in Employment.

The recommendations of the MacPherson's Report specifically addressing 'institutional racism' will also impact on Tribunals to bring about changes to society. The number of ethnic minority Chairs and Panel Members ought to be increased so that the applicants will feel that their cases are being dealt with fairly. The expertise of Tribunal Members can be further increased by allocating certain Chairs to deal only with race discrimination cases and 'specialist race Tribunals' ought to be set up. The Tribunal still looks for concrete evidence before an inference is drawn. The Tribunal could be more flexible in looking at circumstantial evidence to establish discrimination. The Tribunal ought to encourage the greater use of mediation thus saving public money and time and the workload of Tribunals rather than resorting to proceedings. The level of awards made by Tribunals ought to be increased substantially to act as a deterrent for further breaches of the RRA. The formal, abstract and oppressive process in Tribunals ought to be transformed to informal, accessible and less adversarial process and cases dealt with on a practical basis. If the RRA 1976 is reformed to include other areas of public service, then Tribunals will be covering a much wider ambit and addressing race discrimination on a wider scale. The legal criteria for establishing race

discrimination is very stringent – the rules can be relaxed so that the applicant has less difficulty in establishing discrimination.

My comments on the CRE's Third Review of the RRA Proposals for Reform 1998

The proposal to bring the public sector within the ambit of the RRA 1976 is a very essential and a bold move. Under the present legislation many areas of the public domain are exempt and any acts of discrimination by them is exempt from liability. Reform of legislation in this area ought to assist greatly in bringing about changes to society. The public bodies will have to review their policies and procedures to keep pace with the changes in the legislation. I support the view that changes can be achieved by legislative reform and also by means of non legislative means, for example, by promotional work, campaigning and through education.

I agree with all the following CRE's proposals for reform that statutory ethnic monitoring be undertaken – this will show evidence of changes being implemented within an organisation. This evidence will be useful – when proceedings are brought. Priority for discrimination legislation using the Human Rights Act as a precedent – this will enable new areas to be brought within the RRA 1976. At present many statutory posts are excluded under the RRA. They should have the some protection as employees under the RRA. Access to the Courts be more speedy if reference to the Secretary of the State in cases of discrimination in education is removed. Serving members of the armed forces should be given direct access to Employment Tribunals. This will save the unnecessary time and stress caused by internal hearings. Employment Tribunals should have wider powers to make recommendations regarding the future conduct of the respondent and the future treatment of the applicant. This is a very significant piece of reform which will diminish race discrimination and contribute to making changes in society. At present, when proceedings are brought, the Tribunals have no powers to make such orders. The most the successful applicant can expect is monetary

compensation. The time limit for lodging complaints in employment should be extended from the present 3 months to 6 months. This is of assistance to employees in resolving the issues through internal grievance procedures. This will hopefully lessen the workload of the Tribunals in the time taken in the adjudication of cases that are out of time. Several applications are rejected because they are out of time. This was borne out by my survey on Industrial Tribunals.

The CRE's recommendation for the bringing of 'class actions' in Tribunals and Courts is very important. Changes can be effected on a larger scale if discrimination is addressed in a wider ambit. Organisations that discriminate repeatedly will be uncovered and the law can intervene to remedy the situation. The CRE should be accorded powers to assist individuals in proceedings under the Human Rights Act where they are alleging discrimination on racial grounds under the European Convention on Human Rights. This will assist many individuals in seeking a remedy for racial discrimination, for example, religious discrimination. The European Convention on Human Rights guarantees "freedom of thought, conscience and religion".

These reforms are essential for a more effective enforcement of the law. Two things are essential to establish equality of opportunity - the political will and rigorous systems to ensure that it happens. In a television programme in 1992 the CRE was described as a 'tiger without a tooth'. It has also been criticised for spending too much time and money on individual cases. A wider impact could be achieved by testing principles affecting more people and larger organisations. Equal opportunity objectives could be concentrated on the internal labour market, for example, training and selection for promotion. If employers do not perceive the same level of economic advantage in providing opportunities for ethnic minorities, only token measures may be achieved.

Further commitment from Government can realise and sustain further progress. Theoretically the prospects for the future look hopeful, changes in the legislation coupled with a firm commitment on the part of the Government and employers can achieve their goals in the field of equal opportunities in employment. Tribunal cases also prompted ethnic monitoring in the police services and the armed forces. There have been some significant changes in legislation, for example, the Race Relations (Remedies) Act 1994. The provisions provided the upper limit for compensation payable for victims of discrimination to be abolished. The Tribunals do not utilise this provision liberally, if large penalties were imposed on the respondents, this would act as a deterrent against employers. Both the Government and the CRE still have a long way to go before the legislation on race can make a significant impact in Britain. Piecemeal legislation is not the solution to eliminating race discrimination. The CRE is pinning great hopes in the Labour Government and following the 'Lawrence Inquiry' and 'The Macpherson Report' there is a feeling of great optimism. The Labour Government appears committed – but the words of the Prime Minister and the Home Secretary still have to be translated into positive action to effect changes. The Labour Government does possess the capacity to change society by its commitment to race relations. Hopefully, the undertakings given by the Government will materialise in the near future.

There is a general problem of law as an instrument of social change. The Health and Safety Body has been successful in reforming aspects of society through the Health and Safety Act. This could be a model for the CRE in attaining a transformation to society. The Sex Discrimination Act has achieved only limited success. There are inherent problems in 'rights' based law as identified in Chapter II, which make the changes to society difficult and a very slow process. A positive recommendation to remedy this, is the greater use of class actions. The RRA 1976 has to be changed as recommended by the CRE to make enforcement of the Act a reality. One has to wait to see whether the words of the Home Secretary will be translated into definite actions. There has to be a political leadership, resources and the

CRE has to have a firm commitment and determination to succeed in attempting to eliminate discrimination in order to bring about radical changes to British society. The political commitment to race relations has to be strengthened coupled with strong legal provisions and an effective enforcement machinery to eliminate racial discrimination. It is hoped that drastic changes in the legislation pursuant to the 'Lawrence Inquiry' will impact heavily in changes in the attitude of the judiciary and British society. One can envisage a transformation of society by the introduction of new and improved legislation in the field of race relations to affect social reform. If these limitations on the RRA are removed, then law has the capacity to change society to some extent.

CHAPTER X

COMPARISON OF THE HEALTH AND SAFETY COMMISSION (HSC) AND THE HEALTH AND SAFETY EXECUTIVE (HSE) WITH THE CRE

This chapter draws a comparison of the powers of the HSC and the HSE with the CRE because they are both statutory bodies. This chapter will seek to establish as to how the Health and Safety legislation has been successful in bringing about social change.

The HSC and the HSE

The Health and Safety at Work Act 1974 (the 1974 Act) lays the responsibility for industrial safety and health upon employers and employees, but creates the two bodies, (the HSC and HSE) to act as prime movers, consulting with, stimulating and guiding others and setting a legal framework for action. The HSC is appointed by the Secretary of State for employment and consists of a Chairperson and nine Members representing employers, trade unions, Local Authorities, and the public interest. It is responsible to a number of Secretaries of State for the administration of various aspects of the 1974 Act and related legislation. It forms part of the Employment Department Group for administrative and financial purposes. It exercises considerable independence of Government in its day to day functions though it is subject to Ministerial direction. The HSC is advised and clearly supported in all matters by the HSE, which is its main operational arm. Their joint aims under the Act are to protect the health, safety and welfare of employees, and to safeguard the public who may be exposed to risks from industrial activity. It's specific functions are as follows:-

1) "To define standards particularly by:-

   a) 'Proposing reform of existing legislation, through regulations and approved codes under the 1974 Act.'

   b) Issuing guidance.

   c) Co-operating with other standard setting bodies.

2) Participate, through negotiation, in relevant standard - setting in the European Community and in other international bodies taking account of the principles of the 1974 Act.

3) Promote compliance with the 1974 Act and other legislation as relevant, in particular by:-

   a) Inspection, advice and enforcement in undertakings where the HSE is enforcing authority; and

   b) Proposing arrangements for the allocation of enforcement responsibility as between HSE and other enforcement bodies; and keeping their effectiveness under review.

4) Carry out, publish and promote research and investigate accidents and industrial health problems, disseminating findings as appropriate.

5) Provide specific services related to the Commission's main functions, notably: an Electrical Equipment Certification Service and an Employment Medical Advisory Service.

6) Contribute to the process of democratic decision-making, accountability and consistency of approach on health, safety and welfare issues in particular by:-

   a) Providing advice and information as required to Ministers.

   b) Co-operating with regulatory bodies in related fields;

   c) Representing United Kingdom interests in the European Community and other inter-Governmental forum, and

   d) Encouraging well informed public discussion of the nature, scale and tolerability of risk." Report (1990).

The HSE and its functions

The HSE is a separate statutory body appointed by the HSC which works in accordance with directions and guidance given by the HSC. The HSE has a staff of about 3,750 people, about half of whom are highly qualified technically and are appointed either as inspectors, scientists or technological and medical specialists. The major inspectorates in the health and safety field are within the HSE. The HSE is statutorily distinct from the HSC. It has the special function of enforcing the Health and Safety Act 1974 and related legislation in factories, mines, nuclear establishments, farms, on the railways and in other industrial establishments. The HSE also advises the HSC and prepares regulations. It cannot be directed by the HSC and it also acts as a licensing authority, for example, in connection with nuclear sites. The Health and Safety Act 1974 is enforced by both the HSC and the HSE.

The Health and Safety Act 1974

The Health and Safety at Work Act 1974 protects everyone affected by work activities - employees, employer, trainees, contractors, passers-by and visitors too. In general the employer must make sure:- "That the workplace is safe and without risks to health, that dust, fume and noise are kept under control and plant and machinery are safe and meet the standards set. A safe system of work are set and followed. Articles and substances are moved, stored, and used safely. Employees have healthy working conditions including adequate lighting, ventilation, toilet facilities, etc. Employer has to provide training, information, instruction and supervision necessary to ensure health and safety." Report (1990). If the employer designs articles or manufactures, supplies or imports articles or substances for use at work, they must be safe and without risk to health. An employer has a legal duty on health and safety matters. Accidents and ill health caused at work can mean extra costs, damaged machinery, products, and ruined lives. Around 400,000 people at work are injured every year, some 12,000 of them seriously. About 500 people are killed. It is

important for the employer to know the law and observe it. The Act requires the employer to carry out these general duties "so far as is reasonably practicable". This involves weighing up the seriousness of a risk against the difficulty and cost of removing it. In some cases there are things that have to be done at all costs. No allowance is made for the size, nature or profitability of business. The employer must draw up a health and safety policy statement according to the guidelines of the leaflet 'Advice to Employers'. Report (1987).

The Management of Health and Safety

In law the main responsibility for health and safety at work lies with the employer who must provide a safe working environment. It is the employer who must ensure that the work methods are safe. This can only be done if management controls health and safety in the same way as other aspects of business, for example, production and finance and gives them equal importance. The employer must assess what potential hazards exist in the work place, decide what precautionary measures must be taken and implement and maintain these precautionary measures.

Employees must also take reasonable care of their own health and safety, and of others who may be affected by their acts or omissions at work. They must co-operate with their employers on health and safety at work. Regulations made under the Act lay down more specific requirements. Some, such as first aid and the reporting of injuries apply to all employers. Codes of Practice, approved under the Act, guide the employer on how to meet particular legal requirements. They have a legal standing. If the employer does not follow the Code, then he has to show a Court that he has compiled with the law in some other equally effective way. The Health and Safety at Work Act replaced many earlier laws, but some are still in force. The two most important ones are The Factories Act 1961 and The Offices, Shops, and Railway Premises Act 1963.

If either of these applies to the business "the employer must inform the Health and Safety Executive or Local Authority, depending on the type of business conducted on his premises. He must observe a wide variety of requirements on safe machinery, lighting, cleanliness, temperature, ventilation, etc. Under the Employers Liability (Company Insurance) Act 1969, the employer must insure against employees claims for injury or illness and display an up-to-date certificate of insurance. The Fire Precautions Act 1971 deals with general fire precautions, including fire escapes, fire alarms and fire fighting equipment." Report 1990.

What are the HSC and the HSE doing?

According to the Health and Safety Report 1990, the HSC believes that every effort should be made to get across to small firms the message on health and safety. It has therefore, appointed a small firms working group, on which sit representatives of the Confederation of British Industry (CBI), TUC, and Local Authorities, to examine ways of improving health and safety awareness in small firms. This group has concentrated particularly on improving the advice and information available and has overseen the production of easy to read leaflets and booklets.

One of the most significant publications as a result of the groups work was 'Essentials of Health and Safety at Work' in 1990, which is targeted at smaller firms, with no immediate access to in-house health and safety advice. It outlines basic legal requirements and gives practical guidance in a direct, simple style, on how to identify and control hazards to health and safety arising in the workplace. HSE also produces detailed guidance covering specific industries, hazards or legal requirements. The value of these to small firms is that they identify the hazards, explain what should be done and give good practical advice on prevention methods. Inspectors employed by the HSE use their considerable formal enforcement powers with discretion and then try to achieve acceptable standards by advice, persuasion, and education. Most employers respond positively to this approach. If the

response is positive an inspector will want serious matters dealt with quickly but will generally agree a realistic period of time for putting right other matters of lesser priority. If the response is negative, or if there are serious contraventions, inspectors will almost certainly use their enforcement powers. Inspectors want firms to survive and grow but not at the expense of human suffering. The enforcement powers are taken seriously and there is a determined effort to implement the policies and practice by the HSC and HSE. Preventative inspection continued to occupy a central place in the HSC strategy. Important promotional work included improving awareness of safety and the need for more effective management of health and safety. Other initiatives included the 'Save your Breath' campaign aimed at reducing occupational lung disease. The Factory and Agricultural Inspectorate have also in recent years had to respond to an increasing volume of public complaints and questions about industrial harms outside the workplace.

HSE'S Advisory Role

The HSE's advisory role is often overlooked, possibly because firms fear that by approaching HSE for advice they will immediately be faced with prosecution and high financial outlay. This is generally not the case. Giving advice is an important part of an inspector's work. Inspectors prefer to be approached for advice beforehand rather than investigate an accident later. They would rather give advice and see it acted on voluntarily than have to resort to formal enforcement action. The main benefit of managing health and safety is that many accidents are prevented, for example, in a reported case, ('Safety Pays', 1987), an inspector visited a new firm which produced a finely ground food additive comprised of highly explosive dust. The firm had taken advice from a consultant before buying the plant but no suggestion had been made about providing dust explosion suppression equipment, (the firm saw it as non-essential). The inspector said that he was prepared to serve an Improvement Notice. A few weeks later the works director told the

inspector that the equipment, although expensive, had more than paid for itself already. If there had been an explosion the plant would have been wrecked without the explosion 'suppression' equipment. Managing safety improves productivity and quality. In another case an Improvement Notice served on a garage required a ventilated fire resistant enclosure to be provided for use when cars were sprayed with highly flammable paints. The owner later told the inspector that not only had the enclosure improved the health and safety of his employees, but also the finish on the cars.

Advice taken at an early stage can save money. The owner of a small firm told an inspector that he was going to build a fire resistant spray booth. It would have flameproof lights and switches inside. The inspector advised using fluorescent lights and switches outside the booth, than lights shining through sealed Georgian wired glass panels, a much cheaper method. In another example, a firm consulted with an inspector before rebuilding their provender (fodder) mill. They proposed putting the mill in a substantial 'block house' type of building. The inspector suggested a less substantial building with a lightweight roof. This would vent the pressure of any explosion through the roof to a safe place rather than trying to contain it. The inspectors suggestion saved the company £60,000.

Prosecution Policy

The HSE have continued to press for higher fines, since publishing in recent years reports of low fines given in Magistrates Courts, and were greatly encouraged by the support given during the year 1990 to this initiative by the Secretary of State for Employment. Average fines in all Courts have continued to increase. There have been some exceptional fines. In March 1990, Tate and Lyle were fined £250,000 in Greenock Sheriff's Court and in the same month, Nobles Explosives was fined £100,000 in Mold Crown Court. ICI was fined £250,000 at Peterborough Crown Court in April 1990 in connection with accidents involving explosives. HSE has in addition supported the Crown Prosecution Service in prosecutions for

manslaughter, notably in the case of the director of a plastics company following the horrific death of an employee in a plastic crumbing machine.

Enforcement by HSE – Case Law

I now turn to the case law on health and safety. The following cases will demonstrate the way the judges interpret the statutes as well as the powers of the HSC and the HSE.

The case of Austin Rover Group v HM Inspector of Factories (1988) was decided under Health and Safety at Work Act 1974 (C37) Section 4 (2). The employer's knowledge and reasonable foresight of the unexpected event against which precautions should be taken was questioned by the Court. A paint spray booth at A company's works required regular cleaning and the work was sub-contracted to W company (WCO). WCO was instructed not to use highly inflammable thinners from a pipe in the booth. This instruction was breached by one of their employees, and a flash fire resulted, which killed one of their employees. WCO was convicted of contravening Section 4 (2) of the Health and Safety at Work Act 1974. It was held, quashing the conviction, that as the magistrates had made no finding on the foreseeability of the misuse of the pipe, it could not be said that it was reasonable for WCO to have taken measures to make the premises safe against that misuse. This case establishes that the HSA requires the employer to carry out his general duties 'so far as is reasonably practicable'. Ibid (above case). No such duty is placed under the RRA 1976. The employer under the Health and Safety Act has an onerous duty of care to his/her employees.

In the case of Crouch v British Rail Engineering (1988) which involved the failure to supply goggles by the employer and contributory negligence, shows how onerous that duty is. The plaintiff (P) was employed by (D) as a skilled mechanical fitter. Whilst at work, a steel fragment flew into his eye causing damage. He contended that D was negligent in failing to

supply him with goggles. The High Court judge held that D's system of having goggles available for skilled workmen who thought they required them was reasonable. On appeal, P argued that D's duty was more onerous. It was held, allowing the appeal, that the High Court judge had erred in finding that D had fulfilled the duty of care by merely making goggles available to employees who believed they required them. The extent of the duty of care depended on several factors, including the risk of injury, the gravity of potential injury, the difficulty of providing protection, the availability of protective clothing, the distance which an employee may have to go to collect such clothing, and the employees skill and experience. In this case the duty of care extended to the actual provision of goggles into P's hands. Ibid (above case). Contributory negligence was assessed at 50%. This case establishes a very high standard of a duty of care by the employer to his employees. Once again no such duty of care is attributed to the RRA 1976.

Fotheringham v Dunfermline District Council (1991) was decided under the (Factories Act 1961 (C34, Section 72 (1)). An employee injured his back while manoeuvring a sheet of glass. His employers argued that for liability to be established under Section 72 (1) of the Factories Act 1961, it was necessary to establish that it was foreseeable to them that the employee was likely to be injured. "It was held that Section 72 (1) of the 1961 Act involved an objective test and that it was not necessary to consider the foreseeability of the injury by the employers" Ibid (above case). This case set a very high standard of care on the employer. Under the RRA 1976 the employer is under no obligation to enforce the RRA.

In Dexter v Tenby Electrical Accessories (1991) which was also a case under the (Factories Act 1961 (C34) "an occupier of factory premises owed a duty under the Factories Act 1961, to an independent contractor working there to make his premises safe and was liable under the Act, if there was an injury, even if the occupier did not foresee that contractors would work in the unsafe area". This case also established a high standard of a duty of care. In contrast the RRA 1976 has 'very few teeth' regarding enforcement of the law.

In Dixon v London Fire and Civil Defence Authority (1993) where water leaked on to the floor of a fire station from a fire appliance, and that sort of leak was endemic to the service and appeared to be insoluble, the authority was not in breach of its duty of care to an officer who slipped and fell as a result of the wet floor. The powers of the HSE enable it to enforce the legislation very stringently in the Courts. This power is not accorded to the RRA 1976.

Health and Safety Statistics

1996/1997

Number of proceedings brought	1256
Number of convictions	1052
Number of cases withdrawn	130
Number of cases dismissed	68
Number of cases adjourned	3

1997/1998

Number of proceedings brought	1654
Number of convictions	1268
Number of cases withdrawn	261
Number of cases dismissed	73
Number of cases adjourned	50

Outcome of Race Cases at Industrial Tribunals

	1996	1997	1998
Dismissed	995	593	778
Success	77	79	83
Settled	568	273	451
Other - Withdrawn, Adjourned etc.	80	84	73
TOTAL	**1,720**	**1,029**	**1,385**

The comparison between the health and safety statistics and the race cases at Industrial Tribunal speak for themselves. The number of convictions under health and safety for 1996/1997 were 1052 and in 1997/1998 were 1268. In race cases the success rate for 1996 was - 77 cases, 1997 - 79 cases, and in 1998 - 83 cases. The success rate of bringing proceedings under the Health and Safety Act far surpasses the proceedings under the RRA. The number of cases dismissed under the Health and Safety Act for 1996/1997 was 68 and for 1997/1998 was 73. For 1996, 995 race cases were dismissed followed by 593 for 1997 and 778 cases in 1998. For the three year period a total of 141 cases were dismissed under the Health and Safety Act and a total of 2366 cases were dismissed under the RRA 1976.

The number of cases withdrawn and adjourned for the three year period under the Health and Safety Act equals 444 cases and there were 237 cases under the RRA. The number of proceedings brought under the HSA were 2910 and there were 4134 proceedings under the RRA for the period 1996 - 1998. There were 1292 cases settled under the RRA, which means a compromise was agreed between the parties. It does not denote a win – this settlement is generally resorted to in order to save the costs of pursuing legal proceedings. It also benefits the applicant to a large extent in not going through the stress and trauma of a full hearing and publicity. The chances of the applicant finding another job is also increased as the potential future employer will not know about the case (unless divulged by the

applicant). The settlement is conducted in a high degree of confidentiality. The health and safety statistics does not provide figures for settlements

CONCLUSION

The number of convictions under health and safety as the tables show (1052 for 1996/1997, 1268 for 1997/1998) far surpass the success rate of cases under the RRA (77 cases in 1996, 79 in 1997 and 83 in 1998). The above cases illustrate the strength and effectiveness of the legislation governing health and safety at work. It would appear from reading these case histories that the HSE is more competent in managing health and safety as compared with the CRE in their management of race. The reason for this is that the Health and Safety Act has to be implemented legally and there is a duty on the employer unlike the RRA 1976 there is no such duty placed on the employer to enforce the Act.

A lot of success is based on the advisory role of the HSE - perhaps the CRE can take a leaf out of the HSE's book on this and achieve a better success rate. Employers may also be saving money spent on litigation if advice on race issues could have prevented race discrimination in the first place. The CRE's advisory role is rarely sought by employers for general advice on race. The CRE can be approached by an organisation or upon directions of the Tribunal for advice and assistance for bringing about changes, for example, this may happen if an individual complainant brings proceedings against an employer, or if proceedings were brought against the organisation for discriminatory advertisements or .... cases. A large number of cases reported to the CRE on discriminatory advertisements and instructions and pressure to discriminate do not go as far as the Courts. The matter is often settled by the respondent providing a signed assurance against future contraventions of the Act and taking steps to prevent further unlawful discrimination. The question that arises is

whether 'race equality inspectors' with similar powers as the health and safety inspectors would achieve a greater impact in race relations as compared with the present powers of the CRE? Prevention is better than cure - it would be certainly better all round if legal proceedings can be avoided by the voluntary acceptance of good race relations policy.

There are certain legal obligations placed upon the employer not to discriminate on racial grounds. There is no legal obligation placed upon the employer to ensure that the work place is absolutely free of discriminatory practices. If the discrimination does occur the burden of proof is on the employee to establish discrimination. The employee, who generally does not have sufficient resources, has to challenge the might of the employer and expert legal representation. Many organisations still do not consider discriminatory practices as potential hazards in the workplace which can undermine production. Just as health and safety can improve efficiency and production, so can an equal opportunity policy, by improving industrial relations and creating a better workforce. Many employers fail to see the relationship between production and improving working conditions for employees. Health and safety is obviously seen as a higher priority and matters of race are generally accorded low priority.

The Enforcement Powers

The enforcement powers of the HSC and HSE are much stronger than the CRE. The employer has a legal duty on health and safety matters. The employer must draw up a health and safety policy statement. There is a legal duty under the RRA for the employer not to breach the Act but the employer is under no legal obligation to draw up an equal opportunity policy document. Many organisations may be in possession of a policy statement on equal opportunities but there is no legal obligation to implement it. A health and safety policy has to be implemented legally. Regulations under the Health and Safety Act 1974 lay down specific requirements. Codes of Practice, approved under the Health and Safety Act, have a legal standing. The Code of Practice in employment under the RRA (Section 47) has

no legal force. It may be admitted in evidence and an inference can be drawn by virtue of the breach of the Act. The HSC and HSE carry out research on various aspects of their work. The HSE has published for the first time a detailed study of the Costs of Accidents at Work - Employment (1991). The CRE funds are too limited to carry out extensive research on many aspects of race when compared to HSC and HSE.

The enforcement powers are taken seriously and there is a determined effort to implement policies and practice by the HSC and HSE as compared with the CRE. The powers of the CRE are weak in comparison with the HSC and HSE. The health and safety legislation certainly has 'more teeth' than the RRA of 1976. In addition the powers of the CRE are extremely limited as compared with the HSE and HSC. The prosecution policies and penalties under the RRA are very inadequate, for example, for a breach of Section 29 - a person is liable on summary conviction to a fine not exceeding £400. An identical fine is also imposed for breach of Section 30/31 of the RRA. The HSC and HSE have access to larger resources than the CRE. Race relations ought to be taken seriously by the Courts, for example, the excessive stress suffered by complainants in the workplace which can be equally damaging to their health and safety at work. To date the compensation for stress in race cases has not exceeded £10,000. Thomas v London Borough of Hackney (1996). The complainant had to prove psychiatric damage before the level of stress could be established. Once again this is an illustration of the limits of the RRA 1976 and the onerous burden of proof which is placed on the complainant. In conclusion the HSC and HSE are definitely more powerful bodies with effective powers of enforcement as compared with the CRE whose powers and prosecution policies are extremely limited. The Health and Safety Acts have a long tradition and in areas where there were limitations, the law intervened to alter the circumstances. The Health and Safety legislation has been successful in bringing about social change through bringing cases to the Courts. This has resulted in drastic changes to the workplace ensuring the safety of employees.

CHAPTER XI

CONCLUSION

The thesis set out to explore as to whether law could be an instrument of social change with reference to the RRA 1976. There are certain barriers which stand in the way of bringing about transformation to society through legislation. The RRA 1976 is bound by certain limits beyond which it cannot operate. This is a major stumbling block to progress. Chapter V sets out the difficulties of achieving change through the legislation. In Professor Hepple's view anti-discrimination law has failed because it is rights based law. The RRA itself in its present form is riddled with technicalities and difficulties in its interpretations. Fitzpatrick is also pessimistic because he sees certain bounds beyond which law cannot proceed in eliminating discrimination. The survey on Industrial Tribunals (Chapter VIII) and on Discriminatory Advertisements and Pressure Cases (Chapter VII) concluded, that the constraints of the RRA impose limitations in eliminating discrimination on a larger scale than at present. There is some cause for optimism judging by some recent decisions on race cases and the attitude of the Tribunals (Chapter VIII), but there is ample room for greater improvement. Proposals for reforms put forward by the CRE in 1985, 1991, 1992 and 1998 only achieved piecemeal reforms until the recent Race Relations (Amendment) Act 2000. The conclusions to be drawn from this, is that to date, the previous Governments have not given race relations problems a high priority. This ties in with the views expressed by the critical legal scholars as legitimising oppression and disguising the real problems in society as identified in Chapter II, thus impeding social change.

There was the huge problem of the political will which was an obstacle until very recently when parts of the RRA 1976 were reformed. In view of the 'Lawrence Inquiry' and the latest proposals for reform of the RRA 1976 put forward by the CRE to the present Government,

there is hope for optimism. In my view, the reforms ought to have been dealt with by Government before autumn 2000 (as scheduled). The conclusions that one can draw is that there is still a lot of rhetoric about race relations rather than immediate action. The changes to the RRA 1976 and stringent enforcement of the law is required in an attempt to diminish discrimination, thus bringing about a change to society. The limits to the judicial process can be linked to the two empirical studies on Industrial Tribunals and Discriminatory Advertisements and Pressure Cases. The conclusions drawn from these two studies supplement the known difficulty of proving discrimination in the Courts, for example, the criteria for proof of discrimination (as identified in Chapter V). Chapter VIII uncovered the same problems with the Tribunals. The Policy Studies Institute survey 'Racial Justice at Work in 1991' also concluded that overwhelming strong evidence of discrimination was required before a case could succeed (Chapter VI). If the legislation is reformed in areas relating to proving race discrimination cases, I can foresee a significant change in the success rate of race cases in Tribunals. This is a realistic prospect. The very nature of Industrial Tribunals are still beset with problems. There are limits beyond which the Tribunals cannot proceed because of legal technicalities regarding procedures. The law relating to indirect discrimination is so complex and unless the constrictions are removed, there will be no change in this area of the law. Change in this area will impact heavily on change in race relations.

Chapter IV began to explore whether social changes could be effected through legislation and the limits of the legislation on race discrimination. There are inherent limits to the judicial process because of the tradition of English judges. Change is difficult because of entrenched attitudes and race discrimination was identified as an endemic problem. There was a general reluctance on the part of the judiciary (Privy Council and the House of Lords 1900/1965) to address racial discrimination seriously. There was a conflict between the laws on immigration and race relations. One MP, Quinton Hogg, predicted the difficulty of changing attitudes through legislation. He was expressing very little confidence in achieving a just

society by the imposition of laws to control behaviour. These doubts have been confirmed by the extremely slow progress of legislation by piecemeal reforms in improving race relations in Britain and the attitude to race relations by different Governments. Chapter IV established the problems of changing society through legislation although legal intervention was seen as essential in an attempt to influence social behaviour and attitudes. The RRA 1976 attempted to remedy the defects of the RRA 1965 and 1968 but the 1976 Act itself is riddled with problems, and therefore, the recent reforms were paramount before one can argue whether it can be a significant instrument in effecting social change. The changes the Act has brought about have been extremely limited to date. The attitude of the various Governments to race relations is very relevant to bringing about change to society. During the early 1960's the Labour Party saw the Commonwealth Immigrants Bill as blatantly discriminatory and objected to many of its provisions. By 1964 the Labour Party changed its attitude and decided that there was a definite need to curb black immigration into Britain. Race relations law is thus closely related to immigration. The attitude of the present Labour Government appears optimistic and the reforms to the present legislation hopefully will be in keeping to it's aims and promises.

A range of theories ascertains the status of the black immigrant. These theories conjure up an image of the black immigrant as 'a separate underprivileged class', 'underclass', and as a 'problem' in British society. The influx of black immigrants was seen as a threat to law and order throughout the debate on the Race Relations Bill 1968. The black immigrant as 'different' and as a 'problem' emerged and continues today. According to Wallman it is English ethnicity which determines the boundary of 'them' and determines its significance. The boundary is drawn to separate the host from the other groups. Englishness is unacknowledged as ethnicity, although they possess their own culture, language, custom, long history, etc. The debates in Parliament (Chapter IV) foresaw the difficulties of interpreting the legislation and the problems of enforcing the law in race relations matters. This was brought to light in the various studies on employment and discrimination outlined in

Chapter VI and in the two empirical studies (Chapter VII and Chapter VIII). The conclusions to be drawn from the debates in Parliament on the 1965, 1968 and 1976 legislation was not to improve race relations or combat discrimination but the main thrust of the debates were concerned with the number of black immigrants entering Britain. As long as this attitude prevails it will be difficult to envisage a change to society.

Law has succeeded in recognising Sikhs and gypsies as an ethnic group, thus making discriminatory action against them easier to remedy but compliance is virtually unenforced with regard to gypsies. When people from varied ethnic groups are brought within the protection of Section 3 (1) of the RRA 1976, for example, Sikhs and gypsies this enhances the enforcement provisions of RRA 1976 in eliminating discrimination, for example, gypsies who previously had no protection under the RRA 1976 for being discriminated against, are now covered by Section 3 (1) of the RRA as a result of the CRE v Dutton (1989) case in the Court of Appeal. The Rastafarians are viewed as a particular black 'problem'. If they could be brought within the protection of the RRA 1976 as a separate ethnic group, discrimination against them would probably diminish to some extent. Law can help to change attitudes and behaviour. The wearing of dreadlocks by Rastafarians may in time come to be accepted as part of a distinct culture. The Rastafarians did not fulfil the important criteria of long shared history in order to establish them as a separate ethnic group. The Courts were reluctant to accept 'Rastafarians', 'Muslims' and more recently 'Bangladeshis' (1993) as separate racial groups. If the law could be more flexible in its interpretation under Section 3, RRA 1976 then changes to society are more possible. The Courts could exercise greater flexibility in bringing about changes to society by recognising the above groups as ethnic groups, thus acknowledging changing social conditions. 'New racism' embraces culture in its definition of 'race' and the law has to address new forms of racism. The theorists of new cultural racism feel that cultural racism has to be acknowledged in order to remove racism to transform society. Rigid boundaries between race, religion and ethnicity cannot be drawn. There is a need for a realistic interpretation of 'racial group'. The legal definition of 'ethnicity' could in

time embrace several other groups of people with specific identities. This will then bring them within the protection of Section 3 (1) of the RRA as discrimination on 'racial grounds' includes discrimination on grounds of 'ethnic origins'. Chapter III identified the various views on social polices. The RRA 1976 has assisted in social policy development. Urban social policies have failed in addressing the needs of minorities adequately, although some policies have succeeded as a result of pressure and campaigns by minorities.

The pattern of discrimination traced through the various studies from the 1970's to 2001 indicates that the level of discrimination in employment remains high despite the reforms of the 1968 RRA (Chapter VI). When the PSI study in 1985 was compared with the 1973/74 PEP study and the Nottingham CRC study 1977/79, there was no evidence to denote that the level of discrimination had decreased since 1973. The Code of Practice had achieved a very limited success in eliminating discrimination, as it did not impose a legal obligation. Chapter VIII identified the extremely limited use of the Code of Practice in Tribunal cases. The Labour Force Survey in January 2001 emphasised widespread discrimination and shows that discrimination in employment has not diminished. The survey confirms the limited use of the CRE Code of Practice in employment.

The survey 'Racial Justice at Work' concluded that there was scope for further action to provide racial justice at work through legal enforcement, related policies and through reform of the law. The conclusion to be drawn from the various studies is that enforcement of the law has to be strengthened before changes can be established. This was identified in Chapter VII. If law is to be a significant instrument of social change, an enforcement procedure has to be powerful enough to effect changes. Cotterrell highlighted the hopes for transforming society through legislation and enforcement. There are a range of legal strategies for promoting social change which are the nature of the enforcement agencies used, the degree of commitment of enforcement agents in implementing the law and the availability of resources. Roach also sees legal change through "interpretation, application

and enforcement". I prefer Cotterrell's view to Roach because Cotterrell is placing more faith in transforming society through legislation than Roach. Roach's views are not as optimistic as Cotterrell on transforming society through legislation. Roach perceives women's movements and rights activists as important strategy for social change. Roach concludes "engagement with the law must be one strategy for social reform, but legal change does not depend on social movement activism" (Roach (2000: 235)). Both Cotterrell and Roach emphasise enforcement as integral to effect changes to society through legislation.

Professor Hepple argues that the Courts are reluctant to deviate from the norms of society, therefore bringing about change through legislation is a very slow process. Many Tribunals are content to adhere to what has gone before and they are almost afraid to make different decisions to bring about a transformation, thus changing the values in society. 'Right thinking people' – this is an objective assessment based on what society expects, not what ought to be done to improve society. The law fails to take note of recurrent discriminatory patterns of behaviour. The one incident of discrimination or victimisation is stressed and argued by the lawyers within strict rules laid down by the Tribunal procedures and the RRA 1976. Discrimination is not seen as a problem in society that has to be addressed and eradicated. Attitudes and behaviour can be changed through strict enforcement of the law.

Race discrimination is a social problem, which cannot be remedied simply by turning it into an argument on rights. It has to be seen in its social context and stringent measures have to be evoked for the elimination of discrimination, for example, cost deterrent sanctions on discriminators, hopefully this will have a greater impact in invoking changes to society. There is reluctance by the judiciary to change to keep pace with society because they do not wish to detract from traditional accepted values of society. The judges could assist on a larger scale in reforming society by changing their entrenched views. If the Tribunals and the Courts took a more strategic and deterrent view of discrimination law then more changes can be evoked more rapidly. It is extremely difficult to change established social norms, for

example, stereotyping of racial groups. There are changes in the workplace but it is not sufficient. This was brought about as a result of equal opportunity policies, training in equal opportunities to management and staff, race awareness programmes, intervention by the CRE in conducting formal investigations, promotion work, bringing of proceedings etc. Certain jobs that were only reserved for the indigenous race are now made available to all, thus breaking down barriers to some extent.

If law is to be a significant instrument of social change an enforcement procedure has to be powerful enough to effect changes. Law can modify social patterns and engineer social change but law is restricted by certain boundaries, which makes it difficult to be drastic in its operation. Law can be changed by educational process and this has been partly achieved by changing the attitudes of some judges to a certain extent, hence bringing some changes to society. With regard to sex discrimination the European Community can create binding obligations for individuals as well as Government by means of Equality Directives. This has an impact on the SDA 1975. If these Directives could be expanded to the RRA, this could bring about changes to the RRA 1976. At present the EC law is relevant to interpretations of the SDA but not to the RRA - hopefully this could be extended to the RRA 1976 in the future. The conclusion to be drawn from this is the fact that race relations is still given a low priority when compared to sex discrimination. The cases on sex discrimination also emphasise the constraints that are placed upon it because of the limitations of the legislation. Has the SDA succeeded in bringing about social change? The answer is yes, but only to a very moderate extent. In this respect it is in a similar position to the RRA 1976. Cases under the SDA have succeeded in paying out huge compensations when pregnant women were discriminated against by the armed forces. The CRE has also succeeded in obtaining some huge settlements in six figures but the EOC has secured larger settlements and compensation. There is certainly hope for more drastic change. Both the SDA and RRA need to be enforced more stringently to expedite changes in the legislation, which in turn will effect social changes.

The recurring problems of racism, discrimination and xenophobia have reached serious levels in EC member states as discussed in (appendix 6). In response, constitutional and legislative measures to sanction violations and provide remedies are being reviewed and strengthened. Human rights instruments that prohibit racism and racial discrimination are very widely ratified, providing a general framework of legal measures to protect potential victims. A review of the legislation has been undertaken in several countries and can assist in eliminating such discrimination, thus bringing about changes to society. It has become very clear that European law must be amended and strengthened. Only the Community Governments can compel changes in Community law. The countries in Europe could draw heavily from the laws and experience of Britain to improve their policies on race relations. The European Community could build on the race laws in Britain and develop a very comprehensive body of law on race. If the European Community succeeds in bringing the legislation on race on par with the legislation on sex, the scope for anti-discrimination legislation would be greatly enhanced in Europe thus bringing about a change to society.

The difficulties of interpreting Section 29, 30/31 RRA were foreseen during the debates in Parliament. These difficulties were uncovered in the empirical study in Chapter VIII. The problem lies in the narrow interpretation of Section 29, 30/31 RRA. Pressure and advertisement cases involve recruitment. Discrimination under Section 29, 30/31 RRA are generally very covert and in many cases the individual is not aware of being discriminated against. If this area of the law is strengthened then the CRE will certainly be in a position to tackle discrimination in this area with greater vigour and success. Discrimination has to be tackled at the recruitment stage because that is the first rung of the ladder for entry into the job market. If positive steps are taken in relation to recruitment then changes can be affected in bringing about reform to recruitment and changes in society. These reforms are essential for a more effective enforcement of the law. The limits of the RRA 1976 in relation to Section

29, 30/31 RRA are presenting obstacles in attempting to reform society. Reform of legislation will increase the powers of the CRE in enforcing Section 29, 30/31 RRA.

The aim of the first empirical study was to assess the extent of compliance by employers with equal opportunities in relation to Sections 29, 30/31 RRA 1976 as a result of CRE intervention. The survey concluded that there are inherent problems in enforcing Sections 29, 30/31 RRA 1976 adequately because of the limited scope of the legislation, but nevertheless some changes were observed especially by the large organisations. Small organisations did not take equal opportunity policies seriously but large organisations took a more serious view of equal opportunities generally, thus effecting changes by reducing racial discrimination in employment.

This research reinforces the findings of the PSI study '17 years after the Act 1985', 'The Code of Practice 1989' and the PSI study in 1991, 'Racial Justice at Work Enforcement of the RRA 1976 in Employment' with regard to limited enforcement powers of the CRE. My findings conclude that the enforcement powers of the CRE under Sections 29, 30/31 of the RRA 1976 have not attained their objective. The CRE can boast of only a modest success in the area of discriminatory advertisements and instructions/ pressure to discriminate. There is room for greater improvement. However, further achievements in this area of the RRA are severely restricted by the current legislation. In addition the number of legal proceedings under Sections 29, 30/31 has been severely curtailed since 1994 by the CRE because of financial resources. Further, the survey concluded that Equal Opportunities is taken seriously only by few employers. It is difficult to change the small employers attitude to discrimination unless there are reforms to Sections 29, 30/31 of the RRA. It is extremely difficult to change racism in small businesses, for example, word of mouth recruitment is out of reach. One possible deterrent would be to increase the level of fine imposed. The majority either disregard the policies or give them a low priority. The remedies under Sections 29, 30/31 are not sufficient to act as deterrents to employers who are practising discrimination.

The changes in legislation and increased resources to the CRE in 2001 will assist to a great extent as the Health and Safety Act has shown.

There was no formal response to the Review of the RRA 1976 in 1985 and the Review in 1992 from the Home Office. The actions by the CRE has succeeded in bringing about some legislative and case law changes. The Government has strengthened the race relations legislation and given greater support to the CRE to tackle discrimination. The political commitment to race relations coupled with strong legal provisions and an effective enforcement machinery will assist to eliminate racial discrimination. The CRE has placed high hopes in the Labour Government to attain this goal. To date piecemeal reforms have been token gestures. No Government has tackled discrimination on a serious scale until in the year 2001 by the enactment of the Race Relations (Amendment) Act. It is hoped that effective changes in the legislation pursuant to the 'Lawrence Inquiry' and the Third Review of the Act will impact heavily in changes in the attitude of the judiciary and British society. One can envisage a transformation of society by the introduction of new and improved legislation in the field of race relations to effect social reform. Law has the capacity to change society to some extent by the removal of the limitations on the RRA. The use of strategy, political wills, public policy and pressure have all contributed to bring the 'Lawrence Case' to the forefront of British society and its ills. This would hopefully engineer drastic changes throughout society through changes in the legislation. The political will has to be strong enough, then law can effect changes to society. Social movements might facilitate the use of law as an instrument of social change as identified in Chapter III. This was achieved in the past by bringing about changes to legislation; hence to society.

The Chair of the CRE, Mr Gurbux Singh, has stated that the CRE is highly optimistic. He feels that we now have the most positive political environment since the RRA 1976 was enacted. The Government has made a commitment to modernise public service and race equality will be one of the priorities on the agenda. The CRE is pinning great hopes in the

Labour Government and following the 'Lawrence Inquiry' and 'The Macpherson Report' as discussed in Chapter IX, there is a feeling of great optimism. The Labour Government appears committed – but the words of the Prime Minister and the Home Secretary have still to be translated into positive action to effect changes. The Labour Government does possess the capacity to change society by its commitment to race relations. Hopefully, the undertakings given by the Government will materialise in the near future, thus transforming British society.

Social consensus, political will and the Courts have to interact between them to effect changes to society. There is a distance between law and reality. This was identified by the CLS scholars who perceived the applicants in race cases as being alienated from the real situation as stated in Chapter II. The law could be simplified. The Government has a crucial role to play. It must set out it's plans and commitment to tackle racial discrimination seriously and follow this with effective action. If law is to be more effective in producing changes the reliance on bringing individual cases of race discrimination is not enough. The administration has to tackle the elimination of the patterns of discrimination in society. Both the 'Lawrence Inquiry' coupled with the reforms put forward by the CRE is hoping to bring this change with the assistance of the Government. If law is to be an instrument of social change the social organisation has to be investigated. An enforcement procedure has to be very effective to modify social patterns and transform society.

The CRE firmly believes that only changes to the RRA 1976 will enable the law to challenge entrenched forms of race discrimination more effectively than it has done in the past. Chapter V showed the reluctance by the judiciary to bring about drastic changes. The Industrial Tribunal Chairs are becoming more aware of race issues and invoking changes by their decisions. There is optimism for this changing attitude. The CRE is also very optimistic and is working towards achieving significant changes to society in attempting to eliminate discrimination. There is a difference in potential between the CRE, the judges and Chairs of

Tribunals. The judges are (with a few exceptions) still failing to acknowledge changing social values and adhering to their entrenched attitudes. They are not making sufficient contribution to bring about social changes although they possess great potential for reform. By contrast the Chairs of Tribunals have done more by arriving at "bold" decisions in Tribunal cases, becoming more aware of ethnic minority culture, race awareness, etc. They are certainly exercising their potential in an attempt to transform society by their flexibility and change of attitude to race cases. The CRE is ideally placed at this junction in time (The Labour Government, The Race Relations (Amendment) Act 2000, the Macpherson Report and increase in financial resources). These factors make the CRE highly optimistic to effect significant changes to society (coupled with a very ambitious agenda). The CRE has the potential to act as a powerful instrument of policy to bring about social change coupled with inherent changes to the law.

In Chapter II views expressed by Professor Hepple and Fitzpatrick are pessimistic for the reform of society through legislation as they see the law lagging behind social change. My empirical studies uncovered the low success rate of discrimination cases with regard to individual cases and discriminatory advertisements and pressure cases . Despite the gloomy picture for invoking social change, I perceive a great hope for the future, based largely on the reform of the RRA 1976, the Macpherson Report, the commitment by the Labour Government and the agenda set by the CRE for positive changes to race relations in Britain. The Courts can play a very significant role in the interpretation of the RRA 1976. Broad interpretations of the law are a real possibility. In order to bring about an equal and just society merely adopting policies is insufficient, these policies have to be enforced and the enforcement machinery has to be strengthened. 1999 was a year of achievement for the CRE in it's successful campaign for reform the RRA 1976.

The Courts interpret the legislation narrowly rather than bring about radical reforms. This was uncovered in Chapter VIII where we saw the difficulties encountered in establishing

discrimination. The Courts relied on concrete and overwhelming evidence of discrimination for a race case to succeed. We can conclude that the Courts are now becoming more responsive to changing social needs, although they still have a long way to go as identified in Chapter V. There is a gradual trend in improvement in recent decisions compared with the cases in the 1960's and 1980's which illustrated the insensitivity and lack of knowledge and experience of ethnic minorities by the judiciary. In this aspect, there is a change being affected by legislation although at a slow pace.

The study on Industrial Tribunals found the Chair and Panel Members well informed on race issues in 1998 (Chapter VIII). Tribunals are now acknowledging racial remarks as serious and offensive to minorities. One can express optimism with this changing attitude when compared to earlier decisions on race cases at Tribunals. Different cultural values are acknowledged by Tribunals, for example, religious holidays of ethnic minorities. In this respect law is bringing about social change but it is still not sufficient to eliminate discrimination on a large scale as yet. The changes could be attributed to being part of the educational process and the changing attitude of society and judges.

There are difficulties experienced by applicants in proving discrimination as concluded in Chapter V. This problem was further identified in Chapter VIII. There are strict rules laid down as to 'criteria' to be fulfilled before discrimination is proved. The Tribunals could interpret the law widely thus removing the present constraints on the law. The success rate of race cases in the Tribunals will be greatly increased (at present very low), if Tribunal Members departed from the rigid interpretation of the law and arrived at 'bold' decisions, thus bringing about changes to society. Boldness among the judiciary is rare, judges at present act as a limited instrument of social change. The limitations of the law with reference to the criteria to be established for proof of discrimination needs to be eroded. This would contribute to proving cases on race discrimination easier. A better success rate can also be attained by the recent changes in the present legislation. It is enlightening to note

that the Courts are exercising a certain degree of flexibility and change of attitude, for example, Tribunal Members are more aware of race issues in the interpretation of the legislation (as identified in chapter VIII), but there is ample room for greater flexibility, and further change of attitude. These are positive indications that changes to society is a reality although at a slow pace. Drastic reform is a real possibility. The changing attitude of the Tribunals could be attributed to the recent increase in the appointment of Members of ethnic minorities to the Tribunals. The Members of Industrial Tribunal have been made more aware of race issues by compulsory training programmes. There has been a recent trend for flexibility and understanding of different cultures and social changes in Britain. One of the possible avenues for change is for Chairpersons to gain expertise in discrimination matters by sitting on cases involving only discrimination. When this expertise is coupled with changes in the legislation, there is a very realistic hope for changes to society.

Rather positive conclusions were reached from the study of Industrial Tribunals. The grounds for optimism are based on the following facts. The Tribunals recognise the difficulties of proving race discrimination and are willing to draw inferences. The study found Tribunal Panels to be generally well informed on race issues. This is further substantiated by the observation of cases at Tribunals by me. One can conclude that race issues are taken more seriously than in the past by Tribunals. The Tribunals were also consistent in arriving at their decision and this disperses the myth of regional inconsistency among Tribunals. The low success rate of race cases is largely due to the legal technicalities and several criteria to be fulfilled before race discrimination can be established. By the reform of RRA 1976, the limitations will be eliminated and more cases will hopefully succeed. The difficulties of proving discrimination ties in with the fact that the RRA 1976 is rights based law. Race discrimination has to be seen as a social problem and addressed as one to transform society. Most Tribunals are very reluctant to deviate from the norms of society but when the comparison is drawn against the Health and Safety Act, there is an indication of realistic possibilities for change, especially in the light of the reform to the RRA 1976 by the Race

Relations (Amendment) Act 2000. The Health and Safety legislation has succeeded in bringing about social change through bringing cases to court. In the past the RRA 1976 imposed limits on the competence and scope of what Tribunals could achieve. If these limitations are reduced, there is a possibility of law becoming an instrument to change conduct and possibly behaviour as well as attitude. The survey of Industrial Tribunals (Chapter VIII) identified certain areas where changes in the RRA 1976 could increase the success rate in Tribunals, thus bringing about changes to race relations and society. The relevant areas were, addressing institutional racism, the shift of the burden of proof to the respondent after a prime facie case of discrimination is made out, the duty to be placed on Tribunals to draw inferences where respondents failed to reply to the RR65 Questionnaire and by placing a legal obligation of adherence to the Code of Practice in Employment. These changes will, hopefully, assist greatly in the elimination of discrimination, thus attempting to change society by legislation. The RRA (Amendment Act 2000) includes other areas of public service not covered, hence the Tribunals will be covering a much wider ambit and will be addressing race discrimination on a wider scale, but the Industrial Tribunals survey indicates that there will be limits because of their Constitution even with changes in the law.

The number of convictions under Health and Safety Act far surpass the success rate of cases under the RRA 1976 (as identified in Chapter X). Once again the conclusions point to the low priority given to race relations. Just as health and safety can improve efficiency and production, so can an equal opportunity policy, by improving Industrial relations and creating a better workforce. Many organisations may be in possession of a policy statement on equal opportunities but there is no implementation. A health and safety policy has to be implemented legally. This fact separates the Health and Safety Act from the RRA 1976 by a wide margin. The Race Relations (Amendment) Act 2000 spells optimism for the future.

Codes of Practice, approved under the Health and Safety Act, have a legal standing. The Code of Practice in employment under the RRA (Section 47) has no legal force. Chapter VIII

uncovered this problem in Tribunal cases. One of the conclusions to be drawn is that the Health and Safety Act acts as a deterrent whereas the RRA does not. This is because there is a wide discrepancy between the two Acts regarding penalties for breaches. The enforcement powers are taken seriously and there is a determined effort to implement policies and practice by the HSC and HSE as compared with the CRE. The health and safety legislation certainly has 'more teeth' than the RRA of 1976. The conclusion to be drawn is that the HSC and HSE are definitely more powerful bodies with effective powers of enforcement as compared with the CRE whose powers and prosecution policies are extremely limited. This will hopefully change as a result of the reforms. Cases brought under the health and safety legislation has resulted in drastic changes to the workplace ensuring the safety of employees. Case law sets precedents to be followed thus effecting changes in the workplace. There is a glimmer of hope that this could also be achieved under the RRA 1976. The conclusion drawn is that the CRE is not as competent in the management of race as the HSE is in the management of health and safety. We can conclude that the reason for this is because the Health and Safety Act is more powerful than the RRA 1976. Another significant conclusion to be drawn is that the HSE takes preventative measures whereas the CRE does not. The Health and Safety Act has demonstrated that legislation can act as an instrument to bring about social reform and hence change society. The reform has been achieved by advice, persuasion, education and enforcement. Hopefully, in time the RRA 1976 will achieve the same status as the Health and Safety Act.

The persuasive effect of the law in the United States is much greater in respect of successful litigation and economic consequences of those sued. The United States legislation against racial discrimination is much more formidable in practice than in Britain. In the States, blacks are represented in every job and in every profession but this goal has not yet been achieved in Britain. Anti-discrimination law has a limited role. The American experience does indicate that anti-discrimination legislation can achieve a great deal. The manner in which the race law is enforced in Britain compares very unfavourably with the United States.

Britain followed the pattern of the United States in adopting an action to counter the effects of past discrimination - this was termed "positive action". The scope for "affirmative action" in the States is definitely far wider than "positive action" in Britain but the legality and morality of "affirmative action" has been questioned. If the law is properly administered and enforced it can control discriminatory conduct in public life and affect attitudes.

According to Professor Anwar (Anwar, 2000), the Race Relations Act 1976 has made some progress in discovering patterns of discrimination and promoting racial equality. Anwar perceives that racial inequality persists in the 1990s, racial harassment is seen as a serious problem and the attitude of the host community towards ethnics is still a cause for concern. He notes the weakness in RRA 1976 and assesses how it could be strengthened. Anwar emphasises the need for deterrent effective sanctions as they exist in Northern Ireland Fair Employment (Northern Ireland) Act 1989. He also states that individuals who discriminate should also be punished. The CRE's powers of formal investigation has had some impact but more recently the work in this area has diminished and the CRE is not utilising its strategic powers.

The powers of the CRE for formal investigation were curtailed by the Prestige case 1984 and Anwar feels that in the interim period before the Prestige case is reversed, the CRE could follow up some of the decisions of the industrial tribunals and county courts as evidence of discrimination, start formal investigations in those organisations and issue non discrimination notices and ask for further corrective action which should be binding. This suggestion certainly has positive implications for the reduction of racial discrimination especially by large employers. Anwar is also expressing concerns about persistent discriminators and small and medium organisations who are not too bothered by the findings of racial discrimination against them. The CRE's general powers of remedy are weak under the RRA for e.g. under s.29, 30/31. They do not compensate for past discrimination but focus is placed on changing future behaviour. Anwar is suggesting affirmative action programmes binding on all

respondents found guilty of racial discrimination. Affirmative action does have its problems (as discussed in Chapter IV). In Anwar's view, ethnic record keeping and monitoring needs to be mandatory 'contract compliance' should be implemented by central government and local authorities and the CRE should undertake monitoring. Religious groups e.g. Muslims in view of recent political events should be brought within the RRA.

Anwar perceives a stronger Race Relations Act, adequate financial resources for the CRE, the participation of ethnic minorities in all aspects of British public life, the mass media and the political will can bring about changes to society, but he ends on a slightly pessimistic note, by stating that we have a long way to go to achieve this goal for the transformation of society in the economic, social and political institutions in Britain.

According to Geoffrey Bindman (Anwar, 2000) law can have a useful declaratory effect. He stresses effective enforcement by the courts without which it is severely limited. He emphasises the need for statutory powers to enable courts and tribunals to make necessary orders and awards, judges who are willing to implement the law positively and an institutional framework that provides access to courts for victims and their representatives. Bindman also perceives the weakness in the RRA 1976 and asks whether Parliament or the judges are responsible? In his view, the judges with a few exceptions, have viewed cases narrowly without sympathy or understanding of the Act. Nasse vs Science Research Council 1979 and Vyas vs Leyland Cars 1979 decisions illustrated a more sympathetic approach to victims. The Parliament was blamed for judicial hostility on formal investigations. Despite the Race Relations (Remedies) Act 1994 average awards for race cases are still modest compared to defamation. Exemplary or punitive damages are not awarded (Deane v London Borough of Ealing (1993)).

Bindman sees the RRA as a mixture of success and failure – its symbolic impact as a declaration of policy has had some value but it is still very difficult for individuals to pursue a

case against discrimination, in spite of some judicial effort to lighten the burden of proving it. Bindman is concerned about the absence of legal aid in industrial tribunals, lack of resources of the CRE to fund individual cases, also the lack of redress for institutional racism and the paucity of class actions. Bindman sees the need to establish an efficient and effective framework for both individual and collective enforcement of the law. McCrudden (McCrudden & Others, 1991), concluded in Chapter VI – Study No. 3, that there was scope for further action to provide racial justice at work through legal enforcement and related policies. Although much can be done within the current framework of the law, a lot more can be achieved through reform of the legislation. This study had identified changes of strategy and practice of the law in attempting to eliminate discrimination in employment. The research also concluded that the scope for achieving 'group justice' was limited by the form of existing legislation. The research emphasised the limits of the RRA 1976 as the greatest handicap in bringing about reform to discrimination in employment.

Chapter V draws a comparison between the older decisions and the more recent ones e.g. Malik v British Home Stores (BHS) (1980), Orphanos v Queen Mary College (1985) and Greater Manchester Police Authority v Lea (1990) where the courts reflected flexibility in the interpretation of the cases, thus bringing about changes to legislation, hence to society. In the case of Malik the court took into consideration the cultural values of ethnic minorities. In two exceptional cases of Chan (1997) and D Souza (1997) (under appeal) awards of £170,043 and £358,288 were made. In Sam Yeboah v Hackney Borough Council (1998) settlement of £380,000 was made (also under an appeal). These figures combine awards for injury to feelings and actual financial loss. These awards reflect the change of attitude of the courts. Some judges have stressed that discrimination must be treated as serious and compensation ought to be substantial.

All this is possible but the hopes may not be realised if there is a lack of political will, change of government and cuts in the availability of resources. There is a problem and conflict

between the Race Relations Act and the Asylum Act. This is reminiscent of the RRA 1968 and the legislation on immigration at the time. The Asylum seekers question has to be addressed urgently so that there can be positive changes to race relations in Britain. The Race Relations (Amendment) Act 2000 came into force in 2001 and the powers of the CRE have been enhanced regarding the enforcement of the RRA 1976. Public bodies will be forced to change. The CRE has been granted a new lease of life after having gone through a difficult phase. The CRE can achieve a great deal by a combination of formal investigations, promotional, educational work, by campaigning and through the media. The CRE must rely heavily on the political will and judicial will to change for the transformation of society. Law can embrace sociology and bring about change, then law could become an effective machinery. The CRE itself can be viewed as an instrument of social change by the expansion of its own powers, which were considered as inadequate before the RRA (Amendment) Act 2000. By bringing public bodies within the scope of the Act, there is a strong likelihood that more individuals will be demanding assistance from the CRE who believe that they have been discriminated against. If the foundations for changes are firmly in place, then I believe that the RRA 1976 can play a significant role as an instrument of social change.

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Race Relations Act 1976

Sex Discrimination Act 1975

APPENDICES

APPENDIX I

THE LIMITED POWERS OF THE COMMISSION FOR RACIAL EQUALITY (CRE)

Assisting Complainants

The most significant power of the CRE is to provide assistance to complainants under Section 66, RRA 1976. The CRE attempts to conciliate cases as far as possible and only undertakes legal adjudication as a last resort. The CRE also undertakes case 'follow up' whereby it attempts to improve policies and procedures of employers. This aim was to ensure that respondents took the necessary steps to prevent future breaches of the RRA and to ensure that an equal opportunity policy was followed. As a result of the case work follow up, certain significant triumphs were achieved, for example, South Trafford College revised its racial harassment policy and procedure in line with the Commission's recommendations on 'Racial Harassment at Work', Sainsbury's racial and sexual harassment procedures were revised and included in the staff handbook and British Airways gave the Commission an undertaking that it would issue fresh instructions to staff involved in passport checks at United Kingdom airports. In 58% of cases followed up by the CRE in 1996, all or most of the objectives were received.

The Complaints Procedure

Applicants who wish to lodge a complaint about being discriminated against on grounds of race may approach the CRE in a variety of manner. They may turn up in person at the Commission, make contact by telephone, be referred to it by their local law centres, citizen's advice bureaux or their race equality councils and write to the CRE. A complaints officer is allocated to the complainant and he/she is asked to fill out a green form providing a series of personal details, for example, ethnic origin, date of the racial incident, name of respondent,

etc and a brief summary of the allegation of racial discrimination. The complaints officers are subject to the scrutiny of the internal Ombudsman and the Parliamentary Commissioner (external Ombudsman). Although there is no obligation to interview every applicant, it is considered desirable to interview where the application appears to disclose a valid allegation. The complaints officer sets out in detail what he/she can expect from the CRE, time limits, be advised on litigation procedures and remedies. If the applicant identifies any witnesses, the complaints officer should contact them as soon as possible in order to obtain witness statements from them.

The officer either drafts or assists in the drafting of the IT1 form (originating application) to the Industrial Tribunal. The date of the incident of discrimination relied upon is of vital importance because there is a three month time limit imposed for proceedings to be instituted in employment matters and six months in non-employment matters. If the incident complained about is out of time, the complainant is left without a remedy unless the Tribunal exercises its discretionary powers and allows the case to proceed to litigation. The next step in processing the complaint is the sending out of the RR65 Questionnaire to the respondent, which should seek to ask relevant and material questions to gather evidence to establish a case. The procedure seeking further and better particulars can be used as soon as an IT3 (a reply by the respondent to the IT1) is received. The IT3 reply will usually deny the allegations set out in the IT1. The complaints officer has to produce a summary of the case putting forward a recommendation to the Legal Committee (made up of Commissioners), for example, representation subject to review, representation limited to counsel's opinion, no further assistance because the case lacks merit on facts or no further assistance because the desired outcome has been achieved. When making decisions, Commissioners take account of the likely level of costs of a case. Sometimes representation is shared with another body, for example, Law Centre, Race Equality Council, Trade Unions or a Complainant Aid Body.

The Legal Committee

The Legal Committee is made up of Commissioners appointed by the Home Office. Under Section 66 of the RRA, the Commission has a duty to consider applications for assistance made by individuals in order to bring proceedings under the Act. The Legal Committee acting on behalf of the Commission takes decisions on applications for assistance. Section 66 does not oblige the Commission to give assistance by way of legal representation to any individual. The granting of assistance and the type of assistance given is a matter of discretion. There is no right of appeal against the decision of the Legal Committee. The decision can be reviewed if certain criteria are fulfilled, for example, new facts, new evidence or other legal matters which were not known when the decision was taken or other relevant issues are subsequently brought to light.

Religious Discrimination

The Commission is very actively pursuing the questions of religious discrimination to bring about reforms to the RRA to include religious discrimination.

Formal Investigations

The CRE only uses its powers for formal investigation as a last resort. Reports were published in 1996 on senior medical appointments in the NHS, equal opportunities in the Household Cavalry and special educational needs in the Strathclyde Council. Greater emphasis was placed on resolving complaints by negotiating changes in policy and procedure, for example, with the trade union, Unison. The Commission tackles institutional discrimination. With regard to the Asylum and Immigration Act (1996), the CRE responded to the Government's Consultation paper 'Prevention of illegal working' on its proposals to require employers to carry out checks on potential employees. The CRE encourages public and private sector organisations to examine their record on equal opportunities. The Department for Employment and Education and the Crown Prosecution Service established ethnic monitoring as a result of CRE intervention. In 1996 the CRE published 'Race and

Equal Opportunities in the Police Service', which assisted in the development of good employment practice by the Police Service.

Improving Opportunities for Young People

The CRE is concerned about the high levels of unemployment among the young ethnic minorities. In 1996 one in five applications for assistance to the Commission with complaints of racial discrimination came from people under 30 years. The CRE tested discrimination in the North of England and found that the chances of a white person getting a job or an offer of an interview when applying for a vacancy advertised in the press were three times as high as those of an Asian applicant and almost five times as high as those of a Black applicant. The CRE sent out copies of the findings of the report to all the companies involved inviting them to review their procedures and also discussed the findings with the Employment Service.

Tackling Racial Harassment and Violence

The CRE took part in meetings with the Home Office/Metropolitan Police working group on 'stop and search'. The focus of the discussions in 1996 was consideration of how ethnic-monitoring data collected under Section 95 of the Criminal Justice Act (1994), including data on racial incidents, should be put to use. The CRE joined 'Child Line' and 'Crime Concern' in publishing a ten-point action plan for victims of abuse and advice on how to help someone who might have suffered from racism. The magazine was called 'Lets Beat Racism'. In 1996, the CRE also published a leaflet in conjunction with the National Neighbourhood Watch Association and Crime Concern 'Tackling Racial Harassment: How Neighbourhood Watch Can Help'. The leaflet states that no form of racial harassment should go unchallenged. The leaflet was also circulated to police forces and Local Authorities.

Working in Partnership

The CRE provides funding to 90 Race Equality Councils, for example, in Wiltshire, Thamesdown Race Equality Council worked with employers such as Rover, House of Fraser, Nationwide, Woolworths, Littlewoods and British American Tobacco.

Raising Public Awareness

The CRE's main aim has been to encourage people in Britain to play their own part in creating a fair and just society. The CRE alone cannot tackle discrimination. It can assist individuals if they have been discriminated against. A great deal depends on the will and leadership in society in order to create a society free from discrimination and fear of racial harassment. In 1996 the Commission launched an education project 'Roots of the Future' consolidating its campaign against racism in sport. The much publicised 'Let's Kick Racism Out of Football' is co-sponsored by the Commission and the Football Association and other bodies from the professional game. The Rugby Football League, in co-operation with the Commission adopted a 13-point action plan against racism. The plan highlights the need to tackle racist behaviour on the terraces, and to give positive encouragement to players and spectators from ethnic minorities. Plans were made by the Commission and the English Basketball Association to extend the Campaign against racism in sport to basketball. The CRE also liased closely with the Sports Council, which is developing a programme of action to address questions of equality in sport. 'The Citizenship Awards' were launched in 1995 by the CRE, in partnership with the Institute of Citizenship, with the purpose of 'celebrating diversity' in Britain. The awards were set up to recognise and reward, individuals, groups and organisations who have contributed to community life by promoting racial harmony and good race relations.

Project Aid

The Commission is empowered under Section 44 of the RRA to give financial or other assistance to any organisation that it deems to be concerned with the promotion of equality

of opportunity and good relations between persons of different racial groups. Funding was provided to groups such as 'Camden Mentoring Project', "Windrush Foundation", 'Somali Womens Group' etc.

Discriminatory Advertisements and Pressure and Instructions to Discriminate

This aspect is dealt with in detail in Chapter V. Discriminatory advertisements are covered by Section 29 of the RRA which states that it is unlawful to publish an advertisement which indicates, or might reasonably be understood as indicating an intention to discriminate on grounds of colour, race, nationality or ethnic or national origin. Pressure cases are covered by Section 30/31 of the RRA, which makes it unlawful to give discriminatory instructions or exert pressure on an individual to discriminate. The CRE has powers to bring proceedings under these Sections of the Act.

Complaints about Printed Material

Incitement to racial hatred is covered by the Public Order Act 1986. The CRE has no statutory power to deal with such complaints – they are referred to the Attorney General. The complainants were advised on the role of the police, Press Complaints Commission and the Advertising Standards Authority in dealing with such matters.

The Measure of Success Attributed to the CRE

Are race relations improving or deteriorating in Britain? With regard to formal investigations, 38 cases were involved in preliminary enquiries. An investigation concerning employment practices in the London Borough of Hackney has now been suspended pending an enquiry and full report. Following an investigation of the Household Cavalry an agreement was reached with the Ministry of Defence. In 1996 the CRE persuaded the Confederation of British Industry, the Trades Union Congress, the Institute of Personnel and Development and other institutions to fight institutional discrimination. In 1996 the CRE challenged and confirmed employer's vicarious liability in discrimination and the protection for contract

workers under the RRA 1976. The Department of Education and Employment has introduced new arrangements for ethnic monitoring of school pupils following the disproportionate high levels of exclusion of boys from ethnic minority backgrounds.

What has the CRE Achieved 25 Years After the 1976 Act?

The question that I am attempting to answer under this sub heading is how far has Britain moved to the objective of attaining equality and improving race relations? There is frustration as inequality and discrimination remains a part of life's experiences for ethnic minorities in Britain. Progress and achievements were secured as a result of the RRA, the CRE and many other bodies who have contributed to bring about equality over the past 20 years. In a significant case involving the British Steel Corporation and written English tests for job applicants, six Asians were accorded compensation totalling £10,000 against their employers for making them take an English language test. This was a major break through that brought about a drastic change in the field of recruitment – this was because of CRE support and intervention in the case. The use of tests could discriminate beyond the actual needs of the job.

How the RRA has changed over the years

The first RRA was passed by parliament in 1965. The legislation was substantially revised first in 1968 and then in 1976. In 1965 it was illegal to discriminate on the grounds of colour, race, ethnic or national origins in public places. Incitement to racial hatred was a criminal offence. The Act created a Race Relations Board and Conciliation Committees. The 1968 RRA was extended to cover employment, housing, and provision of goods, facilities and services to the public and the publication of discriminatory advertisements. The RRB had its powers increased so it could institute civil proceedings and carry out investigations. A

Community Relations Commission was created to promote 'harmonious community relations'.

The 1976 RRA

Unlawful discrimination was extended to include indirect discrimination. The various bodies set up in the 1965 legislation were replaced by a CRE to carry out formal investigation, assist individuals with cases, take action over discriminatory advertisements and pressure cases, take action to promote good race relations and fund other bodies working for this objective. The CRE has utilised the changes in the legislation to use its powers to bring about changes to move towards a more just society. The CRE has opened doors for people of talent among ethnic minorities through legal action and equal opportunity programmes. There are still areas in Britain where the work force does not reflect the diversity present in the locality.

Changes brought about by the CRE in the field of Indirect Discrimination

Most of these areas of success were achieved by the CRE through the intervention of the Industrial Tribunal and the Courts. Among the significant achievements are the following practices found to be unlawful under the 1976 Act: Recruitment by word of mouth, through internal applications only or from a specific, defined area or restricted only to those with a United Kingdom qualification, hand written tests and application forms hand written by the applicant, English language tests or requirements, denial of time off for religious observance. Uniforms for women allowing only short skirts and 'no head scarf' in work places or schools, 'no hats' rules or conversely rules that all employees wear the same head gear if this is not required under the health and safety regulations and clean shaven rules.

After the publication of the CRE Code of Practice in Employment in 1984 a number of private employers took up the idea of ethnic monitoring. Ethnic monitoring was extended to criminal justice in 1986, Health Authorities in 1995 and the Public Service. The rate of progress of

equality will depend heavily on the Government of the day and their political will. The CRE can boast about its modest achievements but a lot more has to be done to change entrenched behaviour and attitudes. The CRE's major area of success is in the field of complaints and litigation. It has secured many out of Court settlements in the five-figure bracket and in the recent case of Mr Yeboah against Hackney Council £380,000 was awarded in damages for being discriminated against. This was the CRE's longest running case, which lasted 104 days at the Tribunal. The CRE is certainly proud of its contribution in this case. This case was overturned by the EAT and will be appealed further. In another case involving Lambeth Council the applicant was awarded, £350,000 (also supported by the CRE). This case is now the subject of an appeal.

APPENDIX 2

The Personnel Officer,

Dear Sir/Madam,

Re: Research on the RRA 1976

The Law Department is conducting research on aspects of the RRA which aims to uncover some of the problems and difficulties which its implementation has produced. In particular, I am attempting to follow the cases reported to the CRE for possible breaches of Section 30/31 of the RRA. That is the reason for my writing to you.

This is independent research, so that I am free to draw my own conclusions and recommendations however critical they are of the Act or of the Commission.

I would be most grateful if you would be kind enough to answer the Questionnaire enclosed. Please ignore questions that do not apply to you. I am trying to ascertain whether you have encountered any difficulties in attempting to implement an Equal Opportunity policy.

In any publication following the research, anonymity will be preserved, unless you agree otherwise.

Thank you in anticipation for completing the Questionnaire. A speedy response would be greatly appreciated. Please find enclosed an envelope for your reply.

Yours faithfully,
Research Assistant

APPENDIX 3

The Manager

Dear Sir/Madam,

Re: Research on the RRA 1976

The Law Department is conducting research on aspects of the RRA which aims to uncover some of the problems and difficulties which its implementation has produced.

This is independent research, so that I am free to draw my own conclusions and recommendations however critical they are of the Act or of the Commission.

I would be most grateful if you would be kind enough to answer the Questionnaire enclosed. Please ignore questions that do not apply to you. I am trying to ascertain whether you have encountered any difficulties in attempting to implement an Equal Opportunity policy.

In any publication following the research, anonymity will be preserved, unless you agree otherwise.

Thank you in anticipation for completing the Questionnaire. A speedy response would be greatly appreciated. Please find enclosed an envelope for your reply.

Yours faithfully,

Raj Naidoo
Research Assistant

APPENDIX 4
THE QUESTIONNAIRE – 1st EMPIRICAL RESEARCH

Under The RRA 1976
Please type answers if possible

Questionnaire Paper

1. Do you have a written Equal Opportunity Policy or similar document? If yes, would you please provide me with a copy. And at the same time, would you let me know when it was first issued.

2. Have you devised a means of monitoring equality of opportunity in your recruitment and your promotion? If the answer is `yes' would you please provide me with copies of any documents of your procedures.

3. Briefly describe any particular difficulties you have encountered in monitoring equality of opportunity in recruitment and promotion.

4. How closely do you think your workforce reflects the ethnic composition of the labour market from which it is drawn? Please continue on a separate sheet if this space is insufficient?

5. Do you provide instructions or training to those responsible for the following?
   (a) recruitment (b) interviewing (c) training (d) promotion. If the answer is 'yes' to any one of them, would you please provide me with copies of such documentary materials you issue them, and let me know when they were first used.

6. Briefly describe any particular difficulties you have had with making changes in your procedures of:
   (a) recruitment
   (b) interviewing
   (c) training
   (d) promotion

7. According to your information, what is the ethnic composition of your workforce (by reference to race, colour, nationality, ethnic or national origin)?

8. How many promotions or recruitment to senior positions (managerial, supervisory, professional, or technical posts) have you made since the proceedings against you?

9. For reasons of the proceedings against you, have you reviewed job and person specifications? At any particular, or all grades?

10. What is your policy with regard to the following?
    (a) Formal educational qualifications in general
    (b) Overseas qualifications in particular
    (c) Segregation according to language or ethnic group
    (d) Word-of-mouth recruitment

11. Please let me know the names of the employment agencies your organisation uses.

12. Please mention any other steps not mentioned so far which you have taken to bring about equality of opportunity in your employment.

13. Please mention any other difficulties not mentioned so far which you have encountered in complying with the proceedings under the RRA.

APPENDIX 5

RACE RELATIONS IN EUROPE

Anti-discrimination law in Europe is examined very briefly. This will set out the state of race relations in other parts of Europe as compared to Britain. It will have a significant impact, particularly the implications of a more integrated Europe. The year 1992 saw the completion of the single European market, making a reality of the freedom of EC citizens to work, to establish businesses and to trade in other EC countries. Racism and xenophobia, producing acts of discrimination and violence, are not new phenomena in European history. Colonialism, anti-Semitism and extreme nationalism can be seen across centuries and countries. The level of violence and discrimination in EC member states has been rising (in 1991 there were 2,386 attacks in Germany, representing a ten-fold increase from the previous average of 200-250 a year) – Commission of the European Communities (1992). 75% of the attacks took place in the western part of Germany, primarily in rural towns and villages where 70% of asylum seekers are directed: Commission of the European Communities (1992). In addition to problems linked to the recent European immigration of people of various colours and other cultures, there remain in most countries long standing problems of ethnic minorities, especially gypsies.

Europe has become multi-cultural and multi-racial in an unprecedented way. Member states are split over the issue, recognising group rights, while nearly all have taken or are considering taking, measures to restrict immigration and the influx of illegal aliens. Nearly all countries have constitutional provisions on equality or non-discrimination and have adopted some form of legislation implementing the relevant provisions, for example, France in 1972 and Belgium in 1981 adopted comprehensive legislation aimed at combating racism and discrimination and have taken subsequent measures to control immigration. International human rights instruments generally prohibit racism and racial discrimination. Basic protection for refugees is contained in the 1951 Geneva Convention on the status of refugees. EC

member states have widely ratified or acceded to human rights treaties. There are fewer positive or affirmative actions taken by EC member states than there are prohibitions and regulations.

Anti-Discrimination Law in Europe

When we look to Europe we find the following: - "Protection from racial discrimination is not so comprehensively enshrined in the law of other European countries as it is in Great Britain. European Community law has not developed to protect persons from racial discrimination (save in the limited area where a person is discriminated against on the grounds of nationality, if he or she is a citizen of an EC member country). This contrasts with the position of sex discrimination in the area of equal pay where there is a developed jurisprudence and a treaty provision (Article 119) dealing with the matter. The European Community appears to have legal competence to tackle racial discrimination, and the lack of jurisprudence, therefore, seems to represent a lack of political will. The protection from racial discrimination in the European Convention on Human Rights is only a subsidiary protection, coming into play in the exercise of the other convention rights - Article 14 (save in those circumstances where the racial discrimination is so serious that it can be described as 'degrading treatment' for the purposes of Article 3)." CRE (1992).

European Community law has not developed to protect persons from racial discrimination. The protection exists in a variety of constitutional guarantees, provisions of criminal codes and other measures, but it is nowhere so comprehensively dealt with as in Britain, and no country has an enforcement agency equivalent to that of the CRE. In comparative terms Britain has a better framework than elsewhere in Europe. This means three things, people coming here from the rest of Europe fall within the protection of our laws. People going from here to Europe lose the protection of our laws, and are not so well protected elsewhere. There is the real danger that, one day, a process of harmonisation of laws might lead not to

an improvement in protection from racial discrimination across Europe, but to a reduction, as it were, to the lowest common denominator. That could all be done in the name of free trade.

European Community Law

European Community Law has not developed to protect people from racial discrimination. There have been reports to the European Parliament in 1985 and 1990, and the Parliament has called for the "review and amendment of national legislation against political extremism, racism and racial discrimination". The 1990 report called for a whole range of measures. Moreover, in 1989, the Commission proposed a resolution in the subject of 'Racism and Xenophobia', which was considered by the Economic and Social Committee when Baroness Flather was the rapporteur, and by the Parliament. All of this falls short of what is required of Community legislation against racial discrimination.

There is no doubt that European Community law incorporates rights that are to be found in international human rights conventions to which Member States are party. The clearest recognition of this source of Community law is to be found in the judgement of the European Court of Justice in De Frenee v Sabena (1978). The question was whether outside Article 119 sex discrimination was prohibited. The answer was that it was not, but only because at that time no rule of Community laws had been developed. The clear implication is that there is competence to develop laws relating to fundamental human rights outside the treaty provisions, and that this is not limited to sex discrimination. The European Convention on Human Rights is now incorporated into European Community law. Freedom from racial discrimination is now incorporated into European Community Law. The UN Convention on the Elimination of All Forms of Racial Discrimination (Article 2[d]) states:-

> *"Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group, or organisation."*

Article 5 - UN Convention on the Elimination of all forms of Racial discrimination obliges State Parties to prohibit and to eliminate racial discrimination in all its forms, and to guarantee equality in a wide range of situations. The International Convention on Civil and Political Rights (Article 26) states: -

> *"The law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

There is increasingly well developed Community Law against aspects of sex discrimination, and there is no principled reason why there should be better protection from sex discrimination than from racial discrimination. If the actual motivation for equal pay legislation was to ensure that no country's employers were at a competitive disadvantage by providing equal pay, then there is an equally forceful argument that no country's employers should be at a competitive disadvantage by taking measures to eliminate racial discrimination. Racial discrimination in areas such as employment constitutes a significant restrictive practice distorting the labour market and reducing the available pool of labour.

The European Convention on Human Rights

Under the European Convention on Human Rights, the European Commission is endeavouring to make up for the basic failing of the Convention adequately to address itself explicitly to protection from racial discrimination, by recognising that the protection from 'degrading treatment' in Article 3 can also encompass racial discrimination. The need to do this stems from the fact that the explicit mention of discrimination in the Convention comes in Article 14, which simply protects enjoyment of the other rights and freedoms in the

Convention free from discrimination. Article 14 does not grant an independent right to freedom from discrimination. Article 14 reads as follows: -

> *"The enjoyment of the rights and freedom set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

It may be said that such a right ought not to be lacking in the convention. The Convention thus lags behind the development in the United Nations where the elimination of discrimination has received and still receives a good deal of attention, as has been expressed in a number of conventions. (Dijk & Hoof (1990 : 532)). Unhappily for people in the United Kingdom, while the Government recognises the individual's right to pursue matters under the European Convention, it does not recognise the individual's right to petition the UN Committee on the elimination of all forms of racial discrimination. The person who has to rely on the European Convention cannot boldly assert such a freedom, but must construct an argument that the racial discrimination he or she has suffered is sufficiently serious to be regarded as 'degrading treatment' under Article 3.

Lessons for the United Kingdom from Europe

Conclusion

The recurring problems of racism, discrimination and xenophobia have reached serious levels in EC member states. In response, constitutional and legislative measures to sanction violations and provide remedies are being reviewed and strengthened. In common to all states with written constitutions are constitutional statements of equality, in most cases

supplemented by specific prohibitions against racial discrimination. Human rights instruments that prohibit racism and racial discrimination are very widely ratified, providing a general framework of legal measures to protect potential victims. The United Nations Convention on the Elimination of All Forms of Racial Discrimination has had a strange influence on legislation in various states. Each state ought to review existing legislation for gaps in coverage and consider the adoption of a comprehensive anti-racism and anti-discrimination legislation. Despite the evidence of rising racist attacks in most states, it is surprising to find so few reports of prosecution, convictions or civil remedies. The general problems of overburdened legal systems, high costs, the inability to meet the burden and standard of proof in regard to a racial motivation for acts, complaints particularly in criminal cases lack support from police and prosecutors and the general unfamiliarity of victims with legal remedies available to them.

Finally, there is statutory discrimination, with regard to certain laws and their disproportionate impact on minorities. A review of the legislation has been undertaken in several countries and can assist in eliminating such discrimination. Geoffrey Bindman believes that the European Community has failed to legislate effectively against racism (Bindman, 1994). The failure of the Community and of most of its Members to legislate effectively against manifestations of racism contradicts the requirements of international human rights law which demands firm and effective action. Racial discrimination continues to be a serious problem in Britain and is unlikely to be much less serious in the rest of Europe even though it may be disguised by limitations on the acquisition of citizenship. The revival of fascism accompanied by sinister notions of racial superiority has already led to an escalation of racially motivated harassment and violence. (Bindman, 1994). It has become very clear that European law must be amended and strengthened. Only the Community Governments can compel changes in Community Law. The Race Relations Committees of the Law Society and the Bar have established a joint working party on Race in Europe.

The countries in Europe could draw heavily from the laws and experience of Britain to improve their policies on race relations. The European Community could build on the race laws in Britain and develop a very comprehensive body of law on race. The European Community is very much geared towards 'harmonisation'. There is the real threat that in their endeavour to 'harmonise' the race laws, the standard of legislation is bound to be lowered rather than improved in the protection from racial discrimination. As a result, the achievements in the field of race relations so far by Britain and the CRE may be greatly undermined.

Sex Discrimination in the EC

The Community Law on sex discrimination is very well developed as compared to the legislation on race. The original aim of the EEC anti-discrimination provisions was to ensure that free competition was not distorted by the employment of women at lower pay rates than men doing the same work. The Treaty of Rome, Article 119, deals with discrimination against women. Article 119 and the Directions are considerably wider than the Sex Discrimination Act (SDA) 1975. There have been a number of cases, which were lost under English law but won under EEC law. The EEC law establishes broad principles which apply to a wide range of discriminatory acts and which may go beyond the restrictive definitions of discrimination contained in the SDA. The general principles of EEC law prohibiting sex discrimination contain fewer exceptions than the SDA in Britain. If the European Community succeeds in bringing the legislation on race on par with the legislation on sex, the scope for anti-discrimination legislation would be greatly enhanced in Europe. In conclusion, lessons cannot be learnt by the laws on race by Britain from Europe and the EC model on race relations is unhelpful.

Form No

APPENDIX 6
INDUSTRIAL TRIBUNAL RESEARCH STUDY – PRO FORMA FOR DATA ENTRY

This Questionnaire will be analysed by computer. Do not write any comments on any part of the Questionnaire except in the designated response boxes. Any such extraneous comments will be ignored because the computer is programmed to deal only with recognised responses. All completed forms should be sent to the Research Dept.

Q1. TV Area (location of Tribunal/case). Tick the relevant box

01 ❑ London(incl. Surrey, Essex, Herts)
02 ❑ Southern (incl. Kent, Sussex, Hants, Dorset & S Berks.)
03 ❑ Wales & West (incl. Devon & Corn)
04 ❑ Central (incl. E & W Mids.)
05 ❑ Anglia (incl. Beds/Northants)
06 ❑ Granada (incl. Merseyside/Cumbria)
07 ❑ Yorkshire (incl. Lincs.)
08 ❑ Tyne-Tees
09 ❑ Scotland SW (incl. Glasgow & Borders)
10 ❑ Scotland NE (incl. Edinburgh & Highlands)

Q2. Sex of applicant

01 ❑ male
02 ❑ female

Q3. Ethnic origin of applicant

01 ❑ Black Africa-Caribbean
02 ❑ Black Other
03 ❑ White
04 ❑ Indian
05 ❑ Pakistani
06 ❑ Bangladeshi
07 ❑ European / Irish
08 ❑ Chinese & Other Asian
09 ❑ Mid East
10 ❑ African Asian
11 ❑ Other

Q4. Employment sector this case relates to

01 ❑ Private
02 ❑ Public
03 ❑ Information not available

Q5. General area of complaint

01 ❑ unfair dismissal
02 ❑ dismissal on racial grounds
03 ❑ not short-listed or appointed on racial grounds
04 ❑ not offered interview but others (of different race) were
05 ❑ unfair selection for redundancy (incl. racial grounds)
06 ❑ other benefits, facilities and rewards
07 ❑ failed to gain promotion/transfer etc on racial grounds
08 ❑ other, please specify

Q6. The last question talked about the general area of the complaint, please now be more specific and indicate which of the following specific points are involved.

01 ❑ victimisation
02 ❑ direct discrimination
03 ❑ indirect discrimination
04 ❑ harassment
05 ❑ abuse
06 ❑ other factor, please specify

Q.7 Is there any reference to whether RR65 has been used in this case?

01 ❑ yes, it is referred to in the report
02 ❑ nothing to indicate that the RR65 has been used

Q.8 Was the Code of Practice referred to in this case?

01 ❑ yes
02 ❑ no, not mentioned

Q.9 Any use of mediation such as ACAS or other ADR

01 ❑ yes
02 ❑ no

Q.10 Duration of hearing

01 ❑ less than 1 week
02 ❑ 1-4 weeks
03 ❑ over 4 weeks

Q.11 Total number of days (real time) taken by the case

Q.12 Decision

01 ❑ unanimous
02 ❑ majority

Q.13 01 ❑ upheld
02 ❑ rejected
03 ❑ settled

Q.14 Awards

01 ❑ injury to feelings
02 ❑ aggravated damages
03 ❑ loss of earnings
04 ❑ personal injury
05 ❑ loss of prospective earnings
06 ❑ other, please specify

Q.15 Was there any reference to the RR65 by the Chairman / Panel?

01 ❑ Yes
02 ❑ No

Q.16 Relative weight of facts vs. points of law. Select ONE of the following. Comment if appropriate

01 ❑ factual disputes predominate
02 ❑ points of law dominate this case
03 ❑ both are important
04 ❑ case centres more on how events were interpreted
05 ❑ this case to a considerable extent relies on inference(s) being made

Q.17 Is there any one factor or point of law in this case which have clearly been instrumental in leading the Panel to its decision? If yes, comment.
01 ❑ yes
02 ❑ no

Q.18 Attitude of Tribunal to evidence
01 ❑ clearly influenced by applicant's evidence
02 ❑ more obviously impressed with respondent's evidence
03 ❑ no clear cut indicators in the evidence, required a lot of consideration before reaching conclusion

Q.19 Any weakness in either party's evidence noted?
01 ❑ attention drawn to particular weakness/inconsistency of applicant's evidence
02 ❑ attention drawn to particular weakness/inconsistencies in respondent's evidence
03 ❑ no weaknesses mentioned

Q.20 Were racial or otherwise abusive comments a feature of this case? (i.e. cited as evidence by the applicant)
01 ❑ yes
02 ❑ no
03 ❑ not applicable

Q.21 Did any ONE of the following appear to have a bearing on the process of the case and the findings?
01 ❑ poor presentation/argument by applicant's representative
02 ❑ poor/weak presentation on the part of the respondent
03 ❑ not applicable

Q.22 Was any reference made to the respondent's familiarity, or otherwise, with race equality issues?
01 ❑ yes
02 ❑ no

Q.23 Did the Chairman make any comments on the relevance or strength of the Applicant's case. If yes, please give brief details.
01 ❑ yes
02 ❑ no

Q.24 Did the Chairman make any significant comments about the effectiveness of the respondent's case. If yes, please give brief details.
01 ❑ yes
02 ❑ no

Q.25 To what extent is it clear from the summing-up that the Tribunal has used its power to draw inferences in this case, select whichever apply

01 ❑ it has very clearly drawn inferences
02 ❑ it has clearly been reluctant to draw inference
03 ❑ no need to draw inference – the evidence is compelling
04 ❑ clear indication that Tribunal has been prepared to draw inference despite lack of obvious evidence
05 ❑ Tribunal clearly reluctant to give 'benefit of the doubt' to the applicant
06 ❑ clearly reluctant to give 'benefit of the doubt' to respondent
07 ❑ cannot comment on this – summing-up is not really clear
08 ❑ not enough information to comment on this

Q.26 To what extent do the Chairman/Panel appear to be informed on race issues

01 ❑ obviously well-informed
02 ❑ not very aware but clearly fair-minded
03 ❑ not well-informed
04 ❑ cannot tell from the limited information in the report

Q.27 Details about Applicant's legal representative(s). Tick all boxes that are applicable

01 ❑ male
02 ❑ female
03 ❑ QC
04 ❑ barrister
05 ❑ solicitor
06 ❑ TU rep
07 ❑ law centre rep
08 ❑ self-represented
09 ❑ other

Q.28 Details about Respondent's legal representative(s). Tick all boxes that are applicable

01 ❑ male
02 ❑ female
03 ❑ QC
04 ❑ barrister
05 ❑ solicitor
06 ❑ TU or law centre rep
07 ❑ multiple (more than one) representation
08 ❑ other

Q.29 If you have any additional comments on this case, then please use the space below. Try to use keywords or hyphenated phrases where possible, for example, Clear-evidence-of-racism, unreliable-evidence-respondent. (This assists with computer analysis).

HAVE YOU REMEMBERED TO NUMBER THE FRONT OF THIS FORM?

APPENDIX 7

CASE STUDIES ON INDUSTRIAL TRIBUNALS

Case No. 1

The Allegation's by the Applicant

The applicant an Indian was employed as a manager by a large electrical store. The applicant was informed that he would be replaced by a white man who had less service and less experience than the applicant. He was also told that he would be transferred to the another store. The applicant was constantly criticised about the state of the store whilst it was undergoing refurbishment. He complained about his treatment and as a result was transferred. He alleged that there were problems of staff shortages and that his complaints went unheeded. He states that before the appointment of the new area manager (white) his managerial skills were not questioned. His store surpassed the targets set every year.

Composition of Panel

The Chairman was a white male, the Panel Members were composed of one Asian male and one white female.

Representation

The applicant was represented by a white male barrister who was very experienced in race relations work. The respondents were represented by a white female barrister. She was not known to me, therefore I could not assess her experience in race work. She was nevertheless very good in her presentation and cross examination.

Race Awareness of the Panel

The whole Panel seemed informed on race issues.

Conduct of Proceedings

I observed the case on day three of the hearing. The applicant had one witness. I observed the first witness for the respondents, a white male. He was very articulate and gave an excellent presentation of the case against discrimination by the respondents. The applicant was accused of discriminating in favour of Asians by recruiting mainly Asians in an area that had a predominantly Afro-Caribbean population. The applicant was alleged to have a lot of problems regarding the management of the store, such as untidiness and bad discipline among staff. Several people are alleged to have resigned because of the lack of proper management. The applicant was asked to move to a smaller store.

Witness stated that he wanted to assist the applicant with his personal problems pursuant to the death of his father. The transfer to a smaller store would assist the applicant in getting over his personal difficulties. This was to be a temporary solution. The witness was aware of EO policies and attended training courses. The cross examination of this witness by the applicant's barrister was brilliant. He virtually destroyed the respondent's case. Very pertinent questions were asked by the barrister such as those relating to stereotyping of Asians, why no ethnics were listed in area manager posts, as to what steps were taken regarding under representation of Asians at area manager level, as to whether the witness saw the full investigation report and that Asians were seen as a problem. The applicant's barrister put it to the respondents witness that he was making up his responses to the questions raised because he was in difficulties as to how to respond. Why did the respondent witness remove the applicant with 13 years of experience and replace him with a white manager with two years experience. The witness was not aware of the applicant's achievements in winning several awards and prizes as manager. The witness was not aware of the applicant's knowledge, experience or background and did not

bother to find out. The applicant's barrister stated that people unconsciously associate problems with Asians and black people.

The Chairman interrupted to clarify points on several occasions. The white Panel Member asked questions of the witness to establish as to how long he was an area manager. The Asian Panel Member asked as to what time scales were set regarding the applicant's transfer. The second witness for the respondent was a white man, Deputy Manager. He gave evidence to state that the applicant was an incompetent manager, that he did not give detailed instructions and that the standards of the store were deteriorating. In cross examination the applicant's barrister put to this witness that he was merely acting upon instruction's of the respondent, that he was in a vulnerable position because of his age and would experience difficulties in finding another job. It was suggested that he was told what to say to the Tribunal and ideas from other people were fed to him. Both the Asian and white Panel Members questioned the witness. I cannot report further on this case because the respondents had more witnesses to call and it was adjourned to July 1999. The decision has been reserved by the Tribunal.

My Comments

From my observation, I noted that the case for the applicant was being extremely well presented and argued by his barrister. I can foresee a strong possibility of this case succeeding unless the remaining witnesses reveal some damaging evidence against the applicant. I have no criticism of the Chairman who was conducting the case in a fair and proper manner. The Panel Members were attentive and carried out their duties as expected. This case was assisted by the CRE.

Case No.2

The Allegation's by the Applicant

The applicant, a black Nigerian female, alleged that she was racially discriminated against and dismissed on the grounds of race. The applicant was employed by a Health Authority as a Laboratory Technician.

Composition of Panel

The case was chaired by a white male and the Panel Members were one Afro-Caribbean male and one white male.

Representation

The applicant was representing herself because she did not obtain assistance from the CRE. She also tried Law Centres, Citizen Advice Bureaux and a private firm of solicitors. The public bodies were reluctant to take on her case because of the huge number of documents involved. The private solicitors quote for the case were beyond the financial means of the applicant. The respondents were represented by a white male barrister.

Race Awareness of the Panel

The whole Panel appeared to be will informed on race matters.

Conduct of Proceedings

This was a case that ran for 30 days - I sat in on nine days. The bundles of documents went into hundreds of pages. It was a very long and complex case full of incidents and details. As the applicant was a lay representative, the Chairman provided her with a lot of support, for example, by advising her as to how to pose a particular question in cross-examination. The Chairman and Panel Members interrupted the applicant and the respondents' witnesses to ask pertinent questions. The respondents called several witnesses of a high calibre within the

organisation. The applicant had one black female witness who was not very good and displayed nervousness.

Decision

The applicant's case was dismissed.

My Comments

In my view the applicant did have a case to establish the possibility of discrimination. If the case had been handled by an experienced barrister perhaps she may have succeeded. The respondent's witnesses were extremely well prepared and gave their evidence in a very credible manner. The applicant came over as a person with interpersonal problems and difficulty in relating to other staff especially at senior level. The Panel did establish as to who I was at the commencement of the proceedings. I stated that I was a legal researcher on Tribunals from the CRE. The applicant informed me that the behaviour and attitude of the Panel was totally different on the days that I was not present as an observer. The applicant has not given up her fight to establish her case. I believe that she is now gone to the Employment Appeal Tribunal. She stated that she would take her case to the Court of Human Rights and she felt very strongly that the decision was incorrect. She felt that the Panel did not understand her case and she was critical of the Chairman. I could not elicit any problems by the Chair in the conduct of the proceedings. I felt that he was offering the applicant a great deal of assistance in presenting her case.

Case No. 3

The Allegations by the Applicant

The applicant was black Caribbean, (female) who alleged that she suffered racial discrimination in the manner of her dismissal by an Hospital Trust. She was employed as a midwife. The

applicant commenced studying for a law degree in 1991. Her study arrangements impacted on her work routine and there was also a dispute regarding the applicants' employment contract. The applicant's line manager tried to implicate her in a number of issues which were not at all related to her areas of responsibility. The applicant was treated less favourably than a white midwife in a specific incident involving negligence. The applicant further alleged that her line manager wanted to get rid off all black staff and she, (the applicant) was denied days off work and promotion. Following the deaths of two babies, the applicant was suspended from duty pending investigations. The children's deaths were attributed to natural causes and the inquiry team advised that the applicant be reinstated as she was cleared. After a prolonged sick leave, the employers instituted disciplinary proceedings which culminated in the dismissal of the applicant.

Composition of the Panel

The case was chaired by a white male and the Panel was comprised of one Asian female and one Asian male.

Representation

The applicant was represented by a black male barrister and the respondents were represented by a white male barrister.

Race Awareness of Panel

The Panel seemed informed on race issues.

Conduct of Proceedings

The barrister for the applicant did not present or conduct the case as well as the respondent barrister. The respondent barrister surpassed the applicant's barrister in his presentation of his case and cross examination. His closing speech was particularly brilliant. He was absolutely meticulous and thoroughly prepared. The applicant's barrister was someone well versed in the

field of race relations and generally good in the conduct of proceedings. On this occasion his performance was rather disappointing. The respondents barrister completely destroyed the applicant's case. The witnesses for the respondent were particularly good in their presentation of their evidence.

Closing Speech of Respondent

This was brilliant. The barrister felt that the applicant had no case based on race discrimination. Each allegation of the applicant was addressed and totally destroyed to nothing.

Closing Speech of Applicant

This speech lacked the quality of the respondent barrister's speech. I felt that the closing speech was weak and I could not foresee a case of race discrimination succeeding.

Decision

The Tribunal dismissed the case because the Tribunal had no grounds to find race discrimination or even an inference of race discrimination could not be drawn.

My Comments

Further, the applicant was very stressed and did not make a very good witness.

The proceedings were conducted fairly and in a proper manner. The respondent's presentation of the case far surpassed that of the applicant's case.

Case No 4

The Allegations by the applicant

The applicant, an Arab male, alleged that the manner whereby he was subjected to bullying and racial harassment by two of his immediate supervisors, one white and one Pakistani was

racially discriminatory. He was employed as a site engineer by a construction company. The applicant alleged that as soon as he started work he was constantly told by his supervisors that he was "crap" "he was useless" and threatened to sack him. He also alleged that he was stopped from using a company car when other engineers were allowed to use company cars and was also refused training. He also alleged that he was made to work done by labourers, for example, washing cars, changing car tyres, clearing scrap metal, etc. He was further excluded from weekly meetings. Complaints to senior management went unheard. He was eventually given a weeks notice to leave because the company claimed they were unable to offer him alternative position which was suited to his experience. He states that whilst serving notice the Pakistani gentleman said to him "we got rid of you, what are you going to do now" and started laughing mockingly.

Composition of the Panel

The case was chaired by a white male and the Panel was composed of an Asian male and white male.

Representation

The applicant was represented by an Asian female barrister and the case was supported by the CRE. The respondents were represented by a white male barrister.

Race Awareness of Panel

The Chair and the Panel Members seemed well informed on race issues.

Conduct of Proceedings

I observed the case on day four and therefore cannot comment on this aspect. I was present for the applicants closing speech.

Applicants Closing Speech

The applicants barrister was well prepared and the closing speech was well presented. She argued that the applicant was dismissed on racial grounds and there were flaws in the procedure for dismissal. An argument for less favourable treatment of the applicant coupled with comparative evidence was put forward. The unlawful deduction of wages was resolved. The applicant was employed for less than two years and the Tribunal has to decide on this issue pending the outcome of a Court of Appeal decision.

Decision

The decision was reserved by the Tribunal.

My Comment

This case was well presented in the concluding speech by the applicants barrister. The applicant appeared to be very stressed pursuant to his dismissal, the unfair dismissal issue hinges on the Court of Appeal decision .The applicant was extremely upset in the manner that he felt that he was treated, from the facts of the case it does appear that the applicant was treated unfairly. The white comparators were less qualified than the applicant but still remained as employees of the organisation.

Case No. 5

The Allegations by the Applicant

The case involved an Afro-Caribbean woman against a Housing Association. The applicant initially brought proceedings for race discrimination, constructive dismissal and breach of contract. The applicant was employed as a Deputy Manager and she clashed with the Manageress, a white woman. There were mainly problems regarding changes that were brought about by the Manageress. There was an incident involving some missing money of one of the residents. The Police questioned the applicant and she felt that this was discriminatory

and that the respondent manageress influenced the police investigation. The Police interviewed all three people from ethnic minority background only. The applicant eventually resigned and at a later date she requested to be reinstated in her post, but was rejected. No charges were brought against the applicant because of insufficient evidence. Applicant alleged that warnings were given to her and other blacks. There were several other incidents, for example, changing of locks, which the applicant complained about.

Composition of Panel

The case was chaired by a white male and the Panel was composed of one Asian male and another white male.

Representation

The applicant was represented by a white female solicitor from the Law Centre and the respondents were represented by a white male barrister.

Race Awareness of Panel

The Chairman was extremely well informed on race issues. The Panel Members also seemed very well informed on race and asked many pertinent questions of both the applicant and the respondents' witnesses.

Conduct of Proceedings

The Chairman conducted the proceedings very meticulously, paying attention to all the details of the case. He virtually cross-examined the applicant and the respondents' witnesses. He came over as extremely fair in the conduct of the proceedings. The Panel Members were trying to establish from the applicant as to where the less favourable treatment lay to find race discrimination. One very significant question was asked by the Asian member of the Panel to uncover as to whether the same treatment was accorded to all employees by the manageress. The applicant stated "yes". It was very difficult for the applicant to establish that she was

discriminated against by being treated less favourably. The whole Panel expressed a deep interest in the proceedings and were seen to be really involved.

The applicant was very soft spoken initially but later she seemed more relaxed in presenting her evidence. She relied on some 'hearsay' evidence. In the course of the hearing it was revealed that warnings were given to people of all racial origins irrespective of race or ethnic backgrounds. The applicant stated that she did not follow grievance procedures nor race discrimination and harassment procedures. The white Panel member asked many questions pertaining to the allegation of getting rid of long standing staff. The Chairman raised the question as to why the applicant did not raise the question of discrimination until her employment ended. The Chairman was very astute on picking up on little points and he was extremely thorough. The applicant felt that she was treated differently because of her racial origin but was experiencing extreme difficulty in establishing this fact.

The applicant called two witnesses, on white woman and one black woman. The white witness stated that the Manageress wanted the applicant to be got rid of from the organisation. When the Asian Panel member asked the black female witness about instances of racial remarks, she replied that there was covert racism, which was difficult to prove. When the applicant was cross-examined by the respondents' barrister, she did not answer the questions very clearly; she came over as a person with no case. The respondents had 3 white women as witnesses who were very articulate.

Closing Speech of Respondent

The respondent barrister felt that the applicant had no grounds in bringing a case on race discrimination. It was a waste of public funds and he requested costs. The applicant did not like the new regime of management, there was a clash based on personality not on grounds of race. No evidence of discrimination could be established and the applicant suffered no

detriment. Employers as a rule do not take people back once they have resigned. He invited the Panel to dismiss the case.

Applicants Closing Speech

The applicant's solicitor felt that there were serious allegations of race discrimination and that the applicant was treated less favourably. The manageress wanted the applicant to leave. Whites were not interviewed by the Police only ethnics. The management structure was virtually all white. Constructive dismissal and breach of contract was ruled out at a preliminary hearing.

Decision

Before the decision was given, which took 30 minutes to decide the Chairman asked as to who I was – I identified myself as a CRE researcher. I was taken for a member of the Press and was told that certain confidential matters regarding the Police investigation ought not to be reported. The Panel was not satisfied that the police were influenced by the respondents to investigate the applicant. The police were investigating an allegation of theft. It is not the practice of employers to allow employees to withdraw their resignation - it is not industrial relations practice. The applicant was not subject to discrimination and no inference could be drawn. It was a unanimous decision and the case was dismissed. The respondents' request for costs was refused as the Chairman felt that the allegations were not scandalous and the applicant did not act unreasonably. The respondents ought to have asked for a preliminary hearing.

My Comments

This was a weak case with regard to evidence to establish race discrimination. After the first day of the hearing, I felt that the applicant would not succeed – she was not a very good witness. There is a remote possibility that there might have been covert racism as stated by one of the applicant's witnesses. This is extremely difficult to establish. The burden of proof in race cases rests on the applicant. There was not enough evidence for the Panel to draw an

inference of discrimination. The Panel was excellent with one exception. When the applicant's solicitor tried to establish whether the respondents had actually implemented an equal opportunity policy, the Chairman stated that this was irrelevant, as it was not part of the allegations of the applicant in her originating application. The applicant's representative thought that this was crucial evidence. I felt that the Chairman ought to have allowed this line of questioning in a race case to find out whether the respondents were an equal opportunity employer. Further the respondents had drawn up an equal opportunity policy in 1992 and it has not been reviewed to date. This is a significant issue that ought to have been determined by the Tribunal.

Case No 6

The Allegations by the applicant.

The applicant was a black male African who alleged that he was discriminated on grounds of race and sex and also victimised on both grounds. The respondents were a Health Care NHS Trust. The applicant was a medical records officer since April 1996 and had post graduate qualification in administration.

Composition of Panel

The case was chaired by a white male and the Panel was composed of one white female and one black male.

Representation

The applicant was represented by a black male who was a graduate. The respondents were represented by a white female barrister.

Race Awareness of Panel

The Chair and the Panel seemed to be aware of race issues. This was evidenced by the questions asked.

Conduct of Proceedings

I commenced observing this case on day two of the proceedings and the case lasted for five days. The applicant came over as gentle and soft spoken. He was cross examined on various issues including the fact that the applicant had lost responsibility of staff management. The respondents alleged that the applicants standard of work was deteriorating. The applicant admitted to making two mistakes. The respondent's barrister was very good. The applicant was criticised for his lack of confidence. The cross examination was aimed at in extreme detail and the respondent's barrister was thoroughly prepared. The applicant contradicted statements and seemed confused and there was inconsistency in his evidence. The applicant experienced difficulty with understanding certain terminology like 'pen ultimate'. On day three of the proceedings the Chairman interrupted the proceedings as to the related allegations. The re-examinations by the applicant's representative was very bad, he was not sufficiently articulate. The Chairman instructed the applicant's representative to mend what occurred in cross examination and not to reopen the case again. The white Panel Member did not ask any questions, the black member did. The applicant's representative was now seeking an order for confidential documents. Chairman stated that there may be an adjournment and the respondents can ask for costs because of the lateness of the application for the order. The case continues.

My Comments

This did not appear to be a very good case. The applicant's representative was very weak in attempting to prove the allegations by the applicant. The Chair was exercising great patience when the applicant's representative was virtually trying to present the whole case during re-examination of the applicant. The applicant may have stood a better chance in succeeding if he

was represented by someone with better skills in conducting cases at Tribunals. The outcome of this case is not known to me.

Case No. 7

The Allegations by the Applicant

The applicant claims that he was dismissed by the respondent on the grounds of his race and further he was victimised. The applicant was employed as a Housing Officer until his dismissal. Between 3 September and 26 November 1997 the applicant was subjected to a series of disciplinary interviews on the grounds of alleged defamatory comments made against a fellow white employee. A work colleague made a complaint against the applicant alleging that he had made defamatory comments. No formal statement was ever written by her, neither was there a formal statement made by the four witnesses that she called. The complaints procedure was not followed which breached company policy. The Deputy Manager who not only constructed the questions that were to be asked also took part on the Panel that interviewed each witness.

During the period of the applicant's employment he had never been subjected to any form of disciplinary proceedings until September 1997. On 27 November 1997 the applicant was dismissed. The reason given for the dismissal was that "action on his part disclosed during the disciplinary hearing had fundamentally undermined the trust and confidence essential to the employment relationship". The applicant further stated that he was victimised. There was a racial remark made to the applicant by the finance officer. This was done in the presence of the Assistant Area Manager who walked away from the incident and did nothing to resolve the situation. The complaint was upheld. The finance officer did not receive a verbal or written warning. The applicant stated that the allegations brought were untrue. He believed that he was treated differently from other white employees in similar circumstances and that the reason for his dismissal was due to his race and colour.

Composition of Panel

The case was chaired by a white male and the Panel was composed of one white male and another white female.

Representation

The applicant was represented by an Asian female barrister. The Applicant was assisted by the CRE. The respondents were represented by a white male barrister.

Race Awareness of Panel

The Chairman appeared to be well informed on race.

Conduct of Proceedings

The Chairman asked questions as the applicant's witness's statement which was read out. He asked the witness as to his views about being promoted on experience rather than qualifications. The witness stated that racism was rampant in the organisation. During the course of cross examination by the respondent barrister the Chairman intervened to clarify answers given by the applicant's witness. The Panel also noted questions of the applicant's witness. The white male Panel member was attempting to establish as to whether the motive was one of jealousy and not racial. The white female Panel member did not ask any questions of the applicant's witness. The Chair was very thorough in his questioning on the day that I observed the case. The witness for the respondent (white male) was very articulate. The Chairman asked the witness as to whether there were any racial overtones. The Chairman questioned the witnesses for the applicant and the respondents very thoroughly.

My Comments

I observed the case on day three and the case continued. The CRE barrister, was very good and well prepared. The applicant's witness was not very good, he was not very sure of what he

was saying and did not give precise answers. The witness was digressing and going into detailed elaboration. There were talks about the possibility of a settlement between the parties. The case continued and I was not present when the case was concluded.

Case No. 8

The Allegations by the applicant

The applicant complained that he was unfairly dismissed by the respondent contrary to Section 1 (1) (a) and Section 4 (2) (c), RRA. Further he claimed that he was racially victimised. The applicant claimed that he brought a complaint of racial discrimination through the assistance of the Commission in the Industrial Tribunal against the respondent. The applicant's claim was dismissed. He believed that due to initiating proceedings against his employer, he has been subjected to various incidents of intimidation and discrimination from one of the two respondent witnesses in the previous case, namely his manager. On 30 January 1998 he attempted to complain about his manager's behaviour towards him to his senior department manager, but he refused to address his complaint and instead instructed him to refer the matters back to his manager.

On 9 February 1998 the manager in a meeting with the applicant, admitted treating him differently to other colleagues "because of what happened at the Tribunal last year". He believed that the manager treated him less favourably with regard to (a) training issues; (b) sending to him only "job suitability" memos; (c) verbally threatening to sack him; (d) inconsistently refusing holiday leave requests from him; (e) refusing him days off in lieu for weekend working when he granted such requests to other colleagues on the same business trip; (f) checking only his business expenses with other colleagues and yet never once checking theirs with him. On the 24 February 1998 the applicant was unfairly dismissed by the company without notice. He believed that he had been racially victimised.

Composition of Panel

The case was chaired by a white male and the Panel was comprised of two white males.

Representation

The applicant was supported by the CRE and was represented by a white male barrister. The respondents were represented by a white male barrister.

Race Awareness of Panel

The Panel seemed to be well acquainted with race issues.

Conduct of Proceedings

The cross examination by the applicant's barrister of the respondents white male witness was brilliant. He asked questions on the RR65 Questionnaire, the CRE's Code of Practice, equal opportunities policies, monitoring, training and victimisation. The Chair interrupted to ask questions about ethnic monitoring. One of the Panel Members asked questions regarding the appeal hearing. The question of unfair treatment as compared to other colleagues and the distinction between discrimination and racial discrimination was raised by the Panel member. The Chairman asked the witness as to what other options were available before resorting to dismissal. The appeal hearing merely confirmed a lower decision. The respondent barrister stated that he did not receive a response from the CRE when clarification was requested regarding certain questions on the RR65 Questionnaire, therefore the RR65 was not answered fully by the respondents.

Closing Speech of Respondent

The respondents submitted written submissions and also addressed the Tribunal. Respondent's stressed that there was no discrimination based on race. The applicant had several complaints against him and that he was not competent. The respondents stated that

race was not pleaded as applicant was not dismissed because of victimisation. The case had nothing whatsoever to do with race and stated that the application should be dismissed. The respondent barrister referred to several case law precedents.

Applicant's Closing Speech

The applicant's barrister also lodged a written submission of his closing speech and addressed the Tribunal at length. He was very meticulous in setting out the case law and proceeded to apply the facts of the case to the law in detail. He was extremely thorough and in my view it was a brilliant closing speech. The applicant raised the issue of race by way of a letter. The barrister stressed that the applicant was discriminated and victimised, he was denied training, holidays, his contract was breached and was treated less favourably. There was continuing act of discrimination before the applicant was dismissed. The fact that respondents had no formal equal opportunities polices (EO), training or reviews on EO were emphasised. The procedures were not followed.

Decision

The Tribunal were going to produce a reserved decision.

My Comments

The CRE barrister warrants special praise in the conduct of the proceedings. He was extremely meticulous and thoroughly prepared. I congratulated him on his splendid performance. In my view there is a strong probability of succeeding on all grounds if not at least on some of the allegations.

Case No. 9

The Allegations by the Applicant

The case involved a black man against a Union and a large City Council. He was alleging race discrimination against both respondents and also victimisation.

Composition of Panel

The case was chaired by a white male and the Panel was composed of a white female and a black male.

Representation

The applicant represented himself and the respondents were represented by two white male barristers.

Race Awareness of Panel

The Chairman appeared to be well informed on race issues.

Conduct of Proceedings

The applicant called a white female witness in support of his allegations. He was asked by the applicant to narrate the incident in the canteen. Both the applicant and the witness were embarrassed about the incident which involved their line manager. The witness stated that the manager raised his voice and showed personal animosity towards the applicant.

The Chairman interrupted to clarify the incident. The witness stated that his memory to recall dates was affected by disease. The applicant was inexperienced in the conduct of cases before Tribunals and the Chair did not allow questions that he thought were not adhering to the procedural rules. The Chairman appeared to be losing his patience because the applicant continued to ask irrelevant questions. The applicant also repeated his questions to the witness.

The Chairman stated on several occasions that the applicant was asking speculative questions - applicant kept apologising to the Chair. The Chair was attempting to ascertain as to whether similar treatment was accorded to anyone else other than the applicant. In cross examination, the respondent barrister experienced difficulty in eliciting answers from the applicant's witness. The witness stated that he had difficulty in remembering and could not connect dates with incidents. The black male Panel Member asked if it was normal procedure for the line manager to speak to all employees collectively. When the applicant was re-examining his witness he was introducing new material and the Chair cautioned him about that. The case continues.

My Comments

I observed the case on the 5th day since commencement. This appeared as a weak case with regard to evidence to establish race discrimination/victimisation. Even if there was some evidence of race discrimination, the applicant was not aware as to how this case had to be conducted regarding the procedures and the relevance of the issues. The applicant was experiencing great difficulty in trying to establish evidence of race discrimination. The Chair was assisting the applicant but the applicant would have been in a better position had he been advised/supported by a legally qualified person or someone experienced in the conduct of proceedings before Industrial Tribunals.

Case No. 10

I telephoned the Industrial Tribunal a day before a hearing in the north of England to ascertain as to whether the case was going to be heard or not. I was informed by the Tribunal employees that the case was proceeding. Upon my arrival at the Tribunal on the morning of the hearing date, I was told that the case had settled. The only information that I could obtain from the Tribunal employees was the name of the respondent (a PLC timber company) and the name of the applicant. All other matters were strictly confidential as a settlement had been negotiated. The case was listed for just one day.

My Comments

I have been advised by the Tribunal staff to telephone a day in advance before I attend a Tribunal hearing just in case the case settles before proceeding. A case can settle well in advance of the hearing date, within a few days of the hearing date, on the morning prior to hearing or sometimes when the case is heard for a few days and the parties decide to settle. Settlements save, both time and money and this method is resorted to in a number of cases. This cannot be termed as a win by the applicant, but it is a compromise agreement saving the expense and stress for the applicant and time and money for the respondents.

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