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BRITISH ANTI-DISCRIMINATION LAW: AN INTRODUCTION*

Christopher McCrudden**

I. INTRODUCTION

The United Kingdom is a signatory of a number of international treaties protecting various aspects of human rights, including freedom from discrimination. Yet, there is no legislation in this country protecting a comprehensive list of human rights in the manner of the United States Bill of Rights, although there have been a number of unsuccessful attempts to enact such legislation since 1969. Moreover, prior to the race relations legislation there was no general rule, policy or principle in common law directly relevant to combating racial discrimination or incitement to racial hatred.

In specific situations, however, as a by-product of the regulation of other areas, the common law and various statutes (e.g. the Public Order Act 1936)¹ did--and do--make unlawful certain conduct and the use of speech which might incite racial hatred. They also provide an indirect remedy to one who can prove discrimination.

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1. Public Order Act, 1936, ch. 6.

The inadequacies of the common law and statutes stimulated several unsuccessful initiatives during the 1950s and early 1960s to secure legislation directly designed to combat racial discrimination and render incitement to racial hatred unlawful. The Labour Party, going from a position of neutrality to one of support by 1964, gradually accepted the principle of legislation, a decision which Katznelson² attributes in part to the effect of the Notting Hill and Nottingham "race riots" in the summer of 1958. The resurgence of neo-Nazism in the early 1960s also contributed, particularly to the law relating to incitement to racial hatred.

This article shall examine the development and current operation of the law in two areas connected with race: incitement to racial hatred and unlawful discrimination.

II. THE OFFENCE OF "INCITEMENT TO RACIAL HATRED"

The Race Relations Act 1965³ (1965 Act) attempted to deal with the public order problems of racial incitement in two ways. Firstly, the Public Order Act 1936 was to be extended to make it illegal to publish threatening and insulting material with intent to provoke a breach of the peace. Secondly, incitement to racial hatred itself was also made unlawful by Section 6(1) of the 1965 Act, which stated:

A person shall be guilty of an offence under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race or ethnic or national origins--

2. I. Katznelson, Black Men, White Cities 129 (1973).
3. Race Relations Act, 1965, ch. 73.

(a) he publishes or distributes written matter which is threatening, abusive or insulting; or

(b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting, being matter or words likely to stir up hatred against that section on grounds of colour, race or ethnic or national origins.⁴

When introducing the measure to the House of Commons, the Home Secretary explained that the clause was "designed to deal with more dangerous, persistent and insidious forms of propaganda campaigns--the campaign which, over a period of time engenders the hate which begets violence".⁵

Prosecutions could only be by or with the consent of the Attorney-General. Few prosecutions in fact occurred under the 1965 Act. Lord Scarman described Section 6(1) in his report on the Red Lion Square disorders as an "embarrassment to the police" and "useless to a policeman on the street".⁶ Macdonald also assessed the operation of the provision as "hardly a success". He pointed out that apart from Colin Jordan, a well known British National Socialist, the only persons convicted under the 1965 Act between 1965 and 1976 were black.⁷

In 1975, after numerous calls for its revision, the Government reviewed the 1965 Act's provisions and concluded that changes were necessary:

During the past decade, probably largely as a result of Section 6, there has been a decided change in the style of racist propaganda. It tends to be less blatantly bigoted, to disclaim any intention of stirring up racial hatred, and to purport to make a contribution to public education and debate. Whilst this shift away from crudely racist propaganda and abuse is welcome, it is not an unmixed benefit. The more apparently rational and moderate is the message, the greater

4. Id.

5. 711 Parl. Deb., H.C. (5th ser.) 941 (1965).

6. Scarman, Lord, Report on the Red Lion Square, Cmnd. No. 5919 (1974).

7. I. Macdonald, Race Relations: the New Law 138 (1977).

is its probable impact on public opinion. But it is not justifiable in a democratic society to interfere with freedom of expression except where it is necessary to do so for the prevention of disorder or for the protection of other basic freedoms. The present law penalises crude verbal attacks if and only if it is established that they have been made with the deliberate intention of causing groups to be hated because of their racial origins. In the Government's view this is too narrow an approach ... It therefore proposes to ensure that it will no longer be necessary to prove a subjective intention to stir up racial hatred.

Section 70 of the 1976 Race Relations Act⁹ (1976 Act) put this policy into effect by amending Section 6 of the 1965 Act and inserting the provision in the Public Order Act 1936. It is no longer necessary to prove that a person intended to stir up racial hatred. If his or her words or actions are "likely" to stir up hatred in fact, then an offence has occurred. Any prosecution must still be by or with the consent of the Attorney-General.

The incitement to racial hatred provision is one of the few criminal law provisions remaining in the present race relations legislation. The criminal law rather than the civil law is invoked because such incitement is regarded as an offence to public order. However, the actual occurrence of public disorder is not a necessary component of the offence of incitement to racial hatred. The gist of the offence "is the opprobrious nature of the words or conduct in question and the feelings of disgust they are liable to arouse."¹⁰ Between 1977 (when the new section became effective) and April 1980, nine of the fifteen people prosecuted for incitement to racial hatred or conspiracy to incite racial hatred, or both, were found

8. Home Office, Racial Discrimination, Cmnd. No. 6234 (1975).

9. Race Relations Act, 1976, ch. 74.

10. S.A. deSmith, Constitutional and Administrative Law 478 (3d ed. 1977).

guilty. Sentences passed by the courts included four months' imprisonment in one case and nine months' imprisonment in another.¹¹

Section 70 of the 1976 Act and its enforcement have been subject to a number of criticisms. On the one hand, it has been argued that the section goes too far; the removal of a requirement of intention to incite racial hatred is "contrary to the fundamental principles of British justice."¹² Furthermore, "[a]n increase in the rate of successful prosecutions might create the impression among the public that the sensibilities of ethnic minorities were being protected in a manner not extended to other groups in society."¹³

On the other hand, it has been argued that the section is not sufficiently comprehensive, since it does not give the police a power of summary arrest, and it requires the Attorney-General's consent for prosecutions. So, limiting prosecutions, it has been claimed, precludes proceedings other than with respect to the most blatant offences.¹⁴ The Government has replied that the law might fall into disrepute, and that harm might occur to race relations if private prosecutions were allowed which, although doomed to fail, nevertheless give additional publicity to defendants by providing the opportunity to restate their views in court.¹⁵

11. Home Office, Review of the Public Order Act 1936 and Related Legislation, Cmnd. No. 7891 (1980).

12. Id.

13. House of Commons Home Affairs Committee, Fifth Report, The Law Relating to Public Order, HC 756-I (1979-80).

14. Id.

15. United Kingdom, Sixth Periodic Report to the Committee on the Elimination of Racial Discrimination 11, U.N. Doc. CERD/C/66/Add. 13 (1980).

Section 70 of the 1976 Act mirrors the 1965 Act in that it does not penalize "the dissemination of ideas based on an assumption of racial superiority or inferiority or facts (whether true or false) which may encourage racial prejudice or discrimination."¹⁶ Other countries have outlawed racist propaganda of this type. Indeed, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁷ which is in force and which has been ratified by the United Kingdom, requires States, among other things, to:

... declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; [and to]

... declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and ... recognize participation in such organizations or activities as an offence punishable by law.¹⁸

Using standards like these, organizations in this country have sought a wider scope for the British legislation. The Commission for Racial Equality (CRE), for example, has proposed to the Home Affairs Committee (Committee) a new definition of incitement to racial hatred. This would make unlawful the uttering at a public meeting or the publishing of words which, having regard to all the circumstances, expose any racial group in Great Britain to hatred, ridicule or contempt. The CRE's aim was to remove

16. Supra, note 7.

17. International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature March 7, 1966, 660 U.N.T.S. 195 (ratified by the United Kingdom with reservations, March 7, 1969, 677 U.N.T.S. 435).

18. 660 U.N.T.S. at 220.

the need to evaluate the subjective reactions of readers or audience; an objective test would be left to the jury. The Committee rejected the proposal.¹⁹

Extending the 1965 Act to include similar proposals was considered in 1975 but the White Paper of that year announced:

The Government is not at this stage putting forward proposals to extend the criminal law to deal with the dissemination of racist propaganda in the absence of a likelihood that group hatred will be stirred up by it ... It is arguable that false and evil publications of this kind may well be more effectively defeated by public education and debate than by prosecution and that in practice the criminal law would be ineffective to deal with such material. Due regard must also of course be paid to allowing the free expression of opinion.²⁰

A Home Office Green Paper in 1980 also stressed the effect of such a proposal on freedom of expression:

It would make no allowance for genuine discussion and debate or for academic consideration of such proposals. To single out political proposals for proscriptions by law regardless of how they are expressed, and in what circumstances, and of the possible consequences would be a new departure. In the Government's view such a departure would be totally inconsistent with a democratic society in which--provided the manner of expression, and the circumstances, do not provoke unacceptable consequences--political proposals, however odious and undesirable, can be freely advocated.²¹

III. THE DEVELOPMENT OF ANTI-DISCRIMINATION LEGISLATION

A. The Race Relations Act 1965

On April 7, 1965, the Race Relations Bill was formally introduced in the House of Commons by the Labour Government. In addition to those provisions considered above concerning incitement to racial hatred, the Bill

19. Supra, note 13.

20. Supra, note 8.

21. Supra, note 11.

proposed to make discrimination in hotels, public houses, restaurants, theatres, cinemas, public transport and any place maintained by a public authority a criminal offence punishable by fines of up to £100. Prosecutions were only to be undertaken with the authority of the Director of Public Prosecutions. Discrimination in employment and housing was not to be made unlawful. Restrictions by property sellers on the disposal of tenancies to particular racial groups, were made unenforceable.

Considerable pressure, however, was put on the Government to change the method of enforcement. In a particularly influential paper, Jowell,²² for example, argued against criminal sanctions on four grounds:

- (a) Such legislation did not contain the machinery to eliminate discrimination except so far as would-be offenders are deterred by the fear of criminal sanction;
- (b) It was difficult to persuade the prosecution to take action;
- (c) It was difficult to prove a case beyond reasonable doubt; and
- (d) Cases might come before a jury which was not sympathetic with the objectives of the law.

Jowell also argued against the traditional type of civil enforcement. This would not be effective, he argued, again, for at least four reasons:

- (a) Aggrieved persons are unwilling to indulge in the expense or effort of instituting civil actions;
- (b) A person who discriminated might be prepared to pay damages in civil cases or a fine in a criminal suit as the price for continuing to discriminate;
- (c) An immediate public hearing could exacerbate existing racial friction;
- (d) "The opportunity of giving evidence to a civil or criminal court could be enjoyed by those with little other opportunity of obtaining an audience for the demonstration of their racial prejudices or obsessions."²³

22. J. Jowell, Administrative Enforcement of Laws Against Discrimination; Public Law 119-86 (1965).

23. Id. at 167.

Based on North American experience, a number of groups argued for a system of enforcement through a specially constituted administrative body as an alternative to the criminal or civil process. Such enforcement would emphasize the elimination of discrimination for the public interest, rather than for purposes of revenge on or punishment of the individual discriminator. The administrative body could also be given powers which would make it more effective than the ordinary civil and criminal processes.

As a result of pressures inside and outside Parliament, significant changes were made in the Bill's anti-discrimination provisions before it became law. The Government substituted a form of administrative enforcement procedure. Criminal sanctions were dropped in cases of discrimination and retained only for racial incitement. A specialized agency, the Race Relations Board (Board), was charged with enforcing the legislation. The Board set up local conciliation committees to investigate complaints from those who considered themselves victims of discrimination. If attempts to settle complaints failed, the local conciliation committees reported to the Board. If, in turn, the Board found that there had been discrimination and considered it likely that the discrimination would continue, it could refer the case to the Attorney-General. The Attorney-General could then seek an injunction in court requiring the discrimination to cease.

Although a conciliation committee could investigate a single instance of discrimination, it could take no action unless it found that the discrimination formed "part of a

course of conduct."²⁴ Neither the Board nor the local committees had the power to summon witnesses, subpoena documents, require answers to questions or issue orders. According to Lord Stoneham, a government spokesman, conciliation was included "to avoid bringing the flavor of criminality into the delicate question of race relations"²⁵ rather than to improve enforcement. Throughout the debates, the government stressed its desire to actively prevent litigation from ever arising under the Bill.

B. The Race Relations Act 1968

Between 1965 and 1968, a number of pressure groups (and the Board itself) mounted another well-organized campaign to extend and strengthen the anti-discrimination (as opposed to the incitement to racial hatred) provisions of the 1965 Act.²⁶ The campaign stressed that a new Act must prohibit discrimination in housing and employment. It drew support from the influential and well publicized Political and Economic Planning²⁷ report, which found that racial discrimination in these and other areas varied in extent but was generally substantial. It was argued that the weak enforcement structure of the 1965 Act should give way to one closer to the American agency enforcement model advocated by Jowell.

A new Race Relations Act was passed in 1968 (1968 Act),²⁸ prohibiting discrimination in both public and

24. 716 Parl. Deb. H.C. (5th ser.) 982 (1965).

25. 268 Parl. Deb., H.L. (5th ser.) 1006 (1965).

26. See A. Lester & G. Bindman, Race and the Law (1972).

27. Political and Economic Planning (PEP), Report on Racial Discrimination (1967).

28. Race Relations Act, 1967, ch. 71.

private employment and housing, subject to certain exceptions. The 1968 Act retained the two-tier enforcement mechanism of the Board plus local conciliation committees. Upon receipt of a complaint, the Board first determined whether it had jurisdiction and whether there had in fact been discrimination. It then tried to conciliate in the dispute. If this failed, the Board itself was given the power to bring a case against the discriminator in one of a number of specially designated county courts in which "race relations assessors" sat with the judge trying race relations cases.

Individuals could not take discrimination cases directly to the county courts under the Act; that was solely the responsibility of the Board. The Board was also given an additional power to initiate investigations without such individual complaints. This power was limited, however, by the requirement that the Board suspect discrimination against a particular person. "Discrimination" was defined as "less favourable treatment on the ground of race, colour or ethnic or national origin." This in turn was interpreted as requiring proof of a discriminatory intention on the part of the person under investigation.

A different procedure controlled the settling of complaints of employment discrimination. Prior to 1967, the Confederation of British Industry (CBI) and the Trades Union Congress (TUC) opposed legislation prohibiting discrimination in employment on the ground that it conflicted with the British tradition of "voluntarism" in industrial relations. In this context,

[Voluntarism] refers to our preference for collective bargaining to state regulation as a method of settling wages and other terms and conditions of employment. Secondly, it expresses a preference

for our own voluntary or non-legalistic type of collective bargaining. Thirdly, it is identified with the preference of the bargaining parties for complete autonomy in their relations.²⁹

The CBI and the TUC finally agreed to the inclusion of employment in the Act, provided that internal disputes procedures be exhausted first. The procedure adopted in the 1968 Act required that any complaints of employment discrimination be initially dealt with not by the Board as were all other types of complaint, but by the Department of Employment (the Department). If suitable voluntary machinery to deal with the complaint existed within the industry concerned, the Department would send it back to that "industry machinery". Only if none existed, or if the complainant was appealing from a decision of the particular industry machinery, did the Board have any jurisdiction to hear the complaint. Only at this juncture, too, could the courts be involved. The use of industry machinery was thus a compromise between the industrial relations value of voluntarism and the need for government intervention in cases where the parties themselves were unable to solve the problem.

In practice, the coverage and enforcement provisions of the 1968 Act were deficient. Discrimination, as defined by the 1968 Act, was difficult to prove. The 1968 Act did not apply to the present effects of past discrimination or to unintentional discrimination. In most cases the Board could do little until it received a complaint; therefore it was unable to conduct a systematic campaign against discriminatory practices.

29. A. Flanders, Management and Unions 174 (2nd ed. 1975).

The Board's limited powers to investigate when no complaint had been received were small compensation. Investigations were further handicapped because the Board had no power to require production of relevant evidence. Moreover, the two-tiered structure -- conciliation committee decisions followed by the Board review -- increased the time spent on investigation, and provoked bitter controversies between Board and committees. The hope that the special enforcement provisions for employment complaints would stimulate the growth of voluntary procedures was not borne out; existing industry machinery proved cumbersome and of questionable value to both industry and race relations. Even where discrimination was proven, the remedies available to the Board, and more particularly to the courts, were extremely limited.

Another important influence in the late sixties leading to a new Act in 1976 was the campaign for legislative intervention to help secure greater economic equality between the sexes. In 1970, an Equal Pay Bill was introduced and passed by Parliament. It became fully effective at the end of 1975. In September 1974, the White Paper, Equality for Women,³⁰ detailed the Government's further proposals for limiting sex discrimination. The proposals covered not only employment and training, but also education, housing, and the provision of goods, facilities and services. The White Paper also announced the Government's aim to "harmonize the powers and procedures for dealing with sex and race discrimination so as to secure genuine equality of opportunity in both fields."³¹ The White Paper justified this proposed harmonization:

30. Home Office, Equality For Women, Cmd. No. 5724 (1974).

31. Id. (emphasis added).

The nature and consequences of racial and sex discrimination are not, of course, identical. But they share important common features: the adverse treatment of someone on grounds irrelevant to that person's intrinsic qualities and qualifications; the morally unacceptable and socially harmful nature of such conduct; and the pressures of prejudice, custom and conformity which encourage discrimination on either ground. The objectives of the law are also essentially similar in both fields: to eliminate anti-social practices; to provide remedies for the victim of unfair discrimination; and indirectly to change the prejudiced attitudes expressed to discrimination.³²

Harmonization raised two interconnected questions. Firstly, should the procedures, coverage and enforcement provisions of the two acts be identical? Secondly, if they should, then should a single agency with powers to deal with race and sex discrimination be established?

The Government decided that harmonization should not go so far as to include a single enforcement agency at that time, but that strong arguments favoured adopting, almost in their entirety, the coverage and enforcement details of the Sex Discrimination Act 1975.³³ This proposal had several practical advantages. Firstly, it increased public understanding of the two Acts' operation. Secondly, it allowed both enforcement agencies to work on similar lines. Finally, it might also have the political advantage of easing passage of race relations legislation, since Parliament would already have approved virtually identical enforcement provisions in the Sex Discrimination Act 1975. In September 1975, the White Paper Racial Discrimination,³⁴ was issued, proposing that coverage and enforcement provisions almost identical to those in the Sex Discrimination Act 1975 should be enacted to deal with racial discrimination.

32. Id.

33. Sex Discrimination Act, 1975, ch. 65.

34. Supra, note 8.

C. Race Relations Act 1976

The scope of the Race Relations Act 1976³⁵ (1976 Act) is, like its predecessors, subject to several important restrictions. There is an exception for all clubs whose main object is to benefit members of a particular race or ethnic or national origin, but not of a particular colour. With regard to employment, there is a limited exception where being of a particular racial group is a "genuine occupational qualification" for a particular job. The Act does not apply to employment within a private household. An employer may also discriminate in, or in connection with, employment on a ship, if the person applied or was engaged for that employment outside Great Britain. With respect to housing, there is a limited exception for owner-occupiers; the leasing of small premises is also excluded. More generally, exceptions exist for acts done under statutory authority (such as immigration legislation) and for acts to safeguard national security.

In other respects, however, the 1976 Act is broader in scope than the 1968 Act. It makes discrimination on grounds of nationality unlawful, in addition to discrimination on grounds of race, colour, and ethnic and national origins. It is unlawful for non-profit-making associations (including private clubs) having over twenty-five members to discriminate on these grounds in the admission of people to membership or in the treatment of members or associate members. In certain circumstances, it is unlawful to victimize a person for alleging discrimination under the Act.

35. Race Relations Act, 1976, ch. 74.

Most importantly, perhaps, the 1976 Act brought to British law a considerably broadened concept of equality of opportunity between the races. In particular, the meaning of discrimination was expanded to cover "indirect discrimination" as well as the "direct discrimination" prohibited by both the 1968 and the 1976 Acts. In addition, the 1976 Act permits, though it does not require, a form of "positive" or "reverse" discrimination for the first time. The next section examines these provisions more closely.

IV. THE MEANING OF EQUALITY OF OPPORTUNITY IN THE LEGISLATION

A. Indirect Discrimination

The interpretation of discrimination adopted by the 1968 Act was too limited for two main reasons. Firstly, it was difficult to establish that discrimination had occurred because proof was required of a person's discriminatory intention. Secondly, legislation against discrimination as defined in these terms did nothing to prevent the use of criteria which had the effect of excluding disproportionate numbers of minority groups, irrespective of intention. For example, the 1968 Act made it unlawful for an employer to consider race when a black worker sought a job in a factory. However, the 1968 Act ignored the fact that a black was less likely than a white to be hired for reasons other than those directly connected to race. That is, there would be a greater chance that a black would be deficient in those attributes which make an applicant successful. This could be due to the present effects of past discrimination, immigrant disadvantage, or

"institutional discrimination" (i.e., the unjustified use of criteria having an exclusionary effect even though exclusion may not be the intention).

Such criticisms led to demands for the replacement of the 1968 Act's non-discrimination principle by what I shall call the principle of "fair equality of opportunity". This requires that individuals with the same degree of talent and ability, and the same willingness to use them have the same prospects of success regardless of their initial place in the social system, that is, irrespective of the income group, class, or racial group into which they happen to have been born.

The 1976 Act took account of these criticisms of the 1968 Act by expanding the meaning of discrimination to include not only "direct" but also "indirect" discrimination:

A person discriminates against another in any circumstances relevant for the purposes of any provision of the Act if ... he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but--

- (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and
- (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and
- (iii) which is to the detriment of the other because he cannot comply with it.³⁶

Thus, a person alleging indirect discrimination has to prove three elements. Consider an employment situation. Firstly, does the employer have a requirement which he applies to both his Pakistani and English workers? (For example, does he require passing a language proficiency test before workers can be considered for promotion?)

36. Race Relations Act, 1976, Section 1(1).

Secondly, if so, is this requirement such that the proportion of Pakistanis who are able to comply with it is considerably smaller than the proportion of English workers who are able to comply with it? (In our example, do considerably fewer Pakistani workers pass the language proficiency test than English workers?) Thirdly, is the person actually alleging discrimination unable to comply with the requirement--the need to prove "detriment"? (In our example, is the person who is complaining of discrimination himself unable to pass the test?)

If the person alleging discrimination has been able to establish the three elements, then the employer (or whoever is the alleged discriminator) must show that the requirement is justifiable. If the employer does not, then indirect discrimination has been proven. The courts have interpreted "justifiability" in a variety of ways. Their future approach is uncertain--will an interpretation develop which is interventionist, or will a much less taxing and intrusive interpretation with greater deference to managerial concern be applied?

Although most racial discrimination cases under the 1976 Act involve allegations of direct discrimination, complaints of indirect discrimination are increasing. In 1980-81, for example, allegations of indirect discrimination in employment rose to 20.5 per cent of all racial discrimination cases in employment compared with 7.7 per cent in 1979-80.³⁷ As a result of the adoption of the

37. Department of Employment, Employment Gazette, 1978 through 1981.

indirect discrimination provision in the 1976 Act, some firms have become more aware of the extent of the problem of unintentional discrimination and have adopted equal opportunity programs in an attempt to deal with it. In general, however, the 1976 Act appears to have had little effect on institutional discrimination.³⁸

B. Beyond Anti-discrimination

The 1976 Act explicitly permits a limited measure of positive (or reverse) discrimination in favour of minority groups in the form of exceptions to the general prohibition of discrimination. Section 35 of the 1976 Act contains a general exception for conduct intended to meet the special needs of particular racial groups in regards to education, training, welfare or ancillary benefits:

It permits access to facilities, services or benefits to be restricted, or to be allocated first, to members of the particular racial group in question provided it can be shown that members of that racial group have a special need in regard to their education, training, welfare or ancillary benefits, which is met by such a restriction or preferential allocation.³⁹

In addition, employers, training bodies, trade unions and employers' organizations may, though they need not, operate a system of "positive action". For example, if a racial group has been under-represented in an occupation within twelve months prior to commencement of a training program, then the training body may lawfully discriminate by limiting access to training for such work to that racial group, or take steps to encourage members of that racial

38. C. McCrudden, Institutional Discrimination, Oxford Journal of Legal Studies 366 (1982).

39. Home Office, Racial Discrimination: A Guide to the Race Relations Act 1976, 30, 1977.

group to take advantage of opportunities for doing that work.

Employers may take similar action under similar conditions, taking into account the population of the area from which the employer normally recruits. In addition, if appropriate conditions are fulfilled, trade unions and employers' organizations may lawfully encourage members of a particular racial group to take advantage of opportunities to hold posts in the organization or afford members of that racial group access to training facilities which will prepare them to hold such posts.

The 1976 Act, however, does not generally make it lawful "for the employer to discriminate at the point of selection for such work"⁴⁰ or for organizations to discriminate "in admitting people to membership or in appointing members to posts in the organizations".⁴¹ At least some of the problems which have arisen in the United States related to determining the permissible limits of reverse discrimination have been pre-empted in Britain by reason of these detailed provisions. This degree of detail in the 1976 Act has at least two effects. On the one hand, it provides to employers and unions clearer guidance as to what is permissible and perhaps thereby encourages those who might have hesitated to step into the unknown. On the other hand, its rigidity may prevent the type of fruitful experimentation which has so advanced the sophistication and sensitivity of American programmes. Given the lack of pressure in Britain to embark on even the most basic programmes, this rigidity may not have much restrictive effect.

40. Id. at 31.

41. Id.

In Britain, fair equality of opportunity, rather than equality of results, is the major (and, except in very limited circumstances, the only) objective. Although the form of positive discrimination which allows a job to be given to a member of a minority group is generally unlawful, in one circumstance it is permitted--where being of a particular racial group is a "genuine occupational qualification". This includes the situation where part of the job is to provide persons of a particular racial group personal services promoting their welfare, and those services can most effectively be provided by a person of that racial group.⁴²

V. ENFORCEMENT OF THE RACE RELATIONS ACT 1976

The methods of enforcement of the 1976 Act are also substantially different from those of the 1968 Act. Individuals may now take their cases directly to the county courts or industrial tribunals; they need not first process them through a Race Relations Board or an equivalent administrative body. Non-employment complaints are heard in county courts in which race relations assessors sit with the judge. Employment discrimination cases go to industrial tribunals rather than to these county courts. Before a case reaches a tribunal, there is an opportunity for a statutory body, the Advisory, Conciliation and Arbitration Service (ACAS)⁴³, to attempt to conciliate the dispute. Both the industrial tribunals and the county courts are given increased powers to remedy proven discrimination.

42. Race Relations Act, 1976, ch. 74, Section 5(2)(d).

43. Advisory, Conciliation and Arbitration Service, Annual Report, 1978.

A different procedure for enforcing the general duty of non-discrimination in the public sector of education has been introduced. Here, the only sanction is action by the Minister responsible. Most allegations of discrimination against specific pupils of a school or applicants for admission, however, can be contested in the modified county courts.

A new enforcement body, the Commission for Racial Equality (CRE), was set up in 1977. The CRE replaces both the Race Relations Board and the Community Relations Commission and enjoys considerably greater powers of investigation. Rather than being largely reactive to individual complaints, like the Board, the CRE can initiate strategic investigations without the need for complaints by aggrieved individuals. The CRE can investigate even when it does not suspect discrimination against a specific individual. In addition, the CRE has the power to grant assistance to individuals who wish to commence proceedings under the 1976 Act.

Two factors should be borne in mind when considering the anti-discrimination provisions of the 1976 Act. Firstly, the law "on the books" may not be an accurate reflection of what happens in day-to-day affairs, since government ministers, CRE commissioners, judges, and industrial tribunal members all operate or interpret the law with a degree of discretion. Secondly, the use of the law to achieve social change in such areas as racial discrimination is comparatively new in Britain, and the British tend to be far more skeptical than the Americans that social change can come about through the legal

process.⁴⁴ Clearly, both of these factors could influence the operation of the legislation. Therefore, it is important to examine briefly some examples of the actual enforcement of the 1976 Act, up to the end of 1981.

A. Discrimination Cases Taken to Courts and Tribunals by Individuals

The vast majority of cases alleging racial discrimination taken to courts and tribunals under the 1976 Act involve discrimination in employment rather than in education, housing, goods, facilities, services or other areas. Between June 1977 and December 1981, individuals put forward 1440 racial discrimination complaints relating to employment. In the July 1980 to June 1981 period, three types of complaint predominated: dismissal (50.9 per cent); refusal to engage or to offer employment (21.4 per cent); and lack of promotion (7.5 per cent). Most allegations were of direct discrimination and came predominantly from manual occupations, although the proportion of complaints from managerial and professional occupations rose significantly after 1977.⁴⁵

Even taking test cases into account, it is apparent that few cases of racial discrimination reach courts and tribunals compared with the magnitude of discrimination suggested by social science evidence. Reasons advanced⁴⁶ to explain this situation include:

44. See C. McCrudden, Anti-discrimination goals and the legal process, reprinted in, Ethnic Pluralism & Public Policy (N. Glazer & K. Young, eds. 1983).

45. Supra, note 37.

46. Commission For Racial Equality, Annual Report for 1979, 5 (1980).

1. A fear of victimization;
2. The failure of the person discriminated against to realize that discrimination has taken place;
3. The lack of knowledge of the implications of the legislation, especially where indirect discrimination is concerned;
4. The perception of the difficulty of proving a case;
5. The prospect of protracted and complicated litigation;
6. Trade union preference for using other methods, for example, bargaining;
7. The lack of trade union support within the workplace;
8. Perceptions that job retention is more important in a period of economic decline than job equality;
9. The extent of job segregation preventing comparisons.

An important element in employment discrimination cases is the availability of independent conciliation machinery. After an individual has made a complaint to a tribunal under the 1976 Act (and sometimes even before such a complaint, if requested) an officer of the ACAS may attempt to conciliate. One effect of the activities of the ACAS and of private conciliation settlements is that few applications to the industrial tribunals actually result in a tribunal decision; most are settled before the hearing. Of the 1268 applications to tribunals between June 1977 and June 1981, only 494 cases actually reached a tribunal. Table 1 indicates the nature of the settlements in 1980-81:

TABLE 1

Settlement of racial discrimination applications to industrial tribunals, 1980-81

	male	female	all	percentage
Cases cleared without a tribunal hearing:				
conciliated settlement	53	9	62	18.8
withdrawn by applicant*	102	29	131	39.7
Tribunal decisions	107	30	132	41.5
TOTAL	262	68	330	100.0

* These include cases in which the parties reached a private settlement and cases in which the applicant withdrew upon a showing the discrimination was outside the scope of the Act.

Source: Department of Employment, 1981.

Proving direct or indirect discrimination is extremely difficult, particularly in cases before industrial tribunals.⁴⁷ The three main obstacles, which apply to non-employment as well as to employment cases, appear to be the absence of statistical and other necessary information; the decentralized nature of much of the decision-making under investigation; and the interlocking roles of the many individuals and institutions involved therein. Therefore, it is often hard to allocate responsibility with sufficient clarity to warrant a finding of discrimination by any particular individual or institution.

In order to offset the difficulties of proof of discrimination and the reluctance of individuals to litigate, the CRE is empowered to grant legal and procedural assistance, when appropriate, to individuals wishing to invoke the 1976 Act. In 1981, the CRE received 864 formal requests for assistance, the majority of which related to employment discrimination. In 118 cases, the CRE offered legal representation, in a further 160, extensive advice and assistance, and in 214, initial advice and assistance. In only 110 cases did the CRE provide no assistance at all.⁴⁸ The evidence available tends to show a high correlation between representation by the CRE in both industrial tribunal and court cases, and success of the plaintiff represented.⁴⁹

47. Supra, note 37. Between 1977 and 1981, of the 494 applications heard by tribunals, only 102 (20.7 per cent) were successful.

48. Commission For Racial Equality, Annual Report for 1981, 9-10 (1982).

49. See K. Menon, Individual Complaints and the Industrial Tribunals, A Review of the Race Relations Act 1976 (1979).

B. Remedying Discrimination: County Courts and Industrial Tribunals

When a county court upholds a complaint, the remedies available are those which the High Court can award in non-criminal (or tort) cases, including monetary compensation (damages) and an injunction. When an industrial tribunal upholds a complaint of unlawful employment discrimination it also has a number of remedies available: an order declaring the parties' rights respecting the alleged act; damages, including compensation for injured feelings; and a recommendation that the discriminator take specific action within a specified period to right the wrong done to the complainant. For example, the tribunal can recommend that the victim be reinstated or be offered the next available vacancy. Between June 1977 and June 1981, orders declaring rights were made in five cases; compensation (usually less than £400) was awarded in forty-eight cases; and recommendations were issued in fifty-three cases. Recommendations are not enforceable, however. If the respondent fails to comply, additional monetary compensation may be awarded.

These remedies suffer from a number of limitations. Firstly, damages cannot be awarded for indirect discrimination if the respondent shows it was not intentional; there is therefore little incentive for an individual to allege indirect discrimination. Secondly, an individual must show that any discrimination was detrimental to him or her. Thus, a claim that an act is discriminatory will not be successful unless the claimant is personally disadvantaged by the act, making it difficult, for example, to litigate a series of discriminatory practices by one institution or

association. Thirdly, recommendations can only effect a reduction or obviation of the adverse effect of the act of discrimination on the complainant. Wide-ranging affirmative-action court orders of the American type thus cannot issue. Only the CRE may apply to a county court for an injunction, and no injunction may be granted by an industrial tribunal. Mandatory injunctions are not available.

C. Agency Enforcement: the Commission For Racial Equality

The CRE's main functions are to:

1. Conduct investigations in areas covered by the Race Relations Act 1976 and take action to eliminate unlawful discrimination;
2. Promote equality of opportunity and good relations between different racial groups;
3. Assist and represent individual complainants in appropriate cases;
4. Keep the operation of the legislation under review and make recommendations;
5. Conduct research and take action to educate and persuade public opinion;
6. Draw up a Code of Practice in the employment area.

These functions can be divided into two groups. The second and fifth concern promotional and educational work (which includes funding and supervising the local community relations councils). The first, third, and fourth concern law enforcement activities. The sixth--drafting a Code of Practice--might bridge these two groups of functions, but has yet to be successful. The CRE, after the lengthy consultative processes laid down by the 1976 Act and after detailed discussions, has submitted a draft Code to the Secretary of State for Employment. As of August, 1982, however, there had been no definite response.

Constant debate has centered about the proper balance between the CRE's promotional and law enforcement activities. For example, in its 1981 investigation of the CRE, the House of Commons Home Affairs Committee (Committee) argued that the CRE's role should be largely restricted to that of a law enforcement agency. The Committee further argued that the CRE's work on the promotion of equality of opportunity and good race relations should be:

solely dictated by the need to eradicate racial discrimination ... The Commission's priority should be the undertaking of promotional work which builds on the firm foundation of the practical experience won through detailed investigation and research. The further promotional work is removed from being an adjunct of law enforcement the less effective it becomes ... By rushing ahead with promotional work unrelated to law enforcement, the Commission have [sic] put an unwieldy cart before an admittedly ponderous horse; it is now time for the Commission to concentrate on the horse catching up with and leading the cart.⁵⁰

The CRE and the Government replied that this would confine the CRE's role too narrowly:

Not only must the Commission undertake the law enforcement duties imposed by the Race Relations Act; it also needs to play an effective part in the wider field of combating racial disadvantage, in contributing to the general climate of opinion on racial issues and in educating people for a multi-racial society.⁵¹

Nonetheless, the Government did accept the Committee's general criticisms of the present effectiveness and balance of the CRE's work. Furthermore, the CRE is currently reviewing the relationship between its promotional and investigation work "in order to align the two more closely".⁵²

50. House of Commons Home Affairs Committee, First Report, Commission For Racial Equality, HC 46-I (1981-82).

51. Home Office, The Government Reply to the First Report from the Home Affairs Committee, Commission For Racial Equality, Cmnd. No. 8547, at 4 (1982).

52. Id.

The CRE may conduct formal investigations for any purpose connected with its statutory duties. These duties include not only working towards the elimination of discrimination but also the promotion of equal opportunity and good race relations. By the end of 1981, the CRE had initiated forty-seven investigations, one of which had been discontinued, while thirty-four were still in progress; twenty-four of the thirty-four involved employment.⁵³ The Director of the Equal Opportunity Division of the CRE has detailed the reasons for this emphasis on employment:

Employment is obviously of crucial importance, and the widespread extent of discrimination in employment has been well substantiated by PEP research. Moreover, because of the way in which it is organized, employment is particularly susceptible to investigation: indeed the whole argument for the need for investigative powers was originally formulated in the context of employment.⁵⁴

VI. CONCLUSION

In selecting subjects for investigation, the CRE has concentrated on the most important industries and services in geographical areas with strong ethnic minority representation. It has also tried to cover a wide range, both geographically and in types of employment, so that its investigations may have the widest possible repercussions.

The CRE had, by the end of 1981, published reports in twelve of the investigations completed. Eleven of these investigations resulted in non-discrimination notices. In addition, non-discrimination notices have been issued in six of the thirty-four investigations in progress.⁵⁵ The

53. Supra note 46, at 7.

54. P. Saunders, The Strategic Use of the Law, A Review of the Race Relations Act 1976, 65 (1979).

55. Supra note 46, at 7.

results so far have been disappointing. Most of the published investigations have been small, and the Home Affairs Select Committee has criticized the CRE for its delays in completing some of its larger ones. The CRE, while admitting that there is room for improvement, has replied that major investigations inevitably take a long time, since they are in effect major research exercises conducted within the context of law enforcement. The CRE has also indicated that the procedures laid down by the Act are too cumbersome, that there is considerable scope for respondents to delay inquiries, that the CRE's resources are inadequate, and that the difficulty of proving discrimination is considerable. Whatever the reasons, the CRE's formal investigations have at this point obviously made little impact on levels of discrimination.

In the future, some of the more important investigations may be expected to result in non-discrimination notices. The CRE's powers once discrimination has been found shall therefore be examined. A non-discrimination notice, which can apply for up to five years, may require the respondent not to discriminate any further. When such compliance involves changes in practices or other arrangements, the respondent may be required to inform the CRE that he or she has effected the changes and to take reasonable steps to communicate that information to other persons concerned. A non-discrimination notice may also require the discriminator to provide the CRE with sufficient information to show compliance with the terms of the notice.

There are, however, considerable limitations on the CRE's remedial powers. Firstly, it is unclear to what extent the statutory provisions permit the CRE to impose positive, mandatory requirements. Secondly, where the CRE

has reasonable cause to believe that someone does not intend to comply with a requirement contained in a non-discrimination notice, the CRE may only apply to a county court for an order requiring compliance. This is not an injunction, however, and non-compliance is not contempt; it is only punishable by a small fine.