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DISCRIMINATION AND LAW

# *Reforming the Race Relations Act*

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# REFORMING THE RACE RELATIONS ACT

## Introduction

The Race Relations Act 1976 was the third attempt in a little over 10 years to establish an effective legal framework for the elimination (or ,more modestly, reduction) of racial discrimination.

In the 13 years that have elapsed since the Act came into force some minor modifications have improved its effectiveness marginally[1], but the continuing failure of the law (or any other measures) to make any significant impact on the level of discrimination has become increasingly obvious.Many specific weaknesses in the machinery of the law have also been exposed in the litigation which has come before the courts both under the Act itself and under the Sex Discrimination Act.

The Commission for Racial Equality was given an explicit duty to keep the working of the Act under review, and power to submit to the Government proposals for amending the law. After wide consultations it submitted detailed proposals to the Home Secretary in 1985. Five years later, the CRE's major recommendations have neither been implemented nor, it seems, been rejected by the Government. They have largely been ignored.

## Reform or replacement?

'Reform' suggests something less than a root and branch transformation of current policy.The most extreme response to the

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[1] The CRE has been given power to issue a Code of Practice for housing; the requirement of designation for training bodies in s. 38 of the Act was removed by the Employment Act 1989

evident shortcomings of the 1976 Act would be to repeal it and put nothing in its place, accepting the claim sometimes advanced by the disilllusioned that the money spent on administering the law would achieve more for racial equality if distributed among community organisations.

However, assuming that legislative restraints on discrimination could be sufficiently effective to justify their cost, it is appropriate to consider whether the basis of the current legislation should be changed by substituting a different strategic approach. The current approach is to characterise racial discrimination as a statutory tort, giving individuals a right of action seeking traditional forms of personal redress, and at the same time empowering an administrative agency to to uncover and correct discriminatory patterns and practices. Making racial discrimination a criminal offence was tried and failed in the United States and remains ineffective in other countries.A system of administrative enforcement,based on the current structure, still seems to have the best prospects, in spite of present weaknesses. It has no obvious rival.

The prospects for change will be considered under the following headings.

(a) the definition of discrimination;

(b) how discrimination is to be proved;

(c) the machinery for enforcement;

(d) remedies;

(e) anti-discrimination measures beyond law enforcement.

In all these areas policies in the United States have been much more thoughtfully and effectively developed than in Britain.

The CRE's recommendations do not seek to disturb the broad framework of the existing law but they suggest a number of improvements in all the areas identified in the last paragraph. In some cases, the proposed changes have taken place or have been rendered superfluous by other developments. The following comments, which roughly reflect the CRE's main recommendations, are intended as a basis for discussion.

**The definition of discrimination**

Does 'on racial grounds' mean that the perpetrator must intend a racially discriminatory result or is it sufficient that he intends different treatment which has a foreseeable though unintended racially discriminatory result? The CRE recommended that the doubt which existed on this point in 1985 be resolved in favour of the latter alternative. The House of Lords has apparently resolved the question in that way[2] but is about to have a further opportunity of considering the question[3]
The CRE has not addressed what in the United States is called 'systemic direct discrimination'. This is a crucial issue which needs to be discussed.[4]

The statutory definition of indirect discrimination (disparate impact) has been narrowly interpreted by the courts in the past in two important respects. First, no liability can exist unless the respondent imposes a 'condition or requirement' which has discriminatory impact.A mere preference which in practice produces the identical impact is not enough.[5] The CRE proposes an alternative definition which will avoid this problem.
The other problem - the very broad scope given by the courts to the exemption from liability for indirect discrimination shown

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[2] R v.Birmingham City Council ex p EOC [1989] 2 WLR 520

[3] James v.Eastleigh Borough Council [1989] 3 WLR 139

[4] Steven J. Willborn , Proof of Discrimination in the United Kingdom and the USA, 5 Civil Justice Quarterly 321 (1986).

[5] Perera v.Civil Service Commission [1983] IRLR 166 CA; Meer v. London Borough of Tower Hamlets [1988] IRLR 399

to be 'justifiable' regardless of racial grounds - appears to have been resolved by a decision of the European Court of Justice[6].The binding effect of this decision led the English courts to modify their previous position which is now virtually in line with that recommended by the CRE.[7]

**Proving discrimination**

This topic will be the subject of another paper. The CRE suggests strengthening the position of the claimant seeking to prove direct discrimination by imposing a greater burden on the respondent once differential treatment has been shown.But to show differential treatment at all may be too difficult unless tribunals can infer discrimination where no more than a statistical disparity can be demonstrated. Have we already reached this position? The implications of the decision in *West Midlands Passenger Transport Executive v. Singh*[8] need to be worked through.[9]Proof of disparities in treatment and impact may also require skills and resources not hitherto available in the judicial system. However, proving discrimination would be vastly simplified if mere disparity shifted the burden of proof to the employer\respondent to disprove discrimination. This has been the law in the USA.[10]

**Individual or collective redress?**

In the absence of effective provision for the class action in our procedural law, the division between individual redress and action against patterns or practices of discrimination has been too wide.Individual proceedings are expensive and often seem

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[6] Bilka-Kaufhaus GmbH v. Weber von Harz [1987] IRLR 110

[7] Hampson v. Department of Education & Science [1989] 69 CA

[8] [1988] 2 All E.R. 373

[9] see Carrington v. Helix Lighting [1990] IRLR 6

[10] McDonnell Douglas v.Green, 411 U.S. 273 (1973)

relevant only to the parties.Since discrimination against an individual always has the potential for repetition or reflects a backgound of discriminatory behaviour towards others, it makes no sense to pursue individual complaints without reference to their wider implications.The collective attack on racial disscrimination was intended to be led by the CRE through its powers to conduct formal investigations. It has been greatly handicapped by the restrictions on its freedom of action imposed by the Act[11] and by the judiciary in a series of decisions[12]. The restrictive attitude of the courts has - where not merely an expression of hostility to the purposes of this legislation - been justified by the ambiguous role of the CRE as investigator and, when exercising its power to issue a non-discrimination notice, adjudicator. The CRE proposes the abolition of its power to issue a non-discrimination notice in exchange for the power to bring evidence before an independent tribunal which would then have power to make an appropriate order. The independent tribunal could be the present industrial tribunal but the CRE suggests that it would be preferable to create a separate division within the industrial tribunal system to deal with discrimination cases (including sex discrimination).

**Machinery for enforcement**

An overhaul of the system of adjudication on the lines described in the last paragraph seems appropriate. The CRE would take its proper partisan role as representative of the victims of discrimination. It could be given the power to intervene in any individual case where there appeared to be a public or class interest.It could bring cases in its own name wherever there was evidence of discrimination, whether or not a victim could be identified.

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[11] e.g. in s.49(4)

[12] especially those of R v.C.R.E. ex p. Hillingdon L.B.C., [1982] AC 779; C.R.E. v. Prestige Group [1984] 1 WLR 335; and C.R.E. v. Amari Plastics [1982] Q.B. 1194

## Remedies

Enforcement of the Race Relations Act has been severely restricted by the limited remedies available. Damages awards have been too low to compensate or deter.[13]

A newly constituted tribunal should be given wider powers to order affirmative action and it should be the CREs duty to fashion and recommend appropriate programmes, enforceable as mandatory injunctions.

**Anti-discrimnation measures outside the Race Relations Act**

Contract compliance and Government led and directed equal opportunity programmes should form part of an overall anti-discrimination strategy.

## Further Reading

J.C.McCrudden, Legal Remedies for Discrimination in Employment, [1981] CLP 211

B.A.Hepple, Judging Equal Rights, [1983] CLP 71

G.Bindman, Reforming the Race Relations Act, [1985] NLJ 1136,1167

Jeanne Gregory, Sex, Race and the Law, Sage, (1987).

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[13] Even since Alexander v. Home Office [1988] 1 W.L.R. 968 awards have remained too low