
genderace

The use of racial anti-discrimination laws

Gender and citizenship in a multicultural context

ANNEX 3

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by

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1. Immigration, ethnic categories, nationality and gender

The dominant immigrant populations in the post-war years in Great Britain (England, Scotland and Wales but not Northern Ireland which has separate equality legislation) were from its former colonies in the Caribbean, South Asia and Ireland. Ireland (other than the six counties of Northern Ireland) became independent in 1920. The others became independent from the 1940s (1947 India) through to the 1960s (Africa and the Caribbean). There were also European flows of labour migrants and refugees throughout the post-war period but immigration from Eastern and Southern Europe received relatively little attention for a long time.

The post-colonial flows that gave rise to immigration legislation from 1962 onwards were from the New Commonwealth (Bangladesh, India, Pakistan, Caribbean). It was increasingly argued by the late 1960s that integration and immigration control had to be combined and thus measures were enacted both to combat racism and to limit immigration. On the basis of its colonial immigrations and the implementation of race relations legislation (see section 2.4), the UK developed ethnic monitoring using ethnic categories, such as Asian and Black. Hence much of the available data on migrant populations for a long time focused on its ethnic characteristics. A question on ethnicity was first introduced in the 1991 census and was the basis for subsequent ethnic monitoring which used the census categories. Table 1 below indicates the current ethnic categories that are used in the census and in information collected by public authorities. Asian categories are the largest but there has also been significant growth in the Black African population in the past two decades.

Table 1 UK Population by Ethnic Group, 2001

	Total population	%	Minority ethnic population
White	54,153,898	92.1	n/a

Mixed	677,177	1.2	14.6
Asian/Asian British			
Indian	1,053,411	1.8	22.7
Pakistani	747,285	1.3	16.1
Bangladeshi	283,063	0.5	6.1
Other Asian	247,664	0.4	5.3
Black/ Black British			
Black Caribbean	565,876	1.0	12.2
Black African	485,277	0.8	10.5
Black Other	97,585	0.2	2.1
Chinese	247,403	0.4	5.3
Other	230,615	0.4	5.0
All minority ethnic	4,635,296	7.9	
All population	58,789,194	100	

Source ONS 2001 Census

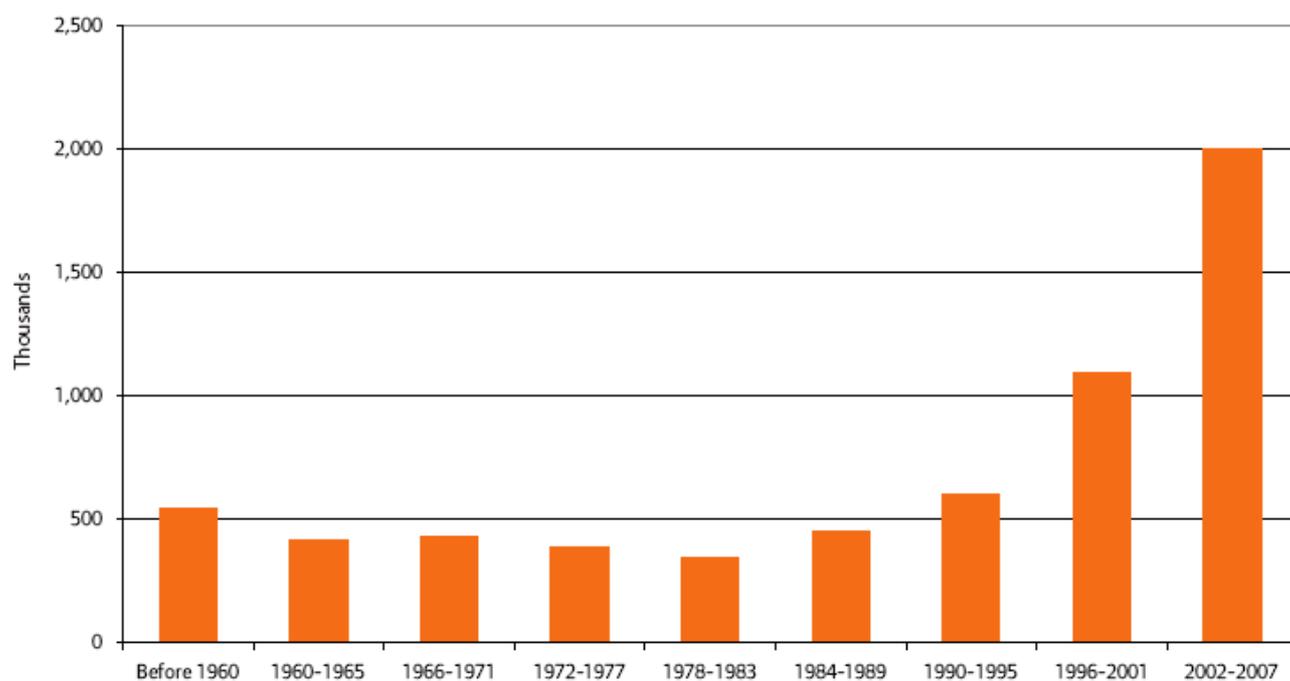
Ethnic monitoring (collection, storage and analysis of data) was seen as being an effective tool in highlighting inequality, investigating underlying causes and the removal of any unfairness or disadvantage. The assumption was that racial disadvantage and discrimination could be captured by these ethnic categories which reflected one of the main, and possibly most significant, grounds of discrimination, incorporated in the Race Relations Act 1976. There is however no monitoring by nationality i.e. citizenship.

However, by the 1990s, the composition of migrant flows had begun to change as a result of increasing numbers of asylum seekers and refugees from Eastern Europe, the Middle East and Latin America. Many of these migrants did not fit neatly into the existing ethnic categories. For example, a Turkish person could categorise themselves as 'white' or 'other'. White migrants, such as the Irish, Portuguese or the Polish might also suffer discrimination. In fact the Irish were added as a specific category in the 2001 census in recognition of disadvantage they experienced in services such as health. In some local authorities, there has been an attempt to add to their data collection,

nationalities not covered by ethnic categories e.g. Somalis, Turkish in order to better understand unequal access to services.

Immigration has continued to diversify during the current decade. Labour shortages for skilled and less skilled workers, both documented and irregular, has long attracted large numbers. Hence by the beginning of the decade the Labour government announced that, given the UK's position in the global labour market, it would implement a policy more open to labour migration through its managed migration policy.¹ In 2004 the UK was only one of three countries to allow the employment of Eastern and Central European A8 migrants with some limits on benefits entitlement and on condition that they register under the Worker Registration Scheme. Self-employed do not have to register.

Figure 1 Foreign born population in the UK in 2007, by period of arrival



Source: Labour Force Survey 2007, Q2

¹ First indications were in a speech 'UK migration in a global economy' by the former Home Office minister, Barbara Roche, to a conference organised by the Institute of Public Policy Research in September 2000. The policy has continued through modification of immigration control since that time, culminating in plans for major reform of economic immigration (see Home Office 2006).

Table 2 Foreign born population by country of birth 1997-2007

Rank (2007)	Country	1997	2002	2007
1	India	404,100	424,600	553,300
2	Poland	67,800	49,600	423,300
3	Ireland	534,600	490,500	410,400
4	Pakistan	222,400	281,600	357,900
5	Germany	227,900	266,700	255,300
6	Bangladesh	140,200	179,900	203,800
7	South Africa	93,400	140,900	194,500
	China and Hong Kong			
8	Kong	86,500	125,500	173,600
9	Jamaica	139,900	149,800	173,500
10	United States	126,800	141,900	170,600
11	Nigeria	59,400	78,600	146,600
12	Kenya	122,300	119,900	135,400
13	France	66,400	94,800	133,700
14	Australia	85,900	107,400	123,800
15	Sri Lanka	51,200	84,000	113,600
16	Philippines	..	52,600	106,700
17	Zimbabwe	..	68,000	106,000
18	Italy	91,800	94,200	102,000
19	Somalia	46,100	70,400	90,300
20	Ghana	41,300	45,700	87,200
	TOTAL foreign born	4,152,000	4,765,000	6,219,000

In terms of gender, amongst the foreign-born living in the UK in 2007 and who not been in the UK a year earlier, there were 143,000 females and 145,000 men or 49.7% females. The gender balance for those in work is different: there were 57,000 females and 85,000 men or 40.4% female (Salt 2007). The gender division amongst nationalities also differs

considerably. For National Insurance Numbers (social security) allocated in 2005/6 (662,390), 45.8% on average were for female migrants but only 40.9% for Polish and 36.9% for Indians (Kofman 2007: 286). The percentage of female migrants applying for National Insurance numbers has decreased from 49.1% in 2000/1 probably because of the greater proportion of men in the Eastern European migrations (BIA et al. 2008). The above figures largely cover those entering or wishing to enter the labour market. However there are a number of routes through which migrants enter as shown in table 3. The gender and national composition of each route is very different.

Table 3 Routes of entry 2006

Labour Migration	Numbers
Worker registration scheme (A8)	234,725
Work permits	96,740
Highly skilled migrants programme (HSMP)	21,934
Working holiday makers	43,685
Sector-based schemes	3,586
Seasonal Agricultural workers	16,127
Domestic workers	12,500
UK ancestry	8,490
Ministers of religion	955
Au pairs	1,840
Post graduate doctors and dentists	330
Family Migration	
Husbands and fiancés	16,200
Wives and fiancées	30,900
Children	5,780
Settlement on arrival	8,380
Dependants (work permit holders, students)	65,500
Students	309,000

This table does not include European Economic Area migrants exercising treaty rights other than through employment (including accession country self employed), those who do not register their presence officially (A8 unregistered workers) and other irregular migrants.

Of the above groups, domestic workers are perhaps the most vulnerable to exploitation, discrimination, harassment and violence. Employers frequently retain passports and misinform employees as to their rights. At present, these workers at least have the right to change employer. However, under proposed reforms of the immigration system, they will lose this right and will be permitted to remain for a short period and work only for their original sponsor. They are likely to have only limited awareness of their rights and access to advice although the NGO Kalayaan campaigns on their behalf as well as providing information and some individual advice.

Family reunification or formation is a significant source of non-white migration. In 2006, 46% of husbands and fiancés and around one third of wives and fiancées were from the Indian sub-continent with significant numbers from Africa, the Americas the Middle East and the rest of Asia. Entry is not permitted unless the parties can demonstrate economic self-sufficiency and adequate accommodation. All entrants may work once the marriage has taken place and may rely on anti-discrimination legislation. Concern at the perceived failure of some migrants to integrate sufficiently and at abuses such as forced or sham marriages have led to controversial measures and important proposed changes. If implemented, the latest proposals will make it harder for some spouses to enter or to achieve a permanent status. This will not directly affect their rights under the discrimination law framework but may add to their general social marginalisation. Children and a very limited range of other dependent relatives may also be admitted. The entry of a broader range of family members under the *Surinder Singh* principle in EU law is a matter of concern to the UK government.

Asylum seekers have been an important source of migration during the past decade although numbers are now decreasing rapidly. 23,600 applications were made in 2006 compared to more than 84,000 in 2002. Most asylum seekers are not permitted to work but may receive limited state benefits. In addition, those who have been refused asylum or another form of protection but remain in the UK may not work and receive very

limited state assistance on condition that they agree to return although many come from regions where this is unrealistic or unsafe. Poverty and even destitution is a major problem amongst this group, leading to social exclusion and victimisation, and contributing to illegal working.

Illegal working is seen as a major issue although estimating its true extent is predictably difficult. Employers are subject to civil and criminal sanctions if employees do not have permission to work, unless they perform necessary checks before employment. Guidance is available to ensure that these are not performed in a racially discriminatory way but there have been suggestions that the burden of these requirements has led to discriminatory hiring practices.² Illegal workers will frequently experience exploitation, discrimination and unsafe working conditions but, while they may, in some circumstances, have rights under discrimination legislation or other employment statutes, they are unlikely, for obvious reasons, to risk bringing a claim. They are unable to enforce the contract itself due to its illegality.

Romany Gypsies and Irish Travellers are longstanding ethnic groups whose discrimination is often under-reported or ignored. For example, the UK's most recent report to the UN Committee for the Elimination of Racial Discrimination (CERD) was criticised by the Committee for the absence of reference to gypsies and travellers.³ Gypsies and Travellers face difficulty in securing their most basic needs for a home, adequate health care, and education for their children, leading to a series of challenges under Article 8 ECHR. These have been generally unsuccessful due to the wide margin of appreciation awarded to the government by the ECHR.

Gypsies and Travellers are defined by law as racial groups and are protected by British anti-discrimination legislation, as discussed below. In addition, Article 14 of the Race Equality Directive might be used to challenge discrimination. However, in reality due to

² *JCWI Response to the Government Consultation on the Prevention of Illegal Working* available at <http://www.jcwi.org.uk/>

³ However, the Commission for Racial Equality (CRE), as part of their strategy for Gypsies and Travellers in England 2004 – 2007, did commission an inquiry into local authorities' arrangements for planning, providing and managing sites. This was the first occasion that the CRE investigated the issue of Gypsies and Travellers.

the discriminatory impact of other laws, in particular planning and criminal justice, the race equality legal framework provides limited protection. Although discrimination is widespread, few cases are taken to court or tribunal due to lack of awareness, lack of access to advice and low confidence in the judicial system.

2.The UK’s national anti-discrimination legal framework, its scope and implementation

2.1 International instruments

Great Britain has signed and ratified all main international treaties relating to human rights and non-discrimination, including the Universal Declaration of Human Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, the International Covenant on Civil and Political Rights and the Convention on the Elimination of all forms of Discrimination against Women. There are no derogations or reservations which are relevant to equality and non-discrimination.

However, individuals cannot directly rely on these instruments in domestic courts, as British law does not provide for this. Rights become enforceable only through incorporation in a domestic statute.

In common with other member states, the UK has not ratified and there seems to be no intention of ratifying the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990.

2.2 European instruments

The UK, which includes Great Britain, is a member of the Council of Europe and has signed and ratified the European Convention for Human Rights and Fundamental Freedoms (ECHR). This Convention has been incorporated into British law by the Human Rights Act 1998 which came into force in 2001. This means that the principal rights provided by the ECHR can be directly relied on in the domestic courts in Britain. The UK has not signed or ratified Protocol 12 to the ECHR, which establishes a free-

standing right to non-discrimination on a large number of grounds. Therefore, under Article 14, there is only a right to non-discrimination in relation to the rights set forth in the ECHR.

In so far as these provisions were not already covered by the Sex Discrimination Act 1975, Britain has implemented the EU Directives on gender (Directives 76/207; 97/80; 2002/73; 2004/113;) through the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (SI 2001/2260); Sex Discrimination Act 1975 (Amendment) Regulations 2003 (SI 2003/1657); and, Employment Equality (Sex Discrimination) Regulations 2005 (SI 2005/2467).⁴ Great Britain has enacted the following legislation to implement Directives 2000/43 and 2000/78: Race Relations Act 1976 (Amendment) Regulations 2003 (SI2003/1626); Employment Equality (Religion and Belief) Regulations 2003 (SI2003/1660); Employment Equality (Sexual Orientation) Regulations 2003 (SI2003/1661); Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI 2003/1673); and, Employment Equality (Age) Regulations 2006 (SI2006/1031).

There is some doubt whether the British legislation complies in all respects to the EU Directives.⁵

2.3 Description of the gender anti-discrimination national framework

The Sex Discrimination Act 1975 (SDA 1975) and the Equal Pay Act 1970 are the two main pieces of legislation covering sex discrimination in Great Britain. Both Acts offer protection against unlawful discrimination against both women and men. Membership of the EU has influenced the development of British law in this area. The prohibition of sex discrimination is well established within Britain, as is the prohibition of race discrimination under the Race Relations Act 1976 (see later). The debate about equality,

⁴ All British statutes and other legislative instruments are available on <http://www.opsi.gov.uk/acts.htm>

⁵ See: European Network of Legal Experts in the Non-discrimination Field, *Country Report on Measures to Combat Discrimination Directives 2000/43/EC and 2000/78/EC, Country Report United Kingdom State of Affairs up to January 2007* (author: O’Cinneide, C), at 3-5, **available from:** http://europe.eu.int/comm/employment_social/fundamental_rights/policy/aneval/mon_en.htm

however, has shifted as the realisation has grown that preventing discrimination is not enough to ensure equal participation of women and ethnic minorities in the labour market. For example, when the Equal Pay Act came into force in 1975, the gap between the average pay of full-time working women and full-time working men was 25% and it has not narrowed significantly.

Completing the Revolution, the final report by the Equal Opportunities Commission (EOC) before it was absorbed into the new Equality and Human Rights Commission, set out a comprehensive measure of gender equality in Britain. The EOC put together a Gender Equality Index which showed that progress in many areas had been very slow and, in some cases had gone backwards. Accompanying the report was a 'Gender Agenda' in which the Commission highlighted the key issues for future action. The Agenda pointed out that despite 30 years of legislation on equal pay a persistent pay gap remains between men and women. Women who work full-time earn, on average, 17% less per hour than men working full-time and 30% for part-time employment. This in turn creates a pensions gap with women's retirement income being 40% less than men's. Occupations continue to be as segregated as they were with 65% being either filled primarily by women or men. Unemployment rates of minority ethnic groups remain stubbornly higher than among the white majority and members of ethnic minorities remain largely invisible in senior positions in the public sector and even more so in the private sector (Pitt 2006: 26). Some groups of women, for example Pakistani women, face an even bigger differential, thus raising the issue of multiple discrimination (Brittan et al. 2005). Unlike other ethnic minority women, they have a higher rate of part-time employment than the average (Government Equalities Office 2008). The Fawcett Society has been active in this field and launched in 2007 a programme *Seeing Double* (Moosa 2008a) on disadvantages faced by ethnic minority women in relation to money, justice and power.

In terms of power, though improving, only 20% of MPs in the House of Commons are women and only 15% of local council leaders. Women only short lists have been suggested. On 6 February 2008, MP Keith Vaz proposed the Race Relations (Election Candidates) Bill, which would enable political parties to adopt ethnic minority only shortlists for MP, MEP and local councillor elections. The Fawcett Society has also

been concerned with the issue of under representation of minority ethnic women, especially of Asian women, and has recently published *Ethnic Minority Women: Routes to Power* (Moosa 2008b).

The Equalities Review looked at new research which revealed clearly the one factor, above all others, that leads to women's inequality in the labour market – becoming mothers. As recent analysis of data and surveys have shown, Bangladeshi and Pakistani women in particular leave the labour force once they have children, even amongst those with high educational qualifications (Dale, Dex and Lindley 2005; EOC 2006). Many only return to part-time work, thus lowering women's income and prospects of training and promotion (Kofman, Ryan and Aaron 2008).

In the last decade, a number of developments have taken place, including the transposition of the EU Directives mentioned above. Another development is the introduction of a Gender Equality Duty into the SDA 1975 by S 84 of the Equality Act 2006, which came into force on 6 April 2007. This imposes a duty on public authorities in carrying out their functions to have due regard to the need: (a) to eliminate unlawful discrimination and harassment, and (b) to promote equality of opportunity between men and women. A similar duty in relation to race equality already existed since the Race Relations (Amendment) Act 2000. There is also a Disability Equality Duty based on the Disability Discrimination Act 2005. These positive duties go beyond the minimum requirements of the Race and Framework Directives which do not contain anything like these duties.

The Equality Act 2006 brought another major change within British anti-discrimination law as it established the Equality and Human Rights Commission (EHRC). This Commission came into existence on 1 October 2007. Before this Commission was established, there were three Commissions dealing with discrimination: the Equal Opportunities Commission, dealing with discrimination based on gender and with gender equal pay issues; the Commission for Racial Equality, dealing with racial and ethnic origin discrimination; and, the Disability Rights Commission, dealing with discrimination on the ground of disability.

These three Commissions were all dissolved and the new Commission has taken over their work as well as covering the other grounds of discrimination for which no Commission previously existed (religion or belief, sexual orientation and age). The new Commission will also have responsibility for the promotion of human rights. According to their website, the Equality and Human Rights Commission ‘champions equality and human rights for all, working to eliminate discrimination, reduce inequality, protect human rights and to build good relations, ensuring that everyone has a fair chance to participate in society.’⁶ The Commission can take legal action on behalf of individuals but it also has significant powers to enforce the equality duties of organisations and authorities. Its powers include launching official inquiries and formal investigations. The Commission will be interviewed for the Genderace project.

As will be clear from the above, the task and powers of the Equality and Human Rights Commission go beyond the minimum requirements of the EU Equality Directives.

The SDA 1975 makes sex discrimination unlawful in employment, vocational training, education, and the provision and sale of goods, facilities and services and premises. It is not clear whether self-employment and occupation are fully covered and this is one of the areas where British law might not fully comply with the EU legislation. The Act prohibits direct and indirect discrimination, victimisation, discrimination on the grounds of pregnancy or maternity leave, sexual harassment and harassment on the ground of sex. In February 2005, the Government launched the Discrimination Law Review (DLR) to consider the opportunities for creating a clearer and more streamlined equality legislation framework for all the grounds covered by the existing British legislation. This led to a consultation paper with proposals for a new Single Equality Bill. The consultation period, which ended in September 2007, focused on, among other things, exploring the scope for harmonising and simplifying current law and considering areas where protection is currently inconsistent. Following the consultation, the Government is now also considering exploring the feasibility of permitting individuals to bring claims based upon multiple-grounds. The Government is, at present, working on its response to the consultation and aims to introduce a Bill during this Parliament.⁷ On 13

⁶ See: <http://www.equalityhumanrights.com/en/Pages/default.aspx>

⁷ See on all this: <http://www.equalities.gov.uk/dlr/index.htm>

May 2008, the Prime Minister published the Government's draft Queen's Speech in which he again signalled a commitment to produce a Single Equality Bill (this is a proposal for a Statute which becomes an Act once it has been adopted by Parliament).

From our preliminary research it appears clear that the area where most data will be available is the area of employment. Cases of sex discrimination and unequal pay claims are heard, in first instance, by an Employment Tribunal, with an appeal open to the Employment Appeal Tribunal, and after that possibly to the Court of Appeal and the House of Lords.⁸ According to the Annual Statistics for Employment Tribunals for 2006-2007,⁹ the number of sex discrimination claims accepted by the tribunals almost doubled in 2006-2007 to 28,153 claims. However, one must remember that this only concerns claims related to the employment field. The majority of these claims are withdrawn (48%), settled after ACAS¹⁰ conciliation (12%), struck out before the hearing (33%) or dismissed at the preliminary hearing (1%). Only about 2% is successful at the hearing, while 3% is unsuccessful. The maximum compensation awarded in these cases was £64,862 and the average award was £10,052.

There are a large number of cases relating to gender discrimination, but for reasons mentioned below, there are hardly any cases on multiple grounds or on gender and race discrimination together.

2.4 Description of the race anti-discrimination national framework

The development of anti race discrimination legislation in Britain, as in many other European States, has always been linked to the adoption of legislation aiming to control immigration and asylum. Laws against race and ethnic origin discrimination were

⁸ It must be mentioned, that the decisions of Employment Tribunals and Employment Appeal Tribunals do not create a precedent. Only decisions of the Court and Appeal or the House of Lords do. This means that, in later cases, all courts and tribunals need to follow the decisions of the Court of Appeal, unless overruled by a later House of Lords decision, and the decisions of the House of Lords, but not those of other Employment Tribunals or Employment Appeal Tribunals.

⁹ Employment Tribunal and Employment Appeal Tribunal Statistics (GB) 1 April 2006 to 31 March 2007, < www.employmenttribunals.gov.uk/publications/publications.htm

¹⁰ Advisory, Conciliation and Arbitration Service. This independent statutory body was set up in 1974. It has a wide remit in employment relations. See now: S 209 and SS 247-253 Trade Union and Labour Relations Consolidation Act 1992 (TULRCA). For more information on ACAS see Pitt 2006, 5—8.

enacted to lighten or soften the impact of harsh and restrictive immigration and asylum rules and to show that these were not based on racism and prejudice against people because of their race/ethnic origin. The legislation showed that something was done about racism and racial discrimination. The first legislation against discrimination on racial grounds was the Race Relations Act 1965. This Act had a limited material scope, but this was extended by the Race Relations Act 1968. The main Act against racial discrimination is now the Race Relations Act 1976 (RRA 1976), as amended. This Act covers discrimination on the grounds of colour, race, nationality or ethnic or national origin. However, there is an anomaly here: the Race Relations Act 1976 (Amendment) Regulations 2003, which aimed to implement the EU Race Directive, only cover race, ethnic and national origin.¹¹

Of the grounds covered by the Race Relations Act 1976, ethnic origin has proved to be the most problematic in the case law. The leading case is the case of *Mandla v Dowell Lee* [1983] 2 AC 548, in which the House of Lords laid down two essential and five other relevant characteristics in determining whether there is an ethnic group under the RRA 1976. The essential characteristics are: a long shared history and a cultural tradition of its own. The other relevant characteristics are: either a common geographical origin, or descent from a small number of common ancestors; a common language; a common literature; a common religion different from that of neighbouring groups or from the general community surrounding it; being a minority or being an oppressed or a dominant group within a larger community.

Using these criteria, the House of Lords decided that Sikhs are an ethnic group. Other courts applied this test and held that gypsies/travellers were also an ethnic group (*CRE v Dutton* [1989] QB 783), but Muslims (*Nyazi v Ryman Ltd* EAT 6/88 (unreported)) and Rastafarians (*Dawkins v Department of the Environment* [1993] ICR 517) were not.¹²

¹¹ This anomaly is a result of the way the Directive was implemented. This was done by a Regulation under the European Communities Act 1972 and this meant that the Regulation could go no further than was necessary in order to implement the Directive. As the Directive covers racial or ethnic origin, this was all that could be covered by the Regulation. Racial or ethnic origin were held to cover national origin as well, but nationality and colour are not covered. This does mean that the amendments made by the Regulation (in the spheres of harassment, burden of proof and indirect discrimination) do not expressly apply to colour or nationality but they do apply to race or ethnic or national origin.

¹² Religion is widely seen as a proxy for race, particularly so far as Muslims are concerned, and religious discrimination in employment and in public functions, including provision of goods and services and

Jews had been held to be an ethnic group in an earlier case: *Seide v Gillette* [1980] IRLR 427.

The RRA 1976 covers a large number of areas: employment, vocational training, education, and the provision and sale of goods, facilities and services and premises. Here, too, it is not clear whether self-employment and occupation are fully covered. The Act prohibits direct and indirect discrimination, victimisation and harassment.

The Race Equality Duty which is similar to the Gender Equality Duty, has already been mentioned above, as has the fact that, until October 2007, the main body dealing with race discrimination was the Commission for Racial Equality, but this Commission has also been dissolved and its tasks have been taken over by the EHRC.

According to the Annual Statistics for employment tribunals for 2006-2007,¹³ the number of race discrimination claims dropped slightly compared to 2005-2006, to 3,780 claims. Again, these claims concern employment related matters only. The majority of these claims are withdrawn (31%), settled after ACAS conciliation (38%), struck out before the hearing (7%) or dismissed at the preliminary hearing (5%). Only about 3% was successful at the hearing, while 15% was unsuccessful. The maximum compensation awarded in these cases was £123,898 and the average award was £14,049. Therefore the awards made in race discrimination cases appear to be generally higher than those made in gender discrimination cases. It appears that claims to the tribunal are made not only by long settled migrants but also by many recent arrivals which, according to a recent study (Brown et al. 2006), warrants further investigation.

2.5 Processing of the double discrimination based on race and gender

The legislation in Britain does not make any specific mention of or provisions for cases where multiple grounds are involved, although it does not appear to explicitly prohibit

education, is now prohibited (Employment Equality (Religion or Belief) Regulations 2003 and Equality Act 2006).

¹³ Employment Tribunal and Employment Appeal Tribunal Statistics (GB) 1 April 2006 to 31 March 2007, < www.employmenttribunals.gov.uk/publications/publications.htm

claims on multiple grounds either. However, the Courts tend to consider each ground separately and to make a ruling on each ground separately. That this is the right and only way to deal with these cases has recently been confirmed by the Court of Appeal in the case of *Bahl v the Law Society* [2004] IRLR 799. This is a case where the applicant claimed to have been discriminated against both on the grounds of her race or ethnic origin and of her gender. In this case, the Employment Tribunal found that Ms Bahl could be compared to a white man, so that the effect of both race and gender could be considered. However, both the Employment Appeal Tribunal and the Court of Appeal held that this was an incorrect interpretation of the law and that each ground must be considered and decided upon separately. This was confirmed by the Employment Appeal Tribunal in: *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865. As mentioned above, Court of Appeal decisions are binding on lower courts and tribunals and, therefore, they will now have to look at each ground separately. They cannot look at more than one ground of discrimination at the same time, unless the legislation changes or the House of Lords overrules the decision of the Court of Appeal in another case.

Because the courts will thus only consider each ground of discrimination separately, equality bodies and other organisations providing legal advice and assistance will often deal with cases of multiple discrimination by deciding which ground is the strongest and then proceeding on this ground only. Alleging more grounds might lead to difficulties with proof and thus a strategic decision is made as to which ground to pursue.

However, this may change in the coming years with the EHRC (see below) which will operate across the equality strands and some recent interest from the Minister for Women and Equalities in the relationship between inequalities, and especially between class, gender, race and disability (The Guardian, 14 June 2008, p. 6). However, in their Green Paper “A Framework for Fairness” the Government has set out proposals for extending and harmonising certain aspects of the definition of discrimination and maintaining separate definitions for certain grounds of discrimination.

3. National specialised bodies, support organisations and experts

Equality and Human Rights Commission (EHRC): This is the main national specialised body as required by Directives 2000/43 and 2002/73 and was established by the Equality Act 2006, which started work on 1 October 2007.¹⁴ As an independent advocate for equality and human rights in Britain, the EHRC's mission is to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights by:

- challenging prejudice and disadvantage, and promoting the importance of human rights;
- enforcing equality legislation on age, disability, gender, race, religion or belief, sexual orientation or transgender status, and encouraging compliance with the Human Rights Act 1998. This task includes enforcing the fulfilment of the race, gender and disability duties;
- using influence and authority to ensure that equality and human rights remain at the top of agendas for government and employers, media and society by targeting key equality battle grounds;
- campaigning for social change and justice to improve life chances and reduce inequalities;
- stimulating debate by fostering partnerships at local, regional and national levels;
- giving advice and guidance to businesses, the voluntary and public sectors, and also to individuals through effective advice and complainant services;

¹⁴ The Equality Commission for Northern Ireland (ECNI) was established under the Northern Ireland Act 1998 and has duties and powers in respect of race, religious belief and political opinion, sex, disability, age and sexual orientation.

- developing a research and evidence-based understanding of the causes and effects of inequality for people across Britain.

Therefore, the EHRC is the main equality body as prescribed by the Race and Gender Directives and covers all the grounds provided for under EU law: gender, racial and ethnic origin, religion or belief, disability, age and sexual orientation. The latter three grounds were not covered by any Commission before October 2007. The EHRC will be one of the bodies interviewed for the Genderace project.

Other bodies and NGOs, which may be interviewed, include:

Citizens Advice Bureaux: These are more than 3000 of these in the UK and they provide information and advice on a range of matters including legal questions. Most CABs are unable to provide in-depth advice or representation but may refer the case onto a Law Centre or a lawyer. The national umbrella organisation, National Association of Citizens' Advice Bureaux (www.citizensadvice.org.uk) undertakes substantial policy work and has investigated the exploitation of migrant workers.

Equality and Diversity Forum: (www.edf.org.uk). This is a network of national organisations committed to progress on age, disability, gender, race, religion and belief, sexual orientation and broader equality and human rights issues. (Gay Moon, who is their special legal adviser, will be the person to interview)

Fatima Women's Network: works for gender equity, social, economic and environmental justice, www.fatima-network.com

Fawcett Society: campaigns for gender equality www.fawcettsociety.org.uk

Government Equalities Office: this is headed by the Minister for Women and Equality (Harriet Harman) and was also set up last year. It is responsible for the Government's overall strategy and priorities on equality issues and leading the development of a more integrated approach on equality across Government. One of its three priority actions is to empower black and minority ethnic women to build cohesion within their communities and as a bridge between communities. Projects have included: *Engaging with Muslim women; Ethnic minority women and social enterprise; Black, Asian and Minority Ethnic (BAME) Women Councillors Taskforce.*

Institute of Race Relations: researches and analyses issues of race in the UK, www.irr.org.uk

Joint Council for the Welfare of Immigrants: campaigns and engages in policy work on immigration issues, created in 1967, and has taken up many issues concerning gender, race and immigration policy; <http://www.jcwi.org.uk/index.html>

Kalayaan: provides advice, advocacy and support services in the UK for migrant domestic workers, <http://www.kalayaan.org.uk/>

Law Centres: There are about 65 Law Centres in England and Wales and 8 in Scotland. They offer free legal advice and representation to those in need who live and work in the area served by the Law Centre including on discrimination matters. The range and type of service available varies between Law Centres and funding is often precarious. Some Law Centres have closed in the recent period. In the past, some Law Centres have brought time-consuming but important test cases. The stringency of most funding regimes has made this more difficult. Their umbrella body is the Law Centres Federation (<http://www.lawcentres.org.uk/>) which engages in some policy work mainly connected with provision of legal services.

PRIAE: Policy Research Institute on Aging and Ethnicity: www.priae.org This organisation has done a lot of work on elderly ethnic minority people

Runnymede Trust: promote a successful multi-ethnic Britain; www.runnymedetrust.org

Southall Black Sisters is one of the major campaigning organisations campaigning on issues concerning black and Asian women including forced marriage, domestic violence and immigration controls particularly as these relate to family and marriage migration or the marriage of existing minority ethnic communities; www.southallblacksisters.org.uk

The 1990 Trust: (www.blink1990.org.uk). Their objective is to increase the participation of Black communities in all spheres of society and to fight racism in all its manifestations (BLINK is the black information link)

Trade Unions: These are mainly active in relation to employment and related fields. The Trades Union Congress (TUC) and UNISON (representing public sector workers in particular) have taken up issues of black and minority ethnic women employment and more recently migrant women, for example, senior carers who have been severely affected by some of the changes in managed migration.

UKREN: UK Race and Europe Network: A secretariat at Runnymede Trust: <http://www.runnymedetrust.org/projects/europe/uk-race-amp-europe-network.html> In March 2008, it held a panel discussion held on the importance for race equality organisations of considering multiple discrimination.

Women's National Commission: This is an independent body funded by the state and under the umbrella of the Government Equalities Office. There are two key groups - *Migration and Asylum Working Group* and the *Violence Against Women Group*. www.thewnc.org.uk

The following are experts or leading practitioners who could be consulted:

Rosalind Hardie Ejiohuo, Head of Equality and Diversity Hackney

Elaine Banton, Bedford Row Chambers (Treasurer, Discrimination Law Association)

Tamara Lewis, Central London Law Centre (Director DLA)

Karon Monaghan Matrix Chambers

Catherine Casserley, Chair DLA and Barrister at Cloisters Chambers

Ulele Burnham, Director DLA and Barrister, Doughty Street Chambers

Nick Bone, Director DLA,

Barbara Cohen, Director DLA

Kiran Daurka, Director DLA and Solicitor, Russell, Jones and Walker

Juliette Nash, Director DLA and Solicitor North Kensington Law Centre

Robin Allen, Barrister, Cloisters Chambers

Tess Gill, Barrister Old Square Chambers

Gay Moon, Equality and Diversity Forum

Academic Experts include:

Aileen McColgan, Professor of Law, Kings College London and barrister at Matrix Chambers, London

Sandra Fredman, Professor of Law, University of Oxford

Lucy Vickers, Professor of Law, Oxford Brookes University

Colm O’Cineide, Senior Lecturer in Law, University College London

Erika Szyszczak, Professor of Law, University of Leicester

Mark Bell, Professor of Law, University of Leicester

Members of Employment Tribunals and Employment Appeal Tribunals.

4. Description of key data sources useful for the study

These include the following:

Employment Tribunals and Employment Appeal Tribunals Annual Reports and Statistics (www.employmenttribunals.gov.uk/publications/publications.htm): These reports should provide us with information on the number of complaints made on the grounds of gender and on the grounds of race, and the outcome of these cases.

Information and statistics from Government Departments: Department for Business Enterprise and Regulatory Reform (previously Department for Trade and Industry): <http://www.berr.gov.uk/>. This website provides information on employment matters, including discrimination and on the legislation, reviews of measures and the Government's plans in relation to changes to this. Department of Work and Pensions: www.dwp.gov.uk

Office of National Statistics: <http://www.statistics.gov.uk/default.asp> This includes social trends; statistics on population in general; population and employment such as the Labour Force Survey; population and migration; population trends; education; health; and, crime and justice.

Brown, A, Erskine, A, and Littlejohn, D, *Review of Judgments in Race Discrimination Employment Tribunal Cases* (Department of Trade and Industry, Employment Research Series No. 64, 2006). This report is the outcome of research into racial discrimination cases in the Employment Tribunal system. The research team studied the texts of 100 judgements and, where possible, the claim and response forms.

Equal Opportunities Commission, *Moving on up? The Way Forward* (Report of the EOC's Investigation into Bangladeshi, Pakistani and Black Caribbean Women and Work) (2007). This report is the result of a statutory, formal investigation done by the Equal Opportunities Commission using the powers given to the Commission by the SDA 1975 and was supported by the European Social Fund. It has data on the underachievement of Bangladeshi, Pakistani and Black Caribbean women in the employment field, despite high achievement in education. It also has valuable links to other information.

Kofman E., Raghuram P., Merefieid M. (2005), *Gendered migrations: Towards gender sensitive policies in the UK*, IPPR. Asylum and Migration Working Paper 6, London includes a number of tables on gender and migration and analysis of the implications of immigration and asylum policies

Mirza, H and Sheridan, A, *Multiple Identities and Access to Health The Experience of Black and Ethnic Minority Women*, Working Paper Series No 10, Equal Opportunities

Commission and Centre for Racial Equality Studies, Middlesex University (2003), http://www.equalityhumanrights.com/Documents/EOC/PDF/Research/multiple_identity.pdf. This study focused on how black and minority ethnic women understand and perceive their identity and on assessing the validity and helpfulness of looking at equality and human rights issues from a multiple identity perspective. It looks at the issues encountered by black and minority ethnic women when accessing services in relation to their health and well-being.

Moosa, Z., (ed.), *Ethnic Minority Women: Routes to Power* (Government Equalities Office, Fawcett Society and Ethnos, 2008) < www.fawcettsociety.org.uk/index.asp?PageID=628 This is the report of a study into the under-representation of ethnic minority women in positions of power and senior decision-making authority across the public, private and voluntary sectors as well as in politics.

Trades Union Congress, *Black Women in Employment* ESAD/EERD 4 April 2006 < www.tuc.org.uk/extras/bwae.pdf This is a very useful report which uses official data to look at the position of black women in the labour market and the barriers they face to gaining employment and progression in work.

5. National literature review on racism and gender discrimination and the anti discrimination debate

There is an extensive literature in the English language on discrimination issues both within the UK and beyond, as can be seen from the bibliographies attached.¹⁵ This literature relates to discrimination on many different grounds and in different areas including the human rights aspects of discrimination and the link between immigration and discrimination. Legislation against gender and race discrimination has been in place for more than 30 years in Britain and, especially in the last two decades or so, the

¹⁵ One on racism, racial discrimination and race relations; one on gender discrimination and one on multiple discrimination (only one attached with this document).

realisation has emerged that anti discrimination legislation alone is not enough. The debate in both academic and general policy circles has recognised that laws in themselves – even when fully implemented and enforced – are not enough to tackle some of the ingrained patterns of inequality that exist in our society. These debates have often concluded that laws aiming at formal equality or equal treatment are not enough and that legislation and policy must focus on substantive equality and look at equality of opportunity and/or equality of outcomes.¹⁶ There is also an emphasis on increasing the participation of women and/or ethnic minorities in fields like politics, employment, especially in the higher ranks, and in education. Several of the studies mentioned above look at one of these aspects (Mirza and Sheridan 2005; TUC 2006; EOC 2007; Moosa 2008b).

One of the ways to go beyond formal equality is to allow for positive action measures and these measures and the extent to which these should be allowed have been part of the general discussion in the UK and beyond. The legislation in Britain provides for only two very limited and specific forms of positive action: it allows measures designed to encourage members of a protected group to apply for a specific job, and measures to equip members of protected groups with the skills they need to effectively compete for specific jobs. The courts will not tolerate actions going beyond this and will hold these to amount to unlawful discrimination. For example, the Labour party's policy to have all-women shortlists for candidates in parliamentary elections was held to be unlawful under the SDA 1975.¹⁷ This has led to the insertion of S 42A into the SDA 1975, which now allows for all women shortlists. There is no such provision for shortlists with ethnic minority candidates only (Connolly 2006: 353-360).

One of the developments towards equality of opportunity and of outcome is the introduction of the Equality Duties, mentioned above, which now exists in Britain in relation to race, gender and disability. Government departments are now producing overarching equality schemes covering these three areas. However, the UK Border Agency (located within the Home Office), has been exempted from Section 71 (duty to promote equality of opportunity between persons of different racial groups) in carrying

¹⁶ See the bibliographies on gender discrimination and race discrimination.

¹⁷ See the case of: *Jepson and Dyas-Elliott v the Labour Party* [1996] IRLR 116 IT.

out its immigration and nationality functions but nevertheless is required to promote good relations between such persons. This goes beyond formal equality legislation and is proactive rather than reactive, focusing not on the discriminator but on the body best able to promote equality. They are proactive in that they aim at preventing discrimination, rather than punishing the perpetrator after an act of discrimination has been committed.

In the UK, there is also an extensive literature on immigration and the integration of minorities, on multiculturalism, on race relations and on (British) identity (Anwar, Roach and Sondhi 2000; Ballard 1996; Blackstone, Parekh and Sanders 1998; Dummett 1998; Fekete 2002 and 2005; Jones and Welhengama 2000; Mason 1995; Miles 1989 and 1994; Parekh 2000a, 2000b and 2000c; Poulter 1998; Rex 1986; Solomos 1993).

If we look at the literature on multiple discrimination in the UK, as early as 1992, Fredman and Szyszczak discussed how law should deal with situations in which both sex and race discrimination are targeted at the same individuals (black women).¹⁸ They criticised the law in Britain for not recognising black women as a discrete legal group, distinct from both white women and black men, and, in not doing so, refusing to recognise the realities of black women's lives. Most of the literature mentioning multiple discrimination is from a later time, but the criticism of the existing British legislation and its interpretation through the case law is the same: it does not encourage (and, according to many writers, it even hinders) multiple discrimination claims (Hannett 2003; O'Conneide in Costello and Barry 2003;¹⁹ Fredman 2005; McColgan 2005: 32-37 and 2007; Schiek 2005; Grabham 2006; Moon 2006 and 2007). This is because, as we have noted, the British Courts have held that in cases where a complainant claims discrimination on two or more grounds, each ground will have to be looked at separately.

As well as this reason, problems with multiple discrimination claims in Britain are sometimes seen to spring from the fact that there are so many different statutes and regulations governing this area, sometimes providing different levels of protection, and

¹⁸ Fredman, S. and Szyszczak, E, "The Interaction of Race and Gender" in Hepple and Szyszczak 1992.

¹⁹ O'Conneide, C, "Making use of Positive equality Duties: The UK Experience", in Costello and Barry 2003.

that a single Equality Act, covering all prohibited grounds would make such claims easier. This argument has also often been used to plead for a single body dealing with all grounds of discrimination. The latter has now been established in Britain in the shape of the EHRC, but the criticism about the over-complexity and a lack of coherence in the present legislation remains. It has even been argued that having a single body dealing with all the prohibited grounds of discrimination is not of much use if there is no single Equality Act (Hepple, Lester, Ellis, Rose and Singh 1997; Wintemute 1997; Bell 2004). As already mentioned the British Government is working on a Single Equality Bill and appears to be exploring the feasibility of permitting individuals to bring claims based upon multiple-grounds. However, in their Green Paper “A Framework for Fairness” the Government has set out proposals for extending and harmonising certain aspects of the definition of discrimination and maintaining separate definitions for certain grounds of discrimination.

Note that a similar argument is often used within the EU to argue for an end to the hierarchy created between discrimination grounds and for either having a single Directive covering all the grounds of Article 13 EC or for levelling up the Employment Equality Directive so it will give the same protection as the Race Directive (Skidmore 2001; Waddington and Bell 2001; Bell 2002b; Bell and Waddington 2003; Fredman 2005; Howard 2006b; Schiek, Bell and Waddington 2007).

The subject of multiple or intersectional discrimination has also been the focus of many NGOs in Britain. For example, the Equality and Diversity Forum has produced a discussion paper (EDF and JUSTICE, 2007) and held a Conference on multiple discrimination in London in November 2007, while Gay Moon, who is now the EDF’s special legal adviser, has written about multiple discrimination (Moon 2006 and 2007). In 2004, the EOC (Equal Opportunities Commission) produced a paper on advising ethnic minority women about discrimination at work. A mention must be made of the organisation Southall Black Sisters, a not-for-profit organisation, established in 1979 to meet the needs of black (Asian and African-Caribbean) women. SBS aims to highlight and challenge violence against women; empower them to gain more control over their lives; live without fear of violence; and assert their human rights to justice, equality and

freedom. SBS manages a resource centre in West London that provides a comprehensive service to women experiencing violence and abuse.²⁰

Many organisations have also done research into intersectional discrimination such as the EOC (Mirza and Sheridan 2003 (done by the Centre for Racial Equality Studies of Middlesex University and the EOC) and EOC 2007)), the Fawcett Society, (Moosa 2008a: this is the report of a project launched by the Fawcett Society to make visible the experiences and priorities of ethnic minority women) and 2008b), PRIAE (Policy Research Institute on Aging and Ethnicity, this organisation has done research on the intersection of ethnicity and age)²¹ and trade unions/TUC (TUC 2006). However this research has focussed on minority ethnic women rather than migrant women, nationality or the impact of immigration policies.

The pioneering publication by Bhabha and Shutter (1994) on women and immigration, nationality and refugee law has unfortunately not led to further up-dates. Since the announcement in September 2000 of more open labour migration by the then Home Office Minister (Barbara Roche), the government has progressively implemented a managed migration system (Home Office 2006).²² Kofman et al. (2005) examined the gendered outcomes of the various entry routes and found that women represented only a quarter of highly skilled migrants. Here salary level is an important determinant as is educational qualification. It was also possible that age intersected with gender in producing this unequal outcome, since women by the late 20s and early 30s were more likely to have family responsibilities and have lower earning power.

Since then, the various changes in the managed migration scheme, especially making it more difficult for migrants to obtain a long-term residence permit (Indefinite Leave to Remain), have given rise to several successful legal challenges. In relation to the Highly Skilled Migrants Programme (now tier 1) the BIA was found to have failed to carry out

²⁰ For more information see: www.southhallblacksisters.org.uk

²¹ See, for example, Patel, N, *Black and Minority Ethnic Elderly: Perspectives on Long-Term Care* (1999a: PRIAE);

Patel, N, *Ageing Matters, Ethnic Concerns* (1999b:PRIAE); and, Patel, N. and Traynor, P, *Developing Extra Care Housing for Black and Minority Ethnic Elders: an Overview of the Issues, Examples and Challenges* (2006 PRIAE and Housing Learning and Improvement Network). These reports are not on the Bibliographies, because they do look into the intersection of age and ethnicity, not of gender and ethnicity.

²² The current managed migration scheme involves five tiers: tier 1 for the highly skilled, tier 2 skilled, tier 3 less skilled which is at present closed, tier 4 students and tier 5 short-term mobility.

a Race Equality Impact Assessment in such a way as to inform the consultation contributed to the negative judgement against the Secretary of State for the Home Department. The Commission for Racial Equality letter to the BIA (6 June 2007) had outlined concerns of how the scheme affected the original applicants as well as the failure to take into account differences that skilled migrants in managerial and professional positions would confront in the UK and which, with the new emphasis on salary levels, would make it difficult for many HSMP migrants to be able to extend their leave. Tier 2, based on a shortage of occupations, minimum level of skills and salaries may well fail to take into account the gender pay gap and the gendered valuation of skills. It is likely to lead to challenges from senior carers who are receive relatively low level of pay but are in demand. Kofman, Lukes, D'Angelo and Montagna (2008) are undertaking a study for the EHRC on the equality implications of being a migrant in Britain, including managed migration scheme.

6. Conclusion

Compared to other European Union Countries, Britain was very early in enacting laws against sex and race discrimination, with the SDA adopted in 1975 and the RRA in 1976. This means that these Acts have been in force for more than 30 years and thus that there is experience of their effects on race and sex discrimination in practice. As Hepple et al. wrote in 1997, despite the legislation, the majority of low-paid workers are still women, there is still an earnings gap between men and women, there is still a glass ceiling which keeps women out of top jobs, and, there is a continued gap in unemployment rates, job levels, earnings, household income and quality of housing between white and black citizens (Hepple, Lester, Ellis, Rose and Singh 1997). This does not seem to be much different in Britain in 2008.²³ This experience has led to a shift in the debates about discrimination from a focus on formal equality to a focus on a more substantive equality. This shift has been followed to some extent by the legislation establishing the Race, Disability and Gender Equality Duties. It has also led to calls for

²³ As is clear from Pitt's remarks on this in 2.3.

a more comprehensive and inclusive single equality act to replace the many acts and regulations currently prohibiting discrimination, a call which has now been taken up by the Government and should result in a Single Equality Bill in the foreseeable future. One of the issues debated in the last decade or so, the establishment of a single equality commission, has now been achieved in the EHRC. Some writers argue that in order for this Commission to do its work effectively, a single equality act is a priority.

If a claim for discrimination on more than one ground reaches a British court, then the court will have to look at each ground separately and it cannot consider two or more grounds simultaneously. This has been established in the case law of the British Court of Appeal in the *Bahl* case and has been confirmed since. It remains to be seen whether the Government will change this by providing for intersectional or multiple claims in the new Single Equality Bill, as has been advocated by many authors and NGOs. Without such a provision or a change in the case law, the organisations providing advice and assistance to victims of multiple discrimination will continue to be forced to make strategic choices as to which of the multiple grounds to pursue, based on which ground they consider more likely to succeed.

There is also a considerable body of research into the situation of black and ethnic minority women in different areas like employment and health (but not in terms of nationality or immigration status), and these, together with data from Government statistics will be used for the British part of the Genderace study.

Special thanks to Helena Wray for her contribution

The GENDERACE Team is responsible for the content of the report which does not necessarily reflect the view of the Commission, nor can the Commission accept responsibility for the accuracy or completeness of information it contains.