RACE BACK FROM EQUALITY

Has the CRE been breaching race equality law and has race equality law been working?

(covering the period from 1 April 2001 to 1 June 2007)

Rupert Harwood

2007

Public Interest Research Unit

This report addresses the following questions:

1. Have the Race Relations (Amendment) Act 2000, the regulations made under it, and the statutory code of practice (CRE, 2002), provided an adequate basis for tackling institutional discrimination?
2. Has the CRE, between 2002 and 2007, complied with the section 71 Race Relations Act 1976 general statutory duty ('the Race Equality Duty') and with the duties imposed by article 2 of the Race Relations Act 1976 (Statutory Duties) Order 2001 ('the specific duties')?
3. What affects, if any, do any failures on the part of the CRE to comply with the general duty, or the specific duties, appear to have had on race discrimination, race equality and race relations in the UK?
4. How could the legislation be strengthened, its implementation improved, and its objectives better achieved?

Public Interest Research Unit (PIRU)

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- improved working environments (to the benefit of the organisation and the employee), including, for example, through a defined right to reasonable social support becoming an implied contractual term; and

- promotion of the principle of freedom of expression.

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telephone: 01559 370 395

RACE BACK FROM EQUALITY: has the CRE been breaching race equality law and has race equality law been working?

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MAIN ABBREVIATIONS

CA	Court of Appeal
CEHR	Commission for Equality and Human Rights
Code of Practice	Statutory Code of Practice on the Duty to Promote Race Equality
CRE	Commission for Racial Equality
DDA	Disability Discrimination Act 1995
DRC	Disability Rights Commission
EOC	Equal Opportunities Commission
FI	Formal Investigation
FIA	Freedom of Information Act 2000
HC	High Court
h	high level of confidence in conclusion
HMIP	Her Majesty's Inspectorate of Prisons
HRA	Human Rights Act 1998
l	low level of confidence in conclusion
lm	low-medium level of confidence in conclusion
m	medium level of confidence in conclusion
mh	medium-high level of confidence in conclusion
NAO	National Audit Office
OP	Operating Plan
RED	Race Equality Duty
REIA	Race Equality Impact Assessment
RES	Race Equality Scheme
RRA	Race Relations Act 1976

RR(A)A	Race Relations (Amendment) Act 2000
SDO	Race Relations Act 1976 (Statutory Duties) Order 2001
SDA	Sex Discrimination Act 1975

glossary

Code of Practice or Code: unless otherwise indicated, references to the 'Code of Practice', or 'Code', are references to the 'Statutory Code of Practice on the Duty to Promote Race Equality' (CRE, 2002a).

The general duty or section 71 duty: the section 71 'Specified authorities: general statutory duty'.

'How' assessment: authority's assessment of how a 'relevant' policy or proposed policy, or function, is relevant to its performance of the duty imposed by section 71(1). Is comparable to what the CRE, in its Race Equality Scheme (CRE, 2005e: p. 21), calls a 'Full impact assessment process' or (ibid) 'A full REIA'.

'initial screening process: The CRE's 'initial screening process' appears designed to identify whether the policy being screened is relevant to section 71. Appendix 4 to the RES 05-08 (CRE, 2005e) shows that the process involves answering 7 specified questions; and appendix 5 (ibid) indicates that a full REIA is needed if the answer to one or more of these questions is 'yes'. The 'initial screening process' is comparable to what we have called a 'whether' assessment.

'Whether' assessment: authority's assessment of whether a policy or proposed policy, or function, is relevant to its performance of the duty imposed by section 71(1). Appears to be equivalent to what the CRE, in its Race Equality Scheme (CRE, 2005e: p. 21), calls 'the initial screening process'.

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CONTENTS

4.4.3 weaknesses in the assessment requirements

4.4.3.1 initial consideration may be too cursory

4.4.3.2 subsequent consideration may be insufficient

4.4.4 the needs at sections 71(1) (a) and (b) insufficiently defined

4.4.4.1 to eliminate unlawful racial discrimination

4.4.4.2 promote equality of opportunity

4.4.4.3 to promote ... good relations between persons of different racial groups

4.5 PROBLEMS WITH THE WORDING AND INTERPRETATION OF THE SPECIFIC DUTIES

4.5.1 bodies not subject to the specific duties

4.5.2 race equality schemes

4.5.2.1 Article 2(2)(a)

4.5.2.2 Article 2(2)(b)

4.5.2.3 limited requirements to plan or act outside the 'arrangements'

4.5.2.4 no requirement for aims, objectives or organisational control

4.6 PROBLEMS WITH ENFORCEMENT

4.6.1 the general duty

4.6.1.1 enforcement by the CRE

4.6.1.2 enforcement by individuals

4.6.1.3 interpretation by the courts

4.6.2 the specific duties

4.7 THE IMPACT OF THE LEGISLATION

4.7.1 compliance with the duty

4.7.1.1 Towards Racial Equality

4.7.1.2 The Journey to Race Equality

4.7.1.3 Common Ground - equality, good race relations and sites for Gypsies and Irish travellers

4.7.1.4 other CRE investigations

4.7.1 the current state of race equality

4.7.1.1 employment and poverty

APPENDICES

The appendices are not in this file (for reasons of space), but will be emailed on request.

1. INTRODUCTION

In the wake of the Stephen Lawrence inquiry, the 'racial' equality duties were introduced (through the Race Relations (Amendment) Act 2000 and the regulations made under it) to combat institutional discrimination on the part of 'public authorities' (which include, for example, government departments, local councils, the police force, and the NHS) and to encourage them to promote 'racial' equality.

This research attempts to better determine whether these laws have been working; and whether the Commission for Racial Equality (CRE) - the statutory body charged with their oversight and enforcement - has itself complied with them. It also, however, takes a preliminary look at how, in more general terms, the CRE has directed its efforts over the last five years and with what results.

While the CRE closes its doors forever on the 28th September 2007, many of its ideas, and senior personnel, are set to reappear in the Commission for Equality and Human Rights (CEHR) or have done so already. We would argue, therefore, that the CEHR could usefully learn from any mistakes that the CRE may have made; and should make every effort to avoid their repetition across all the equality 'strands' (including gender, disability, sexual orientation, age, and religion and belief).

1.1. WHAT ARE THE DUTIES

1.1.1 the general duty

The section 71(1) general statutory duty was inserted into the Race Relations Act 1976 (RRA) by the Race Relations (Amendment) Act 2000; and provides:

‘71(1) Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need -

(a) to eliminate unlawful racial discrimination; and

(b) to promote equality of opportunity and good relations between persons of different racial groups.’

It is generally understood that the courts (in the case of *Mrs Diana Elias* in the High Court and Court of Appeal and of *BAPIO Action Limited (1) and Dr Imran Yousaf (2)* in the High Court - see 'table of cases' at end of report, para. 6.2) have determined that section 71(1) requires public authorities to assess whether each of their policy proposals is relevant to racial equality; and to conduct more detailed race equality impact assessments (REIAs) on those found to be relevant. The general duty can only be enforced though judicial review (either by someone with an interest in the matter or by the CRE).

1.1.2 the specific duties

The specific duties are regulations - in the Race Relations Act 1976 (Statutory Duties) Order 2001 (the ‘SDO‘) - made for the purpose of ensuring the better performance of the section 71(1) general duty.

Of particular relevance to this research are SDO articles 2 and 5. Article 2 requires each listed public authority to ‘publish a Race Equality Scheme, that is a scheme showing how it intends to fulfill its duties under section 71(1) ...’; and to every three years review the assessment (for relevance to the performance of its general duty) of its functions, proposed policies, and policies. Article 5 requires each listed public authority to monitor specified employment matters ‘by reference to racial groups ...’, including, for example, the number of 'applicants for employment, training and promotion’. The CRE is responsible for enforcing the specific duties. It can issue a compliance notice and could subsequently apply for an order to obey it.

1.2 SOME FINDINGS IN BRIEF

1.2.1 Has the CRE been breaching the race equality laws?

1.2.1.1 did the CRE conduct enough Race Equality Impact Assessments?

- It seems clear from the case law that the section 71(1) general duty requires listed public authorities (including the CRE) to conduct race equality impact assessments (REIAs) on each proposed policy which the authority has assessed as relevant to racial equality i.e to the matters at section 71(1)(a) and (b). Indeed, the CRE has made it clear (eg CRE, 2006c) that it considers this to be the case.
- The CRE has confirmed to us (letter 2.2(b) in appendix 5 to this report) that it only completed five REIAs between 1 April 2001 and 7 June 2007 i.e. since the duty came into force. These were (see table 2.3.1.2(a) below) on two codes of practice; and on its Strategy for the English Regions, European and International Strategy, and Public Duty Monitoring Plan.
- Our analysis of a sample of CRE documents (from 2001 to 2007) identified a minimum of 140 policies - including strategies, corporate business plans, plans for the Wales and Scotland offices, and employment policies - which appeared to require an assessment (whether separately or grouped together for assessment purposes). The difference between the number of policies subject to an REIA (5) and the minimum number which, it appears, should have been subject to one (140) indicates that around 135 policies may well have been in breach of section 71(1). These 135 included, for example, the CRE's education, criminal justice, housing, health, public and private sector, parliamentary, and religion and belief strategies.

1.2.1.2 were the five REIAs it conducted of adequate quality?

- It is not clear whether or not a judge would deem each of the CRE's five REIAs to have met the legal requirements (as there has been a lack of detailed guidance in the case law). However, the assessments do not appear to have closely followed the good practice guidance in the Code of Practice (CRE, 2002a). For example, there appears to have been no consultation on two of the five REIAs; and there is some doubt as to whether consultation on two more (which took place under the general requirement, at section 47(3) RRA, to consult on codes of practice) would have fulfilled the purposes of a section 71(1) consultation.
- In addition, the CRE has not published any of the results of one of the five

assessments - that on its Public Duty Monitoring Plan. It stated (in a letter to PIRU, dated 1 June 2007) that “In the light of the confidential nature of the details ... it would not be in any interest to publish the REIA“.

- Since the purpose of an REIA appears to be to feed constructively into the policy making process, the dearth of recommendations coming out of the REIAs leaves some doubt as to whether there had been a great deal of point in conducting them (other than to be able to state that they had been conducted). None of the four published reports (and we don’t know what is in the one that the CRE hasn’t published) make recommendations to amend the assessed policies (although there is an indication that consultation on two of the proposed policies led to some significant changes).

1.2.1.3 <u>what were some of the possible consequences of CRE non-compliance</u>

- We took a preliminary look at some of the possible impacts of a few of the 135 unassessed policies (legal assistance, employment, and multiculturalism); and considered whether REIAs may have led to useful changes.
- In relation to multiculturalism, for example, we found that the CRE appears to have moved some way from its traditional support for multiculturalism; and that this change might have resulted as much from Trevor Phillip's ideological position, close working with the government, and high media profile, as from the normal decision making processes within the CRE.
- Our interviews with a limited number of community groups and legal advice providers indicated that Trevor Phillip’s and the CRE’s attacks on multiculturalism might have - led to an increase in the expression of prejudice; left many individuals from ethnic minorities feeling more isolated; and caused some deterioration in some aspects of race relations. In addition, according to some interviewees, it may have contributed to a significant number of cases of racial harassment. We were left unclear as to the way in which the CRE expected its attacks on multiculturalism to lead to greater integration; and, where we thought we had grasped some of the hypothesised mechanisms, these appeared to lack sufficient credibility (and were certainly untested and unproved).
- It should be stressed that the interviews referred at the previous bullet point were not systematic in nature, and were limited in number; and, therefore, do not provide the basis for making confident generalisations. They do, however, raise serious questions,

which would appear to deserve more thorough research (including, we would suggest, on the part of the CEHR).

1.2.2 Have the race equality laws been working?

1.2.2.1 the legislation, its interpretation in the courts, and enforcement

- The impact to date of the race equality laws suggests that they have not been an entirely adequate response to institutional discrimination (including that identified in the Macpherson report).
- The duties do not apply to private or voluntary organisations carrying out public functions, including, for example, the increasing number of private hospitals treating NHS patients. There appears little reason to think, however, that suffering discrimination from a contracted out service is less detrimental than suffering it from an in-house one.
- The duties have been generally understood to only require an authority to assess its functions and policies, rather than also requiring subsequent action. This would appear to mean that an authority could meet the duties without promoting racial equality i.e. without furthering the purpose of the legislation. This report argues that the statute might require more, and that, if it doesn't, there is an argument for its amendment.
- The case law, and code of practice (CRE, 2002a), appear to give the impression that the requirement is to assess adverse impact and possible means of reducing it. This report suggests that there is also a need - and a requirement in the statute - to assess and maximise the potential positive impacts of policies.
- Section 71(1) appears to omit the need to eliminate section 2(1) RRA 'Discrimination by way of victimisation'; and 'indirect' employment discrimination which is lawful (on account of an objective justification) but which could have been avoided (including, for example, in such a way that the employer's objectives would have been better achieved).

1.2.2.2 compliance and impact

- It appears that the Race Equality duties have suffered (perhaps disastrously) from inadequate enforcement powers, action and intent. The report also suggests that even when the courts find that there has been a breach of section 71, the breach may (as appeared to happen in the case of *BAPIO* in the High Court*)* be given relatively little

weight in deciding whether to make a quashing or other order.

- An overview of the research literature appears to indicate a low level of compliance with the general duty; and that most or all public authorities are breaching it in some of their policies and that some are breaching it in all of them.
- The research literature also suggests that institutional discrimination remains wide spread, and that minority ethnic groups continue to suffer disadvantage and discrimination in, for example, the criminal justice system, housing, health and employment.

2. SUMMARY

2.1 METHODOLOGY

2.1.1 questions addressed

Drawing upon, what we have called, an appearicist approach (a form of social constructionism), this research addressed the following questions:

2.1.1.1 the legislation, and its enforcement and impact

(a) How adequate to the tasks of tackling discrimination, and promoting equal opportunities and good race relations, have been: (i) the Race Relations (Amendment) Act 2000; (ii) the regulations made under the Act; (iii) the statutory Code of Practice (CRE, 2002a), and (iv) the approach to enforcement.

(b) Do the High Court and Court of Appeal interpretations of section 71 suggest a reasonable understanding of Parliament's intentions?

(c) Have public authorities been complying with the duties; what difference have the duties made to their practices; and what is the current state of 'racial equality' and 'institutional racism'?

2.1.1.2 CRE compliance

(a) Has the CRE been complying with the section 71 general statutory duty (the general duty) between 2001 and 2007?

(b) Has the CRE been complying with the applicable specific duties in the Race Relations Act 1976 (Statutory Duties) Order 2001 between 2002 and 2007?

(c) In what ways has the CRE been complying with, or not complying with, the general and specific duties?

(d) What organisational and other factors - such as, for example, organisational culture and structure - have had what kind of effects on how the CRE has been complying with,

or not complying with, the general and specific duties?
(e) What have been some of the possible external impacts - such as, for example, on how the media has reported 'race' issues - of how the CRE has been complying with, or not complying with, the general and specific duties?

2.1.1.3 possible improvements
(a) Would the race equality duty benefit from amendment; and what are some of the non-legislative measures which might help promote ‘race’ equality?
(b) What could be done to increase the compliance of the CEHR (which takes over the functions of the CRE), and other public authorities, with the general and specific duties?

N.B. Some of the questions set-out above will be touched upon here but dealt with in more detail in the follow-up report.

2.1.2 data collection and analysis

Data collection and analysis was primarily conducted between 1 December 2006 and 1 1 September 2007, and included:
2.1.2.1 the legislation, and its enforcement and impact
(a) Analysis of parliamentary debates on the Race Relations (Amendment) Bill and of the relevant Select Committee reports.
(b) Analysis of the Act, the regulations made under it, the Code of Practice, some of the CRE’s non-statutory guides, and the case law; and a limited review of some of the literature on the strengths and weaknesses of the legislation.
(c) Freedom of Information Act requests to the CRE about its use of its powers to enforce section 71(1) and the specific duties; and analysis of how the CRE has presented, explained, and planned its approach to enforcement (including, for example, in its strategies, press releases, and internal memos.).
(d) A limited review of some of the main reports on compliance with the Act (including, in particular, those from the Audit Commission and the CRE).
(e) A limited review of some of the evidence on the level and nature of institutional and other forms of racial discrimination (but without assuming a connection between these phenomena and section 71).

2.1.2.2 CRE compliance

(a) Attempting to determine, from the case law, what the minimum requirements are for compliance with the general duty; and also attempting to determine - including from its investigations into the compliance of other organisations - what the CRE considered to be the minimum requirements for compliance.
(b) Attempting to identify standards which appeared to have to be met so as to be compliant with what appeared to be the minimum requirements, and devising indicators to assist in determining whether these standards had been met.
(c) Identifying CRE statutory functions (powers and duties) from the RRA and others Acts; and sampling CRE annual business and directorate operating plans (from 02-03 to 06-07) to produce what we hope was a representative list of around 200 policies, procedures, plans, programmes and practices (PPPPPs).
(d) Attempting to identify, through Freedom of Information Act requests to the CRE and searching CRE documents, all the race equality assessments the CRE has conducted since April 2001; assessing the nature (including quality) of those conducted; and attempting to determine which of the 200 PPPPPs required an assessment but were not subject to one or not subject to an adequate one.
(e) Attempting to identify some of the possible impacts of CRE non-compliance (on its employment practice, the level of legal assistance provided, and its changing approach to multiculturalism). This involved, in particular, an analysis of CRE documents; semi-structured interviews with a limited number of former CRE staff, and with a limited number of community groups and legal advice providers; and an analysis of media coverage and of the dialogue on a far right website.

FINDINGS

2.2 EFFECTIVENESS OF THE LEGISLATION

2.2.1 problems with the wording and interpretation of section 71

2.2.1.1 <u>comparative neglect of direct discrimination as a cause of institutional discrimination</u>

The government, and others debating the Race Relations (Amendment) Bill, appear, in general, to have understood institutional discrimination (including the institutional racism referred to in the Macpherson report of the investigation into the murder of Stephen Lawrence) to largely consist of indirect discrimination; and, perhaps in part as a result of such an understanding, the regulations made under the Amendment Act, and the Code

of Practice, appear to have been primarily directed towards addressing section 1(1)(b) discrimination (generally referred to as 'indirect' discrimination).

We would argue, however, that there may have been some failure to fully take account of the considerable difference between broad (and sometimes vague and idiosyncratic) understandings of indirect discrimination, and the quite narrow legal definition at section 1(1)(b) RRA; and that much of what those in debate referred to as indirect discrimination (including in relation to the findings of the Macpherson report) was, in fact, section 1(1)(a) discrimination (generally referred to as 'direct' discrimination). We wonder, therefore, whether the legislation should have done more (and, indeed, should now do more) to address section 1(1)(a) 'direct' discrimination; and whether, in this respect, the Race Relations (Amendment) Act 2000 may have not been an entirely adequate response to the Macpherson Report.

2.2.1.2 <u>bodies not subject to section 71(1)</u>

2.2.1.2 (a) exclusions from the list of subject bodies

The section 71(1) duty only applies to public authorities specified, or of a description falling within, Schedule 1A of the RRA. While this list approach would appear to have some advantages (such as, in particular, reducing uncertainty), the Schedule 1A list does not appear to include all the bodies which would be included under the definition in section 49A of the Disability Discrimination Act (DDA) 1995 (which covers the comparable disability equality general duty).

2.2.1.2 (b) not applicable to non-public bodies carrying out a function of a public nature

Unlike the duty at section 49A of the DDA, the section 71(1) RRA duty does not apply to non-public bodies in relation to the carrying out of functions of a public nature (i.e. when standing in the shoes of government). This is despite the fact that many private and voluntary sector organisations carry out important functions of a public nature, and the number appears set to increase (such as, for example, with the greater use of private hospitals for NHS patients). There appears little reason to assume that suffering discrimination from a contracted out service is less detrimental than suffering it from a non-contracted out one.

Some of the potential problems arising from private contractors not being subject to the

duties seem apparent in the case of Parc private prison (where there had been complaints of racism). The report of HM Inspector of Prisons states (HMIP, 2006: para. 3.31) that "Parc was one of the prisons criticised by the Commission for Racial Equality in 2003 in a formal investigation ..., and yet it had not drawn up an action plan to address the problems identified in that report ...". Arguably, if it had been a public sector prison, the Race Equality Scheme that it would have been required to draw up would have needed to constitute such a plan.

2.2.1.3 section 71(1) understood to require assessment but not subsequent action

2.2.1.3 (a) this understanding could have substantially reduced the section's effectiveness

There appears to be a general understanding (including on the part of the CRE) that the case law has determined that section 71(1) requires an authority to assess its functions and policies, but does not require it to take any subsequent action. This would appear to mean, on the one hand, that an authority with an excellent track record in promoting racial equality (but which had not assessed all its relevant policies) will be in breach of the section; and, on the other hand, that an authority which had a terrible track record (but which had assessed all its relevant policies, and perhaps found many of them to be damaging) might be compliant with the section.

2.2.1.3 (b) and could also be mistaken

We would argue, including for the following reasons, that it is not clear that assessment is all that is required under section 71(1):

- Some at least in debate in Parliament appear to have had a good deal more in mind. Lord Lester, for example, refers (Lords Hansard, 14 December, 1999: col. 143) to "a clear and legally enforceable positive duty upon public authorities to secure that their functions are carried out without racial discrimination".
- Consideration of the 'pure spring' of statute (i.e. section 71(1) itself) might be thought to suggest that a good deal more is required. For example, 'in carrying out its functions' (section 71(1)) would appear to be deliberately wide. If it had been intended to only mean 'in assessing how it carries out its functions', it would presumably, to avoid a predictable and important misunderstanding, have said so.
- The Code of Practice (CRE, 2002a) appears to suggest that more than an assessment is required (not just that more would be good practice). The Code states (CRE, 2002,

para. 3.17), for example, that “If the assessment suggests that the policy, or the way the function is carried out, should be modified, the authority should do this to meet the general duty”.

- Despite there being little support, in the case law, for a requirement to act subsequent to assessment, it should be noted that the matter does not appear to have been specifically or at least not strongly tested - since the complaints in the High Court and Court of Appeal related to failures to assess, and the meaning of section 71 (in this or any other respect) has not been tested in the Lords. Further, the case law arguably provides some support for a requirement to act. In *Elias* in the High Court, for example, the judge states (para. 101), referring to the government’s prisoner of war compensation scheme, - “The aim of the scheme was to distribute money, and the obligation in relation to this scheme was to eliminate unlawful racial discrimination”. Stating that the obligation (presumably this means the section 71(1) obligation) was to eliminate unlawful discrimination would appear to suggest something more than an obligation to assess - including because an assessment in itself will not eliminate unlawful discrimination.

We also suspect, however, that, if the House of Lords were to find that there is a requirement to act beyond assessing, such a requirement may well be found to be no more than a requirement to properly consider whether any action should be taken subsequent to an assessment and to take proper account, in doing so, of the findings of the assessment. If this is, indeed, a correct understanding, it would mean that the statute, or the regulations, may need to be amended, or replaced, if there is to be a requirement to take action (even, for example, in the limited sense that the Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 require an authority to take the steps which it states that it proposes to take towards the fulfilment of its section 49A(1) DDA duties).

2.2.1.4 <u>weaknesses in the assessment requirements</u>

2.2.1.4 (a) the case law may require or encourage inadequate initial assessment

The judgement in *Elias* in the High Court (at para. 96) appears to indicate that 'cursory consideration', of whether section 71 is relevant, will be sufficient (i.e. no further consideration will be required) if such consideration makes it ‘plain’ that section 71 is not relevant. Potentially at odds with this statement, however, is the conclusion, in the next

paragraph in the judgement, that there should have been a ‘careful attempt to assess whether the scheme raised issues relating to racial equality'.

It is not at all clear how the ideas in these two paragraphs are intended to relate to each other. There remains some concern, however, that authorities might understand the judgment to mean that 'cursory consideration', in the everyday sense of brief and hasty, is sufficient if it makes it plain that section 71(1) is not relevant. In addition, the judgement fails to indicate what a proper basis would be for concluding that the matter was ‘plain‘. In particular, would it be sufficient that whoever conducted the assessment considered it plain, or would that person need to be in some sense qualified, and would the assessment need to have been in some sense credible?

2.2.1.4 (b) less weight given to section 71(1)(b), and neglect of potential and positive impacts

Other identified possible weaknesses included, among others, -

- Despite there being no foundation for doing so in the statute, the case law appears to give less weight (at least in practice) to the matters at section 71(1)(b) than the matter at section 71(1)(a). For instance, in *Elias* in the High Court, at paragraph 96, the judgement states that there is “no need to enter into time consuming and potentially expensive consultation exercises or monitoring when discrimination issues are plainly not in point”.
- There also appears to be too little weight assigned to the potential impact (as opposed to the purpose) of a policy in determining its relevance to section 71. In *Elias* in the High Court (para. 101), for example, the judge appears to argue that the prisoner of war compensation scheme was not relevant to section 71(1)(a) because it was "not intended to be a scheme directed to promoting equality of opportunity or good relations between persons of different racial groups”. In contrast, we would argue that there was an obligation under section 71(1) to conduct some kind of assessment as to whether the compensation scheme might have negative consequences for equal opportunities (as it would appear to have had) and race relations (as it may have had), regardless of whether these matters were among the scheme’s purposes.
- The case law (eg *Elias* in the High Court: para. 97) gives the impression that the requirement is to assess adverse impact and possible means of reducing it, but does not indicate that there is also a need to assess and maximise potential positive

impacts. Apart from some references to 'promoting good race relations', the Code of Practice appears to give a similar impression (eg CRE, 2002a: para. 3.16). This, however, is despite there being a requirement, at section 71(1)(b), to 'have due regard to the need - ... to promote equality of opportunity and good relations between persons of different racial groups'.

2.2.1.5 'the need's at sections 71(1) (a) and (b) appear inadequately defined

2.2.1.5 (a) 'to eliminate unlawful racial discrimination'

A possible problem is that 'the need', at section 71(1)(a), is to eliminate 'unlawful racial discrimination', which would appear not to include section 2(1) RRA 'Discrimination by way of victimisation'. Arguably, however, reducing victimisation, and the fear or expectation of it, would tend to encourage employees to take a stand (such as giving evidence at the employment tribunals) against unlawful racial discrimination not directed at them. Therefore, reducing victimisation would appear to be relevant to promoting racial equality.

Section 71(1)(a) also appears to not include discrimination which is not unlawful (even when it damages racial equality). It would, for example, appear to exclude what would, if it were not for weak (but sufficient under the act) non-racial justifications, be cases of section 1(1)(b) 'indirect' discrimination. The fact that there is an objective justification (for the purposes of section 1(1)(b)(ii)) does not mean, of course, that the detriment to an individual arising from the requirement or condition will necessarily be any less, nor that there would not have been a better way of achieving the objectives of the policy or procedure in question (both in the sense of more fully achieving the objectives and not having an adverse impact upon individuals from particular 'racial' groups').

2.2.1.5 (b) 'to promote equality of opportunity and good relations between persons of different racial groups'

Neither the Act nor the Code of Practice define what is meant by 'equality of opportunity' or 'good relations...'. Further, since these terms would appear to be highly contested, with different adopted meanings reflecting different political perspectives, turning to the meanings apparent in everyday language may not provide a complete answer. If, however, there is no proper indication of what constitutes equality of opportunity, or good race relations, it would appear difficult to determine whether or not a public authority had

had due regard to the need to promote them. Meanings can, of course, be clarified in court judgements, but the intention should clearly be to start out with terms which are as unambiguous as possible.

2.2.2 problems with the wording and interpretation of the specific duties

Taken together, the specific duties - in the Race Relations Act 1976 (Statutory Duties) Order 2001 (hereafter 'the SDO') - do not appear to add up to a comprehensive or coherent approach to ensuring the better performance of the section 71(1) general duty.

2.2.2.1 bodies not subject to the specific duties or could have been subject to more appropriate ones

2.2.2.1(a) bodies not subject to the specific duties

Since the specific duties are meant, according to section 71(2), to be considered 'appropriate for the purpose of ensuring the better performance by those persons of the duties' under section 71(1), it may be wondered whether those not subject to the specific duties (i.e. those not specified in the regulations) will, in general, find it harder to, and be less likely to, effectively fulfill the general duty.

2.2.2.1 (b) bodies could have been subject to more appropriate duties

Section 71(3)(b) RRA provides that a specific duty 'may make different provision for different purposes', and, indeed, the SDO does this in that it imposes different requirements on educational bodies. We would argue, however, that greater use should have been made of this power; and that, in particular, to take account of the CRE's unique race equality functions, additional duties should have been placed upon it (including, perhaps, a clear requirement to act on the findings of section 71(1) assessments).

2.2.2.2 race equality scheme (RES)

The requirements in article 2 ('race equality schemes') of the SDO are at least several steps removed from the action i.e. from acts (or failures to act) at the end of the process of decision making. Consequently, intervening conditions - including, in particular, the arrangements stated in the Race Equality Scheme not being implemented, or the results from the implemented arrangements being ignored, or attention being paid to unreliable (or otherwise inadequate) results - could prevent fulfillment of the specific duties leading

to the furtherance of their purpose i.e. the better performance of the section 71(1) duties.

Some of the apparent limitations of article 2 include:

- Apart from having to publish the RES and review its assessment (of the relevance of its policies and functions) every three years, article 2 only appears to require an authority to state its arrangements for doing various things (such as monitoring its policies). It is not clear that this entails a requirement to have arrangements in place, to have adequate arrangements in place, or to implement whatever arrangements it says that it has in place. It may simply be sufficient to state what if any arrangements it has in place at the time of producing the RES (including, if it's the case, that it has none).
- The specific duties appear to require some elements of strategic planning, including arrangements for gathering specified information, but fail to require some of the most important, such as, in particular, producing an overall vision; setting goals, objectives and targets; and establishing organisational control mechanisms.
- There appears to be no requirement in the specific duties to take action in response to any findings or conclusions which result from the stated arrangements. For example, if 'monitoring its policies for any adverse impact on the promotion of race equality...' (the arrangement referred to at 2(2)(b)(ii)) shows that the policies are having an adverse impact, there would appear to be no requirement under the SDO to address the impact (even if not doing so would appear - on account, for example, of there being no significant costs involved - to be unreasonable).
- It is not clear that there is a requirement (comparable to regulation 2(3)(c) of the specific duties made under the DDA) to state what steps it proposes to take towards meeting its section 71(1) duties. Paragraph 2(1) of the SDO does require that the person 'publish a Race Equality Scheme, that is a scheme showing how it intends to fulfill its duties under section 71(1) ...'. This may mean that the scheme must show how the authority intends to fulfill its duties (since, if it did not show this, it would not be a Race Equality Scheme). However, even if it does mean this, there would appear to be considerable latitude to decide what to show (including whether to provide the 'how' in general or in more precise terms).
- There appears to be no requirement to take any of the steps which it says that it will take to meet its duties under section 71(1).

2.2.3 problems with enforcement

Arguably, the Race Equality Duty has suffered (perhaps disastrously) from inadequate enforcement powers, action, and intent.

2.2.3.1 the general duty

The RRA includes no provisions for the enforcement of the general duty (except in so far as it makes provision for enforcement of the specific duties). The Code of Practice, however, explains (CRE, 2002: para. 7.8) that "If a public authority does not meet the general duty, its actions (or failure to act) can be challenged by a claim to the High Court for judicial review ... A claim for judicial review can be made by a person or group of people with an interest in the matter, or by the CRE."

2.2.3.1(a) enforcement by the CRE

PIRU's recent report found (Harwood, 2006: para. 4.2) that, between 1 January 1999 and 1 June 2006, the CRE did not challenge, by means of a claim for judicial review, any failures to meet the general race equality duty; but did intervene in one such judicial review action (*R (Elias) v Secretary of State for Defence* (2005) EWHC 1435). This would appear to be an extremely low level of enforcement, especially when it is borne in mind that, according to the CRE's evidence to a parliamentary committee (Joint Committee on the Draft Disability Discrimination Bill: para. 248), around 44,000 public authorities are subject to the general duty; and that, in addition, the available evidence - such as the CRE's report relating to Gypsies and Irish Travellers (CRE, 2006) – seems to indicate that a large percentage of these 44,000 might not be compliant with the general duty.

It should be noted, however, that Trevor Phillips, former chair of the CRE, may not necessarily accept the premise that the CRE made little use of its enforcement powers. In particular, according to a recent select committee report (Select Committee on Communities and Local Government, Sixth Report, 2007: para. 30), Phillips, in response to questioning about PIRU's findings on the three equality commissions, "disputed this analysis, claiming that the existing commissions had used their powers 'pretty extensively'".

2.2.3.1(b) enforcement by individuals

Since the costs of going to a full hearing are, according to the Public Law Project (2006), "probably over £20,000", there may in general need to be an organisation with substantial funds and an individual with standing in the case. Arguably, this is beneficial in that judicial review will tend to be focused on cases of wide and substantial consequence. Justice, however, is meant to be available to individuals even when their case is primarily of consequence to them.

2.2.3.1(c) interpretation by the courts

We suggested above that the courts have interpreted the requirements as being quite limited. We suspect, however, that, at present, a considerable percentage of claims (if well directed) would stand a good chance of success. This is, in particular, because, on the one hand, the accepted requirement appears to be to carry out some sort of REIA on policies of relevance to race equality; and, on the other hand, the available evidence (eg CRE, 2006b) suggests that most of the relevant policies of most authorities have not been subject to an REIA.

The High Court judgment in *BAPIO,* however, appears to suggest a different problem for the claimant - that a breach of section 71 may be given relatively limited weight by the court in deciding whether to make an order in favour of the person alleging the breach. In this case, the claimants had sought, on three grounds, judicial review of the decision to introduce new immigration rules; failed on the first two; but succeeded on the section 71 ground. The judge, Mr Justice Burnton, determined, however, that this did not 'justify the quashing of the rules change' (para. 70).

2.2.3.2 <u>the specific duties</u>

2.2.3.2 (a) not enforceable through judicial review

The judge in *Elias* in the High Court (para. 102) indicates that the Government's failure to include the prisoner of war compensation scheme in its race equality scheme was 'not a matter which this Claimant can do anything about ... because ...' the specific duties 'are not capable of enforcement save by the Commission itself: see the enforcement provisions section 71(D) and 71(E)'. This would appear to assert not just that only the CRE is able to enforce the specific duties, but also that the specific duties cannot be enforced through judicial review (since, if they were capable of enforcement through judicial review, they would appear to be capable of enforcement by those with a standing

in the case i.e. not only by the CRE). We are not certain, however, that there is, or should be, so little relationship between compliance with the specific duties and with the section 71(1) general duty. For example, if an authority has no regard to its specific duties (which are, of course, meant to help it meet its general duty) could it be said to have had 'due regard' to the matters at section 71(1).

2.2.3.2 (b) enforcement by the CRE

There appear to have been problems with how the specific duties have been enforced by the CRE (a particular concern if, as suggested above, enforcement is their exclusive preserve). PIRU' recent report found (Harwood, 2006: 1.2.2) that, between 1 January 1999 and 1 June 2006, the CRE served four compliance notices in relation to alleged failures to meet one or more of the race equality specific duties. However, in a letter (CRE, 2005d) to PIRU providing information on of the Race Equality Duty, the CRE (having given the figures requested) adds - "Please note, however, that since May 31st 2002 the Commission has engaged over 200 listed public authorities in its compliance process, and, due to the rigour and effectiveness of this preliminary work, has only needed to issue the said four (compliance) Notices".

2.2.4 the impact of the legislation

2.2.4.1 compliance

Determining the level of compliance with the race equality duties may provide some indication of the effectiveness of the legislation. Formal compliance, however, may not bring about the kind or degree of change that legislators had intended. For example, if compliance with the general duty requires no more than an assessment, an organisation might be compliant without changing its functions or policies. Conversely, organisations might in general fail to be formally and fully compliant, but their efforts to move towards compliance (and their compliance in some of their activities) may bring about important changes.

2.2.4.1(a) the specific duties

The limited research on the subject appears, in general, to indicate quite promising levels of formal compliance with the specific duties investigated. *Towards Racial Equality*, for example, states (CRE, 2003a: 9) that its "assessment (based on legislative requirements and CRE good practice guidance) of a sample of schemes and policies

found that 39% were 'fully' or 'mainly' developed"; and *Towards Racial Equality in Scotland* found (CRE, 2000: p.2) that 76% of authorities "claimed that they were 'quite well prepared' for scrutiny and inspection...". The research, however, also indicates that there was a problem in moving from processes (including, for example, publishing race equality schemes) to setting objectives, taking actions, and achieving outcomes. The Audit Commission report, for example, states (Audit Commission, 2004: para. 41) - "Two-fifths of organisations in the Commission's survey report poor progress in identifying race equality outcomes. When asked about their race equality objectives, the majority of organisations quoted the duties under the Act." (ibid: para. 40).

2.2.4.1(b) the general duty

The published research, and the results of CRE audits, appear to indicate a low level of compliance with the general duty (even when it is understood to require no more than assessment). A CRE Formal Investigation, for example, found (CRE, 2006b: para. 3.2.4a) that only 42.4% of the local councils which responded had conducted REIAs on any of their policy proposals since May 2002. This would seem to suggest that over half had breached the general duty in relation to all of their policy proposals (or at least all of those of relevance to race equality) produced since May 2002. It may also be that all had been failing to meet the general duty in relation to the majority of their policy proposals. We would need, however, to know more about what the 42.4% (who said that they had conducted some REIAs) had and had not assessed and the quality of the assessments conducted.

It is also notable that a CRE audit "found 15 government departments to be non-compliant" (CRE, 2006c); apparently on the grounds that the departments in question had not conducted enough REIAs. In February 2007 it announced (CRE, 2007a) a formal investigation into one of these, the Department of Health, "to uncover the extent to which it is failing to meet its duty to promote race equality" (ibid). At the time of writing, the publication of this investigation is awaited.

2.2.4.2 <u>the current state of race equality</u>

It will clearly be difficult to isolate with much confidence the impact of the legislation from the impact of other factors. Consequently, all we did in this report was to take a brief look at some of the evidence on the current state of race equality (and, in particular, in

relation to crime and justice, and employment and poverty), but without suggesting that the race equality duty has had a significant impact on the state of race equality in relation to these phenomena (or even that it had the potential to have done so).

The findings included, for example, -

- There is a good deal of evidence that 'racial' factors play a significant part in a substantial number of crimes, and that some types of 'race' related crime have increased in recent years. For example, racially/ religiously aggravated harassment went up from 10, 758 in 1999/2000 to 28,485 in 2006/ 2007 (Nicholas et al, 2007: table 2.04). However, some categories of 'race' related crime went down between 05/06 and 06/07; including, an 8% drop in racially/ religiously aggravated less serious wounding (ibid).
- There appear to be some manifestations of institutional racism in the criminal justice system, including in relation to the interaction between the police and the public, with, for example, the section 95 statistics 2004/05 finding that "Black people were six times more likely to be stopped and searched under section 1 (of the Police and Criminal Evidence Act 1984) compared to White people" (Criminal Justice Ministers, 2006); in relation to arrests, prosecutions, sentencing (eg House of Commons Home Affairs Committee, 2007), and treatment in prison (eg CRE, 2003b); and in relation to employment practices (eg CRE, 2005a). The picture, however, is a complex one. For example, the Section 95 Statistics (Criminal Justice Ministers, 2006) report that Black and Minority Ethnic (BME) "defendants were substantially more likely to be acquitted at the Crown Court than White Defendants (29% for Black people, 30% for Asians and 29% for White people)".
- A recent review (Platt, 2007) of the literature found that rates of poverty (ibid: ix) and unemployment (ibid: xi) were higher for "all identified minority ethnic groups"; and that employment disadvantage was partly the result of an 'ethnic penalty' (taken to include the impact of discrimination) (ibid: xi).

2.3 CRE COMPLIANCE WITH SECTION 71

2.3.1 Has the CRE complied with the duty to assess its relevant policies?

2.3.1.1 <u>what are the main requirements on the CRE?</u>

On the basis of the statute, case law, and code of practice (CRE, 2002a), we concluded that:

(i) If a proposed policy is assessed as being relevant to section 71, there needs to be some sort of assessment of how it is relevant.
(ii) This assessment would need to include some attempt to assess the extent of any adverse impact upon racial equality (taken to mean the impact upon the matters at section 71(1)(a) and (b) - reproduced in our introduction at para. 1.1.1) and to assess possible ways of eliminating any adverse impact. In other words, there would need to be a race equality impact assessment.

2.3.1.1 (a) CRE appears to agree that REIAs are required

The CRE appear to have also concluded that REIAs are required in the case of relevant proposed policies. For example, a CRE press release (CRE, 2006c) states that "By law, central government departments are required to assess new policies and legislation for their impact on race equality"; and, apparently on the grounds that the departments in question had not conducted sufficient REIAS, it "found 15 government departments to be non-compliant".

2.3.1.2 <u>CRE Race Equality Impact Assessments (REIAs) conducted between 1 April 2001 and 1 June 2007</u>

2.3.1.2 *(a) REIAs conducted*

The CRE has confirmed, in a letter dated 1 June 2007 (letter, 2.2(b) in appendix 5 to this report), that the REIAs shown in the table below are the only ones which it completed between 1 April 2001 and 1 June 2007. Further, a search of CRE documents, covering this period, did not indicate that any others had been completed.

REIA	**consultation (outside the CRE) on likely impact of policy on race equality**	**REIA report published**	**REIA produces recommendation for change to policy**
(1) new Statutory Code of Practice on Racial Equality in Employment (CRE, 2005n)	PSCI *(i)*	Y	N *(ii)*

(2) CRE's Strategy for the English Regions (CRE, 2005g)	Y	Y	Y *(iii)*
(3) European and International legal Strategy 2006-2007 (CRE, 2006d)	N *(iv)*	Y	N
(4) Statutory Code of Practice on Racial Equality in Housing (CRE, 2007c)	Y *(v)*	Y	Y *(v)*
(5) Public Duty Monitoring Plan (CRE letter, 2.2(b)) *(ii)*	N *(vi)*	N *(vi)*	unknown

key

PSCI: probably some consultation on impact. Y: yes. N: no.

notes on table

(i) We assigned a 'PSCI' (probably some consultation on impact) on the grounds that it was not clear whether the consultation was approached as a consultation for the purposes of section 47(3) (the general requirement to consult on statutory codes of practice), section 71(1), or both; and that, in part as a consequence, it was not clear to what extent, if at all, the consultation exercise addressed the question of likely impact of the proposed policy on the promotion of race equality (which would appear either to be a requirement of section 71(1) consultations or, at least, likely to be their central focus). Of particular note, none of the 'critical comments' in the report, under 'Results of consultation' (2005n: appendix 2), appear to refer to the likely impact on the promotion of race equality, which might be thought to support a conclusion that consultees were not specifically asked about such impact (not withstanding, of course, that they may have been asked but not commented or that their comments on impact may not have been recorded in the report).

(ii) Under 'REIA recommendations' (CRE, 2005n: 11.1), it states - "The code should be made available widely, and its effectiveness reviewed each year". Under 'conclusion', it states (ibid: 12.1) - "At this stage, no further assessment is required".

It does appear that consultation on the policy led to significant changes to the policy. However, the impression (including because change is not recommended under 'recommendations') is that the REIA was conducted on a version of the code which had

been amended as the result of the consultation (although this is not at all clear); and that, therefore, the changes predated the REIA and were not recommendations arising from it.

(iii) There are no recommendations for changes under 'Race Equality Impact Assessment Recommendations' (CRE, 2005g: para. 12.1) or under 'Conclusion' (ibid: para. 13). However, the impression is that the consultation was part of the REIA process and that significant changes were made to the strategy as a result of the consultation.

(iv) The report (CRE, 2006d: para. 7.1) states that it undertook a consultation "in 2004 in relation to the Corporate European and International Strategy which includes the legal aspects of European and International Work". This was not, however, consultation on the 2006 European and International Strategy (although the findings, not withstanding the passage of time and the difference in focus between a corporate strategy and a legal one) may well have been of relevance to it.

(v) The REIA report implies that the consultation was 'in-line' with section 47(3). However, it also states (CRE, 2007c: para. 7.3) - "The questionnaire drew attention to the REIA and asked if respondents considered that the draft code might have an adverse impact on any racial group. None thought so. However, several respondents did point out that the code failed to mention smaller, more recent migrant groups ... We have taken account of this in the amendments we have made to the code ...". This would appear to suggest some consultation on the impact on racial equality (although there is no suggestion that consultees were asked about any adverse impact on race relations); and that some changes were made as a result of having done so.

(vi) The CRE has told us (CRE letter, 2.2(b)) that 'it would not be in any interest to publish the REIA' (see 5.4.3.2(a) below)

2.3.1.2 (b) adequacy of REIAs conducted

It is not clear whether or not a judge would deem each assessment to have met the legal requirements (as there has been a lack of detailed guidance in the case law). However, it does seem that the assessments did not closely follow the good practice guidance in the Code of Practice (CRE, 2002a), or that in the CRE's *Guide for Public Authorities* (CRE, 2002d); and, in addition, the CRE appeared to have quite frequently departed from the 'eights stages' which its Race Equality Scheme states (CRE, 2005e: p.21) that its REIA consists of. Some possible problems with the REIAs are outlined below:

- Two of the REIAs (on the two codes of practice) were on 'policies' which its 'initial screening' process had declared to not be relevant to racial equality (*supra* 5.4.3.2(g)). Deciding that, for example, the *Code of Practice on Racial Equality in Employment* is not relevant to racial equality would appear surprising (including on account of the clue in the title), but it would also appear surprising to then go on and conduct a full Race Equality Impact Assessment on a policy which it had found to be of no relevance to racial equality.
- The CRE's Race Equality Scheme (RES) states (CRE, 2005e: p.21) that its REIA will include a 'consult formally' stage. There appeared, however, to have been no consultation (apart from within the CRE) on two of the five 'policies' (see table 2.3.1.2(a)(3) and (5) above). Further, consultation on two more (2.3.1.2(a)(1) and (4)) appeared to have taken place under the general requirement at section 47(3) RRA to consult on codes of practice, and should have occurred without section 71. Consequently, section 71(1) appears to have led to just one additional CRE consultation exercise since 2001 (although it appears to have led to a question about impact on racial equality being added to the questionnaire in the consultation on the *Code of Practice on Racial Equality in Housing)*.
- The RES also states (CRE, 2005e: p.21) that it will publish the results of its REIAs. It did not, however, publish any of the results of one of its five assessments - that on its Public Duty Monitoring Plan. It stated (in a letter to PIRU, dated 1 June 2007) that "In the light of the confidential nature of the details ... it would not be in any interest to publish the REIA". Since, however, the CRE's approach to enforcement has been the subject of some concern - with, for example, Trevor Phillips having been recently questioned about it in the Communities and Local Government Committee - it might be thought inappropriate to so completely remove an important element of its approach from public scrutiny.
- Bearing in mind that the purpose of REIAs appears to be to feed constructively into the policy making process, the greatest concern, perhaps, is that two of the five reports appear to recommend no changes to the policies in question (2.3.1.2(a)(1) and (3)); one report has not been published and so we have been unable to tell whether it recommends anything (2.3.1.2(a)(5)); and the remaining two reports include no formal recommendations but there is an indication that consultation undertaken with the REIA in mind led to some significant changes to the policies (2.3.1.2(a)(2) and (4)). This apparent dearth of recommendations leaves some suspicion that there may not have

been a great deal of point to at least some of the REIAs (other than to be able to state that they had been conducted).

2.3.1.3 The Race Equality Impact Assessments shortfall between 1 April 2001 and 1 June 2007

We set-out in the report (at 5.4.2) those CRE policy decisions which appear to have required (whether singly or in groups) an REIA. In the table below, we summarise some of this information and set it alongside the REIAs which, as discussed at 2.3.1.2 above, appear to have been conducted.

2.3.1.3 (a) Policy decisions which appear to have required an REIA and REIAs conducted (1 April 2001 to 1 June 2007)

n.b. PDRA = policy decisions appearing to require an assessment. It is not assumed, however, that each required a separate assessment (as it appears that some could have been adequately assessed together). Further, the assessments should have been integrated into the normal policy development processes; and, therefore, should not have involved excessive additional work.

PDRAs	**PDRAs identified in sampled documents**	**estimated total number of PDRAs**	**Number subject to an REIA**
(1) Strategies	33 *(i)*	40 *(ii) (iii)*	2 *(iv)*
(2) Directorate annual operating plans and corporate business plans	32 *(v)*	40 *(vi)*	0
(3) Annuals plans for office in Wales and for office in Scotland	8 *(vii)*	10	0

(4) Employment policies, procedures and practices	22 *(viii)*	32	0 *(ix)*
(5) Other policies, procedures, programmes, practices and publications	45 (from 05-06 business plan) *(x)*	140 *(xi)*	3
totals	**140**	**272**	**5**

notes on table

(i) See table 5.4.2.1(b) below (in main report) for list of strategies identified from sampled documents.

(ii) Since strategies tend to be in place for a couple of years, and referred to quite frequently across an organisation's documents, we concluded that the majority of strategies that had existed would have been referred to in the documents we sampled, and that, therefore, the estimate of the total number of strategies should not be a great deal higher than the number of strategies identified in the sampled documents.

(iii) It should be noted, however, that we only included strategies which the CRE both referred to as strategies and appeared to regard as formal strategies. This meant that we did not include the substantial number of major plans (referred to in sampled documents) which we felt were (on account of their strategic nature) also strategies.

(iv) Those subject to an REIA were the CRE's *Strategy for the English Regions* (CRE, 2005g) and its *European and International legal Strategy* 2006-2007 (CRE, 2006d).

(v) See table 5.4.2.2(d) below for list of plans identified from sampled documents.

(vi) The main additions to the figure (32) for the number of identified plans (to arrive at the estimated figure of 40) were to take account of the sampled documents missing out an entire year (in which we assume that there were a similar number of plans to the number in sampled years), but also to take account of having omitted, from the figure for identified plans, annual directorate operating plans for years in which we suspected, but were not certain, that the directorate in question was in existence (see notes to table 5.4.2.2 (d) for further explanation).

(vii) See table 5.4.2.2(d) for list of country annual plans. The addition of two annual plans (to arrive at the estimated figure of 10) was to take account of the one year not covered

in the sampled documents.
(viii) See table 5.4.2.3(b) for list of identified employment policies, procedures, and practices. We would argue that these would be particularly amenable to assessment in groups; and that, therefore, the total number of REIAs required would be significantly less than the number of policies, procedures, and practices.
(ix) While there appear to have been no employment REIAs, it should be noted that the CRE monitored its workforce and job applicants, 'by reference to their racial group', in pursuance of the requirements under article 5 of the SDO. Some of the information from this monitoring could have usefully fed into REIAs; and would probably have given some indication of the overall level of 'racial equality'. However, the article 5 monitoring does not itself involve assessments of any policies, or procedures; and, therefore could not be regarded as a substitute for REIAs of policies and procedures.
(x) See table 5.4.2.3(d) for list of policies from 05-06 Business Plan.
(xi) The estimate was based upon extrapolating from the number in the 05-06 plan to the whole period but with a considerable allowance made for the likelihood that some plans will cover several years. Arguably, however, the plan for one year will always - because of different circumstances - be different from the plan for the previous year (regardless of whether it is referred to as if it's the same plan), and, therefore, we have made too much allowance for overlap between years.

2.3.2 POSSIBLE CONSEQUENCES OF CRE NON-COMPLIANCE

2.3.2.1 legal assistance, employment, and multiculturalism

The impact of a failure to conduct an REIA could be thought of as the difference between the impact of the policy as implemented and the impact there would have been if it had been subject to a proper REIA (a difference which might result from the REIA leading to changes to the policy or to it being replaced or even abandoned). The imponderables, however, appear legion, including, in particular, limited information on the impact that an implemented policy has had; and not knowing what changes an REIA would have resulted in, or what difference any changes would have made.
Consequently, all we attempted in this report was to take a preliminary look at some of the impacts of a few of the 135 policies which we identified as having required, but not having been subject to, REIAs; and to consider whether a proper assessment of impacts of racial equality may have led to useful changes. Specifically we looked at policies within two functions - legal assistance in discrimination cases (RRA section 66), and

employment of staff (RRA, schedule 1, paragraph 8); and what appears to have been the focus of much of the CRE's efforts since around the end of 2002 - its approach to multiculturalism. The findings, included, for example:

2.3.2.1(a) legal assistance

- Article 2(2)(a) of the Race Relations Act 1976 (Statutory Duties) Order 2001 (the 'SDO') requires an authority to list, in its Race Equality Scheme (RES), those of its functions which it has assessed as relevant to section 71(1). It is not clear, however, that either of the CRE's RESs (CRE, 2002c; CRE, 2005e) indicate whether or not it assessed its legal assistance (section 66) function, or indeed any other of its statutory functions, as relevant. In the 02-05 RES (CRE, 2002c: appendix 2), for example, it includes section 66 in its list of 'all' its functions in appendix 2; but none of its functions are included its appendix 3, which is a list of policies and functions which it found to be relevant. Since the CRE presumably did not conclude that none of its functions were relevant to race equality (as this would be to conclude that the CRE was not relevant to race equality), we assume that either it didn't assess them for relevance (which, we would argue, would be contrary to section 71(1)) or that it assessed them and (contrary to SDO article 2(2)(a)) did not list its findings in the RES.
- It also appears that neither its legal assistance function, nor the policies arising within it, have been subject to an REIA. It was noted above (2.3.1.2(a)(3)) that one of the five REIAs conducted since 2001 was on its *European and International Legal Strategy 2006-2007* (CRE, 2006d). However, this dealt with European and International level matters - such as, for example, European Union legislation - and did not appear to touch on domestic legal assistance.
- It seems that there have been important policy changes in relation to legal assistance; that these were of substantial relevance to racial equality; and that, therefore, an REIA was required. For example, in the period January to December 1999, the CRE provided full legal representation in 183 cases (CRE, 2001: p.13); but in the period January to December 2005 (CRE, 2006), provided it in just 3 cases (the CRE information line, who we spoke to on 20 and 21 September 2007, were unable to provide figures for 2006 or 2007). Impacts on race equality might, in particular, have included less people being able to seek redress for alleged discrimination; a reduction in the deterrent effect of discrimination law (on account of it appearing less likely that individuals would be able to enforce it); and less opportunity for the CRE to usefully

influence the development of case law. The CRE has, however, funded local case work services under its Getting Results funding framework (eg CRE, 2005o)

- Trevor Phillips appears to have, in some respects, taken the current CRE approach to legal assistance with him from the CRE to the CEHR, but without there being any sign that the CEHR conducted an REIA before adopting it. It is notable, for example, that the recently published sixth report of the Communities and Local Government Committee reports (para. 30) that Mr Phillips told the committee that "the CEHR itself would only 'take a very tiny minority of the cases that enter tribunals'".

2.3.2.1(b) employment

- It is clear that there have been no REIAS of the employment function or of the policies, procedures and practices arising within it. As discussed above (2.3.1.3(a) note (ix)), however, the CRE appears to have conducted considerable monitoring of its workforce and job applicants, 'by reference to their racial group', in pursuance of the requirements under article 5 of the 2001 SDO (and this information might have usefully fed into REIAs if any had been conducted).
- There appears little doubt that employment policies, procedures, and practices are of substantial relevance to racial equality and should, therefore, have been subject to REIAs. However, as discussed above (2.3.1.3(a) note viii), we are not suggesting that each would have required a separate REIA.
- The CRE's own Race Equality Scheme designates (CRE, 2005e: appendix 2) the following employment policies as of 'substantial' relevance to racial equality (a designation which appears to be linked to the need for some kind of assessment) - the appraisal policy; capability procedure; dignity at work/ bullying and harassment policy; disciplinary and grievance procedures; recruitment policy; and training and development policy.
- Our small number of interviews with ex-CRE staff suggest that there have been, over a considerable period of time, some quite serious 'racial equality' related problems within the CRE. It also appears that CRE management has acknowledged (at least in internal documents) that a problem exists. For example, the 2005-06 CRE *Business Plan* (CRE, 2005i: E7) includes, among its intended 'output', 'Step change improvement in HR management'; and, under the corresponding 'impact', 'Decrease in ETs' (employment tribunals). It is also perhaps notable that, during the debate on the Equality Bill, an MP, Phillip Davies, 'asked' (House of Commons Hansard, 21 November

2005: 1245) - “Will the Minister comment on the fact that in the past 10 years the Commission for Racial Equality has faced about 20 claims of racial discrimination from its employees, some of which have been settled out of court with tax payers’ money?”. We do not know how accurate, or off the mark, his figures were, but his comments do appear to suggest the perception of difficulties.

- We wonder whether employment REIAs - and in particular the consultation with staff and managers that this should include - may have assisted the CRE in addressing some of the ‘racial equality’ problems that it appeared to be facing. For example, from the small number of interviews with ex-CRE staff, we wonder whether it might have facilitated improvements to how grievance procedures were implemented; and whether, in turn, this might have helped resolve disputes without recourse to the employment tribunals.

2.3.2.1 (c) multiculturalism

- The CRE appears to have moved some way from its traditional support for multiculturalism. A chapter of its annual report, for example, is entitled 'From Multiculturalism to Integration' (CRE, 2005b: p. 10). It also appears, however, that this change might have resulted as much from Trevor Phillip's personal ideological position, close working with the government, and high media profile, as from the normal decision making processes within the CRE. We have, for example, been unable to find evidence in Commission minutes of this change having been debated (although we didn‘t have all the minutes). In contrast, there are a number of CRE press releases which set out Phillip's views on multiculturalism. One, for example, states (CRE, 2004h) - "Multiculturalism no longer provides the right answer to the complex nature of today's race relation issues, according to Trevor Phillip's, Chair of the Commission for Racial Equality.".
- His ideas, sometimes presented as also those of the CRE, appear to have been cited in support of ideas which go a good deal further. The BNP’s website, for example, states - “The more daring newspaper columnists have been asking awkward questions of multiculturalism for a couple of years or so, and of course the BNP has been a consistent opponent of the concept. But when the head of the Equality Gestapo Trevor Phillips casts doubt on it too, we know something must be up ...”. It continues - “It was as if the lid had been removed from a pressurised container and columnists and broadcasters who previously had been fully behind the multicultural

idea were now expressing concern that it maybe it wasn't such a good idea after all."

- Since the CRE's changed approach to multiculturalism was clearly a major policy decision, and was of substantial relevance to racial equality, there seems no doubt that it required a race equality impact assessment (indeed, perhaps more so than any of its other policies). Further, it might be wondered whether, if there had been an assessment, with wide consultation amongst CRE 'stakeholders', there may well have been some hesitation before the CRE did what the BNP described, approvingly it seems, as removing the lid.

3. METHODOLOGY

3.1 PIRU'S GENERAL APPROACH TO RESEARCH ('APPEARICISM')

3.1.1 ethics

The intended over-riding aim of PIRU's research is that it be ethical. Central to the attempt to achieve this is the adoption of a care ethic (drawing upon, for example, Gilligan et al., 1988; and Siegfried, 1996), which we take to require empathic compassion and a reaching out to others. Since, however, reaching out might well harm those it is meant to benefit, there also needs to be a well developed set of ethical principles, and procedures, to guide and constrain the exercise of individual conscience. These include the established research values and norms (eg Punch, 1994; Pollard, 2006), and gaining the critical input of others.

Some of the values and norms which should be of particular importance to our approach include:

- ensuring informed consent; avoiding harm; protecting privacy; respecting confidentiality; and enabling, where possible, participants to co-determine the nature and use of the research (eg Kemmis and McTaggart, 2003).
- being honest, such as, for example, being explicit about short-comings in the research; and being rigorous, so as to increase the likelihood that an honest report will also be, in some sense, a 'reliable' and useful one.
- attempting to ensure that the research improves the situation of the participants and others.

3.1.2 ontology and epistemology

PIRU's ontological-epistemological approach is, what we have called, appearicism -

consisting of a 'weak' (Schwandt, 2003: 308) social constructionism (drawing, in particular, upon Longino, 1990; Bernstein, 1991; and Fay, 1996), which, in our case, 'permits' the inclusion of non-dualist positivistic elements (at least as methodological tools); and recognises that naive realism is the predominant ontological premise in all research (since even the most hardened relativists think and act as if there is a world 'out there' and, as a result, are able to function in their perceived worlds).

The central assumptions are that - (1) all appearances are realities but not all realities are appearance i.e. there are realities which exist without being apprehended; and, (2), we construct the realities we experience, but do so through interaction with realities which we don't construct. It follows from these assumptions, we would argue, that everything is not interpretation. Whilst our interpretations are, to a great extent, self-validating, we also test them against more external realities. Further, these more external realities (the world outside our mental models and processes) set limits on the usefulness (and perhaps 'correctness') of different interpretations. We thus avoid, it is hoped, the nihilism of radical constructionism, and have some reason for putting the research findings to work.

3.1.3 strategies

Implementing this constructionist epistemology, while furthering the ethical-pragmatic aim of bringing about positive change, suggests the possible value of Charmaz's (2003) 'constructivist grounded theory'; in which "Causality is suggestive, incomplete and indeterminate ..." (ibid: 273). We will, however, attempt to address some of the limitations in traditional grounded theory which appear to remain (albeit in attenuated form) in Charmaz's version.

These limitations include, we would argue, the making of positivistic claims without having applied positivistic methods. In particular, the focus in grounded theory (eg Strauss and Corbin, 1990: 187) often appears to be on seeking confirmation of quite speculative concepts (with counter-examples dealt with through adding dimensional variation). It might, therefore, be worth considering a range of more positivistic approaches - such as, for example, drawing cases studies from a relevant representative sample and testing some of the concepts from the case studies against this sample. This could be done (without basic positivistic paradigmatic assumptions) to

gain more 'purchase' (Lincoln and Guba, 2003: 275) on the intersubjective life world; but also (with basic positivistic paradigmatic assumptions) to add a positivistic perspective to our 'weak' social constructionist 'bricolage' (eg Denzin and Lincoln, 2003: 5).

Grounded theory approaches also appear insufficient to tapping the intricate personal meanings that individuals construct around social phenomena. We will, therefore, draw upon a number of more interpretivist approaches (eg Garfinkel and Sacks 1970; Tedlock, 1991; Feagin et al, 1991; and Gubrium and Holstein, 2003). Gubrium and Holstein's 'analytics of interpretative practice' (ibid: 228), for example, might contribute to a better understanding of how some management behaviour, which appears from outside an organisation to be unlawful, accomplishes the status of procedure-governed good practice within it.

It should be stressed, however, that the aim will not be to produce 'messy' (eg Marcuss and Fischer, 1986) texts of disparate positivistic and interpretivist voices. Two key integrating concepts will be constructionism, in that whatever we present will be presented as our construction; and transparency, in that we'll attempt to describe where we were standing and how we were looking (including in terms of assumptions and methods) when each construction was produced. The third key integrating concept will be evaluation. Whilst we want the reader to be able to "explore competing visions" (Denzin and Lincoln, 2003:9), we will not assume that all tellings are equally valid. First, each 'vision' (i.e. finding) will be evaluated using the evaluative methods appropriate to the paradigm which was applied in its construction (as doing otherwise might tend to involve judging claims which have not been made). Second, we will apply criteria from one paradigm to the findings from another - but with the limited aim of being better able to challenge the more background assumptions inscribed in the findings. Third, the findings as a whole will be evaluated according to 'weak' social constructionist criteria (drawing, for example, upon Maxwell, 1992).

3.2 APPROACH TO THIS PROJECT

3.2.1 application of the general approach

This research project is light on ontological-epistemological reflection - being more in the way of a short investigation than an attempt to build theoretical models of processes and meanings. We have, however, aimed to not stray too far or too often from the

'appearicist' approach outlined above. In particular, we have:

- set out the perspectives from which conclusions have been reached - including in terms of the assumptions, criteria, and methods - and the specific information to which these perspectives were applied. For example, we explain that our main conclusions about CRE compliance are based upon the criteria apparent in (R (Elias) v Secretary of State for Defence (2005) EWHC 1435).
- tried (in particular in the appendices) to provide as much as possible of the source information upon which our interpretations draw, rather than isolated quotes that appear to support the points being made. For example, we hope that we have provided sufficiently comprehensive extracts from the Code of Practice (CRE, 2002a) for readers to reach and substantiate different conclusions.
- presented conclusions from a number of explicated perspectives, including from more sociological as well legal ones. This also involved attempting to present the CRE's perspectives, including, in particular, through attempting to identify these from the available documents. We have also asked the CRE to provide feedback (including suggestions for change) on our findings; and if and when we get a response, we will either make each suggested change or will explain why we have not done so.

3.2.1.1 ethics

3.2.1.1(a) *some of the ethical concerns*

The circumstances to which we needed to apply the general ethical imperatives, outlined earlier (at 3.1.1), appeared different in important respects from those in which their authors appear to have originated and developed them. In particular, their circumstances appear, in general, to have been more ethnographic, with participant consent, it might be argued, having been both more essential and more practicable. In our investigation, the CRE appeared to be relatively reluctant participants, encouraged in through Freedom of Information requests, but - because we were looking at an institution rather than its constituent individuals and because there is a legitimate public interest in its behaviour - it was not clear that such reluctance would have been sufficient reason not to investigate.

In practice, however, the matters of interest operate at the interface between individuals and the institution - such as, for example, between written REIA procedures and how officers implement them - and, therefore, criticising an institutional behaviour could harm

individuals within that organisation. Caution and consideration, therefore, would appear to be needed, along, we would suggest, with the concept of 'proportionate reason' (eg Angrosino and Mays de Perez, 2003: 139-143; Walter,1984). In addition, we made a general distinction between those leading an organisation (who arguably need to be held to account if the organisation is to be held to account and improve), and those in more junior positions (whose actions may have been primarily the result of corporate factors, and whose identities should, therefore, be protected if possible - including through what might be called accurate imprecision). In addition, when individuals provided information in a private capacity, we tried to fully apply the principles of informed consent, protecting privacy, respecting confidentiality, and avoiding harm.

3.2.1.1(b) *some of the ethical objectives*

By 'ethical objectives' we mean outcomes which we would like the research to achieve and which we believe to be ethical. These objectives, not surprisingly, related to the questions being addressed and included, for example:

- Help increase the likelihood that the CEHR, and other public authorities, will comply with the Race Equality Duty.
- Formulate, and promote, possible improvements to the Duty.
- Contribute, including through the above, to efforts to reduce discrimination and improve 'race' relations.
- Challenge what appears to be an increasing tendency among the media and politicians to problematicise cultural difference per se (rather than, for example, celebrating variety but providing reasoned criticism of particular cultural practices).

3.2.1.2 <u>reflexive considerations</u>

It may be argued that these objectives suggest that we approached the project with some quite strong expectations about what we were likely to find; and that, in addition, having objectives might in itself have a distorting influence upon what we believe we have found. For example, wanting to be able to present a case for increasing compliance could provide some unintended encouragement to finding evidence of non-compliance.

To take better account of the influence of particular existing mental models upon the findings (and to allow other to do the same), we attempted, early on in the investigation,

to identify some of our relevant motivations and assumptions. These appeared to include, for example:

- a wish to produce/ discover results that would attract media coverage; and provide support for our desired ethical outcomes.
- a belief - based, in particular, upon PIRU's previous research (Harwood, 2006) - that the CRE has not been complying fully with the duty to promote race equality and might well have been substantially non-compliant.
- a belief - based, in particular, upon media coverage of Trevor Phillip's speeches on multiculturalism - that such non-compliance may well have contributed to major shifts in CRE principles and policies, which may well, in turn, have influenced or helped facilitate what appear to have been far reaching changes in the government's approach to 'race' relations.

Our attempts to address these probable presumptions (or biases) included, for example:

- making the reader aware (in particular, in this section) what some of the most 'glaring' presumptions were.
- applying a higher standard of validation, including a more thorough search for counter examples, to those findings that support identified presumptions. For example, we made a particular effort to determine the extent to which the changing media attitude to multiculturalism predated the CRE's apparent change in emphasis.
- giving 'voice' (e.g. Olesen, 2003:359-361) in the final text to opinions and other interpretations (along with relevant supporting information) which oppose those presumptions which we retained at the end of the research.

3.2.2 questions addressed

We set out to address the questions shown below. However, the 'grounded' approach meant that we also ended up addressing other related questions (which are included in the relevant parts of the report). In addition, time and other constraints meant that we did no more than make a limited start on some of the initial questions (which we hope to build upon in future reports, and in particular, in relation to the nature of institutional discrimination and in relation to the possible consequences of any failures on the part of the CRE to comply with section 71).

3.2.2.1 <u>the legislation and its enforcement</u>

(a) How adequate to the tasks of tackling discrimination, and promoting equal opportunities and good race relations, have been: (i) the Race Relations (Amendment) Act 2000, (ii) the regulations made under the Act, (iii) the statutory code of practice, and (iv) the approach to enforcement.
(b) Do the courts' interpretations of section 71, and their decisions made in relation to section 71, appear to indicate a sufficient understanding of Parliament's intentions?

3.2.2.2. CRE compliance

N.B. questions (b), (c), (d), and (e) will be touched upon in this report but will be primarily dealt with in the follow-up report.

(a) Has the CRE been complying with the section 71 general statutory duty between 2001 and 2007?
(b) Has the CRE been complying with the applicable specific duties in the Race Relations Act 1976 (Statutory Duties) Order 2001 between 2002 and 2007?
(c) In what ways has the CRE been complying with, or not complying with, the general and specific duties?
(d) What organisational and other factors - such as, for example, organisational culture and structure - have had what kind of effects on how the CRE has been complying with, or not complying with, the general and specific duties?
(e) What have been some of the possible external impacts - such as, for example, on how the media has reported 'race' issues - of how the CRE has been complying with, or not complying with, the general and specific duties?

3.2.2.3 possible improvements

(a) Would the race equality duty benefit from amendment; and what are some of the non-legislative measures which might help promote 'race' equality?
(b) What could be done to increase the compliance of the CEHR (which takes over the functions of the CRE), and other public authorities, with the general and specific duties?

The above questions, however, also needed to be further specified-operationalised. For example, addressing question 3.2.2.2 (b) will require deciding what should be taken as constituting a race equality scheme for the purposes of article 2(1) of the 2001 Order (bearing in mind that the courts appear so far to have provided little guidance on this matter).

3.2.3 methods adopted

3.2.3.1 the legislation and its enforcement

Addressing questions 3.2.2.1 (a) to (b), on the adequacy of the legislation and its promotion and enforcement, included the steps outlined below.

(a) *the Act's purpose*

(i) We attempted to better determine, including through looking at the debates in the Lords on the Amendment Bill and some of the Committee minutes, what the Government and Parliament intended or expected the Act to achieve.

(ii) We also considered whether there may have been significant weaknesses (viewed from the perspective of the time) in their analysis of the problems being addressed and/ or in their analysis of the suitability of the solutions being proposed?

Clearly, it would also have been useful (in relation to both (i) and (ii)) to have looked at the debates in the Commons, and briefing papers sent to members of Parliament (including from the CRE); and to have spoken to some of those involved, including, of course, ministers and opposition spokespeople.

(b) the *nature of the statute, regulations, code, and court judgments*

(i) We attempted to identify and assess - through brief document analysis - some of the strengths and weaknesses apparent in the wording of the legislation, regulations, code, and court judgments. It was clear, however, that each element would have, to some extent, to be judged in relation to the other elements. For example, it would be difficult to criticise the code of practice for not requiring enough if what it said was required was what the statute appeared to require or what the courts determined that the statute required (except, perhaps, in so far as the judgments of the court were the result of perverse or otherwise inadequate interpretations provided in the code).

(i) We also reviewed some of the commentaries relating to the adequacy of the legislation, code, and judgments, which we came across in the course of the research - such as, for example, Fredman and Spencer (2007) - or identified during a limited literature search.

(c) the approach to enforcement.

An assessment of the adequacy of the legislation also needs to take account of the

adequacy of its enforcement. Some might argue, for example, that the legislation was adequate but its enforcement was inadequate. However, it would then need to be considered whether the legislation made adequate provision for enforcement or took sufficient account of the likelihood that the CRE would make limited use of the powers provided.

(i) We attempted to get a better idea from the literature of the extent to which individuals have been able to enforce section 71 in challenging the decisions of public authorities. Unfortunately, apart from noting the apparent scarcity of cases involving section 71, and the problems that individuals are likely to face in making use of the section (in terms of expense and the limited prospects of success), this part of the question remained largely unanswered.

(i) We also attempted to better determine how the CRE has made use of its section 71 enforcement powers. This involved Freedom of Information Act requests to the CRE; looking at the court judgment in the one section 71 judicial review case in which it intervened; and looking at how it has presented and explained (including, for example, in its annual reports and operating plans) its approach to enforcement.

(d) the Act's impact

The impact of the Act is, of course, an important dimension to consider in better determining its adequacy (it being to some extent the 'proof of the pudding'). However, while it would appear possible to gain some idea of what impact the Act has had on the formal consideration that particular public authorities have given to race equality in their decision making, it would appear much harder to reach robust conclusions about the kind of impact it has had on their behaviour. Further, any conclusions about the impact on race equality and discrimination across the UK need, we would suggest, to be regarded as at best highly speculative.

(i) We reviewed some of the main reports on formal compliance with the Act (including, in particular, those from the Audit Commission and the CRE); some of which indicated possible relationships between compliance, organisational behaviour, and wider outcomes.

(ii) We reviewed some of the evidence on the level and nature of institutional and other forms of racial discrimination; including, for example, findings on changes in racially aggravated offences (but did so without assuming any connection between these phenomena and section 71).

(iii) We looked in detailed - as set out at 3.2.32 below - at how the CRE appears to have

responded to the Act, and, very briefly, at what appear to have been some of the possible consequences of their responses.

3.2.3.2 CRE compliance with the Act

Addressing questions 3.2.2.2 (a), relating to the CRE's response to the section 71 requirements, included the steps outlined below.

(a) compliance with the section 71 general duty.

(i) We attempted to determine, through the case law, what the minimum requirements are for compliance with the general duty. We also attempted to determine, from the Code of Practice, and from the CRE's non-statutory guidance and its investigations into the compliance of other organisations, what the CRE considered to be the minimum requirements for compliance.

(ii) We attempted to identify standards which appeared to have to be met so as to be compliant with these assumed minimum requirements, and devised indicators to assist in determining whether these standards had been met.

(iii) We attempted to gain a complete list of all those functions and policy decisions which appeared of sufficient relevance to race equality to require some kind of section 71 focused assessment (whether formal or informal). This attempt included making unsuccessful Freedom of Information requests to the CRE for lists of policies; with the CRE stating that each request was too broad. We, therefore, obtained (through FIA requests and off the CRE's website) race equality schemes, operating and business plans, strategies, annual reports, and press releases, from 2002 onwards, and extracted from a sample of these a list of relevant policies. We also used these sampled documents, the CRE's Race Equality Schemes, and the provisions in the Race Relations Act, to draw up a list of relevant CRE functions.

(iv) In a letter dated 23 November 2006 (see appendix 5, letter 2.1(a)), we made a Freedom of Information request to the CRE for a list of (for the period since 2001): the REIAs, and REIA consultations, it had undertaken and the reports it had produced of these; and the policies and functions it had monitored or reviewed for adverse impacts. The response stated (appendix 5, letter 2.2(a)) that the information we were seeking was on the CRE website. Since, however, the website only listed 5 REIAs as having been completed, and provided no information on REIA reviews, we wrote, in a letter dated 14 January 2007 (appendix 5, letter 2.1(b)), to attempt to confirm whether or not this was the complete picture. A letter from the CRE, dated 1 June 2007 (letter 2.2(b)), set out what

REIAs and 'initial screening assessments' it had conducted and published.
(iv) We drew up a list of 'policies' which we thought should, as a minimum, have been subject to an REIA (but without assuming that there should have been a distinct REIA for each). We tried in general to include policies of a type which the CRE, the Code of Practice, and the case law, appeared to have indicated should be subject to an REIA; and which, in addition, appeared to us to merit an assessment (on the grounds that it was of particular relevance to the matters at section 71(1) - whether directly or as a result of its impact on other policies.). Where we included policies which didn't meet all these criteria, we indicated this, and explained why we felt that the policy should still be included.
(vi) We intended to provide an assessment of each of the five REIAs which had been conducted since 2001; and, in particular, consider the extent to which they appeared to follow the good practice guidance that the CRE provided in the Code of Practice (CRE, 2002a), guidance publications, and in its Race Equality Schemes (CRE, 2002c; CRE, 2005e).

(b) compliance with the specific duties.
This part of the research has only been begun, and the results so far are only touched upon in this report. The main findings will be included in the follow-up report.
We focused on article 2 ('Race equality schemes') of the 2001 SDO, as it appeared to be the article which compliance or non-compliance with would be likely to have the greatest impact upon whether or not the general duty was being met. It should be noted, however, that the CRE appears to have been the subject of a number of complaints of race discrimination submitted to the Employment Tribunals; and, therefore, it may be worthwhile others further considering its compliance with article 5 (‘Monitoring by Employers‘).

Determining compliance with article 2 could be regarded as a simple matter of ensuring that the organisation has a Race Equality Scheme and that the scheme states what it is required to state and that the requirement to review, at article 2(3), is complied with. The problem with this approach, however, is that, at the extreme, a scheme which was an act of almost complete fiction - in particular, in terms of stating arrangements which did not exist - might be assessed in the research as having complied with the legal requirements. Since the statute makes clear (at section 71(2)) that the specific duties are

meant to ensure better performance of the general duty, it seems unlikely that this is what Parliament had in mind. Therefore, with the court judgments providing little guidance on the matter, we will attempt to assess the CRE against criteria based upon a minimum interpretation, and upon a more demanding interpretation, of what the Article might be understood as requiring.

For example, article 2(2)(b)(i) provides that the Race Equality Scheme shall state 'that person's arrangements for - (i) assessing and consulting on the likely impact of its proposed policies on the promotion of race equality'. The minimum criteria would require that somewhere in the RES it sets out arrangements for assessing and consulting on the impact; and with sufficient detail to have some general idea of what would be involved if these arrangements were implemented. The more demanding purpose focussed criteria would require, for example, that the arrangements stated were the arrangements that were in place, and that these arrangements were implemented. Determining compliance with these will involve, for example, searching documents for evidence of the processes referred to in the RES. For example, in a letter dated 1 February 2007 (appendix 5, letter 1.1(e)), we requested - "A copy of the latest CRE RES progress report from the internal steering group of the quality and equality team to the CMT and Finance and Modernisation Committee (referred to in RES, section 4, objective 1, under subheading 'senior management responsibility')".

(c) some of the possible reasons for non-compliance

Properly addressing this important question should have involved, for example, in-depth interviews (including with CRE employees, former employees, and commissioners), organisational observations, and a wide ranging analysis of documents (including, for example, the minutes of the Corporate Management Team); and could have usefully looked at, for example, how individuals regarded the duty (and how such views related to organisational culture), and at why some of the detailed procedures set out in the RES, with tasks assigned to named committees and officers, came not to have been followed. However, all we were able to do in this short report was to look for possible clues in the documents available, and were, therefore, unable to do more than suggest a number of factors which may have contributed to the high level of non-compliance.

(d) some of the possible external impacts of the CRE not having complied with the duty

The findings from this phase of the research have not been fully analysed and will be written up in the follow-up report.

We focussed on two areas, and (including because of their small number, non-random selection, and the considerable variation in relevant characteristics between different CRE polices and functions) we would not want to suggest that the findings could be generalised across CRE activities as a whole. However, the areas would appear to be of sufficient importance in their own right to give serious cause for concern.

(i) The first area we looked at was legal assistance for individuals making complaints of race discrimination. We attempted (including through FIA requests and CRE information otherwise available) to determine: how many individuals had been provided with legal assistance in each year since 2002; whether the identified changing patterns of assistance related to changes in written policies; whether there was any evidence that (despite there having been no clear race equality impact assessment) there had been any significant consideration of the effect that the dramatic decline in assistance provided could have on the matters at sections 71(1)(a) and (b); and what effects this decline may, in fact, have had on individuals and more widely (including, for example, in relation to the message it may have sent employers). We then considered whether it seemed likely that an REIA may have led to a different approach to legal assistance; and what the consequences of different approaches may have been.

(ii) The second area we looked was the CRE's apparently changing approach to multiculturalism. We took a comparable approach to that at (i) above. However, our failure to find commensurate policies and proposals (i.e. ones which explained and justified the change) led to a more wide ranging search of, in particular, speeches and the minutes of commission meetings. In addition, we made an attempt to trace the trajectory of possible influence through, in particular, reports in randomly selected editions of the Guardian, the Telegraph and the Sun; government and opposition statements; and opinions and other information on minority ethnic websites (such as BLINK) and on the British National Party's site. In doing this, we avoided any firm conclusions about the nature or existence of possible influence. For example, it may be that being able to quote the CRE in support made criticisms of multiculturalism in the particular newspapers easier to get past the editor and more credible to the audience.

To say whether this was likely, however, would require a good deal more research (such as, of course, interviewing the editors). We also conducted semi-structured interviews wit a limited number of community groups and legal advice providers.

(iii) The third area we looked at was employment. The approach included looking at CRE employment policies; searching for comments about employment practice in internal CRE documents; and interviewing a limited number of former CRE employees.

4. STRENGTHS AND WEAKNESSES OF THE LEGISLATION

Considering some of the strengths and weaknesses of the legislation would appear to be a worthwhile exercise in itself. It would also, however, appear to be of relevance to our main task of assessing the CRE's compliance, including, for example, for the following reasons:

- gaining a better idea of the extent to which complying with the specific duties is likely to assist in complying with the general duty may help indicate the extent to which we should draw conclusions about the CRE's compliance with the general duty from its, perhaps, more easily assessed compliance with the specific duties.
- if it appears that compliance with the general duty is not achieving Parliament's intention and purpose (and, indeed, appears ill-fitted to do so), and this is or should be apparent, the CRE's minimal compliance with the duty in particular functions (if it is minimally compliant) could be argued to be an insufficient response to the duty (both in terms of not itself going sufficiently beyond the duty and in terms of not pushing for a more effective general duty for all public authorities). In addition, minimal compliance could, in these circumstances, be argued to constitute a failure on the part of the CRE to meet the more demanding duties provided for in its establishing Act.

Better understanding the strengths and weaknesses of the legislation would appear to include the need to address:

- section 71's purpose (or purposes);
- the wording of the Act, regulations, and Code of Practice;
- the court judgments;
- enforcement and promotion;
- and impact.

Further, each element should be considered with the others in mind. It could be argued, for example, that inadequate enforcement was to blame for the failure of what would otherwise have an effective law. However, it would need to be asked whether Parliament should have been aware - including from CRE practice up to that point and from knowledge of the arrangements for legal aid - that enforcement might well be a problem, and, therefore, either have framed the section so that it would not require a great deal of enforcement or have made provision for increased enforcement powers and greater enforcement duties.

4.1 SECTION 71'S PURPOSE

Clearly, the effectiveness of legislation cannot be assessed without some reference to what it was hoped it would achieve, which would appear to require attempting to better understand Parliament's purpose (bearing in mind, of course, that different individuals voting for the duty would have intended different purposes for their votes and for the Bill as voted on). In addition, however, there could be value in assessing the extent to which legislation achieved what others outside Parliament believed (or indeed believe) its purpose should have been (taking particular account of what it was felt needed to be done in relation to the matters addressed and what could reasonably have been expected of a piece of legislation, along related lines, and passable around the time in question). This, of course, implies an assessment of the adequacy of the purpose behind the legislation.

Our brief consideration of purpose(s) included, in particular:

- some of the parliamentary debate on the Race Relations (Amendment) Bill;
- the section 71 duty;
- the regulations;
- the Code of Practice;
- the case law; and
- mainstreaming.

In looking at these, it seemed useful to attempt to distinguish between what a provision was intended to require of those subject to it, and what it may have been hoped that compliance would achieve. For example, it may be that compliance with section 71

requires no more than proper consideration be given to race equality when making a decision. Presumably, however, parliament hoped that such consideration would lead to decisions that better promoted race equality and that (even allowing for non-compliance on the part of a large percentage of public authorities) these improvements in individual decisions would together lead to significant improvements in relevant indicators across the UK (including, in particular, a reduction in institutional discrimination).

4.1.1 debate on the Bill

The debate, in the Lords on 14 December 1999, on the amendment Bill (which brought in the general duty) casts some light on the Act's possible intended purpose. It also, however, suggests, we would argue, that there were significant weaknesses in the ways in which the purpose was conceived; and provides some possible partial explanations as to why section 71 can appear unclear, unfocussed and undemanding, and its potential, perhaps, unfulfilled.

Some of the problems may be partly the result of (or have been exacerbated by) the slightly chaotic nature of section 71's introduction and passage. Specifically, the relevant clause was inserted into the Race Relations (Amendment) Bill after the Bill's introduction; it had to compete for attention with other late additions, and, in particular, those relating to indirect discrimination; and there appears to have been some confusion in debate between the legal definition of indirect discrimination and various more everyday understandings (some of which appeared to identify it as the almost exclusive cause and constituent of institutional racism).

4.1.1.1 the indirect discrimination provisions

An important impetus behind the Bill was, of course, the Macpherson report of the investigation into the murder of Stephen Lawrence. Those debating the Bill in the Lords appear, in general, to have understood Macpherson as concluding that the main cause of the failures in the investigation was indirect rather direct discrimination. Lord Cope, for example, stated (Lords Hansard, 14 December, 1999, col. 137) that "The Macpherson report indicated that what went wrong was primarily connected to indirect discrimination rather than direct discrimination and victimisation"; and Baroness Howells stated (ibid: col. 150) - "Dr Richard Stone, one of the three advisory members of the Macpherson inquiry .... says that the inquiry found, 'no evidence of direct racism -- what we did find was indirect

racial discrimination'".

Those in debate also appear to have regarded some sort indirect discrimination as the main cause, and, perhaps main constituent, of institutional racism in general. The Bishop of Oxford, for example, stated (ibid: col. 152) that "As many noble Lords have said, institutional racism reveals itself not so much in direct but in indirect discrimination." Later in the debate, Baroness Whitaker developed this theme, stating (ibid: col. 163) - "Direct discrimination by a public authority fortunately is now rare in our society... it is not direct discrimination that holds up 'the building of an anti-racist society', but ... unconscious attitudes ... Those attitudes are the main underlying reason why people from visible ethnic minorities are treated unfairly and have unequal opportunities. It shows in the employment figures ... in school attainment figures ... Those are the symptoms of institutional racism - specific groups of people defined by their race getting a worse deal from public services, and the cause is indirect discrimination".

The assumption that indirect discrimination is the main cause of institutional racism (including the failures in the Stephen Lawrence investigation) appears to have encouraged the search for solutions among the indirect discrimination provisions in the Act. In particular, it appears to have encouraged, and helped shape, the successful call for the extension of the indirect discrimination provisions in the Act to the public authority functions that the Bill would bring under the Act. Lord Lester, for example, argued (14 December 1999, col. 140) that "the Home Secretary stated that the Government had accepted" the recommendation, of the Stephen Lawrence Inquiry, that the full force of the race relations legislation should apply to all police officers, and that the Home Secretary had gone further, in saying that all public services would be brought within the scope of the Act, but "What Mr Straw did not say was that public services were to be brought within the scope of only half of the concept of unlawful racial discrimination: only direct, and not indirect discrimination". Similarly, Baroness Whitaker stated (ibid: col. 162) - "To bring all public authorities under the scope of the legislation will help to make a reality of the Government's intention and, in the words of my right honourable friend the Home Secretary, to 'tackle institutional racism'. However, the Bill does not provide for that completely because, as we have heard from all sides of your Lordships' House, it deals only with direct discrimination committed by a public authority".

We would argue, however, that there appears to have been some failure to fully appreciate (or to engage a full appreciation within the context of the debate) the considerable difference between, on the one hand, their Lordships' broad (and, to some extent, and in some cases, vague and idiosyncratic) understandings of indirect discrimination - which tend to present it as the almost exclusive cause of institutional racism - and, on the other hand, the quite narrow legal definition, at section 1(1)(b) RRA, of what is generally referred to as 'indirect discrimination' (although the terms direct and indirect discrimination do not appear in the Act). Nor, relatedly, does there appear to have been an articulated appreciation that the legal provisions against indirect discrimination, even if extended, would probably fall a long way short of the ambitious task being ascribed to them.

In the above quote from Baroness Whitaker (14 December 1999, col. 162), for example, she appears to conceptualise indirect discrimination as the cause of institutional racism; and negative 'unconscious attitudes' as causing or constituting indirect discrimination. Her presented understanding of indirect discrimination, however, appears to be quite different from section 1(1)(b) 'indirect discrimination'. Section 1(1)(b) discrimination, for example, might, in the absence of negative unconscious attitudes, arise from ignorance of the impact of a condition or requirement. Further, what appear to be given as examples of indirect discrimination appear more likely to involve section 1(1)(a) (direct) discrimination than 1(1)(b) (indirect) discrimination. We suspect, for example, that different teacher expectations of different ethnic groups will only lead to different attainment figures - a process which the Baroness appears to refer to - if the different expectations lead to different treatment (even if that involves no more than a different tone of voice). In other words, it would not be about the same treatment leading to different outcomes (as would be the case with indirect discrimination) but might well involve less favourable treatment on racial grounds (i.e. direct discrimination).

We also wonder whether the Lords understandings (suggested above) of indirect discrimination, and of the indirect discrimination provisions, may have had some negative consequences on the passage of the Bill.

First, exaggerating the strength of the indirect discrimination provisions (understandable, perhaps, in the context of arguing for their further extension) may well have contributed

to a failure to take the opportunity to address some of their weaknesses. There appeared, for example, to be a stated assumption that the provisions covered practices (rather than, as it stood before the EC 2000 Race Directive, just 'requirements' and 'conditions'). Lord Lester (ibid: col. 141), for example, when defining indirect discrimination, refers to "unfair treatment resulting from a rule or practice ... ". Further, the case for extension of the indirect discrimination provisions appears to have been made as if there was no section 57(3) - in that there appeared to be no reference in the Lords debate to this section or to the severe limitations that it placed on the indirect discrimination provisions. The section had provided that damages would not be awarded if the respondent proved that the requirement or condition in question was not applied with the intention of treating the claimant unfavourably on racial grounds.

Second, the need to show that tackling indirect discrimination was the most urgent task appears to have contributed to the problem of direct discrimination being played down (at least in relation to public authorities). This, in turn, appears to have, perhaps, reduced the pressure to seek improvements to both the direct discrimination provisions and to their enforcement. It might be argued, for example, that institutional racism often manifests itself in direct discrimination (such as when an organisational culture condones less favourable treatment on racial grounds in making redundancies); and that one effective way of addressing such institutional racism would be to make it easier for individuals to make claims in the Employment Tribunals.

Third, the importance placed upon the indirect discrimination provisions may have distracted attention from the potential of a strongly worded equality duty to address institutional discrimination.

4.1.1.2 the race equality duty

The government appears to have argued that its current policies, and a future duty to promote equality (which it later, under pressure from the opposition benches, agreed to include in the Bill), would serve a comparable purpose to that which others had ascribed to an extension of the indirect discrimination provisions, but would do so without what the government argued would be the serious drawbacks of such an extension.

Setting out some of these alleged drawbacks, the Minister, Lord Bassam, stated (Lords

Hansard, 14 December, 1999: col 130) - “To outlaw indirect discrimination in all the functions to be newly covered by the Act would have uncertain and potentially far reaching effects on the government’s ability to make policy. Any policy or practice that had a differential impact on different racial groups because of a requirement or condition could be challenged in the courts. That could potentially include any age-based policy because of the different demographic profiles of different racial groups, and also any regional policy because of the different regional spread of racial groups.”. Lord Lestor, however, argued (ibid: col. 143) that “The problems suggested by the Minister about policy making are, with respect, fanciful and unreal. There is no reason whatever why regional policies and policies related to a person’s age cannot be objectively justified”.

Lord Bassam also set out what he appears to have argued was the government’s more effective approach. In particular, he stated (ibid: col. 130) - “The Government are working to ensure that discriminatory policy-making and practice must stop. But we believe that the most effective way of ensuring this is to retain the flexibility necessary to pursue policies which can benefit ethnic minorities and others without the risk of frequent and counter-productive challenges in the courts while obliging public authorities to tackle unjustifiable discriminatory practices through the promotion of race equality. That means, for example, consulting those affected by policy proposals and monitoring the differential impact of policy on different groups so that unexpected, unjustifiable outcomes can be remedied. As announced in the Government’s equality statement, we are pursuing this administratively and are committed to placing a statutory duty on public authorities to promote equality as soon as parliamentary time permits”.

It is not clear what was meant by 'unjustifiable discriminatory practices' (which it appears to have been argued would be tackled through the duty to promote race equality). However, from the rest of the paragraph, it seems that the Minister, Lord Bassam, may have had some sort of indirect discrimination in mind. To begin with, ‘unjustifiable’ suggests the potential for justification, which exists as a legal defence to alleged indirect discrimination but not to alleged direct discrimination. In addition, the illustrations of what the duty would involve appear to support such an interpretation. He refers, for example, to "monitoring the differential impact of policy on different groups so that unexpected, unjustifiable outcomes can be remedied". Differential impact is central to indirect discrimination, whereas different treatment is central to direct discrimination; and

'unexpected' appears to suggest unintended, which takes us away from the 'racial grounds' necessary for there to have been direct discrimination. It should be noted, however, that, as we understand it, a practice (as in 'discriminatory practices') could, at the time, only have potentially constituted indirect discrimination if it also constituted the application of a condition or requirement.

The Liberal Democrat, Lord Lester, may, in some respects, have had a broader conception of the duty. In particular, he refers (ibid: col 143) to a "positive duty upon public authorities to secure that their functions are carried out without racial discrimination". 'Racial discrimination', in the Race Relations Act, includes both 'direct' and 'indirect' discrimination. Similarly, Lord Sheppard states (ibid: col. 155) that he hopes "that amendments will be brought forward to impose a positive legal duty on public authorities to oblige them to act to prevent discrimination". Indeed, 'discrimination' would also include section 2(1) victimisation. It should be noted, however, that, in the case of both speakers, we have assumed, from the contrary not being implied, that their reference to discrimination is meant to be read as a reference to both indirect and direct discrimination, and this assumption might well be mistaken.

The government's apparent framing of the duty as primarily a means to address indirect discrimination, and the apparent failure of the opposition benches to successfully challenge this, may also have had some potentially negative consequences. First, it may have meant that the subsequent agreement to extend the indirect discrimination provisions (through amendment to the Bill) reduced the perceived need to ensure that the race equality provisions (also introduced through amendment) were robustly worded; which left the Government, largely unscrutinised, to fill-in or not fill-in the necessary details through the regulations. Second, despite the extension of the indirect discrimination provisions, the conceptualisation of the duty as primarily about indirect discrimination appears to have had a significant influence on the regulations, and an even greater one upon the statutory code of practice (CRE, 2002). There appears, for example, to be little in the code which is specifically aimed at, or even recognises the existence of, direct discrimination.

4.1.2 section 71 and the regulations

4.1.2.1 section 71

The purpose discernable from reading section 71 in isolation appears, perhaps, both more ambitious and more modest than the purpose discernable from reading the debate in isolation (allowing, however, that the purpose arguably appears unclear in both instances). It appears more ambitious in that section 71 refers to 'discrimination', 'equality of opportunity' and 'good relations', whereas, in the Lords debate, the focus was on discrimination. It appears more modest in that there is no reference in section 71, or elsewhere in the legislation, to a duty to 'promote race equality' (as opposed to equality of opportunity); and in that there appears to be no section 71 duty to prevent discrimination (there being, instead, a duty to have due regard to the need 'to eliminate unlawful racial discrimination'). In contrast, all parties to the debate referred to a 'duty to promote race equality'. Indeed, the Home Office Memorandum (on the Amendment Bill) to the select committee (Select Committee on Delegated Powers and Deregulation, 1999: Annex 1, para. 4) states - "The provisions in Clause 2 have been newly inserted since the Bill's introduction to impose a duty to promote race equality on specified public authorities". In addition, some parties to the debate appeared to understand the duty as obliging public authorities to take action to prevent discrimination (see, for example, the quotes from Lords Lester and Sheppard at 4.1.1.2 above). It is not clear, at least in the Lords debate on the 14th, that the government indicated that this was their understanding. It is notable, however, that Lord Bassam appears to imply that the duty will oblige public authorities to 'tackle unjustifiable discriminatory practices" (Lords Hansard, 14 December 1999: col. 130), which - despite appearing to be about addressing, rather than preventing, discrimination - could be read as going beyond 'due regard' as interpreted by the courts (see 4.2 below).

4.1.1.2 <u>the regulations</u>

We would argue that there is some responsibility upon government to attempt to ensure that Parliament's purpose, to the extent that it can be discerned from the debates in Parliament and the provisions of the primary legislation, should be reflected, or at least not overly flouted, in the making of regulations (since Parliament is unlikely to scrutinise these to any great extent). It could be argued, however, that the 2001 regulations (Race Relations Act 1976 (Statutory Duties) Order 2001) are too great a departure from what appears to have been Parliament's 'mean' purpose; and that this departure appears more likely to have been the result of the government reining back on the potential implications of the Act than a result of new information coming to light during

consultation on the draft regulations.

An important possible departure, we would argue, is that there appears to have been some consensus in the Lords debate that the duty would include some degree of legal obligation on public authorities to take action (see 4.1.1.2 above); and, in addition, we would argue that the words ‘in carrying out its functions’ (at section 71(1)) lend support to an understanding that the section requires ‘due regard’ in acting as well as in considering how to act - since, if the intention was to only require 'due regard' in decision making, the section might be expected to have specified this (through, for example, the words ‘in deciding how to carry out its functions’). There appears, however, to be no requirement in SDO 2 to act (other than to assess for relevance and to state arrangements for doing various things). This, of course, is not necessarily inconsistent with any intention on the part of parliament that there should be a requirement to take action - since the arrangements referred to in article 2 SDO might be thought to provide a basis for effective action. However, the failure to include the arguably common sense requirement to set out objectives, and steps for achieving these objectives, might be thought to be an inadequate transposition of the purpose apparent in the debates in Parliament and in section 71(1). That the courts do not appear to have determined that there is a duty to take action does not in itself appear to invalidate this argument. First, a requirement in the regulations to include objectives and planned actions would be consistent with what appears to be the court’s interpretation of section 71 - since the absence of a general duty to act in a particular way (i.e. with due regard to the specified matters) would make it more important that the steps leading up to action (including setting out the objectives and the planned steps) are as thorough and competent as possible. Second, as discussed below (4.3.2), the courts’ apparent position is not necessarily clear and may not necessarily be correct (i.e. the Court of Appeal, in a different case, might clarify itself as having meant otherwise or the Lords might reach a different conclusion). Third, it has to be wondered whether the conspicuous general omission of requirements to act, from article 2 SDO, may itself have influenced the courts in determining that the general duty requires only assessment - on account of concluding that a requirement to do more would have been reflected in the regulations.

Possible distance between the regulations and the debate in Parliament, and section 71, does not mean, of course, that, in attempting to determine purpose, the regulations can

be ignored. If, for example, the regulations are incompatible with the interpretation that the Act was designed to oblige public authorities to prevent discrimination, that interpretation has to be called into question, since Parliament permitted the regulations to be made. It seems relevant, however, that the regulations were only subject to the negative resolution procedure, and, therefore, received very little parliamentary scrutiny (and, as far as we are aware, were not debated).

4.1.3 the Code of Practice

The Code of Practice (CRE, 2002) was also subject to parliamentary approval through the negative resolution procedure, and should, therefore, also be regarded as casting some light on Parliament's purpose. Since, however, the legal status of the code is not as substantial as that of the regulations, it may well be that it received even less parliamentary scrutiny (assuming such to have been possible). Indeed, it may be wondered whether the code, in some respects, reflects interaction between the government's vision of the Act and the CRE's (bearing in mind that the CRE appeared to be more sympathetic towards regulation and its enforcement than it appears to have been more recently and that it had quite strongly promoted the idea of a race equality duty).

Of particular relevance to better determining section 71's purpose, the code states (ibid: para. 2.4) that "The duty's aim is to make the promotion of race equality central to the work of the listed public authorities". That there is no clear legal duty to promote race equality (see 4.1.2.1 above), does not mean, of course, that making such promotion central to the work of public authorities is not the aim. The Code of Practice, however, appears to go further in that it quite frequently refers to the general 'duty to promote race equality' (eg CRE, 2002: para. 2.6). It may be that this could be understood to be another way of stating the aim quoted above in this paragraph i.e. it is a 'duty to promote race equality' in the sense that it is a duty aimed at promoting race equality. It is not clear, however, that the Code of Practice could be understood to sustain this limited interpretation. To begin with, it would have been apparent that 'duty to promote' would tend to be understood to mean that the duty is to promote, and, therefore, another wording might well have been used to avoid confusion. In addition, the Code appears to quite clearly indicate that there is a duty to promote. For example, one of the Code's 'guiding principles' is "Promoting race equality is obligatory for all public authorities listed

in Schedule 1A to the Act" (ibid: para. 3.1). In deed, the implication of this 'guiding principle' could be that 'due regard' will not be had if an authority's actions are not, taken overall, promoting race equality, even though it may not have been possible to promote race equality in every function.

In addition to the question of whether there is a duty to promote race equality, there are other elements in the 'aim' sentence from the Code of Practice (i.e. "The duty's aim is to make the promotion of race equality central to the work of the listed public authorities") which appear unclear. It might be wondered, for example, what is meant by 'central'. It seems unlikely that the aim is for the promotion of race equally to be an authority's 'principal' concern in carrying out its functions, since this would appear to mean, for example, that an emergency ward would need to give greater weight to 'promoting race equality' than to saving lives. Further, the list of 'benefits of the duty', which the Code sets out (ibid: paras. 1.4 and 1.5), would appear to indicate relatively limited ambitions, conceived as being achieved over a fairly long period of time. The first benefit, for example, is - "The duty will help public authorities to make steady progress in achieving race equality", which would appear to suggest that there is no expectation that race equality will be achieved in the immediate future. The next stated benefit is that - "In relation to policy development and service delivery, the duty will encourage policy makers to be more aware of possible problems". While it moves between more and less demanding visions of what is required, and what the aim of the duty is, the general sense is that it is primarily thinking of the duty as a means to improve efforts to reduce the unintended disproportionate adverse impact of policies and functions on particular racial groups - and to that extent appears to regard the duty as a means to reduce section 1(1)(b) discrimination; but also, as discussed below (4.1.5), as a means to encourage a greater degree of mainstreaming.

4.1.4 the case law

The case law, of course, casts legal light on what the duty should be understood to require, and we address this in detail in the next section (4.2). The court judgments, however, also include comments which, perhaps, also indicate what the judges understand the section as having been intended to achieve (although, as can be seen from the quotes below, it is difficult to separate implied requirement from assumed purpose).

Of particular note, Lady Justice Arden in the *Court of Appeal, in Secretary of State v Mrs Diana Elias (2006) EWCA Civ 1293* (Elias CA), appears to suggest that the purpose of the section is to further the aims of anti-discrimination legislation, that it is an important part of the mechanisms for furthering these aims, and that it is to achieve its purpose through requiring public authorities to give advance consideration to issues of race discrimination before making any policy decision of relevance to issues of race discrimination. In particular, she states (Elias CA, para. 274) - “It is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and the provision must be seen as an integral and important part of the mechanisms for ensuring the fulfillment of the aims of anti-discrimination legislaton. It is not possible to take the view that the Secretary of State's non-compliance with that provision was not a very important mater. In the context of the wider objectives of anti-discrimination legislation, section 71 has a significant role to play.".

More, however, appears to be required than paragraph 274 taken alone might be thought to imply. Indeed, in the preceding paragraph, Lady Justice Arden states - “legal proceedings are not the only way of policing anti-discrimination legislation. Monitoring and self-assessment by public bodies in their decision making can also further the aims of such legislation, and this is the role of section 71 ...”. This would seem to suggest, similarly to paragraph 274, that the role of section 71 is to further the aims of anti-discrimination legislation; but also that consideration should not just be advance, but should involve monitoring. In addition, the use of the term ’self-assessment’ might be understood to suggest that there should be some assessment of performance (at least in decision making and at least in relation to compliance with anti-discrimination law) rather than just an assessment of the possible effects of the particular proposed policy decision.

4.1.5 mainstreaming

In relation to gender, Sullivan et al (2004: 28) argue that the principle of mainstreaming “has usually been defined as incorporation of gender considerations into all policies, programmes, practices and decision making so that at every stage of development and

implementation an analysis is made of the effects on women and men and appropriate action is taken".

The duty appears to be conceptualised - including in the court judgments, the regulations, and the Code of Practice - as a means to encourage (albeit with the theoretical possibility of enforcement action) public authorities to mainstream race equality. This, for example, appears to be what the Code of Practice has in mind when, as discussed above (supra 4.1.3), it states (CRE, 2002: para. 2.4) - "The duty's aim is to make the promotion of race equality central to the work of the listed public authorities". From the perspective of the above definition from Sullivan et al, however, it could be argued that - although the goal of the duty may have been full mainstreaming - it only requires (according to what appears to be the court's interpretation) partial mainstreaming. Specifically, it appears to not require that "appropriate action is taken" (Sullivan et al, 2004: 28), so long as consideration is given to race equality when making decisions of relevance to race equality; and requires that race equality considerations are incorporated into decision making but does not require them to be incorporated into 'policies, programmes, and practices' (except, perhaps, those, such as the race equality scheme, that relate specifically to the race equality duty).

4.2 WHAT SECTION 71 REQUIRES

We have set out in the tables below our initial thoughts on what section 71 may require (with, where relevant, the sources which we have drawn upon). It should be stressed, however, that we are far more confident about some of the conclusions than about others; and, since we have not indicated our level of confidence in each case (including because our levels of confidence may well be misplaced), each conclusion should be corroborated before being drawn upon.

We have also set out, with more confidence, what the Code of Practice appears to suggest is good practice.

key to tables:

- Elias HC = High Court judgment in *Elias;* Elias CA = Court of Appeal judgment in *Elias*; *BAPIO* HC = High Court judgment in *BAPIO.*
- R = might be a statutory requirement (see note above about levels of confidence);

R? = might also be a statutory requirement but the evidence for it being so appears more limited.

- G = Code of Practice appears to clearly indicate that it would be good practice. G? = might be read into the Code, that it would be good practice, but it doesn't appear to clearly or specifically state it. For example, we have concluded that some of the things that it states are good practice in the case of functions, might well have been intended to also apply to policies (or at least would have been so intended if the matter had been considered). G/ G? = the Code appears to clearly indicate that part of that which is stated would be good practice but we have concluded that the other part of that which is stated appears to be implied in the Code or to be possibly stated but not stated clearly.

4.2.1 proposed policies

table 4.2.1.1 assessing proposed policies

		requirement or good practice	sources additional to section 71
(a)	Before making a policy decision, proper consideration must be given to whether and how section 71 is relevant; which may require 'a careful attempt' to assess whether the scheme raised any issues relating to racial equality.	R	Elias HC: 96-98 Elias CA: 274
(b)	To be proper, consideration must be at least cursory but cursory consideration is only sufficient if such consideration makes it plain that section 71 is not relevant. It may also be that cursory consideration would need to constitute the careful attempt referred to at (a) above.	R	Elias HC: 96-98

(c)	If there is uncertainty as to whether 71(1)(a) is relevant, further consideration of the potentially discriminatory effects of the policy will be necessary. The same requirement may apply to 71(1)(b), but so far the courts do not appear to have explicitly said that it does.	R	Elias HC: 98
(d)	If section 71 appears to be relevant, consideration, to be proper, should include an attempt to assess the extent of any adverse impact on race equality.	R	Elias HC: 97
(e)	If section 71 appears to be relevant, consideration, to be proper, should also include an attempt to assess possible ways of eliminating or minimising any adverse impact.	R	Elias HC: 97
(f)	Consideration must be given to all three parts of the general duty (at 71(1) (a) and (b)), but attention to any one of these need only be cursory if it is plain after the same that the part in question is not relevant.	R	COP: 3.10 Elias HC: 96, 100, and 101
(g)	We wonder whether, to be proper, consideration will, in some circumstances, require consultation. It is not clear from the case law what such circumstances would be. However, it might be required when consultation is necessary so as not to be uncertain as to whether section 71(1)(a) is relevant .	R?	Elias HC: 98; SDO article 2(2)(b)(i)
(h)	Each time a public authority tackles a specific duty, it must consider whether it is meeting the three parts of the general duty.	G/ R?	COP: 4.1

(i)	The weight given to race equality should be proportionate to its relevance to a particular policy or proposed policy.	G?/ R?	COP: 3.5 The Code says this about functions, but we can see no reason why the principle would not also be meant to apply to policies and proposed policies.
(j)	To assess the impact its policies, and proposed polices, have or are likely to have on race equality, the authority may find it useful to draw up a clear statement of the aims of each function or policy or proposed policy.	G/ G?	COP: 3.14 The Code says this about policies but it appears intended to also apply to proposed policies.
(k)	As part of the assessment of its policies and proposed policies, it should consider whether it has information about how different racial groups are likely to be affected by the policy.	G/ G?	COP: 3.14 The Code refers to policies but it appears intended to also apply to proposed policies.

(l)	To assess the effects of a policy, or the way a function is being carried out, public authorities could ask themselves the following questions: (i) could the policy or the way the function is being carried out have an adverse impact on equality of opportunity for some racial groups (i.e. does it put some racial groups at a disadvantage); (ii) could the policy or the way the function is being carried out have an adverse impact on relations between different racial groups; (iii) is any adverse impact unavoidable; (iv) could any adverse impact be considered to be unlawful racial discrimination; (v) can any adverse impact be justified by the aims and importance of the policy; (vi) are there other ways in which the authority's aims can be achieved without causing an adverse impact on some racial groups; (vii) could the adverse impact be reduced by taking any particular measures; (viii) is further research or consultation necessary, would this research be proportionate to the importance of the policy, and is it likely to lead to a different outcome?	G/ G?	3.16 The Code refers to policies but it appears intended to also apply to proposed policies.

(m)	If the assessment or consultation shows that the proposed policy is likely to have an adverse impact or harm race equality, the authority will want to consider how it is going to meet the general duty to promote race equality. The authority might ask itself the following questions - (i) If one of our policies leads to unlawful racial discrimination, can we find another way of meeting our aims? (ii) If one of our policies adversely affects people from certain racial groups, can we justify it because of its overall objectives? If we adapt the policy, could that compensate for any adverse effects? (iii) If the assessment or consultation exercise reveals that certain racial groups have different needs, can we meet these needs, either within the proposed policy or in some other way? (iv) Could the policy harm good race relations? (v) Will changes to the policy be significant and will we need fresh consultation?	G	COP: 4.23
(n)	The assessment of a proposed policy might involve using - (I) information that is already available; (ii) research findings; (iii) population data; (iv) comparisons with similar policies in other authorities; (v) survey results; (vi) ethnic data collected at different stages of a process (for example, when people apply for a service); (vii) one-off data-gathering exercises; or (viii) specially-commissioned research.	G	COP: 4.19
(o)	If there has been a significant examination of the race relations issues, involved in a major policy proposal, there is likely to be some written record of it (at least in the case of a government department).	Evidence that R met	HC BAPIO: 69

(p)	The general duty is a continuing duty. What a public authority has to do to meet it may change over time as functions or policies change, or as the communities it serves change.	R	COP: 3.7

table 4.2.1.2 consulting on proposed policies

		requirement or good practice proposal	sources additional to section 71
(a)	We wonder whether, to have been proper consideration, consideration will, in some circumstances, require consultation. It is not clear from the case law what such circumstances would be. However, it might be required when consultation is necessary so as not to be uncertain as to whether section 71(1)(a) is relevant.	R?	Elias HC: 98; SDO article 2(2)(b)(i)
(b)	Public authorities could consult people through - (i) consultation meetings; (ii) focus groups; (iii) reference groups; (iv) citizens' juries; (v) public scrutiny; (vi) survey questionnaires.	G	COP: 4.21

(c)	Whichever consultation method they use, public authorities should try to make sure that - (i) they use people's views to shape their decision making process; (ii) the exercise represents the views of those who are likely to be affected by the policy; (iii) the consultation method is suitable for both the topic and the groups involved; (iv) the exercise is in proportion to the effect that the policy is likely to have; (v) the consultation's aims are clearly explained; (vi) the consultation exercise is properly time-tabled; (vii) the consultation exercise is monitored; and (viii) the consultation's findings are published.	G	COP: 4.22
(d)	If the assessment or consultation shows that the proposed policy is likely to have an adverse impact or harm race equality, the authority might ask itself the questions at 4.2.1.1(m) above.	G	COP: 4.23

4.2.2 existing functions and policies

The case law appears to indicate that an assessment of policies is required (see tables 4.2.1 above and 4.2.2 below); the statute itself makes clear (at section 71(1)) that an authority must have 'due regard' in carrying out its functions; and the case law indicates that considering a policy involves exercising a function (see, Elias HC: 99). It is not clear, however, either from the statute or the case law, whether there needs to be an assessment of the functions themselves (as opposed to just the relevant policies that constitute or arise from a function).

The lack of an explicit statement in the case law on the assessment of functions might be primarily the result of the section 71 ground in the relevant cases having concerned particular policies (such as the Compensation Scheme in *Elias* and the Immigration Rules and Department of Health guidance in *BAPIO)* rather than the associated

functions. This, in turn, is perhaps not surprising, since it is the policy decisions which impact upon particular individuals (and gives them standing in a judicial review); and since, in addition, the purpose of judicial review would appear to be to review decisions or actions. For example, it appears to have made sense for the Claimant in *BAPIO* to challenge the Department of Health's advice on the Migrant Programme, rather than to have attempted the broad task of arguing that the Department's function of advising employers was not compliant and that this had affected the advice on the Migrant Programme. Arguably, it also of no great consequence that there is no explicit statement, in section 71, that functions should be assessed, since there is also no explicit statement that policies should be assessed; and, in deed, section 71 does not refer to policies. As discussed above (4.4.2), the section in general holds back from explaining what it might in practice require.

There would certainly appear to be little reason to conclude that the duty requires an authority to assess its functions i.e. its duties and powers, since these are primarily the result of policy decisions that legislators have made (and, consequently, any duty to assess would appear to be primarily on the relevant central government department). However, it might be argued that there are powers which an authority can decide to take or not take to itself - in that, if an authority seldom or never exercises a particular power, it might be said that the power in question is not among its functions (assuming, of course, that there is not a duty to exercise the power in question). In addition, certain authorities - including the three equality commissions - are under a duty (at s43(1)(c) in the case of the CRE) to keep under review the working of the Acts which set out their duties and powers; and, therefore, assessing their duties and powers is one of their functions (although, assuming section 71 requires an assessment in relation to functions, the requirement would, we assume, be to assess the assessment - i.e the review - of the powers and functions and not to assess the powers and functions themselves).

Notwithstanding these possible caveats, however, it would seem that, if there is a requirement to assess 'functions', this should in general be understood to mean how a function is carried out (including, perhaps, the weight given to different functions and the interactions between them). Some of the arguments for and against there being such a duty, and some ideas as to what any such duty might require, are set out below in table

4.2.2.1. We also look at whether the absence of a duty to assess functions (or uncertainty as to whether there is such a duty) has the potential to have a significant negative impact upon the duty's effectiveness.

4.2.2.1 <u>assessing existing functions</u>

		requirement or good practice	sources additional to section 71
(a)	*the broad sweep of section 71* The phrase 'in carrying out its functions', at section 71(1), would appear to potentially encompass everything that an authority does. There would appear to be no indication, at least not in the statute, that due regard requires an assessment of policies but not an assessment of functions. Further, in that it refers to functions, rather 'each function', it might be understood to require an over-view of all the functions (including the weight given to each and the interactions between them), and some consideration of the mix of policies (and, again, the weight given to each and the interactions between them) within each function.	R?	

(b)	*SDO duty to assess functions* It might be argued that, on account of SDO paragraphs 2(2) and 2(3) read together, there is a duty on subject public authorities to assess whether their functions are relevant to their performance of the section 71(1) duty. The SDO, however, does not appear to indicate that this assessment would need to look at how, including to what degree, any relevant function is relevant (although it doesn't indicate that it would not need to do this). Therefore, the SDO does not appear, in itself, to require the sort of assessment of relevant functions - perhaps involving an attempt to assess adverse impact - that the case law (eg Elias HC: 97) appears to require in the case of relevant policies. Indeed, the omission of 'functions' from paragraph 2(2)(b) might be thought to suggest such an REIA would not be required.	R?	Elias HC: 97 SDO Article 2

(c)	*neglect of unused powers* Without a duty to assess functions, there would appear to be little or no requirement to assess functions which were not being exercised (and, if there was a requirement, it might well not be met). For example, the equality commissions, according to PIRU's recent report (Harwood, 2006) had never taken enforcement action in relation to 'instructions and pressure to discriminate', and therefore, had not exercised their power to do so (at section 63 in the CRE's case). The decision not to use the power might, of course, be included in a policy (such as a legal strategy), which, in turn, will require an assessment. However, the decision not to use the power may not be stated in the strategy (since it may simply address what it intends to do and not what it does not intend to do), and therefore might be missed or given cursory attention in any assessment. Further, a decision not to use a power/ function - which, of course, Parliament has used its time to provide and presumably did so on the basis of a perceived need - would appear to merit a separate assessment. Indeed, we suspect that the consultation that such an assessment might have involved may well have led to a decision on the part of the commissions to make greater use of the power relating to instructions and pressure to discriminate.	R?	

(d)	*failure to assess the balance and interactions between functions* There being no duty to assess functions may also discourage an assessment of the balance and interactions between functions. There is, as with the previous point, a theoretical possibility that REIAS could address issues beyond themselves (including the strategic context in which they operate) but, from the REIAs we've looked at it was not clear that this would happen systematically, otherwise adequately, or indeed at all For example, all three equality commissions appear to have decided to focus on the promotion of good practice rather than upon enforcement action (which in the case of the CRE would appear to mean more of s45 and less of, for example, s58 to 61). It is not clear, however, that REIAs of individuals policies - such as the policies on non-discrimination notices - would look at the overall balance between promotion and enforcement, or at the relationships between functions, including, for example, the extent to which high profile enforcement action will help promote good practice (such as an employer being found to have broken the RRA helping to inform other employers about what the RRA requires).	R?	

(e)	*requirement to assess functions may be entailed in the requirement to assess policy decisions* According to the Code of Practice (CRE, 2002), policies are 'the informal and informal decisions about how a public authority carries out its duties and uses its powers'. If correct, this would seem to suggest that the requirement is to assess policy decisions not just formal policies, and, indeed, it is notable that LJ Arden in Elias in the Court of Appeal (para. 274) refers to 'any policy decision'. Further, it would appear to mean that decisions about what powers to use and not use, the balance and relationships established between them, and about how each function should be carried out, are policy decisions, and, therefore, require an assessment. This will be the case whether or not there is a strategy set out for the function in question.	R?	Elias CA: 274 COP: glossary

(f)	*significant informal decisions relating to functions may not be (or not understood to be) so entailed* Despite the Code referring to 'informal', as well as 'formal', decisions, we suspect that authority's will tend to only assess formal written policies. Indeed, the importance of the policy being written is perhaps evident in the fact that one of the few REIAS that the CRE has conducted was on a leaflet (entitled 'equal opportunities is your business too). We also suspect that many decisions about functions will not be recorded in such formal written policies; and will, therefore, be less likely to be assessed.	R?	COP: glossary. (ii)

(g)	*significant unmade decisions relating to functions may not be (or not understood to be) so entailed* It is not clear that the failure to address questions about what to do or not do (such as, for example, when the relevance of the question is not realised) will be understood - by a public authority or the High Court - to constitute a policy decision which requires assessment; and, therefore, many of the matters of relevance to how a function is carried out may tend not to be assessed. For example, the CRE may not have asked itself whether the inclusion of an annual state of the nation report in its annual reports could be set-out and promoted in such a way as to usefully inform the research priorities of academic institutions; and, therefore, there will have been no decision (requiring an assessment) not to do this. However, if it had carried out an overarching assessment of the relevant function (s.46), it seems considerably likely that the possibilities for action (including those not eventually taken) would have been assessed. Indeed, the wording of section 46(2) may well have pushed them in the direction of the question suggested above. The subsection provides that 'Each annual report shall include a general survey of developments, during the period to which it relates, in respect of matters falling within the scope of the Commission's functions'.	R?	

(h)	*structures and processes relating to functions may not be (or not understood to be) so entailed* There would appear to be some distinction between the policies made in relation to a function and the arrangements and conditions underpinning a function. Further, it appears that such arrangements and conditions (including organisational structure, control, and culture) could be of considerable relevance to the promotion of race equality but not be subject to REIAs on policies. For example, it may be that a culture has developed in some organisations in which promoting race equality has come to be understood as a bureaucratic burden, and that this has arisen not from one policy which could be assessed with this problem in mind, but instead from, for example, the effect of a number of different policies, from the absence of policies, and from organisational norms, informal networks and communication processes.	R?	

(i)	*The Code of Practice states that there is a duty to assess functions.* It states (CRE, 2002: para. 3.4), for example, that "Public authorities should assess whether and how race equality is relevant to each of their functions". Other Code of Practice statements appearing to support a duty to assess functions are shown below in this table. It should be noted, however, that the CRE's 2005-08 RES (CRE, 2005e) appears to indicate that it assessed whether functions were relevant, but does not indicate that it aimed to conduct full REIAs on functions or that there was a duty to do so. This may mean that the CRE no longer hold to the view expressed at para. 3.4 in the Code. However, it should also be noted that the Code not the RES has legal status, and that CRE has left the Code unchanged. Therefore, it might be concluded that the possible discrepancy - between Code and RES - means that the CRE has failed to understand or follow what is required, and that it should not be regarded as indicating that the requirements have changed.	R?	COP: 3.4

(j)	Functions are exercised through policies; and, therefore, policies and proposed policies within each function are, we assume, subject to the requirements on all policies (set out at 4.2.1 above and not repeated in this table). We do not think that there would be much merit in the argument that relevant policies within functions of little overall relevance would require less consideration than policies of equal relevance within more relevant functions.	R?	see table 4.2.1 above.
(k)	Public authorities should assess whether and how race equality is relevant to each of their functions.	R? G	COP: 3.4
(l)	It is necessary to pay attention to all three parts of the duty in assessing a function.	R	COP: 3.2(d), 3.10 Elias HC: 100. The relevant statement in Elias concerns the assessment of a compensation scheme, but we assume that the same principle applies to functions. Further, the Code states that all the elements of the duty are 'necessary to meet the whole duty' and does not appear to imply that this only applies to policies.

(m)	The weight given to race equality should be proportionate to its relevance to a particular function. This idea is presented in the code as the meaning of 'due regard' in section 71(1); and, therefore, as a statutory requirement. We are not convinced, however, that such a 'sliding scale' interpretation, taken with the code's explanation of what relevance is about (see (e) below), is consistent with the interpretation in the case law (accepting, however, that the case law primarily addresses the assessment of policies rather than functions).	R? G	COP: 3.5
(n)	Relevance is about how much a function affects people, as members of the public or as employees of the authority. This understanding of 'relevance', from the Code, also appears debatable. It appears, for example, to be more a definition of total impact rather than impact on race equality.	G	COP: 3.4
(o)	Public authorities should consider the following four steps to meet the general duty - (i) identify which of their functions and policies are relevant to the duty, or, in other words, affect most people; (ii) put the functions and policies in order of priority, based on how relevant they are to race equality; (iii) assess whether the way these relevant functions and policies are being carried out meets the three parts of the duty; (iv) consider whether any changes need to be made to meet the duty; and (v) make the changes.	G R Presented as guidance. But (i) and (iii) would appear to be legal requirements.	COP: 3.11

(p)	The general duty is a continuing duty. What a public authority has to do to meet it may change over time as functions or policies change, or as the communities it serves change. Taken with the case law, this statement from the Code would appear to mean that policies and functions need to be monitored and reassessed when either the policy or function, or the situation to which it applies, have changed so much that the original assessment is no longer a reliable indicator of relevance, impact, or the other matters that an assessment should consider. However, taken without the case law so far, it would appear to be suggesting that the policies and functions themselves - to continue to be having due regard - might need to change in response to changed circumstances.	R/ R?	COP:3.7
(q)	(i) To identify relevant functions, a public authority will find it useful, first, to make a list of all its functions, including employment. (ii) It should then assess how relevant each function is to each part of the general duty. (iii) A public authority should consider setting priorities, and giving priority to those functions that are most relevant to race equality.	G	COP: 3.12, 3.13
(r)	To assess the impact its functions and policies have on race equality, the authority may find it useful to draw up a clear statement of the aims of each function or policy.	G	COP: 3.14

(s)	After drawing up the statement of aims (see (i) above), it should consider (i) whether it has information about how different racial groups are affected by the function or policy, as employees or users (or possible users) of services. (ii) whether its policies and functions are promoting good race relations.	G	3.14
(t)	The information for assessing policies and functions could come, for example, from previous research; records of complaints; surveys; or local meetings.	G	3.14
(u)	Public authorities may need to consider adapting their existing information systems, so that they can provide information about different racial groups and show what progress the authority is making on race equality.	G	COP: 3.15
(v)	The information gathered for assessment purposes (see j and k above) should help public authorities assess (i) which of their services are used by which racial groups, or (ii) what people think of their services, and (iii) whether they are being provided fairly to people from different racial groups.	G	3.14
(w)	To assess the effects of a policy or the way a function is being carried out, public authorities could ask themselves the questions reproduced at 4.2.1.1(l) above.	G	3.16

4.2.2.2 assessing existing policies

		requirement or good practice	sources additional to section 71
(a)	There appears good reason to assume that there is a requirement for all policies to be assessed for relevance (albeit permissible in some circumstances for the assessment to be cursory). If there is such a requirement, it would appear to mean that any policies which were not subject to assessment at the proposal stage would require an assessment when implemented. *reasoning:* There is support for the need to assess existing policies in the code (see, in particular, paras 3.14 to 3.17). In addition, however, there appears to be support in the SDO and in the case law. SDO article 2(3), read with 2(1) appears to require some sort of assessment (for relevance) of existing policies. In *Bapio*, it was determined that there should have been an assessment on existing immigration rules, relating to overseas doctors, on account of the nature of the change made to them. In *Elias*, there had been no need to assess the proposed scheme (because it predated section 71 coming into force), but the court determined that the already operating scheme should have been assessed when the duty came into force.	R	SDO 2(1) read with 2(2). COP: 3.14-3.17 Elias HC: 91-104 Bapio HC: 64-70

(b)	The assessment requirements in relation to an unassessed existing policy may in some circumstances be less than in relation to proposed policies. Specifically, we wonder whether there will be no need for a formal assessment if - (i) monitoring of the policy has been sufficient to make plain that the policy is not relevant to race equality; or (ii) the monitoring indicated that the policy is relevant to race equality, and served as a proper assessment (including, for example, an assessment of how any adverse impact could be minimised). *reasoning:* These conclusions are primarily based upon what appears to be the purpose of section 71(1) i.e. to ensure that proper consideration is given to race equality in decision making (including decision making about whether to change or continue with a policy); and that, in some circumstances, monitoring would appear to constitute proper consideration. Further, we would suggest that the SDO 2001 lends some support to this conceptualisation of monitoring. It refers to the need to state, in the RES, the policies and proposed policies assessed as relevant; but only requires that it states the arrangements for assessing and consulting on the likely impact of its proposed policies. However, this difference may simply reflect an assumption (perhaps apparent in article 2(2)) that existing policies will already have been assessed; and that, therefore, the appropriate arrangement to state in relation to these (as is required at 2(2)(b)(ii)) is just the arrangements for monitoring adverse impact.	R?	SDO 2 Elias HC: 96 to 97 Elias CA: 274

(c)	Already assessed existing policies will need to be assessed before changes are made to them if the proposed change is sufficient to constitute a policy decision. *reasoning:* That changes to policies may sometimes need to be assessed appears to be clear from *Bapio*. It does not however appear to make clear under what circumstances a change will necessitate an assessment. However, LJ Arden in *Elias* in the Court of Appeal states that the purpose of section 71 is to require advance consideration before making any policy decision.	R?	Elias CA: 274 Bapio HC: 64-74
(d)	The following statements in the previous table (4.2.2.1 assessing functions) refer and apply to policies (which is presumably intended to mean existing policies): (o), (p), (r), (s), (t), (u), (v), and (w). In addition, (l) appears intended to apply to existing policies.	see table 4.2.2.1	see table 4.2.2.1
(d)	It may be that the following requirements (or possible requirements), stated above (in table 4.2.1.1 assessing proposed policies) in relation to the assessment of proposed policies, also apply or are intended to apply to existing policies: (a), (b), (c), (d), (e), (f), (g), (h), (i).	see table 4.2.1.1	see table 4.2.1.1

4.2.2.3 <u>monitoring policies and functions</u>

		requirement or good practice	sources additional to section 71

(a)	It appears possible that compliance with section 71 will, in certain circumstances, require the monitoring of some policies and functions. *reasoning:* If 'due regard' in carrying out its functions requires assessment before a policy decision is made (as appears to be the case), and this requirement is aimed at the identification and tackling of possible future adverse impacts, it would appear logical for 'due regard' to also require that some consideration be given to what the actual impacts of the policy turn out to be (since the predictions may well have been entirely wrong). Further, it is not clear why 'due regard' 'in carrying out its functions' should be taken to refer to assessment and not what would appear to be the comparably important monitoring; especially when it is borne in mind that section 71 does not explicitly refer to either assessment or monitoring. In addition, the fact that there is a requirement in SDO article 2(2)(b)(ii) to state the monitoring arrangements in the RES, and since the SDO is meant to be considered to be appropriate for the better performance of the general duty, it seems ... continued ...	R?	SDO 2(2)(b)(ii) Elias HC: 96. Elias CA: 273.

(a)	likely that some sort of monitoring will sometimes be required to comply with the general duty. There also appears to be some support in the case law for this suggestion. In particular, LJ Arden, in *Elias* in the Court of Appeal (para. 273), appears to say that monitoring and self-assessment by public bodies in their decision making is the role of section 71. However, it is not clear whether this means monitoring the way decisions are made or monitoring decisions which have been made. In addition, in *Elias* in the High Court (para. 96) it is stated that "There is no need to enter into time consuming and potentially expensive consultation exercises or monitoring when discrimination issues are plainly not in point". This would appear to support a contention that there is a need to do so when they are in point or are not plainly not in point.		
(b)	(i) Knowing that a policy is working as it should is vital to achieving the aims of the general duty. (ii) Keeping track of how a policy is working, and whether it is having an adverse impact or harming race equality, depends largely on having an efficient and, up to date, and relevant monitoring system.	G	COP: 4.25

(c)	Monitoring allows public authorities to test - (i) how racial groups are affected by their policies (for example, how often and why people use a service, how often they experience enforcement or legal action, how often they make complaints and why, and whether they face disadvantage or find that their needs are not met); (ii) whether people from all groups are equally satisfied with the way they are treated; (iii) whether services are provided effectively to all communities; (iv) and whether services are suitable and designed to meet different needs (for example, whether they recognise language difficulties, individual cultural needs, or long standing patterns of discrimination or exclusion).	G	COP: 4.27
(d)	Arrangements that the authority makes, or changes, to meet the duty should be relevant to the size of the authority, the nature of the policy and its possible effect on the public. This statement from the code is in the section on monitoring and appears to be intended to apply to arrangements for monitoring (but probably also to arrangements for assessment).	G/ R?	COP: 4.28
(e)	Authorities can use a range of methods to monitor and analyse the effects of their policies on different racial groups, including: (i) statistical analysis of ethnic monitoring data; (ii) satisfaction surveys (analysed by racial groups to which the people surveyed belong); (iii) random or targeted surveys; (iv) meetings, focus groups, and citizens' juries.	G	COP: 4.28

(f)	A public authority's arrangements might explain what it would do if its monitoring showed that one of its policies was having an adverse impact on race equality, and that it would prevent the authority from meeting its general duty.	G	COP: 4.29
(g)	In the event of its arrangements so showing (see (f) above), the authority could ask itself the following questions: (i) If one of our policies is leading to unlawful racial discrimination, can we find another way to meet our aims? (ii) If one of our policies is adversely affecting people from certain racial groups, can we justify the policy because of its overall objectives? (iii) If we adapt the policy could that compensate for any adverse effects? (iv) If the policy is harming good race relations, what should we do? (v) Will the changes to the policy be significant, and will we need to consult about them?	G	COP: 4.30

4.2.3 making changes or otherwise acting

The case law does not appear to provide much or any support to the understanding that section 71 requires action other than assessment (which could, perhaps, be taken to include monitoring). The matter, however, does not appear to have been specifically or at least not strongly tested - since the complaints in the High Court and Court of Appeal related to failures to assess, and the meaning of section 71 (in this or any other respect) has not been tested in the Lords. We have, therefore, set out below what appear to be some of the possible requirements to act (with what appear to be possible sources for these); and have also set out what the Code states is good practice in relation to acting on assessments. We have also, however, set out some of what appears to be positive support for there being no duty to act.

4.2.3.1 evidence possibly supportive of there being a duty to do more than assess

	extracts and arguments	**sources**
(a)	Listed public authorities "must make race equality a central part of their functions (such as planning, policy making, service delivery, regulation, inspection, enforcement and employment)". *comments: To* refer to making race equality central to policy making and to the other specified matters would appear to possibly suggest that race equality needs to be central to more than policy making. In contrast, if it had simply referred to the other specified matters, without referring to policy making, there would have been more support for the conclusion that it meant policy making in relation to each of these other specified matters. It will be also be noted that the Code rarely uses the term 'must'; and, for this and other reasons (including the juxtaposition of the reference to Schedule 1A), it appears likely that it believes that what it says must be done is something which is required to be done under the act.	COP:3.3
(b)	"The duty should underpin all policy and practice; and it should encourage improvement". *comments*: 'Practice' might be understood to refer to what the organisation does (in contrast, to some extent, to its decisions about what to do); and, therefore, to suggest a belief that the duty applies to matters other than decision making. However, practice might also be understood to be the way in which something is generally done (and to encompass decisions about how things are done or should be done); and, therefore, might be regarded as a form of policy decision - in which case this sentence does not, perhaps support a requirement to act.	COP: 3.3

(c)	"Public authorities should consider the following four steps to meet the general duty... c. Assess whether the way these 'relevant' functions and policies are being carried out meets the three parts of the duty. d. Consider whether any changes need to be made to meet the duty, and make the changes". *comments:* The meaning is unclear, including because it seems to imply that the authority should 'consider' whether it should 'consider'; and, relatedly, it is not clear whether it is suggesting that 'to meet the duty' it is sufficient to consider whether to consider or whether there is, indeed, a requirement to 'consider whether any changes are needed to meet the duty ....". However, it does clearly imply that changes to functions or policies may be needed to be made to meet the duty. Further, although it may simply be the result of hurried drafting, it seems to imply that, to meet the duty, the authority must make the changes that it considers need to be made to meet the duty (as it does not include 'consider' before 'make the changes'.	COP: 3.11(e)
(d)	The code says that methods referred to (such as surveys) "should help public authorities to assess which of their services are used by which racial groups, or what people think of their services, and whether they are being provided fairly to people from different racial groups". It continues - "This kind of evidence should help public authorities to decide what they might need to do to meet all three parts of the general duty". *comments:* The implication appears to be that, to meet the duty, action needs to be taken subsequent to an assessment, and it appears to be implied that this might involve tackling problems identified in the assessment (such as, for example, a service not being provided fairly to people from different racial groups).	COP: 3.14

(e)	"If the assessment suggests that the policy, or the way the function is carried out, should be modified, the authority should do this to meet the general duty". *comments:* In addition to appearing to state that action may be required subsequent to an assessment; it also appears to set down what it considers to be the circumstances under which action will be required. Specifically, it appears to be saying that the authority would have to act if, but only if, the authority itself considered that the assessment suggested that the policy, or the way the function is carried out, should be modified. However, the phrase 'If the assessment suggests ...' might be intended to mean - if an objective assessment of the results of the assessment (something which would presumably need to be determined by the court if a claim reached court) suggests the same. The problem with this extract from the Code, as with many other apparently important statements in it, is that there remains the suspicion that those producing the Code did not, to any great extent, think through exactly what they intended the statement to mean or what the implications of different understood meanings might be.	COP: 3.17
(f)	"A public authority's arrangements might explain what it would do if its monitoring showed that one of its policies was having an adverse impact on race equality, and that it would prevent the authority from meeting its general duty". *comments:* The implication appears to be either that - (i) the fact that one of its policies is having an adverse impact on race equality could in itself prevent an authority from meeting the general duty or (ii) the fact that its monitoring showed that this was happening, and it did not properly address this apparent impact, could prevent an authority from meeting the general duty.	COP: 4.29

(g)	In *Elias* in the High Court, the judge states (para. 101), referring to the government's compensation scheme, - "The aim of the scheme was to distribute money, and the obligation in relation to this scheme was to eliminate unlawful racial discrimination". *comments:* It should be borne in mind that this point appears to have been secondary to the main point being made; and, therefore, the phrasing may not have been as careful as if it had been the main point. However, some weight still, perhaps, should be given to the statement that the obligation (presumably this means the section 71 obligation) was to eliminate unlawful discrimination. This would appear to suggest something more than an obligation to assess - including because an assessment in itself will not eliminate unlawful discrimination.	Elias HC: 101

(h)	LJ Mummery, in *Elias* in the Court of Appeal, states (para. 17) - "section 71 ... imposed on the Secretary of State a statutory duty to have due regard to the need to eliminate unlawful race discrimination. It was held by the court below that this duty was breached by the Secretary of State, as no regard was had to the potentially racially discriminatory nature of the eligibility criteria. The Secretary of State ... accepted that no detailed review of the Compensation Scheme was undertaken on the coming into effect of section 71 and that there should have been". *comments:* Stating that it was a breach for "no regard" to be "had to the potentially racially discriminatory nature of the eligibility criteria" would appear to, perhaps, suggest that regard means more than determining whether a policy is potentially discriminatory; and that regard also has to be had to a finding that it is potentially discriminatory. If it had meant otherwise, it may more usefully have said, for example, - no regard was had to the need to determine whether the policy was potentially discriminatory. There appears to be possible support for this interpretation in the reference to 'a detailed review'. A 'Detailed review', as opposed to an assessment, tends to be understood (in relation to government departments) to refer to the process of looking at how well a policy is working with a view to proposing changes if these appear to be required. However, it is not clear that the court had implied that a detailed review was required. It also seems possible that what was meant by "no regard was had to the potentially racially discriminatory nature of the eligibility criteria" was that there was no further assessment to better understand whether the criteria were, in deed, potentially discriminatory and/ or to learn more about their potentially discriminatory nature. .	Elias CA: 17

(i)	The extract below from *BAPIO* in the High Court seems to cast some light on how the Home Office at the time may have understood the requirements of the duty. We are not, however, suggesting that it has any wider significance in relation to how the section should be interpreted. Referring to the witness statement for the Immigration and Nationality Directorate, Justice Burnton states (para. 67) - "James Quinault ... In paragraph 10 ... said: ' ... The relevant issues were examined and discussed before the changes were laid before Parliament. It was concluded that the proposed changes to the rules was compliant with the Home Office's general duty to promote good race relations between persons of different racial groups and to avoid unlawful racial discrimination'." The implication appears to, perhaps, be that the proposed changes which came out of the examination were compliant rather than that the examination alone needed to be and was compliant.	BAPIO HC: 67

4.2.3.2 <u>evidence possibly supportive of there not being a duty to do more than assess</u>

	extracts and arguments	**sources**
(a)	The strongest evidence (for there not being a duty to do more than assess or monitor) is, perhaps, that there appears to have been no clear assertion, in the case law, of a duty to do more than assess or monitor. Set against this, in addition to the points made in previous table (4.2.3.1), is the fact that the judgements appear to have focussed on the question of whether an assessment took place; and, therefore, did not need to focus on the question of whether more is needed. Set against this in turn, however, are some explicit, and apparently general, explications in the case law of what the general duty requires (in which the opportunity did not appear to have been taken to refer to more than assessment or consideration).	

(b)	In *Elias* in the Court of Appeal, LJ Mummery states (para. 133), referring to the general duty, that the Secretary of State "has to justify an act of discrimination committed in the carrying out his functions when, in breach of an express duty, he failed to even have due regard to the elimination of that form of unlawful race discrimination". *Comments:* The use of the word 'even' in this context, perhaps, suggests that a limited interpretation has been placed upon 'due regard'. Further, it seems likely, from a reading of the rest of the judgement, that the failure being referred to in this passage is a failure to have assessed, since what the Secretary of State is found not to have done is to conduct an assessment and because the term 'even' would not have been used if it was also referring to a failure to have acted on an assessment. In addition, since the term 'due regard' is used, it seems that it is being implied that an assessment, without further action, would have constituted 'due regard'. However, it may be that the passage was intended to mean that due regard was not had in the assessment, without intending to mean that - for there to have been due regard within the meaning of section 71 - there would also have needed to be due regard in taking action or at least that some action would have been required.	Elias CA: 133

(c)	There appears to be possible support for the conclusions at (b) above in Mummery's comments later in the same judgement. Specifically, he states (para. 175), apparently referring to section 71, - "There is an unappealed ruling that he acted in breach of that duty. It is more difficult for the Secretary of State to justify the proportionality of his choice of the birth link criteria as matter of discretionary judgement when he did not even consider whether or not he was indirectly discriminating on racial grounds... ". *Comments:* The general sense of this seems to be that it assumes that the duty was "to consider whether or not he was indirectly discriminating on racial grounds ..". However, comparably to the points made at (b) above, it may be that he is saying that the Secretary of State failed to even meet part of the requirements of the duty i.e. the assessment part, and did not necessarily mean to imply that this was all that was required.	Elias CA: 175

(d)	LJ Arden, in her judgement in the same case, states (para. 273) - "legal proceedings are not the only way of policing anti-discrimination legislation. Monitoring and self-assessment by public bodies in their decision making can also further the aims of such legislation, and this is the role of section 71 of the 1976 Act ... " *Comments:* This might be taken to mean that the role of section 71 is to help bring about monitoring and self-assessment in decision making, as opposed to it also being to bring about consequent action. She does, of course, refer to the role of the section rather the requirement it places on those subject to it. However, in general, one would expect, in relation to particular persons subject to a provision, that the role of the provision will be wider than the requirement on the person. Therefore, if she does not include consequent action in the role, it seems possible that she did not understand it to be a requirement. However, it might be more 'correct' to read it as saying that the role is to further the aims of anti-discrimination legislation, through the mechanism of monitoring and self-assessment, in which case the role is wider and could be taken to include action in addition to assessment. In deed, it is not clear how assessment without action could do much to further the aims of anti-discrimination legislation.	Elias CA: 273

(e)	In the paragraph (274) after the one quoted above, LJ Arden, in *Elias* in the Court of Appeal, states - “It is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation. ” . *Comments:* The first sentence might reasonably be understood to mean that advance consideration is the only requirement. It could be argued, however, that she is stating that the duty requires advance consideration, but is not necessarily stating that this is all that it requires. Set against this is the impression, in the rest of the paragraph, that she is treating the requirement as synonymous with the provision as a whole (and in particular when she uses the word ‘this‘ in ‘this provision must be seen as...’.).	Elias CA: 274

4.2.4 the relationship between the specific duties and the general duty

The specific duties should, according to section 71(2), be such that the Secretary of State considers them appropriate for the purpose of ensuring the better performance of the general duty. There appears, however, to be some uncertainty as to whether, and, if so, in what ways and to what extent, meeting the specific duties is a requirement of the general duty (for those persons subject to the specific duties).

4.2.4.1 <u>the Code of Practice</u>

Under the subheading ‘relationship between the general and the specific duties’, the Code of Practice (CRE, 2002: 4.1) states "The specific duties are a means to an end - in other words, steps, methods or arrangements - rather than an end in themselves. Meeting the general duty is the main objective. This means that each time a public authority tackles a specific duty, it must consider whether it is meeting the three parts of the general duty. The authority needs to regularly ask itself this key question:

What action should we take to:
a. eliminate unlawful race discrimination; b. promote equality of opportunity; c. promote good race relations".

This suggests that the Code considers there to be some potential relationship between meeting (or not meeting) the specific duties and meeting (or not meeting) the general duty. Beyond this, however, the passage does not seem to greatly clarify matters (including because it appears able to support quite a number of contradictory meanings).

In the light of the understanding that the general duty requires some sort of race equality impact assessment of proposed policies, the extract might reasonably be taken to mean that the proposals for tackling each specific duty should be subject to such an assessment. There is also some indication in the passage, however, that the Code may have had something else or additional in mind (including on account of stating a need to ask 'what action should' be taken). The passage might, for example, be intended to mean that an authority needs to meet the duty in the way in which it tackles a specific duty (in addition to conducting an assessment of how it intends to do so). If this understanding were correct, it would seem to mean that a failure to properly tackle (including not tackling at all) a specific duty could in itself be a breach of the general duty. It could, however, be (despite the use of the term 'must' in the passage) that the Code is simply attempting to emphasise that the question of whether an authority is meeting the general duty (and how the specific duty can assist it in doing so) is more important than the question of whether it is meeting a specific duty (notwithstanding that it would be rather surprising for the Code to downplay the importance of meeting a statutory obligation).

4.2.4.2 <u>the case law</u>
The case law judgments do not give a great deal of attention to the question of the specific duties; and the comments made do not appear to be necessarily consistent with each other.

In *Elias* in the High Court, the judgment states (para. 102), referring to the prisoner of war compensation scheme - "it was alleged that the Secretary of State had failed to include the scheme in the government's race equality scheme. That would seem to be

right, but it is not a matter which this Claimant can do anything about. This is because the obligations imposed by the Secretary of State pursuant to his power to make an order under section 71(2) are not capable of enforcement save by the Commission itself ... Accordingly, Mrs Elias cannot complain of any breach of the order itself. It follows that the failure to include this scheme or otherwise to make reference to the scheme in the Race Equality Scheme is not a matter which can be the subject of any relief in these proceedings. That does not however, preclude the more general challenge on the grounds that the Secretary of State did not lawfully carry out his obligations under section 71. I am minded to grant a declaration to that effect, but I will hear counsel on the appropriate relief".

If failing to meet a specific duty is 'not a matter which this Claimant can do anything about', because the specific duties are 'not capable of enforcement save by the commission ...', this would seem to suggest that a failure to meet a specific duty cannot constitute (and perhaps cannot even significantly contribute to) a failure to meet a general duty. This is because, if it could so constitute or contribute, it would be something that this claimant could do something about, and could, indeed, enforce in court through a claim that there had been a breach of section 71. It would, therefore, be a matter which could be the subject of relief in the proceedings - whether it be, for example, declaratory relief or a quashing order.

There is also a reference to race equality schemes in LJ Arden's judgment in *Elias* the Court of Appeal. She states (para. 273), with reference *Elias* in the High Court, - "The judge set out the requirements for the content of a race equality scheme in para 92 ... The judge went on to make a declaration that in the present case the Secretary of State had not complied with his obligations under section 71(1) of the Race Relations Act in formulating and maintaining the scheme." Reading para, 273 on its own might well strongly suggest that she is saying that formulating and maintaining the race equality scheme is a requirement under section 71(1) i.e. is required for compliance with the general duty. However, reading it with LJ Mummery's comments at paragraph 52 in the same Court of Appeal judgment (to which LJ Arden said, at para. 262, she desired "to add a number of supplementary points"), would seem to suggest that it is more likely that she was referring to the compensation scheme and not to the race equality scheme.

4.2.4.3 what might be required

There is little reason to think that that fulfilling all the specific duties will be necessary for the person to have met the general duty (assuming, for the moment, that a failure to meet the specific duties does not in and of itself constitute a failure to comply with the general duty). For example, the RES may not have set out the arrangements for consulting (a requirement of article 2(2)(b)(i) of the SDO), but the authority concerned might still be consulting, and, indeed, might have set out its specific arrangements elsewhere or might be relying upon its general arrangements for consulting (and these might be perfectly suitable for the purpose of consulting on the likely impact on race equality of its proposals). Therefore, without meeting this specific duty, it could meet what, according to the case law, is the requirement of the general duty - giving proper advance consideration (including through, where necessary, proper consultation) to race equality before making a policy decision. In addition, the fact that not all the listed 'public authorities' (i.e. those subject to the general duty) are subject to the specific duties would appear to suggest that it is envisaged that the general duty can be met without meeting all the specific duties at article 2 (unless of course this is only assumed to be true for those which are not subject to the specific duties).

We wonder, however, whether a failure (or at least a gross or substantial failure) to meet the specific duties may be strongly suggestive of a failure to meet the general duty; may contribute towards such a failure; or may, indeed, in itself, constitute such a failure.

To begin with, it seems likely that the requirement, apparent in the case law, to assess policies of relevance to race equality would apply to the race equality scheme. It is, according to the SDO, 'a scheme showing how it intends to fulfill its duties under section 71(1)'. It is, therefore, a policy decision and is of the kind (on account of its relevance to race equality) which - according to the Code and the case law - requires a proper assessment in relation to the matters at section 71(1) (a) and (b). If, however, there is no RES, it would appear difficult for the authority to conduct a proper assessment of the plans which should be included in the RES. For example, it is not clear how it could properly consult on its overall approach to the general duty if it does not have that approach set out in one document; and it would be difficult for consultees to determine and judge those arrangements, such as for monitoring policies, which should be set out in the RES.

Second, it might be argued that the requirement is to have 'due regard' in giving advance consideration (*Elias* in the High Court, for example, indicates that 'cursory consideration' will not in some cases be sufficient), and that 'due regard' will not be the same for all organisations. For example, 'due regard' may require less information gathering for an organisation with less resources. An important element of 'due regard' in giving advance consideration could also be whether the organisation is meeting those of its legal requirements which are designed to assist it in its advance consideration i.e. whether it is meeting its specific duties. Therefore, an organisation which should have an RES, but doesn't have one, might not be having due regard in giving advance consideration.

4.3 THE IMPACT OF OTHER FORCES AND APPROACHES

4.3.1 other forces

It would appear difficult to distinguish the impact of particular pieces of legislation from the impact of attitude shifts and other socio-economic-cultural forces (or how each is effecting the other). If, however, it appears that there has been a low level of compliance with the duty, and if there is no strong evidence that the duty is making a substantial difference to practice even when not strictly complied with, it might be wondered whether the effects of the duty will have been quite minor when set against such forces (and, indeed, may have been largely undermined by them). These might be said to include, for example, terrorism and how the 'war on terror' is being 'fought' in Britain; migration from new EU members and its presentation; and 'the debate' on multiculturalism. We have not attempted to consider these forces here. We wonder, however, whether the duty had the potential to have some impact upon shaping some of them. For example, would a race equality impact assessment (with public consultation) have led elements at the CRE to question the wisdom of acting in such a way as to give the appearance of switching from being a champion of multiculturalism; and would a different policy at the CRE (including with different speeches from the chairman) have made a difference to how the media and the political parties (from the governing party to the British National Party) framed the issue?

4.3.2 other approaches

Account also needs to be taken of the impact that approaches other than the general

duty have had or could have had (and ideally of what impact the general duty had on these other approaches)? We will focus on the CRE's Race Equality Standard (CRE, 1995) and the Equality Standard for Local Government (Employer's Organisation for Local Government, 2001) which replaced it - since these appear to have been closest in objectives and format to the section 71 duty (albeit without being statutory). There are, however, other approaches (which we haven't been able to outline here) which also appear to be of relevance - such as, for example, local and central government performance indicators; pressure from campaign groups and research reports; CRE good practice guides and Formal Investigations of public bodies; and Audit Commission inspections.

4.3.2.1 CRE's Standard for Racial Equality

This was designed to enable local authorities to measure their progress, towards racial equality, in terms of five hierarchical levels; and to facilitate compliance with legislation. There were problems, however, with rates of adoption and levels reached. For instance, by 1999/2000, one half of English councils, and just under two thirds of Welsh councils, had not adopted the standard (London Borough of Hammersmith and Fulham, 2001, reported in Audit Commission, 2002: para. 28); and, five years after its introduction, only around a fifth of English councils and one-eight of Welsh councils had reached level 2 or higher (ibid: para 30). It does seem, however (with there being possible lessons for implementation of the SDO 2001 specific duties), that the Audit Commission's introduction of a Performance Indicator on the adoption of the Standard (in 1998/9), and on the level reached (in 2000/01), is likely to have contributed to improving performance on both measures.

Other identified problems included the considerable scope for local interpretation of the Standard (Clarke and Speeden, 2000), with different councils, and departments within councils, having different understandings as to what was required at each level. The reliance on self-assessment, therefore, made it difficult to make meaningful comparisons between authorities. Clarke and Speeden also found that "data on the ethnic background of applicants and interviewees are collected but not used effectively in monitoring recruitment policy and practice" (ibid.: p.25); and that "it was evident from the survey that adoption of the Standard and publication of a racial equality statement do not necessarily lead to action" (ibid.: p.30).

4.3.2.2 the Equality Standard for Local Government

The CRE's Race Equality Standard was replaced by a generic Equality Standard for Local Government (Employers' Organisation for Local Government, 2001), which, in the case of the Welsh version, has, according to the summary document (Employer's Organisation for Local Government, 2002a), been "developed as a tool to enable authorities to mainstream race, the welsh language and disability into council policies and practice at all levels".

The four levels, that authorities can pass through, are: (1) commitment to a comprehensive equality policy; (2) assessment and consultation; (3) setting equality objectives and targets; (4) information systems and monitoring against targets; and (5) achieving and reviewing outcomes. It can be seen that there are some similarities with the specific duties; and, in particular, references to assessment, consultation, and monitoring. The Standard, however, appears to require considerably more in order to be eligible to move up the levels. In particular, the explicit requirements are to do (such as consult) rather than, as is mainly the case with the specific duties, state the arrangements for doing; and, in addition, the Standard, unlike the specific duties, includes a clear requirement to set objectives and achieve outcomes. The Standard document states, for example, under 'Equality Standard at a Glance', that "To achieve Level 5 of the Standard an authority will have to demonstrate that it has made considerable progress in achieving equal employment and service provision with regard to race, language, gender and disability" (Employers' Organisation for Local Government, 2002b: 3).

It could be argued, therefore, that for the specific duties to have been an improvement on the Standard (assuming the admittedly hypothetical situation where just one or the other was in place), greater compliance with the specific duties (perhaps on account of there being an enforcement mechanism), and going beyond that which was required, would need to have outweighed any effect of the specific duties having required less. In addition, however, it needs to be borne in mind that the Standard also covered disability equality (ahead of the 2005 Disability Equality Duty), and was designed to be adaptable to include additional equality strands, such as gender and sexuality. Consideration, therefore, would need to be given to whether the Race Equality Duty diverted effort from

the Standard, and whether, in turn, this had a negative impact upon disability equality and the other equality strands.

Unfortunately, we have not looked at the literature, such that there is, on the effects of the Equality Standard. However, we have, for another report (Harwood, 2005: para. 3.3.2.2 b), looked at the implementation of the Standard in the case of the London Borough of Hammersmith and Fulham (albeit after the Race Equality Duty came into force). The Council had assessed itself as being at level 2 of the Standard (Horgan, 2005); and appeared set to very shortly assess itself as being at Level 3 (London Borough Hammersmith and Fulham, 2004a). It was unable, however, to provide, in response to a Freedom of Information Act request, the evidence that the Standard stipulates as being required to demonstrate achievement of Level 2. Further, the information that was provided indicated that the Council had decided to not carry out many of the actions that it is required to have carried out before assessing itself as at Level 2, and that it may have substantially misread or misunderstood what was required.

Evidence required to demonstrate achievement of Level 2 includes (Employer's Organisation for Local Government, 'EOLG', 2002b: para 2.1.1) a copy of the Corporate Equality Plan; and that "information is available showing outcomes of consultation process ... ". The Council, however, did not appear to have produced a Corporate Equality Plan. It had produced a document entitled 'Evidence of the Comprehensive Equality Plan' (London Borough of Hammersmith and Fulham, 2004b). The Standard, however, makes no reference to a 'Comprehensive Equality Plan'. It does require, at Level 1, 'a comprehensive equality policy', and, at Level 2, as noted above, a 'Corporate Equality Plan'. It seems that the council is likely to have been thinking more in terms of the Level 1 Corporate Equality Plan. However, it also appeared to be suggesting (London Borough of Hammersmith and Fulham, 2004b: para. 1) that it hadn't, in fact, produced a separate 'Corporate Equality Plan', but that, instead, documents that it has produced in the past, such as its 'Community Strategy', and which it would be 'sign-posting', should, together, be taken to satisfactorily constitute its 'Comprehensive Equality Plan' (even though, as far as we could tell, these policies and documents did not contain the information which the Standard specifies should be included in the Comprehensive Equality Policy or Corporate Equality Plan).

If Hammersmith and Fulham's performance is in any way typical, and if matters have not improved substantially, it seems that the Standard may not have been sufficient or meeting its potential. However, it should also be borne in mind that it included audit mechanisms which, if developed or applied more rigorously, could have improved the extent to which Hammersmith was complying with the requirements of the Standard. The Standard states (Employers Organisation for Local Government, 2002a: 47), for example, that, when the basic assessment procedures "are insufficient to generate change", "there may be provision for an independent audit or peer review process developed to assess the local authority and make recommendations for compliance with the Standard". It should also be noted that the Standard was aimed at, and provided a mechanism to facilitate, ongoing improvement, and, therefore, its effect on a council may be expected to occur over a period of time (including in some cases where there has been an apparently shaky start).

4.4 PROBLEMS WITH THE WORDING AND INTERPRETATION OF SECTION 71

4.4.1 bodies not subject (or not subject in respect of all their functions) to the general duty

4.4.1.1 not all public bodies subject or not subject when first established

Whereas the general duty at section 49A of the Disability Discrimination Act 1995 applies (with important exceptions) to 'any person certain of whose functions are functions of a public nature', the section 71 RRA duty only applies to public authorities specified, or of a description falling within, Schedule 1A of the RRA. This - despite the list at 1A being long and including bodies one might not normally think of as public authorities (such as, for example, listed libraries, museums and art galleries) - would appear to be a possible weakness.

First, the RRA Schedule 1A list does not appear to include all the public bodies which might be included under the definition (shown above) in the DDA (which is based upon the definition in the Human Rights Act). In relation to what became the definition in the DDA, the report of the Joint Committee on the Draft Disability Discrimination Act states (2004, para. 209) that "The broad approach to defining a public authority taken by clause 8 was welcomed by the DRC for sending the message that 'disability equality is the business of all public authorities, not just ones on a particular list"'. It should be noted, however, that there appears to have been problems with the use of a definition as

opposed to a closed list. In particular, the Joint Committee on the Draft DDA state (ibid: para. 210) that "The Joint Committee on Human Rights highlighted that the definition of a public authority in the HRA ... has been applied by the courts in an inconsistent and restrictive manner. This has left those providing important public services, from the state and private sectors, uncertain about their responsibilities." Indeed, it reports (ibid) that "Jean Corston MP, Chair of the (Human Rights) Committee, suggested that it was likely that the application of the HRA case law would confine the duty to promote equality of opportunity to 'obvious' public authorities and to some private organisations performing public functions which had close organisational links to a government body".

Second, there would appear to be the potential for a significant delay between a public body being established and it being included in the Schedule (notwithstanding that descriptions in the Schedule, and forethought, should have reduced the realisation of this potential).

4.4.1.2 <u>not applicable to non-public bodies carrying out a function of a public nature</u>
Unlike the duty at section 49A of the DDA, the section 71 RRA duty does not apply to non-public bodies in relation to the carrying out of functions of a public nature (i.e. when in the shoes of government). This is despite the fact that many private and voluntary sector organisations carry out important functions of a public nature, and the number appears set to increase (such as, for example, with the greater use of private hospitals for NHS patients). In addition, the arguments for promoting race equality in relation to the public functions of non-public bodies would appear to be as strong as those for promoting it in relation to the comparable functions of public authorities (except, perhaps, in relation to the argument that public authorities should be seen to be setting a good example); and there appears little reason to assume that suffering discrimination from a contracted out service is less detrimental than suffering it from a non-contracted out one.

The Code of Practice explains how it views the situation in relation to "Private or voluntary organisations carrying out a public authority's functions". It states (CRE, 2002: para. 2.9) - "When a public authority has a contract or other agreement with a private company or voluntary organisation to carry out any of its functions..., and the duty to promote race equality applies to those functions, the public authority remains

responsible for meeting the general duty and any specific duties that apply to those functions". It also offers some possible approaches - such as incorporating the duties "among the performance requirements for delivery of the service" (ibid). It adds, however, that "Whatever action the authority takes, it must be consistent with the policy and legal framework for public procurement" (ibid). It also provides guidance on what might be done within this framework, stating (ibid: para. 2.10) - "public authorities may promote race equality by encouraging contractors to draw up policies that will help them (contractors) to avoid unlawful discrimination, and promote equality of opportunity. Such encouragement should only be within a voluntary framework, once contracts have been awarded, rather than by making specific criteria or conditions part of the selection process".

Arguably, this is an overly restrictive interpretation; does not sufficiently clarify the legal position; and may well discourage lawful but imaginative action. Even with revised guidance, however, the problem would remain that the general duty is likely to generate far less pressure on a public authority to ensure good practice on the part of its contractor than in its own organisation. In particular, it will not be required to do an REIA of its contractor's policies or to monitor or review them; and may well not be able to require that the contractor does so. In relation to this, it is worth noting that, according to a report in the Guardian (Campbell, 2006), Committed2Equality found that "Of the 300,000 organisations which supply local authorities, 92% have no equality practices"; and that "88% of local authorities are unaware that most of their suppliers do not have equality practices in place".

4.4.1.2 (a) *HMP and YOI Parc*

Some of the potential problems arising from private contractors not being subject to the duties seem apparent in the case of Parc private prison. The report of HM Inspector of Prisons states (HMIP, 2006: para. 3.31) that "Parc was one of the prisons criticised by the Commission for Racial Equality in 2003 in a formal investigation ..., and yet it had not drawn up an action plan to address the problems identified in that report and provide a clear focus for improvement and promotion of race relations". Arguably, if it had been a public sector prison, the Race Equality Scheme that it would have been required to draw up would have needed to constitute such a plan (although, according to the HMIP report at para. 3.35, there was a more general race relations policy included in the Prison's

‘comprehensive diversity strategy document‘). It also seems that other elements of the race equality duties may have been useful if followed. For example, the report notes (ibid: para. 3.32) that “There was no specific consultation with prisoners on race equality and diversity issues”. We have argued above (table 4.2.1.2) that the general duty may require consultation in certain circumstances (and wonder whether this might be one such circumstance). However, even if the general duty does not require consultation, the SDO article 2(2)(b)(i) specific duties requirement, to state the arrangements for consultation, may well have encouraged the prison to put more appropriate arrangements in place.

It is also, perhaps, significant that the HMIP report refers, as noted above, to the CRE’s formal investigation, but it does not suggest, although it does not suggest that this did not happen, that Her Majesty’s Prison Service or the Home Office had been particularly or at all involved with Parc in tackling the issues identified in the CRE’s report of its investigation. If, indeed, the Prison service and Home Office were not involved to any great extent, this would appear to cast some possible doubt upon the assumption (apparent to some extent in the Code of Practice at paras. 2.9 to 2.10) that the contracting out public authority will - in the process of meeting its own general and specific duties - ensure the promotion of race equality in relation to its contracted out functions.

4.4.2 not clear that section 71 requires authorities to act

4.4.2.1 unclear what is required

Public authorities could be forgiven for being unclear as to what they are required to do to have had 'due regard' to the matters at section 71(1)(a) and (b). The case law does not appear to provide much support to the understanding that section 71 requires more than an assessment of relevant policies (taken to, perhaps, include a requirement to monitor and review and, in some circumstances, to consult on). However, as we have set out in table 4.2.3.1 (a) to (f), the Code of Practice appears to repeatedly, and relatively unambiguously, suggest that more than an assessment is required (not just that more would be good practice). The Code states (CRE, 2002, para. 3.17), for example, that “If the assessment suggests that the policy, or the way the function is carried out, should be modified, the authority should do this to meet the general duty”.

Such uncertainty would not appear to be conducive to encouraging an effective response on the part of public authorities to the general duty. For example, we wonder whether it might have led authorities to focus on meeting the simpler requirements of the specific duties, without sufficient account being taken of the fact that the specific duties are there to ensure the better performance of the general duty; and whether it has inhibited the putting in place in each authority of a corporate procedure for meeting the general duty (something which the RESs we have seen do not appear to constitute). The uncertainty may also have discouraged enforcement, and partly explain why the CRE has so far not challenged by means of judicial review any alleged failure to meet the general duty (although it did intervene in R (Elias) v Secretary of State for Defence (2005) EWHC 1435); and have discouraged the incorporation of general duty performance indicators into audit and inspection regimes, including, of course, because the Audit Commission will have been unclear about what the indicators would need to indicate.

4.4.2.2 <u>more than assessment may be required</u>

The CRE appear, perhaps understandably in the light of the judgments in *Elias* in the High Court and Court of Appeal, to have come to increasingly regard and present the general duty as being primarily about conducting a race equality impact assessment. While we have not come across a clear CRE statement that nothing else is required, the recent CRE documents we've looked at do not appear to suggest that anything else is required. For example, a press release (CRE, 2006), states "Whitehall departments are perilously close to being subjected to enforcement action for failure to deliver on their legal duties under the Race Relations Amendment Act (2000) .... "; and continues, a couple of paragraphs down, "By law, central government departments are required to assess new policies and legislation for their impact on race equality".

This conceptualisation, albeit perhaps a matter of emphasis, appears likely to influence how the CRE caries out its enforcement and promotion activities, and also what public authorities consider to be required. We would argue, however, that it is not clear that assessment is all that is required under section 71, including for the following reasons:

- Some at least in debate in Parliament appear to have had more in mind; and the government contributions we have looked at did not appear to necessarily indicate

that the duty requirement would only be to assess.

- An attempt to look at, what is sometimes referred to as, the pure spring of statute arguably leaves the impression that more is required.
- As referred to above (supra 4.4.2.1), the Code of Practice states that action subsequent to assessment will sometimes be necessary to meet the duty.
- Despite there being little support, in the case law, for a requirement to act subsequent to assessment, it should be noted that the matter does not appear to have been specifically or at least not strongly tested - since the complaints in the High Court and Court of Appeal related to failures to assess, and the meaning of section 71 (in this or any other respect) has not been tested in the Lords. Further, the case law arguably provides some support for a requirement to act.

4.4.2.2 (a) the debate on the Bill

Whether the Minister, Lord Bassam, had more than assessment in mind seems unclear. He refers (Lords Hansard, 14 December, 1999: col. 130) to "obliging public authorities to tackle unjustifiable discriminatory practices through the promotion of race equality", which appears to suggest that there will be a requirement to tackle, with the word tackle appearing to mean more than assess (and in particular to include action directed at producing change). He continues, however, - "That means, for example, consulting those affected by policy proposals and monitoring the differential impact of policy on different groups so that unexpected, unjustifiable outcomes can be remedied". This might be understood to suggest that the duty will be to consult and monitor (and presumably to otherwise assess); and that the information from this will enable adverse impacts to be remedied (rather than suggesting that there will be a requirement to remedy such impacts).

Lord Lester, however, refers (ibid: col. 143) to "a clear and legally enforceable positive duty upon public authorities to secure that their functions are carried out without racial discrimination". This would appear to mean more than a duty to determine, through assessment, whether their functions (and policies within these) are causing racial discrimination, but to also mean that there is a duty to take action to ensure that they don't. It should be noted, however, that there would appear to have already been a duty (albeit in some respects quite limited) to ensure that functions are carried out without unlawful racial discrimination or, indeed, in any other way which is unlawful (see, for

example, para. 4.4.4.1 below on the significance of an employer having taken reasonable steps to avoid an act of discrimination on the part of its employees). Lord Shepperd takes a similar line to Lord Lester, stating (Lords Hansard, 14 December, 1999: col. 155) “I hope that amendments will be brought forward that will impose a positive legal duty on public authorities to oblige them to act to prevent discrimination”. It would be a mistake to read too much into the exact wording of what is said in the 'heat' of debate. That said, however, an obligation to ‘prevent discrimination’ would, unlike the concepts apparent in the quote from Lord Bassam, appear to encompass a requirement to prevent (or at least to attempt to reduce) discrimination on the part of others, including those outside an organisation (which is arguably closer to an everyday understanding of 'promote racial equality').

4.4.2.2 (b) section 71 in isolation

A possible problem with section 71, we would argue, is that (if taken at face value) it appears to potentially require a great deal (such as doing something about race relations), but does so without giving much idea of what this would mean in practice. Consequently, there may have been a temptation to interpret its broad sweep as a statement of mission, and to then decide what it should be taken to require on the pragmatic basis of what it would be realistic to expect public authorities to do. It is remarkable, for example, the degree to which the court judgments, in deciding what section 71 requires, fail to engage with the wording in the statute. For example, in *Elias* in the Court of Appeal, LJ Arden sets out in paragraph 273 what the ‘role’ of section 71 is, and in paragraph 274 what ‘the clear purpose’ of section 71 is, but she does not explain how the wording of the section led her to these conclusions (conclusions which are arguably too precise and different from the wording in the section to be regarded as obvious).

We would argue, therefore, that there is value in initially attempting to read the statute in isolation i.e. to read it, as far as possible, without introducing the interpretations provided or suggested in the case law and Code of Practice; and to do so with the aim of gaining an everyday meaning of the wording (except in so far as the statute suggests a meaning other than an everyday one). Such a reading, we would argue, does not appear to provide much support for the general duty being limited to a requirement to assess (although it is not at all clear what it does require).

First, the wording ‘in carrying out its functions’ (section 71(1)) would appear to be deliberately wide. If it had been intended to only mean ‘in assessing how it carries out its functions‘, it would presumably, to avoid a predictable and important misunderstanding, have said so. As it is, carrying out its functions would appear to encompass everything that an authority does within its functions - which taken together would appear to mean everything which it does. This would include producing strategies, policies, operating plans, and individual staff plans; assessing some of them; attempting to implement them; reviewing and revising them; as well as what happens day-to-day and which sometimes bears little relation to what has been planned.

Second, the term ‘need’ (section 71)(1)) in this context appears to reinforce the impression that something more than assessment is required (and, again, it seems likely that those drafting the section would have been aware of this). If, for example, ‘need’ is taken to refer to the need for the public authority to eliminate unlawful racial discrimination (and to do the other specified things), ‘due regard’ would appear to require that the public authority makes some attempt to achieve the objectives which have been assigned or ascribed to it; and there appears to be no indication that such effort should start and finish with an assessment. If assessing was sufficient, it would seem to be possible for an authority which actively worked to increase unlawful discrimination (or at least took no steps aimed at eliminating it) to still have had due regard to the race equality general duty (assuming, of course, that it had conducted an assessment of the unhelpful things it intended to do). Further, if it was intended to only mean assessment, the question again arises as to why the opportunity was not taken to state this. For example, it might have referred to ‘due regard to the need assess its functions and policies for their impact upon unlawful racial discrimination‘; or more simply have stated that ‘public authorities shall assess their policies and functions for their impact ....”.

Arguably, instead of the definition of ‘need’ we have given above, it could be taken to refer to an assumed shared understanding (a kind of social norm) that unlawful racial discrimination needs to be eliminated in our society. We would argue, however, that this would lead to conclusions comparable to those we reached in the previous paragraph. Section 71 cannot be simply stating a shared understanding, with the aim of making public authorities and others aware of it, since the section's clear purpose is to set out

what listed public authorities are required to do. Even though it may not be directly referring to 'the need' for the public authority to eliminate unlawful racial discrimination (but, instead, to the general need for unlawful racial discrimination to be eliminated), it does refer to the need (i.e. requirement) for them to have due regard to this shared aim. Further, since 'due regard' to a shared aim would not appear to be able to mean working against it, or doing nothing about it, it would appear to mean furthering it, which is effectively the same as saying that 'the need' referred to is the need for the public authority to eliminate unlawful racial discrimination i.e. the definition suggested in the previous paragraph.

The conclusion (arguably apparent in the case law) that assessment is all that is required may partly have arisen from some attention being given to both main categories of meaning of 'regard' i.e. to gaze upon and to take into account. To some extent, assessment falls between the two - an assessment would appear to mean more than to gaze upon but less than to take into account. Indeed, it would appear to also be between them in a more causal sense. Someone might gaze upon, assess that gazed upon, and then take or not take the conclusions of that assessment into account when making a decision. We would argue that it cannot mean simply to gaze upon, since there would appear little point in statute requiring that a person do something so non-productive. Further, the term ‘due’ would not appear to make much sense in relation to ‘gaze upon’, since it would only specify how much gazing should take place, and it is not clear under what circumstances it might be said that there ought to be (i.e. it is due) a great deal of non-productive gazing as opposed to a little non-productive gazing. This would leave us with the alternative meaning of ‘regard’ i.e. to take into account, which, as discussed below, would appear, including when combined with ’due’, to fit better with what appears to be section 71’s purpose and would also appear to require something more than assessment.

4.4.2.2 (c) the case law

The strongest support for the contention that the case law has determined that there is not a duty to do more than assess is, perhaps, that it does not appear to have asserted that there is. It might be countered, however, that the judgements appear to have focussed on the question of whether an assessment took place; and, therefore, did not need to focus on the question of whether more was required. Indeed, in *Elias* in the High

Court, the CRE appears, from the account in the judgment, to itself have, perhaps, argued for this limited interpretation (although it may also have simply felt no need to address possible additional requirements of the section). The judgement states (para. 93) - "The Claimant and the Commission (for Racial Equality) contend that the Secretary of State was in breach of his obligations under section 71. They submit that section 71 requires a proper and rational consideration to be given as to whether in carrying out his functions there may be issues relating to unlawful racial discrimination."

It might, in turn, be countered that there appear to be some apparently general explications in the case law of what the general duty requires; and in which the opportunity did not appear to have been taken to refer to more than assessment or consideration. Even these (which are set out in table 4.2.3.2 above), however, appear possibly amenable (albeit some might argue that it would be a stretch) to interpretations which do not rule out the need for more than assessment. For example, LJ Arden in *Elias* in the Court of appeal states (para. 274) - “It is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfillment of the aims of anti-discrimination legislation. ”. The first sentence might reasonably be understood to mean that advance consideration is the only requirement. It could be argued, however, that she is stating that the duty requires advance consideration, but is not necessarily stating that this is all that it requires. Set against this wider interpretation is, perhaps, the possible impression, in the rest of the paragraph, that she is treating the requirement to give advance consideration as synonymous with the provision as a whole (and in particular when she uses the word ‘this‘ in ‘this provision must be seen as...’.).

In addition to the arguable ambiguity of the statements which might appear to suggest that assessment is the sole requirement, there are also statements in the case law which might be said to lend positive support to there being a duty to do more than assess (set out in table 4.2.3.1 above). In *Elias* in the High Court, for example, the judge states (para. 101), referring to the government’s compensation scheme, - “The aim of the scheme was to distribute money, and the obligation in relation to this scheme was to eliminate unlawful racial discrimination”. Stating that the obligation (presumably this means the

section 71 obligation) was to eliminate unlawful discrimination would appear to suggest something more than an obligation to assess - including because an assessment in itself will not eliminate unlawful discrimination.

4.4.2.2 <u>any requirement to act is likely to be quite limited</u>

We would argue, including for the reasons set out above (4.4.2.2), that the duty may well require more than an impact assessment of policies. We also suspect, however, that all that might be required in relation to taking action may be to have due regard to the matters at section 71(1) when deciding what if any action to take. In this context, due regard would require an assessment (when section 71 is relevant) but would also presumably require that, in deciding whether to act, account be taken of the findings of any assessment. However, having done so, and having taken account of the needs set out at sections 71(1)(a) and (b) and of its other organisational objectives (which might include, for example, the need to limit expenditure), it would able to decide whether or not to act.

The question is whether, assuming an assessment has been conducted, there could be a situation in which it could be successfully argued that a failure to act (or the nature of any action taken) was a breach of the section 71 duty. We suspect that doing so would generally require a focus on how the decision was made. However, in more extreme (or obvious) cases, the nature of the final decision may itself be highly suggestive and put the burden on the authority to show that it had had ‘due regard‘.

We wonder whether possible circumstances, in which a breach might be found to have resulted from a matter other than a failure to conduct a proper assessment, could include, for example:

- a proper assessment had been undertaken but the decision not to act had not taken account of all the relevant findings of the assessment (perhaps because those undertaking the assessment had failed to provide them);
- the decision failed to take account of relevant policies of the authority (for example, a council decision not to support a multicultural project might have been made without knowing that the council had adopted a policy to promote good race relations through supporting multicultural projects).
- the negative impact of a decision on race equality was likely to be so great, and the

benefits likely to be so minimal, it would be hard to reach any conclusion other than that due regard had not been had.

4.4.3 weaknesses in the assessment requirements

4.4.3.1 initial consideration may be too cursory

4.4.3.1 (a) *what the case law appears to require*

The judge in *Elias* in the High Court states (para. 96) - "No doubt in some cases it will be plain even after a cursory consideration that section 71 is not engaged, or at least not relevant. There is no need to enter into time consuming and potentially expensive consultation exercises or monitoring when discrimination issues are plainly not in point". This might mean that if it is plain after a cursory consideration that section 71 is not relevant there is no need to consult or monitor (without the judgement having committed itself to whether some sort of further assessment would be required). It appears more likely, however, that it means that cursory consideration, of whether section 71 is relevant, will be sufficient (i.e. no further consideration will be required) if such consideration makes it plain that section 71 is not engaged.

It might be wondered, however, what would be a proper (including sufficient) basis for being able to determine that it was plain that section 71 was not relevant. In particular, is it sufficient that the person concerned considered it to be plain - regardless of who the person was, how the assessment was conducted, and how valid the assessment subsequently appeared (including, for example, whether in the court's opinion it should have been plain that section 71 was relevant)? It might also be wondered whether cursory consideration, in the sense of hasty and brief, will ever or often be sufficient to make it plain in the sense that the case law appears to require it to be plain or in the sense that might be considered compatible with furthering the apparent aims of section 71.

In saying that 'it will be plain even after a cursory consideration', rather than it will be plain to the person concerned, it may have meant that it will have been objectively plain (taken to mean, perhaps, that it will have been plain to a reasonable person making a rational assessment), and, therefore, rule out an irrational or perverse conclusion that it was plain (such as, for example, a determination after a cursory consideration that an authority's proposed race equality policy is not relevant to section 71). The omission of

reference to the person concerned, however, might not have been intended to be of any consequence. More relevant, perhaps, is what appears to, perhaps, be the conclusion, in the next paragraph of the judgment in *Elias* in the High Court (paragraph 97), that there should have been a 'careful attempt to assess whether the scheme raised issues relating to racial equality'. However, as can be seen, the meaning of the paragraph is far from clear. It states - "It is nowhere suggested that there was any careful attempt to assess whether the scheme raised issues relating to racial equality, although the possibility was raised; nor was there any attempt to assess the extent of any adverse impact, nor other possible ways of eliminating or minimising such impact. I accept that even after considering these matters the minister may have adopted precisely the same scheme, but he would have done so after having had due regard to the obligations under the section'. This may have been intended to mean - in making a 'careful attempt' the minister would have had due regard in that he would have done more than was required to have due regard. On balance, however, it appears more likely that the intended meaning was - to have had due regard, there should have been "a careful attempt" to assess whether the scheme was relevant to section 71.

If this understanding is correct, it seems to be potentially at odds with the apparent assertion in the previous paragraph of the judgment (para. 96) that it will sometimes be sufficient to give the matter cursory consideration. A possible answer may be that the judgment is stating that cursory consideration will be sufficient when this makes it plain that section 71 is not relevant, but that in this particular case - in which, for example, it would have been obvious that it would affect different 'racial' groups differently - it would not have been plain that section 71 was not relevant, and therefore, further (more careful) consideration would have been required to determine whether it was relevant. The possible contradiction may also, or instead, reflect a belief on the part of the judge that the Secretary of State's case had not presented an entirely accurate picture (and a reluctance, on the part of the judge, to state this in unambiguous terms). In particular, the judgment appears to suggest that it was inconceivable that - whether after a cursory or careful consideration - the Secretary of State could have genuinely concluded that section 71 was not relevant.

Paragraphs 95 and 96, in *Elias* in the High Court, also appear to cast some light on the question of the circumstances in which consideration will have been sufficient. The judge

appears to accept (in para. 96) the submission on behalf of the Secretary of State, which according to the judge (para. 95), was “that it is not a breach of the law for the Secretary of State to form the view on proper grounds that there is no issue of unlawful racial discrimination which could sensibly be said to arise in the scheme, even if he is in fact wrong about that”. This seems to suggest that being wrong, and, as in this case, later admitting to being wrong, does not mean that there was a breach. However, the passage does specify that it is referring to a view formed ’on proper grounds’.

Such questions would appear to matter. If, for example, it is sufficient, within reason, for anyone to determine that it is plain that section 71 is not relevant, there would appear to be little incentive for public authorities to ensure that properly skilled and experienced individuals conducted proper initial considerations. Further, without such an incentive, it seems likely that initial consideration, if any occurs, will not be undertaken by specialists in race equality (since these, if involved at all, are more likely to be involved when it has been determined that race equality is relevant). It would also, for example, seem to matter whether the judgment is in fact saying that cursory consideration is sufficient (or whether, as possibly suggested at paragraph 97 in *Elias* in the High Court, there would need to be some 'careful attempt' to assess whether section 71 was relevant - even allowing that what constitutes 'careful' will depend upon the circumstances of the case); and, if cursory consideration could be sufficient, what exactly is meant by cursory (bearing in mind that its meanings include ‘inconsiderate‘).

A particular concern is that cursory consideration may spot (or spot the absence of) obvious and direct relevance to race equality (and especially the likelihood of adverse impacts), but fail to spot possible or indirect relevance (and especially the potential of a policy to promote race equality). It may also be that once confined to the no relevance box, there is unlikely to be any monitoring, and, therefore, emerging relevance may either not be identified or not addressed. For example, round the corner from where this is being written, 50 Hindu and multi-faith monks are awaiting (a Court of Appeal decision having gone against them) the imminent arrival of officials from the Welsh Assembly Government to take away for slaughter the monk’s sacred cow Shambo (which tested positive for bovine TB). We imagine that the Welsh Assembly Government’s Race Equality Scheme did not include animal disease control policies, and perhaps not vetinary policies of any sort; and yet it is hard to think of a quicker way to damage race

relations than to commit what presumably many Hindus and others in Wales will regard as an act of sacrilege (at present, we do not have sufficient information to take a view on whether or not there was a practicable alternative, but wonder whether one might have been found).

4.4.3.1 (b) what the Code of Practice appears to suggest

One of the Code's four 'guiding principles' for the general duty is that "The weight given to race equality should be proportionate to its relevance" (CRE, 2002: 3.2); and it goes onto explain (ibid: para. 3.4) that "Relevance is about how much a function affects people, as members of the public or as employees of the authority". This definition would appear to be not entirely satisfactory in that there is unlikely to be a simple relationship between the number of people a function affects and its overall relevance to race equality. Indeed, the example given to illustrate the point appears to belie the point being made. It states (ibid: para. 3.4) "For example, a local authority may decide that race equality is more relevant to raising educational standards than to its work on highway maintenance". It may well do and may well be right to do so, but its work on highway maintenance is likely to affect more people, and, therefore, according to the Code's formulae, should be considered more relevant to race equality.

The Code continues (ibid: para. 3.4) - "Public authorities should ... assess whether, and how, race equality is relevant to each of their functions. A public authority may decide that the general duty does not apply to some of its functions; for example those that are purely technical, such as traffic control or weather forecasting". The problem, of course, is that functions can be defined and delineated in different ways (including ones which are more or less encompassing); and how this is done could well have a substantial influence upon which functions are determined to be relevant to race equality and whether, in turn, particular activities are swept-up in relevant or not relevant functions. For example, if a sub-function which is highly relevant to race equality has ended up in a function which is in general of little relevance to race equality, the highly relevant sub-function may not receive the attention which would otherwise be regarded as proportionate. This is why it seems that it will be important to assess policies as well as functions.

4.4.3.2 <u>subsequent consideration may be insufficient</u>

The case law appears to indicate that if there is uncertainty as to whether section 71(1)(a) is relevant, further consideration of the potentially discriminatory effects of the policy will be necessary (see *Elias* in the High Court: para. 98); and also appears, as discussed below, to provide some idea of what might constitute proper consideration if section 71 is found to be relevant.

Paragraph 97 of *Elias* in the High Court, quoted above (4.4.3.1(a)), would appear to indicate that, if section 71 appears to be relevant, consideration will need to include an 'attempt to assess the extent of any adverse impact' and an attempt to assess 'other possible ways of eliminating or minimising such impact'. Further, the judgment appears to suggest (albeit with the appearance of being slightly grudging) that consideration must be given to all three parts of the general duty. Specifically, it states (para. 100) - "I accept of course that in principle it is necessary for the Secretary of State to pay attention not only to what might be termed the negative aspect of eliminating unlawful discrimination in subsection (a), but also the positive obligations under the section found in subsection (b)". We also wonder whether there may in some circumstances be a requirement to consult. There is an emphasis on consultation in the Code of Practice and a requirement in the SDO to state arrangements for 'consulting on the likely impact of its proposed policies on the promotion of race equality' (SDO 2001, article 2(2)(b)(ii)). In addition, there would appear to be possible support, for a requirement to consult, at paragraph 96 of *Elias* in the High Court. Specifically, it states - "There is no need to enter into time consuming and potentially expensive consultation exercises or monitoring when discrimination issues are plainly not in point"; which could, perhaps, be read as suggesting that there may be a need to do so when it is not plain that discrimination issues are 'not in point'.

The judgments referred to above, however, do not appear to provide unambiguous, or at all detailed, guidance on what would be required. For example, in the preceding quote about consultation, the judge may have been primarily making the point that consultation is time consuming and can be expensive and should not be entered into when discrimination issues are plainly not in point - 'no need' referring to the legal need but also perhaps to there being no need per se - rather than intending to suggest that there needs to be consultation when it is not plain that discrimination issues are 'not in point'. It is also not clear that the Court of Appeal greatly clarified what is required for a proper

assessment. For example, LJ Mummery, in *Elias* in the Court of Appeal, states (paragraph 17) that “It was held by the court below that this duty was breached by the Secretary of State, as no regard was had to the potentially racially discriminatory nature of the eligibility criteria.” That, according to this, it was determined that no regard was had, might help explain why there appears to have been limited effort in either court to determine and indicate how much regard should have been had. In addition, of course, the fact that the Secretary of State did not appeal the section 71 High Court ruling in *Elias* reduced the need for the Court of Appeal to consider the matter. LJ Mummery, in *Elias* in the Court of Appeal, did, however, address section 71 at some length, and, in particular, on the grounds, referring to alleged indirect discrimination, that it ‘it adds to the difficulties of the Secretary of Sate in now attempting to justify the imposition of the birth link criteria’ (paragraph 133); and LJ Arden, in the same case, took the opportunity to address in more general terms the section’s purpose and importance (paras 273 to 275). Either judge, it might be argued, could usefully have set out in greater detail what the requirements are for an assessment under section 71.

4.4.3.2(a) less weight given to matters at section 71(1)(b)

To the extent that the possible requirements can be understood from the case law, there appear to be significant problems with what is required. To begin with, despite there being no foundation for it doing so in the statute, the case law might be understood to give less weight to the matters at section 71(1)(b) than the matter at section 71(1)(a). For instance, in *Elias* in the High Court, at paragraph 96, it states, as quoted above, that there is “no need to enter into time consuming and potentially expensive consultation exercises or monitoring when discrimination issues are plainly not in point”. This might be understood to suggest that the appearance of discrimination issues should be more of a reason to consult and monitor than the appearance of equal opportunities or race relations issues. It should be noted, however, that a couple of lines earlier, in the same paragraph, it states that “The obligation is to have due regard to the matters identified in section 71“; and it might, therefore, have been intended that the term ‘discrimination’ would be understood to be a short-hand for all the matters at sections 71(1)(a) and (b). The comparative exclusion of section 71(1)(b), however, is apparent elsewhere in the section 71 judgements. In *Elias* in the Court of Appeal, for example, LJ Arden states (para. 274) that the ‘clear purpose’ of section 71 is to require listed public bodies "to give advance consideration to issues of race discrimination...".

4.4.3.2(b) little weight given to a policy's potential as opposed to purpose

There also appears to be too little weight assigned to the potential (as opposed to the purpose) of a policy in determining its relevance to section 71; and this appears to reduce the weight given to section 71(1)(b) matters more than it does that given to the matter at 71(1)(a). In particular, there appears to be some suggestion that for the 71(1)(b) matters to be considered relevant - and, therefore, require further consideration and perhaps action - it needs to have been the intention of the policy in question to have furthered these matters. In *Elias* in the High Court, in response to the contention from Mr Pannick (for the CRE) that there was no recognition on the Secretary of State's part that section 71(1)(b) was relevant, the judge states (para. 101) "In my opinion the obligations imposed by subsection (b) had no real relevance in this case. At any event, to the extent that they did, this was only in so far as they are entailed within subsection (a). The aim of the scheme was to distribute money, and the obligation in relation to this scheme was to eliminate unlawful discrimination. This was not intended to be a scheme directed to promoting equality of opportunity or good relations between persons of different racial groups". The scheme, however, was also not a scheme directed at eliminating unlawful racial discrimination. It was a scheme aimed at providing monetary compensation to British civilians interned by the Japanese during the war. In contrast to the attitude to the 71(1)(a) matters, the need to eliminate unlawful discrimination is, perhaps, seen as a purpose which must always be there (and indeed would be so even in the absence of section 71) - at least when a policy has some potential to have an effect on unlawful racial discrimination.

The approach suggested in the above quote from *Elias* in the High Court appears to be at variance with what appears to be an underlying purpose of section 71 - to mainstream race equality or, in the words of the Code of Practice (CRE, 2002: para. 1.3), "to make the promotion of race equality central to the way public authorities work". Contrary to the assertion in the above quote from the judgment, 'the obligation in relation to' the compensation scheme was not just 'to eliminate unlawful discrimination', it was to have due regard to all the matters (presumably in proportion to their relevance) at section 71(1). Further, the point of mainstreaming would appear to be to promote equality across the whole range of policies and not just those specifically or primarily aimed at promoting equality. Therefore, the obligation would be to conduct some kind of assessment as to

whether the compensation scheme might have unintended negative consequences for equal opportunities and race relations (and subsequently to consider addressing any which are identified) but also to consider whether the scheme might have the potential to promote equal opportunities and good race relations.

We would also argue that the scheme did have some considerable potential to promote the matters at section 71(1)(b). For example, according to the judgment (at para. 2) in *Elias* in the High Court, "When setting up the scheme, the government said that it was 'to repay the debt of honour' owed by the United Kingdom to British civilians interned by the Japanese during the war". Providing money to all those interned, rather than excluding the relatively small number who failed to meet the birth link criteria (and providing it without fighting it through the courts), would, it might be argued, have highlighted and encouraged the sense of cohesion between all British citizens living in Britain (bearing in mind that Mrs Elias had lived in Britain full time since 1976); and would also (bearing in mind that the majority excluded would have been 'non-white' British citizens) have highlighted the contribution of different 'races' to the war effort. Both effects may well have promoted good race relations.

4.4.3.2 (c) what the Code of Practice appears to suggest

In addition to addressing, as discussed above at 4.4.3.1 (a), how to determine whether a policy is relevant, the Code goes on to provide more detailed guidance on how to conduct an assessment (intended it appears to be applicable to an initial assessment of whether a function or policy is relevant and a more detailed assessment of those which have been determined to be relevant).

The Code states (CRE, 2002: para. 3.14) - "To assess the impact its functions and policies have on race equality, the authority may find it useful to draw up a clear statement of the aims of each function or policy." While seeing the value in this, we wonder whether it would also be useful to produce (or bring together) an indicative programme of action for each policy or function, since what the authority does, rather than what it hopes to achieve, may have the greater impact on race equality. For example, the aims of a local economic strategy might include a certain increase in economic activity in the area, and there would probably be no reason to conclude that this will have a positive or negative impact upon equal opportunities. However, its plans for targeting the investment -

including, for example, whether it focuses on particular size businesses in particular economic sectors - might well appear in an assessment to be likely to have a differential impact on different 'racial' groups.

After drawing up the statement of aims, the authority, according to the Code (ibid: 3.14) "should then consider whether it has information about how different racial groups are affected by the function or policy, as employees or users (or possible users) of services". Arguably, this is too narrow. It should be looking at potential employees as well, including because recruitment is an important issue in relation to discrimination. It should also, perhaps, consider those who are not users or possible users of services but may be affected by the services, or by the non-service functions, of the authority. For example, the CRE's policy on multiculturalism may well have a positive or negative affect on the levels of prejudice experienced by individuals from minority ethnic communities, but only a small percentage of these individuals will have used its services and arguably none will have used its services arising from it multiculturalism policy (since it is not a service directed policy).

In addition, in referring to 'how different racial groups are affected', it appears to indicate that there will need to be an assessment of statistical (or at least aggregate) differences between groups. While such differences are clearly relevant to an assessment, we would argue that consideration should be given to relevant impacts even when it is not clear that these differ greatly or at all between ethnic groups. For example, changes to the national curriculum might lead to a general reduction or increase in discrimination, and this would be a important impact - to which, in relation to section 71, substantial weight would need to be given - but there may be no indication that it would benefit or disbenefit particular ethnic groups (indeed, if the change was aimed at reducing discrimination, one would assume that it would be aimed at not having a differential impact - notwithstanding that certain groups suffer more discrimination at present and, therefore, may be likely to benefit more than average).

The paragraph continues (ibid: 3.14) - "The authority should also consider whether its functions and policies are promoting good race relations". It might be argued that here, and in general, the Code fails to give sufficient effect to the proactive idea of promotion which appears to have been articulated in parliament and which, it might be argued, is

apparent in the statute. In particular, in addition to considering whether a policy or function is promoting good race relations, we wonder whether the duty requires an authority to give some consideration to whether a policy or function could be used to promote good race relations and race equality. Relatedly, the focus in this assessment section in the Code, with the important exception of the above reference to 'promoting good race relations', appears to be on identifying and avoiding adverse impacts (with no suggestion of a need to identify positive impacts). At paragraph 3.16, for example, it provides five questions which 'public authorities could ask themselves' 'to assess the affects of a policy, or the way a function is being carried out'; the first four of which concern adverse impacts and the last of which does not refer to impacts at all. Arguably, not including positive impacts in the assessment would be to fail to adequately assess the total impact upon race equality, and would tend to make it less likely that the authority will adopt policies which increase race equality.

4.4.4 the needs at sections 71(1) (a) and (b) insufficiently defined

4.4.4.1 <u>to eliminate unlawful racial discrimination</u>

4.4.4.1(a) should arguably be a requirement to act

Fredman and Spencer argue (2007: section 2) that "it does not make sense to require the authority only to pay due regard to the need to eliminate unlawful discrimination, since, by definition, unlawful discrimination is unlawful. The Authority therefore should be required to act, not only to have due regard to the need to do so". We would, in general, agree with this analysis, and it takes us back to the arguments above (para. 4.2.3) about whether there is a duty to take action. However, we would argue that, even if section 71(1)(a) does not encompass a requirement to act, there is still value in requiring the authority to have due regard to the need to eliminate unlawful racial discrimination (albeit perhaps not as much value).

First, this is because it would put an otherwise non-existent duty on a public authority to have due regard to the need to eliminate unlawful racial discrimination on the part of others (i.e. those outside their employment). For example, a local council, having taken account of this duty, may decide not to rent its rooms to a group which appeared intent on promoting negative attitudes towards minority ethnic groups, and whose meetings the council, therefore, might reasonably have assumed could encourage acts of unlawful racial discrimination (even if it had no reason to believe that the promotion of negative

attitudes at the meeting would constitute criminal incitement). Second, there are already some requirements on public authorities to act in relation to preventing unlawful racial discrimination. For example, it is provided in the RRA that the employer and employee will be liable if a discriminatory act is done by an employee in the course of employment, but it is a defence for the employer to have taken reasonable steps to have prevented the discrimination. Arguably, the duty (even if taken not to require action) could prove relevant in that it might be argued that an REIA of the function in which the discrimination took place was one of the reasonable steps that should have been taken.

4.4.4.1(b) does not include victimisation or racial discrimination which is not unlawful

A possible problem with the wording of the duty (whether or not it is taken to require action) is that 'the need' is 'to eliminate unlawful racial discrimination', which would not appear to include section 2(1) RRA 'Discrimination by way of victimisation'. Arguably, however, eliminating such victimisation, and the fear or expectation of it, could be of relevance to promoting racial equality. In particular, it could well encourage some employees to take a stand (such as giving evidence in proceedings at the employment tribunals) against unlawful employment discrimination not directed at them. The reference to 'unlawful racial discrimination' at 71(1)(a), however, would also appear to not include discrimination which is not unlawful (even if it appears undesirable and to damage race equality). It would, for example, appear to exclude what would, if it were not for a weak (but sufficient under the act) non-racial justification, be cases of section 1(1)(b) 'indirect discrimination'. The fact that there is an objective justification (for the purposes of section 1(1)(b)(ii)) does not mean, of course, that the detriment to an individual arising from the requirement or condition will necessarily be any less, nor that there would not have been a better way of achieving the objectives of the policy or procedure in question (both in the sense of more fully achieving the objective and of not having an adverse impact upon individuals from particular 'racial' groups).

4.4.4.2 <u>to promote equality of opportunity</u>

Neither the Act nor the Code of Practice define what is meant by 'equality of opportunity'. Further, since the term 'equality of opportunity' would appear in general to be highly contested, with different adopted meanings reflecting different political perspectives, turning to the meanings apparent in everyday language may not provide a complete answer. If, however, there is no proper indication of what constitutes equality of

opportunity, it would appear difficult to determine whether or not a public authority had had due regard to the need to promote it. This might be less so if the duty is taken to only be to give advance consideration - since an assessment of the impact on the difference in opportunities between different 'racial' groups would appear to meet the requirement. However, if the due regard is taken to require action, there would need to be some understanding of what the action should be aimed at achieving.

Fredman and Spencer (2007: section 2) argue that "Equality of Opportunity is vague and difficult to measure. It is a broader concept than equality of treatment in that it recognises that the same treatment might perpetuate disadvantage by failing to address existing discrimination and disadvantage. The legislation, however, fails to make clear what equal opportunities would entail and to what extent the principle permits different treatment. It could simply require removal of barriers, leaving everyone to compete on merit, ignoring the fact that 'merit' itself is related to previous opportunities. .... A broader understanding of equal opportunities would require that resources be provided to make sure that members of disadvantaged groups can make use of new opportunities."

4.4.4.3 to promote ... good relations between persons of different racial groups

The CRE's guide to good race relations states (2005f), in its introduction, that it "explains what is meant by 'good race relations'". Bearing in mind, however, that the guidance has no legal status, and that the CRE's idea of good race relations (and in particular as regards multiculturalism) appears to have undergone significant changes, it may be more realistic to think of it as explaining what the CRE currently means by good race relations. This leaves the question of what 'good relations ... ', in section 71, should be understood to mean, and the related question of what should be understood to be the need to promote it.

As with 'equal opportunities', the term 'good race relations' appears to be more political than precise (concerning different visions, related to wider ideologies, of the desirable and the practicable); appears to have no commonly agreed meaning; and the more commonly held meanings appear to relate to social norms and therefore tend to change over time. This contrasts with the use of other terms in the Race Relations Act (such as, for example, setting out in considerable detail, at sections 5(1) to (4), what constitute 'exceptions for genuine occupational qualifications'). Meanings can, of course, be

determined and clarified in court judgments (such as, for example, the House of Lords redefining victimisation under the RRA in *Nagarajan v London Regional Transport* (1999) ICR 877). However, the intention should clearly be to start out with terms which are as unambiguous as possible, since it may be some time before a provision is finally determined in a higher court. It is notable, for example, that it was not until its 2004 decision, in *Collins v Royal National Theatre Board Ltd,* that the Court of Appeal addressed the meaning of the section 5(4) justification defence in the original 1995 Disability Discrimination Act (shortly before the 2005 Disability Discrimination (Amendment) Act removed the defence and, therefore, the question). It is also not clear that the terms at section 71(1)(b) are amenable to satisfactory determination through case law, including, we hope, because the terms would be understood to be disputed terrain over which there should be an ongoing democratic debate. Further, since the meaning of these terms is not defined, or otherwise apparent, in the statute, a judge defining them might be thought to be muscling in on the role of the legislature; and for the legislature to define them (at least other than broadly) might be thought to be an abuse of power or at least to be excessively centralising (since, in particular, local councils should, it might be argued, be able to promote their own vision of good race relations).

At the same time, it would appear right that public authorities work, and are required to work, within the parameters of certain shared social values, such as, for example, those apparent in the articles of the European Convention on Human Rights. It might be wondered, for example, what Barking and Dagenham's intention might become if the British National Party continued to increase their representation. The CRE's guide (2005f), perhaps, provides a possible partial answer. It states - "This guide provides a minimum definition of good race relations. Each organisation will need to develop a more detailed understanding, based on for (sic) its particular circumstances." It continues, in the next section, "we have identified five principles that should govern public authorities' efforts in this area. Each is equally necessary to achieve good race relations". It gives these as - equality, respect, security, unity, and cooperation, and briefly explains what it means in each case.

With the explanations, however, these particular principles have something of the appearance of a political agenda. It is notable, for example, that there is little or no

indication that cultural diversity is something with positive value (and certainly no suggestion that anyone should celebrate it). The closest it gets is (under the 'respect' heading) - 'acceptance of the individual right to identify with, maintain and develop one's particular cultural heritage, and to explore other cultures'. The meaning of this 'principle' (and how far it takes us from celebrating or welcoming) would depend, of course, on what is meant by 'acceptance' - does it mean to favour, tolerate, or simply recognise the existence of, this individual right. It seems, for example, that Jack Straw may well have accepted that his constituent had the right to come to his surgery in a veil, but also felt that asking her to remove it was acceptable behaviour and would, indeed, promote community cohesion (not withstanding that it is not clear how criticising how some Muslim women choose to dress, while they're engaging in the democratic process, will encourage integration).

4.5 PROBLEMS WITH THE WORDING AND INTERPRETATION OF THE SPECIFIC DUTIES

Taken together, the specific duties do not appear to add up to a comprehensive or coherent approach to ensuring the better performance of the general duty.

4.5.1 bodies not subject to the specific duties

Since, according to the Code of Practice (CRE, 2002: para. 4.1), the "specific duties have been introduced to help public authorities to meet the general duty", it may be wondered whether those not subject to the specific duties (i.e. those not specified in the regulations) will, in general, find it harder to, and be less likely to, effectively meet the general duty.

This might not be so, of course, if those not subject to the specific duties were those most able and willing to ensure that they met the general duty. This does not, however, appear to be the case. The rational might be that it is considered more important that those listed meet the general duty, on account of, in particular, the wider impact of their practices and policies; and that, on account of their greater resources, they will be more able to do so. This would seem to suggest, however, that it will be tolerable for non-listed organisations to not meet the general duty (and so, perhaps, damage the credibility and force of the duties). Alternatively, or additionally, the rational might be that the criteria for meeting the general duty should be understood to be more stringent for those subject to

the specific duties (since, in particular, as discussed above at para. 4.2.3), 'due regard' for those subject to specific duties might be understood to require that the specific duties are met or at least that a reasonable effort is made to do so). This, however, might further diminish the clarity upon which the effective operation of section 71 might be thought to depend.

A possible improvement is suggested in the TUC's evidence to the Joint Committee of the Draft Disability Discrimination Bill. Talking about the specific duties under the DDA, the TUC argues (TUC, 2004: under Q.4) that "all bodies with a public function should be required to comply with the specific duties, however small. Clearly, the extent to which a small PB (public body) is required to prepare a plan would be related to its size and its functions ... ". Sections 2(2) and 2(3) RRA already make it clear that different duties can be imposed on different persons, and indeed the SDO 2001 makes different provision for educational bodies. However, we wonder whether greater use should have been made of these sections. It may, for example, be reasonable for some of those at schedule 3 to be excepted by article 5(5)(b) from the requirements on employers to monitor, including because their small size might make the amount of work involved disproportionate and perhaps less necessary (as there might be a good understanding of what most of the figures are without monitoring). This, however, would seem to be an argument for a more appropriate set of requirements rather than for no requirements at all. Indeed, the requirements for those with less than 150 staff are not particularly onerous as they stand, and we imagine that systems could be quiet easily put in place which would make the monitoring a matter of course with quite limited subsequent effort required. It is also notable that many of those at schedule 3 are advisory committees, which have significant impact on policy formulation and implementation (including policies with clear relevance to race equality), and which arguably should, including because of this influence, make a particular attempt to ensure that they reflect a range of experiences and do not discriminate against people from certain 'racial' groups.

4.5.2 race equality schemes

The requirements in article 2 ('race equality schemes') of the SDO are at least several steps removed from the action i.e. from acts (or failures to act) at the end of the process of decision making. Consequently, intervening conditions - including, in particular, the arrangements stated in the Race Equality Scheme not being implemented, or the results

from the implemented arrangements being ignored, or attention being paid to the results of implemented arrangements which are inadequate to the task - could prevent fulfillment of the specific duties leading to the furtherance of their purpose i.e. the better performance of the section 71(1) duties.

4.5.2.1 Article 2(2)(a)

Article 2(2)(a) provides that a Race Equality Scheme must state 'those of its functions and policies, or proposed policies, which that person has assessed as relevant to its performance of the duty imposed by section 71(1) of the Race Relations Act ...'. This does not appear to require that the assessment be of a minimum standard or competent or accurate; nor (at least taken on its own) does it appear to require that there be any assessment at all - so long as its states any functions or policies which it assessed as relevant. It might be argued, however, that a duty to assess arises from reading article 2(2)(a) in conjunction with 2(3) (albeit a limited duty and one which, perhaps, does not need to be fulfilled until just before three years from 31 May 2002). Article 2(3) provides that the person subject to article 2 ‘shall, within a period of three years from 31 st May 2002, and within each further period of three years, review the assessment referred to in paragraph (2)(a).’ Stating that the assessment at 2(a) must be reviewed would appear to imply that an assessment is required to have taken place (otherwise it would have stated, for example, ‘review any assessment made under paragraph 2(a)’). In addition, a review of the assessment referred to at 2(a) would appear likely itself to need to involve an assessment of the kind referred to at 2(a). In particular, it is not clear that adequacy or up-to-dateness of the assessment could be properly judged without comparing the assessment against that which was or should have been assessed i.e. without some sort of assessment of the relevance of the authority’s functions and policies.

However, any assessment required under the specific duties would appear to be only required every three years, which, if this was all that was required, would appear to be inadequate, including on account of being arbitrary. It would mean, for example, that if a policy proposal came forward after one of the three-yearly statutory reviews, and was implemented before the next, there would be no requirement to assess it (regardless of whether it might be of substantial relevance to race equality). Further, any assessment which took place as part of (or which constituted) a three yearly review would appear to be only required to determine whether the policy or function was relevant to the

performance of the general duty; which would be considerably less than the assessment which, according to the case law, appears to be required under section 71 in the case of all policies and proposed policies. Therefore, if the requirement under section 71 is taken to extend to functions (and it is assumed that the courts have not made this clear simply because they have not addressed the question), the significance of article 2(3) of the SDO would appear to be largely limited to functions and perhaps proposed changes in functions (except that a proposal to change a function might itself be regarded as a policy).

The judgement in *Elias* in the High Court may have some bearing on the meaning of paragraph 2(2)(a) of the SDO. It is not clear, however, whether the judge is indicating that there is a particular requirement in relation to race equality schemes or that, if there were, there would be nothing that the Claimant could have done about it in the proceeding in question. The judgement states (at para. 102) - "it was alleged that the Secretary of State failed to include the (compensation) scheme in the government's race equality scheme. That would seem to be right, but it is not a matter which this Claimant can do anything about. This is because the obligations imposed by the Secretary of State pursuant to his power to make an order under section 71(2) are not capable of enforcement save by the Commission itself ... Accordingly, Mrs Elias cannot complain of any breach of the order itself. It follows that the failure to include this scheme or otherwise to make reference to the scheme in the Race Equality Scheme is not a matter which can be the subject of any relief in these proceedings." Stating that "it is not a matter which this Claimant can do anything about", because the obligations in the specific duties are only capable of enforcement by the Commission, might be thought to imply (but as suggested above it is far from clear that it does) that including the compensation scheme in the RES was among those obligations.

However, even if it does imply this, it is not clear what exactly the obligation should be taken to be and what specific duty would be breached. The suggestion may be that the Secretary of State could not have other than assessed the scheme as relevant (on the grounds that it was self-evident that it was), and, therefore, having done so, should (pursuant to paragraph 2(2)(a)) have included it in the RES. In other words, it might not imply that the duty, under the SDO, was to conduct an assessment (but simply to report the findings of any assessments - including, perhaps, more informal ones - which were

conducted).

4.5.2.2 Article 2(2)(b)

Article 2(2)(b) provides that the Race Equality Scheme must state 'that person's arrangements for -

(i) assessing and consulting on the likely impact of its proposed policies on the promotion of race equality;

(ii) monitoring its policies for any adverse impact on the promotion of race equality;

(iii) publishing the results of such assessments and consultations as are mentioned in sub-paragraph (i) and of such monitoring as is mentioned in sub-paragraph (ii);

(iv) ensuring public access to information and services which it provides; and

(v) training staff in connection with the duties imposed by section 71(1) of the Race Relations Act and this Order.'

Whilst there is a clear requirement to state arrangements for the matters at (i) to (v), there would appears to be no requirement that these arrangements be adequate to their purpose. For example, if a local council's arrangement for consulting on proposed policies (including those concerning services to the public) was to send an email to managers asking for comments, and it stated the same in the RES, would it have complied with the assessment requirement at 2(2)(b)(i)? Indeed, it is also not clear whether there is a requirement, under article 2(2), to have arrangements at all (so long as the Race Equality Scheme states any arrangements that the person does have). Whereas the reference in paragraph 2(3) to 'the assessment' suggests that there is required to have been an assessment, the reference in 2(2)(b) to 'that person's arrangements' appears to be more amenable to an understanding that the non-existence of arrangements would not in itself be a breach. For example, 'that person's arrangements for - ' is at the head of a list of six different matters, and, therefore, arrangements could, perhaps, be taken as referring to the overall arrangements for all of these and as being able to encompass the state of there being no plans for some of them. On balance, however, we think that it would be reasonable to assume that Parliament intended that there be a requirement to have some arrangement in place for each of the specified matters.

A possibly distinct question is whether there is a requirement that the arrangements be

implemented (and, if there is, what implementation should be taken to require). If, for example, the RES states that the arrangements for consulting are to take, say, five specified steps (and it is genuinely intended that these steps will be the ones which are taken), will these steps have to be followed in all, most, or any, cases for this to be a statement of the 'person's arrangements' (and therefore for the specific duty to be met in relation to this matter)? Further, if there is no genuine intention to follow, or expectation of following, the stated arrangements (such as, for example, if impressive arrangements are stated for the sake of making a good impression), can what is stated be said to be a statement of the 'person's arrangements'. Indeed, it might be wondered to what extent the RES can be a work of fiction - whether in intention or in practice - before it is no longer a RES for the purposes of paragraph 2(1) SDO (which requires that the person 'publish a Race Equality Scheme, that is a scheme showing how it intends to fulfill its duties under section 71(1)...').

4.5.2.3 <u>limited requirements to plan or act outside the 'arrangements'</u>

4.5.2.3(a) no requirement to respond to findings from the arrangements

There appears to be no requirement in the specific duties to take action in response to any findings or conclusions which result from the stated arrangements. For example, if 'monitoring its policies for any adverse impact on the promotion of race equality...' (the arrangement referred to at 2(2)(b)(ii)) shows that the policies are having an adverse impact, there would appear to be no requirement under the SDO to address the impact (even if not doing so would appear - on account, for example, of there being no costs involved - to be unreasonable). Failing to do so, however, might, perhaps, be relevant to a court in determining whether the general duty was being breached (assuming, of course, that the general duty requires more than assessment).

4.5.2.3(b) no requirement to take the steps it says it will take to meet the general duty

Paragraph 2(1) requires that the person 'publish a Race Equality Scheme, that is a scheme showing how it intends to fulfill its duties under section 71(1) ...'. This may mean that the scheme must show how the authority intends to fulfill its duties (since, if it did not show this, it would not be a Race Equality Scheme). However, even if it does mean this, there would appear to be considerable latitude to decide what to show (including whether it provides the 'how' in general or in more precise terms). Further, since 2(2) provides what it 'shall state, in particular -', it might be that there is no particular

requirement to state other matters. The matters at 2(2), however, are restricted - with the important exceptions of ‘ensuring public access to information and services ...’ and ‘training staff ...’ - to the arrangements for gathering information (including opinion), and do not appear to include the steps for using that information to further the matters at section 71(1)(a) and (b). There appears to be no requirement, for example, to set out the steps it intends to take to promote good race relations over the life of the RES. In contrast, the comparable requirement in the Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2004 appears to be both clearer and more demanding. Specifically, 2(3)(c) of the regulations provides that a Disability Equality Scheme shall include a statement of ‘the steps which that authority proposes to take towards the fulfillment of its section 49A(1) duties (the general duty) within the period of time covered by the Scheme'. Not only would setting out such steps tend to encourage the authority to decide (and decide with some care) what steps it intends to take, it should also inform others as to what the intended steps are. This, in turn, will put others in a better position to provide critical feed back (which should facilitate improvements to the planned steps and to their implementation); and will also make it easier to hold the authority to account (including for any failure to take steps it said it would take).

Whatever the requirement to set out in the Race Equality Scheme the steps which an authority intends to take, there would appear to be no requirement (under the specific duties) to take the steps which it does set out. In this respect, the contrast with the Disability Equality Duty is even greater. Article 3(1) of the Disability Discrimination (Public Authorities) (Statutory Duties) Regulations provides that ‘A public authority specified in Part I or II of Schedule I (to the regulations) shall, by no later than the end of the period of time covered by the Scheme .... a) take the steps which it is required to set out in the Scheme by virtue of regulation 2(3)(c).’ This would appear to mean that to not take the steps it sets out would be a breach of the specific disability equality duties. Bearing in mind the inclusion of the requirement in the disability regulations (suggesting as it does that the government recognises the value of such a requirement), it is not clear why the RRA SDO 2001 has not been amended to include a comparable requirement.

4.5.2.4 <u>no requirement for aims, objectives or organisational control</u>

The specific duties appear to require some elements of strategic planning, including

arrangements for gathering specified information, but fail to require some of the most important, such as, in particular, producing an overall vision, goals, objectives and targets; and establishing organisational control mechanisms. Even the elements it does require are not required in a form which appears adequate. For example, it would appear to be important to put in place the arrangements referred to at 2(2)(b)(ii) - i.e. for 'monitoring its policies for any adverse impact on the promotion of race equality'. However, it would arguably also be useful for an authority to at the same time monitor its policies for beneficial impacts on race equality.

It might be argued that authorities will include these elements anyhow, and that the Code of Practice points them in the right direction. However, the limited evidence available suggests that authorities are failing to adequately include, or to include at all, some of these elements; and that there are particular problems in relation to setting and achieving outcomes. According to the Audit Commission's *The Journey to Race Equality* report (Audit Commission, 2004: para. 41) - "Two fifths of organisations in the Commission's survey report poor progress in identifying race equality outcomes. When asked about their race equality objectives, the majority of organisations quoted their duties under the Act."

In addition, it is not clear that the guidance in the Code of Practice provides much encouragement to go beyond meeting the legal requirements. For example, its states (CRE, 2002: para. 4.2), with reference to the arrangements referred to in article 2(2)(b), that 'Others may wish to go beyond the necessary minimum'. This might be thought to suggest that there would be no great problem in not going beyond the minimum arrangements, even though, as discussed below, the minimum arrangements do not include a need to set aims or objectives. In other words, there is no need to decide or state what it intends the arrangements to achieve. It arguably further discourages good practice in the next paragraph (ibid: 4.3), stating - "The necessary arrangements may not have to be new. Most of the main public services already have systems in place to meet their statutory requirements to collect information on performance, or to have their policies and services examined by independent inspection or audit agencies". It may be that some systems could be adapted to serve (rather than perhaps serve as) the new arrangements, but there would still need to be new arrangements put in place (including because there is no evidence that authorities already had in place arrangements for

assessing and consulting on the likely impact of their proposed policies on the promotion of race equality).

4.5.2.4 (a) *mission and vision*

Most corporate mission statements, according to Hill and Jones (1998: 40 to 42), are built around a statement of the organisation's overall vision; its key values; and the key goals that management "believes must be adhered to in order to attain the vision or mission, and that are consistent with the values to which managers are committed". A mission statement, perhaps along these lines (albeit with something more inclusive substituted for 'management'), would appear to be an almost indispensable starting point for the ambitious task of effectively tackling institutional discrimination within large organisations. For instance, since much discrimination relates to organisational culture, developing, setting out, and promoting, the values of an organisation could be an important first step in changing that culture. Other important potential benefits of stating aims might, in particular, include a greater sense of purpose and direction, and increased accountability (to employees and the wider public).

Arguably, the aim is implied (even when it is not stated) - it is to meet the general duty. However, legal compliance should be the sine qua non for all public authorities. Further, if the duty only requires assessment of functions and policies, compliance with the duty being the aim would mean that the aim was to assess its functions and policies (an 'aim' which would give no idea of the kind of vision of race equality that the authority was hoping to achieve). The Code of Practice does state (CRE, 2002: 4.4) that the race equality scheme "is also an opportunity to explain the values, principles and standards that guide its approach to race equality". Doing so, however, would not appear to amount to including a mission statement, including because it does not refer to aims. Further, the code simply says that it is an opportunity to explain these matters, not that these matters should be included. Nor does it suggest that there should be a process, involving consultation, to determine what these values, principles and standards should be, and in particular to ensure that they are consistent with promoting race equality in relation to the matters at section 71(1).

4.4.2.3 (b) *objectives*

Along with there appearing to be no requirement to set out broad aims in the Race

Equality Scheme, there appears to be no requirement to set out objectives. However, without specifically thinking through and setting out its aims and objectives, an authority is presumably significantly less likely to have a clear idea of where it wants to go, of where it should go (including to be compliant with the general duty), what it will need to do to get there, and whether it has got there.

As noted earlier (*4.5.2.3(b)*), the SDO does possibly require that an authority set out in its RES how it intends to fulfil its duties under section 71(1). If, however, section 71(1) only requires assessment (as the case law might be understood to imply), setting out how it intends to meet the section 71(1) duties would only require that it set out is plans for assessing its functions and policies (and proposed policies). There also appears, as with aims, to be little or no encouragement in the Code of Practice to set out objectives in the RES, or even to produce them or consider them (whether in the RES elsewhere). The closest it appears to come to addressing the matter of aims is in relation to meeting the general duty. Specifically, it states (CRE, 2002: 3.14) - "To assess the impact its functions and policies have on race equality, the authority may find it useful to draw up a clear statement of the aims of each function or policy". If 'policies' is taken to include the RES (along with all other policies), this would appear to mean that the authority may find it useful to draw up a clear statement of the aims of the RES. However, the absence of any other suggestion, in the Code, that a statement of the aims of the RES should be drawn-up might be taken to indicate that those writing the Code did not have this in mind.

4.6 PROBLEMS WITH ENFORCEMENT

Arguably, the Race Equality Duty has suffered (perhaps disastrously) from inadequate enforcement powers, mechanisms and intent.

4.6.1 the general duty

The RRA includes no provisions for the enforcement of the general duty (except in so far as it makes provision for enforcement of the specific duties). The Code of Practice explains (CRE, 2002: para. 7.8) that "If a public authority does not meet the general duty, its actions (or failure to act) can be challenged by a claim to the High Court for judicial review ... A claim for judicial review can be made by a person or group of people with an interest in the matter, or by the CRE." This, however, would appear to be no more than a

useful reminder that it is possible for those, with a standing in a case, to mount a legal challenge to the lawfulness of a public body's decision or action (and that failure to meet the general duty would be unlawful). Further, it is not clear that judicial review is a sufficient mechanism for enforcing the general duty. We don't attempt to understand the complexities of judicial review. However, we note some of it more obvious weaknesses as a means to enforce section 71, and look at some of the problems with how section 71 has been enforced (or possibly not enforced).

4.6.1.1 enforcement by the CRE

PIRU's recent report found (Harwood, 2006: para. 4.2) that, between 1 January 1999 and 1 June 2006, the CRE did not challenge, by means of a claim for judicial review, any failures to meet the general race equality duty; but did intervene in one such judicial review action (R (Elias) v Secretary of State for Defence (2005) EWHC 1435). This would appear to be an extremely low level of enforcement, especially when it is borne in mind that, according to the CRE's evidence to a parliamentary committee (Joint Committee on the Draft Disability Discrimination Bill: para. 248), around 44,000 public authorities are subject to the general duty; and that, in addition, the available evidence - such as the CRE's report on Gypsies and Irish Travellers (CRE, 2006b) - suggests that a large percentage of these 44,000 might not be compliant with the general duty.

It may be that the CRE does not regard judicial review as particularly well suited to the task. The Joint Committee on the Disability Discrimination Bill, for example, note (2004: para. 248) that "The CRE told the Committee that they were unable to enforce the RRA general duty very easily through the mechanism of judicial review available to them". The CRE also appears to indicate in its annual report that it wishes to bring a claim but has encountered some practical difficulties. In particular, it states (CRE, 2005b: 30) - "we have been actively seeking the right case in this area. We have been hampered by the time limits for bringing judicial review, since we frequently receive complaints about possible breaches of the duty too late. We will continue to seek cases in this area, since it is clear from many allegations that we receive that many sectors are still not taking racial equality considerations into account when making important decisions. We have considered and inquired into eight case for potential judicial review action during the year...". It is not clear what the 'seeking' has involved or what would constitute the 'right' case. However, there would appear to have been an abundance of appropriate cases for

the CRE to have chosen from. It could, for example, have identified those organisations which had a large number of judgments for unlawful discrimination against them, and selected from these the ones which had been most in breach of the general duty. As regards the time limit, we understand that it is the same as for employment tribunals i.e. within three months (which does not appear to have prevented the CRE from becoming involved in a large number of employment cases in the past).

It may be that not using judicial review is a reflection of the CRE's general reluctance to use its enforcement powers. For example, PIRU's recent study found (Harwood, 2006: table 1a) that, between January 1999 and June 2006, the CRE applied for no persistent discrimination injunctions; and made no 'discriminatory advertisements', or 'pressure and instructions to discriminate', complaints to the employment tribunals. Relatedly, the CRE may consider that methods other than legal enforcement are more effective in encouraging compliance with the general duty. For example, it has highlighted, in relation to the general duty, its work with inspectorates, stating, in its annual report (CRE, 2006a:14) - "We continued to work closely with inspectorates throughout the year, encouraging them to make racial equality part of their standards and inspection processes ....."; and that – "In line with a recommendation from our formal investigation of the police service ...., Her Majesty's Inspectorate of Constabulary (HMIC) decided to inspect six police forces in early 2006, to see how well they were meeting the race equality duty."

It should be noted, however, that Trevor Phillips, former chair of the CRE, may not necessarily accept the premise that the CRE made little use of its enforcement powers. For example, according to a select committee report (Select Committee on Communities and Local Government, Sixth Report, 2007: para. 30), he told the committee, in response to questioning about PIRU's findings, that he "disputed this analysis, claiming that the existing commissions had used their powers 'pretty extensively'".

4.6.1.2 <u>enforcement by individuals</u>

If it is not easy for the statutory enforcement body to use judicial review in relation to the general equality duties, it will in general, one assumes, be even harder for individuals and groups. Fredman and Spencer state (2007: section 2) - "Enforcing the general duty only through judicial review proceedings is costly and slow, and with limited chances of

success given that the duty is only to have due regard to the need to promote equality. Enforcement in this way is out of the range of most individuals and organisations". According to The Public Law Project (2006), "If a case goes all the way to a full hearing, or further, the costs can be massive, probably over £20,000".

It would appear, therefore, that in general there will need to be an organisation with substantial funds and an individual with standing in the case. Arguably, this is beneficial in that judicial review will tend to be focused on cases of wide and substantial consequence. However, clearly justice is meant to be available to individuals even when their case is primarily of consequence to them (so long as it has merit).

4.6.1.3 <u>interpretation by the courts</u>

We discussed above (4.4) some of the possible weaknesses in the legislation, and suggested that the courts have interpreted the requirements as being quite limited. We suspect, however, that, at present, a considerable percentage of claims (if well directed) would stand a good chance of success. This is, in particular, because, on the one hand, the requirement appears to be to carry out some sort of REIA on policies of relevance to race equality; and, on the other hand, the available evidence (eg CRE, 2006) suggests that most relevant policies of most authorities have not been subject to an REIA.

The High Court judgment in *BAPIO,* however, appears to suggest a different problem for the claimant - that a breach of section 71 may be given relatively limited weight by the court in deciding whether to make an order in favour of the person alleging the breach. In this case, the claimants had sought, on three grounds, judicial review of the decision to introduce new immigration rule; failed on the first two; but succeeded on the section 71 ground. The judge, Mr Justice Burnton, determined, however, that this did not 'justify the quashing of the rule change' (para. 70). The judgment 'conclusions', which appear worth quoting in full, were as follows - "The Claimants have not established that the change in the Immigration Rules announced on 7 March 2006 or the guidance given by the DH was unlawful. Their third ground of challenge succeeds. It does not however justify the quashing of the rules change. In any event, there was a subsequent Race Equality Impact Assessment the sufficiency of which has not been challenged. In these circumstances there will be a declaration that the Secretary of State for the Home Department failed to comply with his duty under section 71 of the Race Relations Act

1976 before deciding to make the changes in the Immigration Rules for Postgraduate Doctors and Dentists that took effect on 3 April 2006....". Including on account of the phrase 'In any event', it is not clear whether the breach of section 71 did not justify quashing the rules change on account of the subsequent REIA or whether it would not have justified it even if there had not been the subsequent REIA. On balance, however, we suspect that the later is the intended meaning. It is also, perhaps, notable that the judgment appears to be able to conclude that the claimants had 'not established that the change in the Immigration Rules ... was unlawful' and conclude that section 71 was breached in the making of the rule change - suggesting (despite this presumably not being the case in law) that making a decision in breach of section 71 is not unlawful (or perhaps not the right kind of unlawful).

Not much assistance, in determining whether a section 71 breach would be regarded as sufficient in itself to justify a quashing or similar order, appears to be available from *Elias* - since the application in *Elias* for judicial review of the compensation scheme was upheld in the High Court on two grounds. The High Court judgment, under 'conclusions', states - "First, I consider that the scheme adopted was unlawful and indirectly discriminated against those of non-British national origin..." (para. 103); and continues (para. 104) - "In addition, I have found that the secretary of State was in breach of his duties under section 71 of the Act'. The impression from the judgment as a whole might be that the indirect discrimination was regarded as by far the most serious failure - understandable, perhaps, in that the breach of section 71 concerned consideration of possible problems rather than necessarily being a problem itself in terms of final impact - and that the indirect discrimination would have been sufficient by itself for the appeal to have been upheld. Further, the importance given to section 71 in *Elias* in the Court of Appeal (see, for example, LJ Mummery at paragraph 175) appears to have related, to a great extent, to the support that its breach provided to the argument that there had been indirect discrimination (although, since the section 71 decision was unappealed, there was no particular purpose in revisiting it without reference to the appealed decisions). However, the possible impression of limited importance being attached to section 71 in *Elias* in the High Court needs to be considered with the general importance that LJ Arden seems to attach to it in the Court of Appeal judgment, stating (para. 274), for example, that "It is not possible to take the view that the Secretary of State's non-compliance with that provision was not a very important matter".

4.6.2 the specific duties

As discussed earlier (4.2.3), complying with the specific duties will not necessarily mean that an authority will comply with the general duty (both because meeting the requirements of the specific duties will not necessarily lead the authority to meet the requirements of the general duty and because as a matter of law meeting the specific duties may not be a requirement of the general duty). We also noted (4.6.1.3) that Justice Burnton in *BAPIO* in the High Court may have regarded non-compliance with the specific duties (or at least with the specific duty in question) to have been insufficient reason to quash an order; and, indeed, that the judge in *Elias* in the High Court (para. 102) appeared to not have regarded the specific duties as being enforceable through judicial review (or at least not by any person other than the CRE).

In addition, however, there appear to have been problems with how the specific duties have been enforced by the CRE (a particular concern if, as suggested above, enforcement is their exclusive preserve). PIRU' recent report found (Harwood, 2006: 1.2.2) that, between 1 January 1999 and 1 June 2006, the CRE served four compliance notices in relation to alleged failures to meet one or more of the race equality specific duties (on Conwy Borough Council, West Midlands Police, West Mercia Constabulary, and a fourth party which the CRE declined to name), and made no applications for a court order requiring compliance with the specific duties. Bearing in mind the ease with which a non-compliance notice can be issued, and the possibility that thousands of public authorities are breaching some of the specific duties (especially if, as we suggest, paragraph 2(3) requires a screening assessment of all policies and functions to determine which are of some potential relevance to race equality), this would appear to be a surprisingly low level of enforcement action (albeit not as low, in terms of number of legal actions, as in the case of their enforcement of the general duty). However, in a letter (CRE, 2005d) to PIRU providing information on of the Race Equality Duty, the CRE (having given the figures requested) adds - “Please note, however, that since May 31st 2002 the Commission has engaged over 200 listed public authorities in its compliance process, and, due to the rigour and effectiveness of this preliminary work, has only need to issue the said four (compliance) Notices”.

4.7 THE IMPACT OF THE LEGISLATION

Better determining the impact of the legislation is, of course, central to better determining whether it can be said to be working; and might, for example, include addressing the following questions:

- how have the general and specific duties affected the behaviour of public authorities, including, in particular, organisational culture, structure, control, procedures, policies, practices (taken to mean both how things are expected to be done and how things are in general done), and group process and decision making (including decisions, such as racial harassment, which are aberrant and isolated but significant in their consequences); and individual attitudes, beliefs (including prejudices), decision making, and experiences.
- what affects (whether more direct or more indirect) might these changes in behaviour have had on the matters at sections 71(1)(a) and (b). This might include, for example, looking at the affect on equality of educational opportunities, number of claims of racial discrimination upheld in the employment tribunals, and surveys of changing public attitudes.

It will clearly, however, be difficult to isolate with any great confidence the impact of the legislation from the impact of other factors. For example, an increase in some forms of racially aggravated crimes may partly reflect a greater willingness for people to come forward; which, in turn, may be partly the result of a change - including on account of section 71 - in the attitude and approach of the police force. We have, therefore, not even attempted in this report to reach other than very limited conclusions about some possible impacts of the legislation on race equality. In particular, we have - (1) looked at some of the evidence on compliance with the duty (including at the changes made in response to it), but without suggesting that compliance or non-compliance has necessarily had a significant impact on the matters at sections 71(1) (a) and (b); and (2) looked at some of the evidence on the current state of race equality (and in particular in relation to crime, poverty, and employment), but without suggesting that the race equality duty has had a significant impact on the state of race equality in relation to these phenomena.

4.7.1 compliance with the duty

Determining the level of compliance with the general duty may provide some indication of the effectiveness of the legislation. It would need to be borne in mind, however, that

formal compliance (i.e. compliance with the letter of the law) may not bring about the kind or degree of change that legislators had intended. For example, if compliance with the general duty requires no more than an assessment, an organisation might be compliant without changing its functions or policies (indeed, following an assessment which showed the financial cost of reducing adverse impacts, it might decide to do less to promote race equality). Further, organisations might in general fail to be formally and fully compliant, but their efforts to move towards compliance (and their compliance in some of their activities) may bring about important changes. For example, it seems likely that few of the estimated (see para. 4.6.1.1 above) 44,000 public authorities have assessed all their policies and functions. However, it also seems likely that the existence of the duty has led a large number of these (and perhaps the majority) to give more attention to promoting race equality and avoiding discrimination.

Comparable arguments would appear to apply in relation to the specific duties. Compliance with the specific duties could be a useful indicator of general organisational attributes (such as culture, competence, and attitudes towards equality issues). However, to gain a meaningful picture, attention would also need to be given to the context surrounding compliance or non-compliance (as compliance may be associated with good or poor practice). For example, if a local council applies unreasonably exclusive criteria in determining which policies are relevant to race equality, and ends up with a very short list, but includes this entire list in its race equality scheme, it will be compliant with article 2(2) (even though, as a result of its approach, it may end up conducting REIAS on a small percentage of all its policies). On the other hand, if another authority applies inclusive criteria, and ends up with a very long list, but does not include some of the identified policies in the Race Equality Scheme, it will be in breach of article 2(2) (even though, in this case, it may end up conducting REIAs on an exceptionally high percentage of all its policies).

4.7.1.1 Towards Racial Equality

4.7.1.1(a) aims and methodology

The field work for the CRE's *Towards Racial Equality* report (CRE, 2003a) began in "November 2002 (six months after the date for meeting the specific duties)" (ibid: 4). It consisted of a 'questionnaire based survey of 3,338 public authorities and educational institutions" (with a response rate of 47%) (ibid: 5); and an "Analysis of a random sample

of 143 race equality schemes and policies", which it states it "assessed against the recommendations of the Code of Practice and CRE guidance materials and therefore provide an independent view of the quality of the work to date" (ibid: 5). The main aim of the research is stated as having been "to provide a profile of the nature, extent and quality of response at the outset of the public duty" (ibid: 4). The Research should, it argues, "provide a baseline against which future progress can be measured and, in time, the effectiveness of the legislation reviewed"(ibid: 4). While a useful and timely piece of research, it does not in itself appear to provide anything approaching a sufficiently comprehensive or reliable base line.

A possible problem, we would argue, is the 47% response rate (even though the total number of responses is clearly impressive). A survey of public authorities by (or on behalf of) a watchdog public authority should perhaps have been able to achieve a higher rate; and, if this had not been possible, it may have been more appropriate to have selected a sample of less than the 3,338, but have ensured that a much higher percentage responded (and that this was done in such a way as to try and ensure that those who responded were relatively representative). As it is, it might be wondered whether, for example, the 53% who failed to respond are likely, in general, to have done significantly less in relation to the duty than those who did respond. In addition, it might be argued that there could have been more verification, since the findings appear to have relied a great deal upon respondents having a shared understanding of central concepts (such as what constitutes an assessment for relevance) provided in postal questionnaires, and upon them giving informed and honest answers. The random sample of race equality schemes and policies, however, would appear to have provided some basis for addressing these possible problems.

4.7.1.1(b) findings

Under 'positive indicators', it states (CRE, 2003a: 5) that "just under 70% felt that their work to date on the public duty had produced positive benefits". Bearing in mind the considerable amount of work involved in fulfilling the duty, and the importance of the issues addressed, just over 30% not perceiving positive benefits may be thought to give some cause for concern. It may partly have been a reflection of the duties having recently come into force, and of the preliminary stages being regarded as laying the grounds for positive benefits (rather than producing positive benefits). Set against this,

however, it appears that the concept of positive benefits was not taken to necessarily be restricted to tangible final outcomes - since the report states (ibid: 7) that “The positive result most often cited was increased awareness of race equality in policy making and service delivery”.

The research also looked at assessments, race equality schemes, and the implementation of some of the arrangements in the schemes. Of particular note, it found that:

- “84% of authorities and institutions said they had fully or partially assessed their functions for relevance” (38% partially and 46% fully) (ibid: 8);
- “Although most said their assessments had covered eliminating discrimination and promoting equality of opportunity, they were often less likely to have addressed relevance in relation to good relations between different groups” (ibid: 9);
- "Between 83 and 99% of relevant authorities and institutions, in the main sectors on which" it reported, said that they had produced a race equality scheme or policy (ibid: 9);
- its “independent assessment (based on legislative requirements and CRE good practice guidance) of a sample of schemes and policies found that 39% were 'fully' or 'mainly' developed.“ (ibid: 9); and
- “a high proportion of central government and parts of criminal justice with race equality schemes (or in the process of producing one), said their arrangements for monitoring the impact of policies had reached the implementation stage - whereas progress in monitoring both student and staff progress was much less advanced in education” (ibid: 10)

The greatest potential problems identified appear to have related to moving from processes (including assessment and monitoring) to setting objectives and deciding upon actions to achieve the objectives. It states, for example, (ibid: 10) - “In many cases ... race equality schemes and policies did not make clear links between assessment and monitoring processes and identifying objectives and actions as a result. Although a relatively high proportion of local authorities’ schemes and action plans, for example, proposed to integrate impact assessments and performance targets with their best value and other performance managements systems, this approach was not often made in other sectors’ schemes”. This, perhaps, supports the contention, suggested earlier

(4.5.2.4), that the absence (from the specific duties) of a requirement to set objectives was a major weakness (while, at the same time, perhaps, also supporting a conclusion that the duties have made a difference in relation to the matters which are covered).

4.7.1.2 The Journey to Race Equality

4.7.1.2(a) aims and methods

This report (Audit Commission, 2004) says that the 'main aim of the study was to investigate how local agencies were responding, at a strategic level, to the new duties under the Act in terms of delivering improved outcomes to local black and minority ethnic communities" (ibid: appendix 2). It involved (ibid: appendix 2) - three-day site visits to ten organisations, including councils, acute hospital trusts, police forces and primary care trusts; an NOP telephone survey of 150 organisations, "asking CEOs and 'equality champions' about their work on race equality"; focus groups with black and minority ethnic members of the public; interviews with 'national policy makers'; and a review of national data.

The report appears to provide invaluable insights; and to be particularly useful in that it looks at whether the duty has made a difference to outcomes. There are, however, some possible methodological limitations. For example, it might be wondered whether the interviews with 150 CEOs and equality champions fell between the in-depth interview and the representative sample. In addition, it was difficult, in some instances, to pick out what information supported which conclusions or what exactly (even in terms of ball-park percentages) the conclusions were. It states (ibid: para. 41), for example, that "Field work showed that many organisations found it hard to articulate what success would look like beyond a broad aspiration to 'treat people fairly'", but it does not explain how many 'many' is, whether finding 'it hard' meant not going beyond the broad aspiration 'to treat people fairly' or struggling in doing so, or whether 'many' organisations specifically referred to treating people fairly or if this was taken from one and included as a typical broad aspiration.

4.7.1.2(b) findings

The findings of most relevance to our purposes were in the section on 'How the public sector is responding' (ibid: paras. 36 to 52); and included:

- "Most public services recognise that race equality is an important aspect of good

performance. Our survey, commissioned from NOP (the Commission's survey) shows that 89% of chief executives say that race equality is a significant part of the organisation's overall objectives and 50% say they have changed their priorities to reflect this" (ibid: para. 38).

- "Public services are also confident about their progress. Four in five believe they made good progress with implementing their race equality scheme." (ibid: para. 40).
- "a gap between optimism and reality is emerging" (ibid: para. 40). It continues (para. 41) - "Local agencies say that race equality is an important part of improving services. However, many are unclear about what they are trying to achieve, and are focussing on compliance with the requirements of the Act.";
- "Two-fifths of organisations in the Commission's survey report poor progress in identifying race equality outcomes. When asked about their race equality objectives, the majority of organisations quoted the duties under the Act." (ibid: para. 40);
- "We found that progress is often measured in terms of process, rather than the delivery of outcomes that will impact upon quality of life. Although many local agencies are feeling confident, this is based on a low level of ambition to really deliver outcome change (ibid: para. 42).
- "The most common areas of success cited by equality champions in the Commission's survey were setting up systems, writing a race equality scheme or policy, and collecting or using information" (ibid: para. 42).

4.7.1.3 Common Ground - equality, good race relations and sites for Gypsies and Irish travellers

4.7.1.3 (a) aims and methods

The aim of this CRE Formal Investigation (CRE, 2006b), launched in October 2004, is stated as having been "to see how far local authorities in England and Wales were meeting the duty to promote race equality and good race relations in respect of Gypsies and Irish Travellers" (ibid: 1.6) (There appears to be no explanation as to why the duty to have due regard to the need to eliminate unlawful racial discrimination was not included). The report also suggests that "The way local authorities were meeting their duties in relation to Gypsies and Irish Travellers was to an extent a litmus test for how the duty was being met more widely" (ibid: 1.6).

Data collection included (ibid: 1.6.1) 'an open call for evidence'; a survey of local

authorities, with 'an in-depth' questionnaire sent to all 410 local authorities in England and Wales (with a 58% response rate); and cases studies "of policy and practice in nine local authorities".

4.7.1.3 (b) findings

An overview of the (highly informative and perhaps dispiriting) findings suggests that most authorities were failing, and failing badly, to meet the general duty in relation to Gypsies and Irish Travellers. Further, a majority appeared to be failing to meet the general duty more generally. For example, it found that only 42.4% of respondents had conducted REIAs on any of their policy proposals since May 2002 (ibid: 3.2.4.a). Since such assessments would appear to be central to meeting the duty, this would seem to suggest that over half have breached the general duty in relation to all of their policy proposals (or at least all of those of potential relevance to race equality) produced since May 2002. It may also be that all authorities have been failing to meet the general duty in relation to the majority of their policy proposals. We would need, however, to know more about what the 42.4% (who said that they had conducted some REIAS) had and had not assessed and the quality of the assessments conducted. It is notable, for example, that the report found that “Many REIAs consisted of a simple statement, with no supporting evidence” and that most “were related to employment matters rather than services“ (Ibid: 3.2.4.b).

The report findings of particular relevance to our research include:

- 99.1% of the authorities had published an RES; 28.6% of which specifically mentioned Gypsies or Irish Travellers (ibid: para. 3.2.2a).
- “Most local authorities failed to identify functions that were particularly relevant to Gypsies and Irish Travellers as being relevant to race equality and race relations” (ibid: para. 3.2.2b). For example, only 35.6% had listed planning as being relevant to race equality in their RES (ibid).
- 37.3% of local authorities said they consulted Gypsies and Irish Travellers differently from other groups, such as meeting with small groups, but the report said that “delving deeper into some of these good practice examples, we found that many of them did not amount to very much. For example, the regular face-to-face consultation that one authority had reported as good practice actually involved speaking to one Gypsy living in conventional housing in the neighbouring area about

providing Gypsy sites in the area" (ibid: 3.2.3a).

- "Most of the examples that authorities have of consultations with Gypsies and Irish Travellers involved small scale, day to day issues, such as repairs to sites" (3.2.3b)
- Only 42.4% of the local authorities that responded to the survey "had assessed any of their policy proposals since May 2002", and only 27% had published the results (3.2.4a).
- Most REIAS "appeared to be desk-based exercises, involving little consultation or further data collection, and were related to employment matters rather than services (ibid: 3.2.4b).
- 80.6% of local authorities "had either monitored the effects of some or all of the policies that were relevant to race equality and good race relations, or had started to do so, but not completed the task" (3.2.5a). It is difficult to interpret this figure without more details. For example, it may be that in most of these cases only one policy (perhaps, for example, recruitment) was monitored.
- 11% had monitored the effects of their policies on Gypsies and Irish Travellers (3.2.5a).

4.7.1.4 CRE audits

4.7.1.4 (a) authorities in Wales

According to a CRE press release (CRE 2005c), an investigation in Wales by the CRE "approached all local authorities, all NHS Trusts, the three fire services and four other public bodies" and "found that none of 43 bodies surveyed were properly meeting one of their key responsibilities". It is not clear from the press release whether the 'key responsibilities' should be taken to refer to the specific duties in general or, instead, how the "the organisations monitored the ethnic origin of their staff", which is what the press releases says the research 'focused on' (and which we assume concerned compliance with Article 5(1) of the 2001 Order).

4.7.1.4 (b). central government

"Whitehall departments", a CRE press releases states (CRE, 2006c), "are perilously close to being subjected to enforcement action for failure to deliver on their legal duties under the Race Relations (Amendment) Act 2000 ...". It continues - "By law, central government departments are required to assess new policies and legislation for their impact on race equality"; and, apparently on the grounds that the departments in

question had not conducted sufficient REIAS, it “found 15 government departments to be non-compliant”. Among these, the number of REIAS conducted (during the year in question) ranged from 20 in the case of the MOD to 0 in the case of the Department of Health; HM Treasury, Department for Culture Media and Sport; Foreign and Commonwealth Office; Department of Trade and Industry; and Department for International Development.

4.7.1.4 (c). Department of Health

A CRE press release (CRE, 2007a), dated 7 February 2007, states that “A formal Investigation into the Department of Health to uncover the extent to which it is failing to meet its duty to promote race equality ... was announced by the Commission for Racial Equality today”. It continues, a couple of paragraphs down, - “The CRE has on several occasions urged the Department of Health to address inequalities at all levels but found that Race Equality Impact assessments (REIAs) were not being satisfactorily carried out on the Department’s policies”.

4.7.1.5 Healthcare Commission Audit

4.7.1.5 (a) method

The audit looked at the websites of all 570 NHS Trusts (spending a set half an hour on each site) for some of the information that the general and specific duties require to be published. The press release states (Healthcare Commission, 2006) that the audit 'assumes that if a trust has published the documents, they will be accessible on the trust’s website as a minimum’ but acknowledges (ibid) that there “are situations where the trust may have met the requirement to publish without it being on the website”, and states that “The Commission stresses that the audit is not a definitive test of compliance ...”.

4.7.1.5 (b) *findings*

It found that 60% of trusts have published a current RES (2005-08); 6% have published employment monitoring statistics by ethnic groups in the last 18 months; and 2% have published the outcomes of race equality impact assessments.

4.7.1 the current state of race equality

4.7.1.1 crime and justice

We selected crime and justice to look at on account of their relevance to the origins of the 2000 Act; and because, relatedly, they might be regarded as among the areas in which there is, because of how they can impact upon the individual, the strongest possible duty on government and others to ensure that there is race equality. On the one hand, being a victim of crime can deprive someone of their life, the life of a loved one, or the freedom to move around without fear or at all; and, on the other hand, being accused of a crime can (sometimes wrongly) deprive someone of their liberty and/ or devastate their future life chances.

4.7.1.1(a) 'race' related crimes

(i) up to 2005/06 figures

There is a good deal of evidence that 'racial' factors play a significant part in a substantial number of crimes, and that some types of 'race' related crime have increased in recent years (but see 2006/07 update below). For example, according to Home Office figures (Walker et al., 2006: table 2.04), the police recorded 2,687 racially aggravated less serious woundings in 1999/2000; 5,423 in 2004/05; and 6,108 in 2005/06 (an increase of 13% between 2004/05 and 2005/06). In addition (ibid), between 2004/05 and 2005/06, there was an increase in recorded offences of racially aggravated harassment (14%), racially aggravated criminal damage to a building other than a dwelling (12%), and racially aggravated criminal damage to a vehicle (16%). There was, however, a decrease of 6% in recorded offences of racially aggravated damage to a dwelling (the only reduction in recorded racially aggravated crime that we were able to find for the period 2004/05 to 2005/06).

In interpreting these figures, and the figures given at (ii) below, it is worth noting the explanation that the glossary in *Crime in England and Wales 2006/07* (Nicholas et al, 2007) gives of 'Racially or religiously aggravated offences'. It states (ibid: 151) - "Used in recorded crime, racially aggravated offences are legally defined under the Crime and Disorder Act 1998 (section 28). The Anti-terrorism, Crime and Security Act 2001 (section 39) added the religiously aggravated aspect. Racially or religiously aggravated offences cannot be separately identified in police recorded crime. BCS respondents are asked whether they thought the incident was racially motivated, and from 2005/06 whether they thought the incident was religiously motivated".

Some of the increases in recorded racially aggravated crimes across the UK are partly the result of changes in how crimes in general are recorded. This has involved both improvements in recording procedures and mechanisms, which 'capture' more incidents; and changes in how crimes are defined, and, therefore, in what is included or excluded from a particular category. However, not only do changes in recording practice only explain part of the increases, it is notable that the increases in racially aggravated crimes have, in general, been greater than the increases in any associated larger category. For example, recorded offences of criminal damage to a building other than a dwelling, in England and Wales, decreased by 8% between 2004/05 and 2005/06 (Walker et al., 2006: table 2.04); whereas, as referred to above, the figure for racially aggravated criminal damage to a building other than a dwelling was an increase of 12% (ibid).

It is also appears that the number of recorded racially aggravated crimes may well be considerably less than the number of committed racially aggravated crimes. The basis for saying this is that, according to the 2001/02 and 2002/03 British Crime Surveys (Salisbury and Upson, 2004), people "with a mixed race background and black people were less likely to report an incident to the police than people from the white, Asian and 'Chinese or other' ethnic groups". Further, it seems likely (and would appear consistent with the relevant findings in the British Crime Surveys) that those with mixed, black, and minority ethnic backgrounds are more likely than the population as a whole to be the victims of racially aggravated crimes. The British Crime Surveys, for example, found that the "risk of racially motivated victimisation was higher for people from black and minority ethnic backgrounds than for white people in general" (Salisbury and Upson, 2004). In other words, those most likely to be the victims of racially aggravated crimes may be the least likely to report racially aggravated crimes to the police. We do not know, however, whether the under reporting of crime among particular groups is apparent for racially aggravated crimes or just for crime as a whole. It also seems that some racially motivated or aggravated crimes may not have been recorded as racially motivated or aggravated (see, for example, the Institute of Race Relation's documentary record of "racially motivated murders (known or suspected) 2000 onwards" at www.irr.org.uk).

(i) 2006/07 update

Shortly before completing this report, the *Crime in England and Wales 2006/07* figures were published (Nicholas et al, 2007). We have set out below what appeared to be the

most relevant findings; and, as can been seen, there have been considerable reductions in the numbers recorded in 4 of the categories (and considerable increases in 2). However, since we did not have time to take a proper look at the report, we have not been able to determine what factors should be taken into account when interpreting these apparent changes; and suggest, therefore, that the reader has a look at Nicholas et al's report themselves on the Home Office Website.

We thought it worth including the figures for 1999/2000, since that was the year before the race equality duty came into force (and also, we assume, the year from whence the same definitions - from the Crime and Disorder Act - have applied). It can be seen from these figures - although figures for the surrounding years should also be taken into account, along with any relevant changes in the effectiveness of recording practices, willingness to report offences, and other relevant factors - that, despite the important reductions between 05/06 and 06/07, the percentage changes between 1999/2000 and 2006/07 in all five categories are even more dramatic and are all positive i.e. representing increases in recorded offences. For example, number of recorded offences of racially/ religiously aggravated harassment went down by 1880 between 05/06 and 06/07 but went up by 17,727 between 99/2000 and 06/07.

offence	**number recorded 99/2000**	**number recorded 2005/06**	**number recorded 2006/07**	**% change between 05/06 and 06/07**
Racially/ religiously aggravated less serious wounding	2,687	6,107	5,619	-8
Racially/ religiously aggravated harassment	10,758	26,605	28,485	7

Racially/ religiously aggravated assault without injury	4,275	3,945	4,350	10
Racially/ religiously aggravated criminal damage to a dwelling	1,452	1,742	1,543	- 11
racially/ religiously aggravated criminal damage to a vehicle	1,232	1,899	1,711	- 10
racially/ religiously aggravated other criminal damage	5,90	975	944	-3

source: Nicholas et al (2007: table 2.04)

% change between 2005/06 and 2006/07

Racially/ religiously aggravated less serious wounding:	-8
Racially/ religiously aggravated harassment	7
Racially/ religiously aggravated assault without injury	10
Racially/ religiously aggravated criminal damage to a dwelling	-11
racially/ religiously aggravated criminal damage to a vehicle	- 10
racially/ religiously aggravated other criminal damage	- 3

4.7.1.1(b) the criminal justice system

There also appear to be possible manifestations of institutional racism in the criminal justice system, including in relation to the interaction between the police and the public, with, for example, the section 95 statistics 2004/05 finding that "Black people were six times more likely to be stopped and searched under section 1 (of the Police and Criminal Evidence Act 1984) compared to White people" (Criminal Justice Ministers, 2006); in relation to arrests, prosecutions, sentencing (eg House of Commons Home Affairs Committee, 2007), and treatment in prison (eg CRE, 2003b); and in relation to employment practices (eg CRE, 2005a). It needs to be borne in mind, however, that the picture is a

complex one. For example, the Section 95 Statistics (Criminal Justice Ministers, 2006) report that Black and Minority Ethnic (BME) "defendants were substantially more likely to be acquitted at the Crown Court than White Defendants (29% for Black people, 30% for Asians and 29% for White people". Unfortunately, we do not know the extent to which, if at all, this might be attributable to, for example (and these are pure speculations), more less well founded cases reaching the crown court in the case of 'BME' defendants; some jurors assuming this to have been the case and taking this assumption into account in their deliberations; or some jurors wanting to avoid the appearance or actuality of being racially biased.

We don't attempt here to take a look at the situation in the criminal justice system as a whole, but, instead, look briefly here at a couple of the reports on the situation in prisons.

Of particular note in relation to the situation in the Prison Service prior to the general duty is the report of the CRE's services and employment *Formal investigation of HM Prison Service of England and Wales* (CRE, 2003b), which looked at the period up to the autumn of 2000. Part 1 of the report concerns the racist murder of Zahid Mubarek and Part 2 deals more generally with race equality in prisons. The foreword to the report, by Ray Singh, Chair of the Panel of Nominated Commissioners, states (ibid: 5) - "It is the conclusion of this formal investigation by the Commission for Racial Equality that the Service committed acts of unlawful racial discrimination. This happened against individual members of staff and individual prisoners. It is also occurred in respect of the overall standards of delivery for the job it was created to perform, the care of prisoners, and its employment practices". The implication in the report appears to be that some at least of the problems were institutional. In the above quote, for example, reference is made to 'employment practices' (suggesting some sort of norm), as opposed to, for example, 'employment incidents'; and there appears to be no suggestion that the acts of unlawful discrimination were aberrational and unlikely to recur. The foreword to the report (ibid: 5) states, however, that "We are assured by HM Prison Service that much progress has been made in the three years since the end of the period covered by our investigation... We are not in a position to judge upon the extent of that progress but we are pleased to announce that an agreement has been reached between the Service and the Commission. An agreed action plan has been drawn up for changes and developments in the way HM Prison Service will work".

The report (HMIP, 2006) of HM Chief Inspectors of Prison's announced inspection, in January 2006, of HMP and YOI Parc (which was one of the three prisons covered by the CRE's formal investigation referred to above) does, however, provide some basis upon which 'to judge upon the extent of that progress', and appears to indicate that serious race equality problems remained. In the introduction, for example, Anne Owers, HM Chief Inspector of Prisons, states (ibid: 2006: p.6): - "Black and minority ethnic prisoners, as in many other prisons, had even more negative perceptions than white prisoners. It was of particular concern that impetus in race relations had slowed considerably: indeed there was no evidence of an action plan to deal with issues raised in the recent critical Commission for Racial Equality investigation. Ethnic monitoring was limited, and there was no record of racist incident investigations for previous years". In the Race Relations section of the report it states (ibid: para. 3.34) - "Survey responses from black and minority ethnic prisoners were significantly more negative than their white counterparts in several areas, such as treatment by staff, the administration of some procedures and services, and victimisation by other prisoners". It continues (para. 3.39) - "... Black and minority ethnic prisoners said they felt they were discriminated against in activities, complaints, home detention curfew (HDC), recategorisation and adjudications." It did, however, state (para. 3.34) that it had "found no evidence to suggest a high level of direct racism by staff or prisoners but the prison's own monitoring system had highlighted areas of possible indirect discrimination that needed careful scrutiny ...". The assertion that it found 'no evidence to suggest a high level of direct racism', when juxtaposed (and it seems contrasted with) the assertion that 'areas of possible indirect discrimination' had been highlighted, might be understood to be intended to mean that there was no evidence of any direct racism (including that no areas of possible direct discrimination had been highlighted); or might mean that it found evidence of direct racism but no evidence of high levels of it. If the intended meaning is the former, it would appear to be possibly at variance with other statements in the report, since there are indications elsewhere of significant levels of possible direct racism. For example, it would appear reasonable to assume that less favourable treatment on racial grounds (i.e. RRA section 1(1)(a) 'direct discrimination') would have been partly responsible for no black and minority ethnic respondents saying that their complaints had been dealt with fairly, compared to 24% of white respondents (unless the difference was down to different interpretations of the same treatment or there was a reason other than racial which was

responsible for the entire difference).

Other research also suggests that there may still be serious problems across the prison service. Cheliotis and Liebling (2006: 286), for example, drawing on a survey of 4,860 prisoners' perceptions of the quality of life in 49 establishments, state that "The findings support those of previous studies in that they raise concerns about the treatment of ethnic minority prisoners", and that "Ethnic minority prisoners tended to rate the quality of race relations in prison more poorly than their white counter parts".

4.7.1.2 employment and poverty

A recent review found (Platt, 2007: ix) that "all identified minority ethnic groups had higher rates of poverty than the average for the population"; and that "Child poverty rates were greater than adult poverty rates across groups, so that children from minority ethnic groups were poorer both than White children and than adults from their own ethnic groups" (ibid).

Platt's review also found employment disadvantage and relationships between this and higher rates of poverty. She writes (ibid: xi) - "Unemployment rates were higher for all identified minority ethnic groups compared to the majority ... Rates of pay also differed substantially, with Bangladeshi men facing particularly low rates of pay. This meant that both in-work and out-of-work Bangladeshi household faced high poverty risks". The causes of this disadvantage will, of course, be complicated, but the evidence appears to suggest that employment discrimination plays a significant part. She states (ibid: xi) - "Analysis of employment disadvantage found that it could partly be explained by characteristics such as education, but that an ethnic penalty tended to remain. The term 'ethnic penalty' is used to summarise the disadvantage associated with a particular ethnic category that remains once relevant characteristics have been controlled for. It therefore includes additional, unmeasured, factors including discrimination".

There does appear to be considerable possible evidence of significant employment discrimination. The CRE, for example, stated in a press release in May 2007 (CRE, 2007b) that "Latest CRE statistics show Racism is still rife in the work place". It continued - "The CRE received over 5,000 complaints over the last six months and found that a staggering 43% of all complaints were linked to employment"; notes that "analysis from

the Employment Tribunal Services revealed that in 2005/06 there has been a 2.7% increase in the number of race discrimination cases submitted to employment tribunals since last year"; and that, perhaps most significantly of all, the "latest unemployment figures released from the Office of National Statistics showed that the unemployment rate for ethnic minorities is over 11% - twice the national average". These figures clearly paint a worrying picture. It is not clear, however, that the latest CRE statistics (on the complaints to it) 'show that racism is rife in the work place' (even though it might indeed be rife). There is no indication, for example, of how many of the 2,150 employment 'complaints' appeared to be probable cases of section 1(1)(a) - less favourable treatment on racial grounds - which is what the term 'racism' in this context would appear to imply. In addition, of course, Employment Tribunal figures reveal an increase in decisions to submit a complaint to a tribunal, which may or may not reflect an increase in the number of instances of unlawful employment discrimination (with other factors, such as, for example, awareness of the legislation or level and nature of support from unions, needing to be taken into account).

5. HAS THE CRE COMPLIED WITH SECTION 71?

5.1 WHAT IS REQUIRED OF THE CRE

In-line with the 'appearicist' approach (*supra* para. 3.1 and 3.21), we have attempted to set out in as much detail as is practicable the basis upon which we reached our conclusions about CRE compliance (including so that the conclusions can be more easily assessed and challenged). This has included setting out:

- why we think the standards for assessing the CRE should meet particular conditions (see 5.1.1) and how we think particular standards meet (or don't meet) these conditions; and
- some of our doubts about the approach we have taken and about the credibility of our findings (throughout section 5).

5.1.1 basis for determining standards against which to assess the CRE

We aimed to assess compliance in such a way that any findings of non-compliance could be regarded as relatively reliable and valid. We, therefore, assessed CRE actions (including any failures to act) against standards which, as far as possible, met the conditions set out below (5.1.1.1 - 5.1.1.3). It can be seen that the main conditions were that:

- meeting the standard appeared likely to be a requirement under section 71;
- the CRE appeared to accept that meeting the standard was a requirement under section 71;
- the standard could be adequately operationalised (through reliable indicators) and applied to the information we had or could get.

5.1.1.1 clear support from the case law; and support from the statute, debate and code *(a) case law*. The paramount condition is that it be relatively clear that the case law has determined that any failure to meet the chosen standard constitutes in itself non-compliance with the section 71 duty (see 4.2 on what section 71 requires). This, therefore, argued against, for example, the standard of 'due regard' having been had in acting on the findings of an REIA (see 4.4.2.2. - 4.4.2.3. above). *(b) statute.* Bearing in mind that the case law does not go as high as the House of Lords, and that - assuming that the legislation is not superseded first - the Lords may come to disagree with what the Court of Appeal has determined, and that, in addition, the case law is limited in scope (see 4.2.3), it would be preferable to select standards which are apparent in, or at least consistent with, the 'pure spring' of statute (which, of course, the Lords would draw upon). *(c) debate in Parliament*. Since the House of Lords may well go back to the debates on the bill, including on account of the lack of precision in the statute, it would also be preferable to select a standard which appears to be consistent with Parliament's intentions as expressed in debate. *(d) code of practice* (CRE, 2002a). The Code of Practice on the race equality duty has legal status and the court can take it into account in determining whether the duty has been met (see appendix 1c). It can be used, we would suggest, to better understand the court's determinations (since the court may have taken it into account), and to cast some light on questions in relation to which the courts do not so far appear to have made a decision (since they may well take the code into account if and when they do).

5.1.1.2 clear support from the CRE

Assessing the CRE against standards which it appears to consider must be met (to be compliant with section 71) would have number of advantages. First, the CRE are the enforcement body for the section 71 duty; and, therefore, should have particular expertise in determining what might be required. Second, it might argued that the Commission had, in effect, chosen the standards against which it was assessed; which

might be thought to be, in some respects, both fair and telling. For example, if it has not been following what it has said are the requirements, this, perhaps, raises concerns about whether it has followed other possible requirements. The CRE may, of course, agree with the standards we have chosen but disagree with how we have measured them against these standards.

In attempting to determine what the CRE considers to be the requirements, we looked at its statements in the Code of Practice (CRE, 2002a); in non-statutory CRE documents (from press releases to annual reports); and in its High Court submissions in *Elias* (as reported in the judgment). In drawing conclusions from the Code, however, the special circumstances of statutory guidance needs to be borne in mind. For example, the CRE's current beliefs about what is required may be significantly different (perhaps as result of recent case law) from the assertions it made in the Code, but, whereas it could quickly change its own documents, it may have been reluctant to go through the complicated process (set out at section 71C RRA) entailed in amending the Code (including for example the requirements in relation to consultation).

5.1.1.3 operationalisable

There will, of course, be limits to a standard which appears to reflect a requirement, if it is impracticable to determine whether the CRE has been meeting the standard. For example, there would appear to be good support for there needing to be both 'whether' assessments on all policies and 'how' assessments on all 'relevant' policies. However, the latter assessment having been conducted would appear to be a more operationalisable standard in that 'how' assessments are far more likely to leave a paper trail (and arguably must leave one); and, therefore, the absence of a written record of a 'how' assessment will be more compelling evidence of non-compliance than the absence of a written record of 'whether' assessments.

5.1.2 determining and presenting the standards

5.1.2.1 determining the standards

With the exception of the need to assess policies, there appear to be no standards which meet to a high degree all the conditions set out above (5.1.1). This seems, in particular, to be the result of imprecision in the statute; there so far having been few relevant court cases; and the cases which there have been having focused on the question of whether

policies were assessed. Arguably, this should be the end of the matter - this is what is most clearly required, and, therefore, what CRE compliance should be judged against.

There are, however, indications in the case law, and clear statements in the Code of Practice, that more is required; and more being required is certainly not inconsistent with a reading of the statute or the debates in Parliament (see 4.2.3). We have, therefore, also included standards which (while, in some respects, not being as ideal for our purposes as assessment of policies) appear to meet the set conditions to a substantial degree, and are not inconsistent with the statute and case law (including, of course, the case law not having implied that the standard is not a requirement). For example, the need to conduct a 'whether' assessment of functions gains considerable support at Article 2(2) of the SDO (at least in the case of those subject to the article), but the question of functions is not addressed (or at least not directly or explicitly) in the court judgments.

However, a necessary accompaniment to this approach to selecting standards is that we make clear why we think a selected standard might not be a requirement, not just why we think that it is (both of which we have attempted to do in the 'substantiation' columns in the tables below). For example, in *Elias* in the Court of Appeal (para. 274), LJ Arden's states - "It is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them." Arguably, this should be taken to mean that the only requirement is to give advance consideration before making a policy decision, and that, therefore, there is no requirement to assess functions (although it might, instead, be argued that it is simply a statement of what is required in relation to policy decisions; or, indeed, that decisions on how to carry out a function are policy decisions, and, therefore, subject to the requirement stated in the quote from Arden).

5.1.2.2 <u>assigning levels of confidence</u>

The other necessary accompaniment to the approach is, we would argue, to assign levels of confidence to the selected standards - indicating how confident we are that the standard is also a requirement. It should be stressed, however, that the assignments do no more than reflect our level of confidence (albeit based upon an attempt to weigh up the evidence); and the reader is left to decide - including, perhaps, on the basis of the

information reproduced in appendix 1 - what level of confidence to assign to our assignments of confidence.

5.1.3 what is required in relation to functions

requirement	substantiation	confidence
5.1.3.1 *assessment (not of functions) but of how functions are carried out*		

(a) There would appear to be, at most, a quite limited requirement, under section 71(1), for an authority to assess it functions i.e. to assess what its statutory duties and powers consist of. Our reasoning is that the CRE's functions are set out in statute; and are, therefore, decisions that legislators have taken. In other words, determining what its functions are is not a function of the CRE. However, reviewing its functions (along with drawing up proposals for amendment) is a function, under section 43(1)(c); and, therefore, how it reviews its functions should be subject to assessment under section 71(1). In addition, it proposals for amendment to its functions might be regarded as policy decisions (on account being what it has decided to propose) which it would need to assess in pursuance of its duties at section 71(1).	Its duties and powers derive from policy decisions that legislators have taken (and, consequently, any duty to assess the CRE's functions would appear to be primarily on the relevant central government departments, in so far as there would be a requirement on departments to assess their proposals to ministers). We suggest above (??), however, that there may be important exceptions to this. It should be noted that the Code of Practice, and the SDO, refer to assessing functions. However, we suspect that this should, perhaps, be understood as short-hand for assessing how functions are carried out (as, indeed, is made explicit in the case of para. 3.11c of the Code). The apparent requirements to assess how functions are carried are discussed in the remainder of this table.	low-medium

(b) Instead of a duty to assess a function (i.e. to assess the powers and duties entailed in it), any duty to assess is likely to be to conduct an assessment in relation to how a function is carried out.	In addition to the arguments (at 5.1.3.1(a)) for there not being a duty to assess statutory functions, support for there being a duty to assess how functions are carried out comes from the following (set out in more detail at 4.2.2.1): how section 71 is worded (including reference to 'in carrying out its functions') and the section's broad sweep; SDO Article 2(2) read with Article 2(3); such a duty being consistent with the purpose of section 71 (including in that an assessment of a function would appear likely to achieve something additional to assessments of the policies which constitute or arise from it); a requirement to assess how functions are carried out may be entailed in the requirement (apparent in the case law) to assess policy decisions; the Code of Practice clearly states that there is a duty to assess functions (which certainly appears intended to include consideration of how the function is carried out and, indeed, this may be the extent of what is meant). However, the case law does not appear to clearly imply either that there is (or that there isn't) a duty to assess functions or to assess how they are carried out. This, perhaps, suggests that the duty does not exist (although this seems unlikely on account of SDO article 2); was not understood as relevant to the cases in question; or was regarded (in the circumstances of the particular cases or in general) as of less importance than the duty to assess policies, or as subsumed within that duty.	medium

5.1.3.2 *assessment of whether function is relevant to section 71*		
(a) Public authorities (or at least those, like the CRE, which are subject to Article 2 of the SDO) must conduct some sort of assessment of each of their functions - taken to mean, perhaps, how it is carried out (including, perhaps, plans and proposals for the function) - for relevance to its performance of its duties under section 71.	If there is a requirement to assess how functions are carried out (see 5.1.3.1(b) above), the minimum that would appear to be required would be an assessment of whether or not the function is relevant to section 71 (assuming requirements are relatively analogous to those which appear, from the case law, to apply in the case of policies). Therefore, the arguments referred to above (at 5.1.3.1(b)) for there being a duty to assess would also appear to apply to a duty to conduct at least this minimum level of assessment. In addition, the SDO appears (from article 2(1)(a) read with 2(3)) to require this kind of assessment, and - although the relationship between non-compliance with the specific duties and non-compliance with the general duty, is complex and uncertain (see 4.2.4) - we would argue that substantial non-compliance with the specific duties would be at least strongly indicative of 'due regard' not having been had; and that the failure to assess functions for relevance would constitute such substantial non-compliance.	medium-high

(b) (i) To be proper, consideration of whether the function is relevant must be at least cursory but cursory consideration is only sufficient if such consideration makes it plain that section 71 is not relevant. (ii) However, the criteria for what constitutes 'plain', and what constitutes 'cursory', may be more demanding than in the case of policies. In the case of 'cursory', this is especially on account of functions being, in general, more complex. In the case of 'plain', this is especially on account of functions, again in general, having greater impact. In particular, to constitute 'plain', there may need to be a higher degree of certainty than in the case of policies; including, in particular, because the impact of not treating a function as relevant would tend to be greater than the impact of not treating an individual policy as relevant.	The comments (reproduced in our appendix 1(d)) in *Elias* in the High Court (at para. 96 of Elias HC), relating to cursory consideration, appear intended to particularly apply to the compensation scheme (which would appear to be closer to a policy than a function). However, the judge also appears to be possibly setting out a general principle about assessing for relevance, which the context suggests might well have been intended to apply to all policies (or at least to those of a comparable nature to the compensation scheme) but which he might also have intended to apply to all assessments for relevance (including to assessments of functions). Further, there would appear to be no good reason why functions, which in general will have more impact than individual policies, should be subject to less scrutiny than is entailed in the requirement which appears to exist in relation to policies. Indeed, it might, bearing this in mind, be that the requirement in relation to functions is greater than that in relation to policies; and that it being 'plain' after 'cursory' consideration of a function may not in general be sufficient (unless 'plain' and/ or 'cursory' are understood differently in the case of functions compared to in the case of policies).	(i) low-medium (ii) low-medium

(c) (i) Making it 'plain' (see 5.1.3.2(b) above) requires a ‘careful attempt’ to assess whether the function in question raises any issues relating to racial equality.	(i) *Elias* in the High Court (at para. 97) appears to suggest - although, on account of the circuitous manner, it is far from clear - that the assessment for relevance must include a "careful attempt" to assess whether the policy in question raises issues relating to racial equality. That this would appear to mean that cursory consideration needs to be careful consideration suggests, perhaps, that a word other than 'cursory' could usefully have been chosen rather than that the requirements are contradictory (so long as the meaning of ‘cursory’ and ‘careful attempt’ are understood in the context of the relevant paragraphs and excessive attention is not given to their normal every-day meaning). There is considerable doubt, however, comparable to that referred to at 5.1.3.2 (b), as to whether the requirement for a ‘careful attempt’ should be understood to apply to assessments of functions as well as of policies. On balance, we would argue that, if there is a requirement to assess functions for relevance, this requirement for a ‘careful attempt’ (as set out in para. 97 of *Elias*) either applies to functions or makes it likely, unless it is itself overturned, that a similar requirement will be found to apply in the case of functions.	(i) low-medium

(c)(ii) 'careful attempt' means that the assessment must be reasonable, or at least not irrational, which might entail that the consideration-assessment process was in some sense adequate (including, perhaps, on account of the person conducting it being in some sense adequate to the task of doing so). However, we suspect - including on account of the approach that the courts have taken to justification in discrimination cases (eg *Jones v Post Office*) - that any such requirements might be fairly limited.	(ii) To be 'plain' (in the sense which appears to be suggested in *Elias* in the High Court: para. 96), irrelevance to section 71 would appear to need to be plain to a particular person in particular circumstances. Paragraph 96, however, does not appear to address the question of who and what these need to be. It may, therefore, make some sense to conclude that the use of the words 'careful attempt' in the next paragraph (*Elias* HC: para. 97) goes some way towards doing so. Specifically, it might be understood to mean that the circumstances of the assessment (including the person conducting it) need to have been such that the assessment can be said to have been careful. It is not at all clear, however, whether - assuming that the general premise is correct - it is sufficient that the authority reasonably understood itself to have been making a careful attempt or whether, if it came to court, more objective criteria would need to be applied.	(ii) low-medium

(d) (i) If there is uncertainty as to whether section 71(1)(a) is relevant i.e. it is not plain that it is not relevant, further consideration of the potentially discriminatory effects of the function will be necessary. (ii) The requirement to consider further may also apply if there is uncertainty as to whether section 71(1)(b) is relevant to the function.	(i) The requirement for further consideration, in the event of uncertainty about the potentially discriminatory effects of a policy, appears to be indicated at para. 98 of *Elias* in the High Court. Further, on account of the Home Office appearing to have stated that it had found there to be no race equality issue, it might be concluded that the requirement for further consideration is meant to apply to assessments for relevance - since that is as far as the Home Office had got or failed to get - although it might be thought to also be intended to apply to assessments of how section 71 is relevant. As with (b) and (c) above (and for comparable reasons), we have concluded that the requirements in relation to policies - suggested in the case law - may, to some extent, also apply to functions or, alternatively, comparable requirements may be found to apply if the courts were to specifically address the question. (ii) Since it is neither clear that the requirement applies to policies in relation to section 71(1)(b), nor that it applies to functions in relation to section 71(1)(a), it might be concluded that there is particular doubt as to whether it applies to functions in relation to section 71(1)(b) - hence the assignment of 'low-medium' confidence to our suggestion at (d)(ii).	(i) medium (ii) low-medium
5.1.3.3 *assessment of relevant functions*		

(a) In the case of functions which are relevant - to its performance of its duties under section 71 - there is some requirement to conduct a more detailed assessment of how the function is relevant.	The Code clearly indicates that the assessment should go beyond identifying relevant functions (4.2.2.1(k)(l)(m)(n)(0)(q)). It states, for example, that “Public authorities should therefore assess whether, and how, race equality is relevant to each of their functions“ (CRE, 2002a: 3.4). Further, determining whether a function is relevant, without conducting further assessment, would appear to be of little value. It would tell the authority that it was probably affecting the matters at section 71(1), but not necessarily whether it was furthering the aims therein implied or what it could usefully do in future. It might also be argued that case law support for there being a requirement to conduct more detailed assessments of relevant policies provides some limited support for there being a similar requirement in relation to relevant functions. This is because some of the statements might be intended to also be general statements (applicable to functions) about the need for more detailed assessments; and because assessing the policy decisions made in relation to a function might be thought to come close to constituting an assessment of the function. However, it might be thought significant that there is a requirement, under the SDO, to state arrangements for assessing proposed policies but not arrangements for functions. Specific arrangements are, perhaps, considered less important for functions, on the grounds that there will not be an ongoing flow of them, but it may simply be that no such assessment is required.	medium

(b) The assessment of how a functions is relevant, to be proper, should include - (i) an attempt to assess the extent of any adverse impact on race equality; and (ii) an attempt to assess possible ways of eliminating or minimising any adverse impact.	On the basis of comments in *Elias* in the High Court (at para. 97) about the compensation scheme, and what the Code states (including, in particular, at para. 3.14) an assessment of relevant functions should include, we would argue that as a minimum - and so as to make it an assessment of how a function is relevant, rather than whether it is relevant - there may well be a requirement that there be some attempt to assess the extent of any adverse impact on race equality, and to assess possible ways of eliminating or minimising it. However, it should be borne in mind that para. 97 in *Elias* HC may not be intended to apply to functions, and that it is not clear, in this matter (including at para. 3.14), whether the Code regards itself as setting out legal requirements or good practice.	low-medium

(c) (i) There needs to be or have been some written record of the assessment. (ii) Consideration must be given to all three parts of the general duty (at 71(1) (a) and (b)); and should include assessing whether the way the function is being carried out is meeting the three parts of the duty.	(i) The objective of the 'how' assessment would appear to be to assist with addressing any identified problems. Therefore, and bearing in mind the complex nature of functions and the sort of detailed conclusions that are likely to be drawn, the failure to record in writing any of the conclusions would appear to cast considerable doubt on whether a section 71 compliant 'how' assessment had been conducted. In relation to this, it is worth noting the comments of Justice Burnton in BAPIO in the High Court (para. 69) - "If there had been a significant examination of the race relations issues involved in the change to the Immigration Rules, there would have been a written record of it". It is perhaps particularly notable that he says 'would have been' rather than, for example, 'is likely to have been'. (ii) The Code (para. 3.10) says that the authority should consider and deal with all three parts of the general duty. However, there would also appear to be support for the idea in that the statute does not appear to indicate that more attention should be given to any one part of the duty, and makes it clear that 'due regard' has to be had to all three parts. In addition, *Elias* HC (para. 100) appears to support the idea that attention must, 'in principle' at least, be paid to all three parts (see our appendix 1c for relevant extract).	(i) low-medium (ii) medium (iii) medium
5.1.3.4 <u>monitoring and reviewing functions</u>		

(a) (i) Previous assessments of functions for relevance to section 71 ('whether' assessments) must be reviewed at least every three years. (ii) Such reviews require some re-assessment of each function (either at the time of the review or not so long before it that there is a significant likelihood that its findings are no longer valid).	(i) There is a requirement, at article 2(3) SDO, to review 'the assessment' of functions referred to at article 2(2)(a). Arguably, this requirement is of sufficient importance that, even though it is a specific duty, not meeting it may be thought to at least cast significant doubt on whether the general duty was being met in relation to the matter. That such a review may in some circumstances be required in order to meet the general duty, is, perhaps, also supported by the statement from the Code of Practice that - "The general duty is a continuing duty. What a public authority has to do to meet it may change over time as its functions or policies change, or as the communities it serves change" (3.7). This would appear to indicate that an assessment which is redundant - because the function and/or the circumstances have changed - is no longer sufficient to meet the duty; and, therefore, it needs to be reviewed or redone. (ii) Reviewing whether an assessment is still valid would appear to require comparing that assessment with a new one. In other words, the review implies some sort of assessment comparable to the original one (albeit the original assessment may have involved some ground work - such as establishing criteria - which may not need to be repeated in the case of the new one).	(i) That it is required under the SDO = high. That it is required to meet the general duty = low-medium. (ii) medium

(b) There is some requirement to monitor functions.	If a major purpose of assessment is, as the case law would appear to suggest (at least in the case of policy decisions), to enable the identification and tackling of possible future adverse impacts, it would appear logical for 'due regard' to also require that some consideration be given to what the actual impacts of the policy turn out to be (since the predictions may well have been incorrect). It also seems that the three yearly review would not in itself be adequate to this purpose, since substantial changes to the function and/ or the circumstances - which may, in turn, have adverse impacts on race equality - could occur just after one review, and, as a consequence, may go largely unidentified and unaddressed for almost three years i.e. until the next review. Further, it is not clear why 'due regard' 'in carrying out its functions' should be taken to refer to assessment and not to monitoring; especially when it is borne in mind that section 71 does not explicitly refer to either. It should be noted, however, that the SDO requires that the RES state arrangements for monitoring policies for adverse impact, but does not require that the same be done for functions; and this might be thought to support the argument that there is no discrete duty to monitor functions (except in so far as there is a duty to monitor relevant policies which arise from or constitute a function).	low-medium

5.1.4 what is required in relation to policies

requirement	substantiation	confidence
5.1.4.1 <u>assessment of whether proposed policies are relevant to section 71</u>		
(a) (i) Before making a policy decision, proper consideration (involving some sort of assessment) must be given to whether section 71 is relevant. (ii) To be proper, consideration must be at least cursory but cursory consideration is only sufficient if such consideration makes it plain that section 71 is not relevant; and, in addition, 'cursory' consideration would need to include a 'careful attempt to assess whether' the policy decision 'raised issues relating to race equality'.	(i) The courts appear to have made it clear that there is a duty to give proper consideration to whether section 71 is relevant before making a policy decision (see, for example, Elias HC: paras 96-98; and Elias CA: 274 - both reproduced in our appendix 1D). It also appears that some form of assessment would need to be involved, with, for example, reference in *Elias* HC (para. 97) to 'careful attempt to assess'; and references to assessing proposed policies at SDO article 2. (ii) The judge in *Elias* in the High Court (at paras 95 - 96) appears to indicate that cursory consideration will be sufficient if such consideration makes it plain that section 71 is not relevant. However, as we discuss at 4.4.3.1 and 5.1.3.2(b), it is not clear what 'cursory' or 'plain' are intended to mean; nor how 'cursory consideration' fits with what appears to be a need - expressed at para. 97 of Elias HC - for a 'careful attempt' to assess whether the proposed policy raised issues relating to race equality. On balance, we suspect that the requirement is that cursory consideration be ‘careful’ in the sense that the ‘attempt’ is a reasonable one.	(i) High (ii) low-medium

(b) (i) If there is uncertainty as to whether section 71(1)(a) is relevant, further consideration of the potentially discriminatory effects of the policy will be necessary. (ii) The same requirement may apply to 71(1)(b), but so far the courts do not appear to have explicitly said that it does.	(i) That further consideration is required in the event of uncertainty appears to be fairly clear from *Elias* in the High Court (at para. 98 of the judgement and reproduced in our appendix 1D). (ii) Since it appears that 'due regard' is required to be had to all three elements of the section 71 duty (see 5.1.3.3(c)(ii) above), it might be concluded that further consideration will be required if it is 'plain' that section 71(1)(a) is not relevant but there is uncertainty as to whether section 71(1)(b) is relevant. Further, the reference in *Elias* in the HC to 'potentially discriminatory effects' (para. 98) may have been intended to mean effects on race equality (and to include the matters at section 71(1)(b)). However, it might be argued that the requirement in relation to the matter at 71(1)(a) (i.e. the need to eliminate unlawful discrimination) is stronger (on account of being multiple) in that it might be said to arise from section 71 but also from the general requirement not to commit unlawful acts i.e. from the meaning of unlawful.	(i) high (ii) medium-high
5.1.4.2 <u>assessment of relevant proposed policies</u>		

(a) If a policy is assessed as being relevant to section 71, there needs to be some sort of assessment of how it is relevant.	There appears to be a great deal of support in the case law for this proposition. For example, LJ Arden's reference in *Elias* in the Court of Appeal (at para. 274 of the judgement and reproduced in our appendix 1D) to giving 'advance consideration to issues of race discrimination...' would appear to suggest the need, in some circumstances, to do more than determine whether race discrimination is an issue; and the comments in *Elias* in the High Court (at para. 97), referred to at (b) below, would appear to suggest that the assessment will sometimes need to be quite detailed. There also appears to be support in the requirement in the SDO to state arrangements for assessing the likely impact of proposed policies; and from various statements in the Code, including, in particular - “Public authorities should therefore assess whether, and how, race equality is relevant to each of their functions“ (CRE, 2002a: 3.4)	high
(b) (i) If section 71 appears to be relevant, consideration, to be proper, should include an attempt to assess the extent of any adverse impact on race equality. (ii) If section 71 appears to be relevant, consideration, to be proper, should also include an attempt to assess possible ways of eliminating or minimising any adverse impact.	Support for the propositions at (b) (i) and (ii) comes, in particular, from *Elias* in the High Court (at para. 97 of the judgement, which is reproduced in our appendix 1D). In addition, the Code of Practice appears to suggest that identifying and reducing adverse impacts are the central elements in assessing relevant policies (see, for example, para. 3.16 of the Code of Practice, reproduced at our appendix 1C).	(i) medium-high (ii) medium-high

(c) Consideration must be given to all parts of the three parts of the general duty (at 71(1) (a) and (b)), except to any part which was found not to have been relevant in the assessment for relevance (i.e. the 'whether' assessment) and was not subsequently found to be relevant (including during the 'how' assessments in relation to the parts of the duty which had been found to be relevant in the ‘whether‘ assessment).	It is not clear whether the statement, in *Elias* in the High Court (at para. 100) - that in principle consideration must be given to section 71(1)(b) as well as (a) - is meant to apply to an assessment for relevance (i.e. a ‘whether’ assessment) or an assessment of relevance (i.e. a ‘how’ assessment). However, since it appears to be neither specified nor otherwise apparent from the context, it might be thought to apply to both. There also appears to be support (as discussed at 5.1.3.3 (c)(ii) above) from the statute and the Code of Practice for the need to consider all three parts of the duty. We wonder whether what might be required is a 'whether' assessment which looks at all three parts, and a 'how' assessment which focuses on the parts which were found to be relevant. However, it might also be argued that, on account of involving more detailed consideration, a 'how' assessment in relation to a part of the duty found to be relevant in a 'whether' assessment may well - if it remains alert to the possibility - find that parts of the duty found not to be relevant in the original 'whether' assessment are, in fact, relevant.	medium-high

(d) Consideration, to be proper, will, in some circumstances, require some consultation; including when consultation is necessary so as not to be uncertain as to whether section 71(1)(a) is relevant .	There is considerable emphasis in the Code of Practice on the need to consult as part of the policy making process (see for example para. 4.22 of the Code); and the requirement at article 2(2)(b)(i) - to state arrangements for 'consulting on the likely impact of its proposed policies ...' - might be thought to indicate that (perhaps as an aspect of due regard) the stated arrangements should be in place and in some sense be put into practice; rather than it being sufficient to state in the RES that there are no arrangements or to state ones which don't exist (including in the sense of there being no intention to implement them). Further, the statement, at paragraph 96 in *Elias* in the High Court - that "There is no need to enter into time consuming and potentially expensive consultation exercises or monitoring when discrimination issues are plainly not in point" - could, perhaps, be understood to imply that there may be a need to do so when it is not plain that discrimination issues are 'not in point'. Such an understanding might also be thought to be consistent with - and supported by - the suggestion at para. 98, in the same case, about the need for further consideration in the event of uncertainty. Indeed, it would seem reasonable to conclude that consultation will often reveal impacts that a desk based exercise did not. However, it is far from clear that there is any duty, under section 71, to consult; and, even if there were, it might be thought unlikely to apply to all 'how' assessments.	low-medium

5.1.4.3 <u>assessment of in-force policies</u>		
(a) (i) There is a requirement, in some circumstances, to assess in-force policies. (ii) The requirement suggested at 5.1.4.3 (a)(i) includes a requirement to assess in-force policies for relevance at least every three years. (iii) The requirement at 5.1.4.3 (a)(i) includes a requirement to assess policies which came into force before section 71 came into force. (iv) Changed policies, and/ or changes to policies, will sometimes require assessment in relation to section 71. (v) The requirements in relation to the kind of assessments suggested at 5.1.4.3 (a (iii) and (iv) are comparable to the requirements in relation to proposed policies (set out above at 5.1.4.1 and 5.1.4.2)	(i) As discussed at 4.2.2.2 (a), there is considerable support in the case law, Code of Practice, and the SDO, for there being some requirement to assess in-force policies. (ii) Reading SDO 2(2)(a) with 2(3) might be thought, for the reasons set out in relation to functions at 5.1.3.4(a)(ii), to suggest that assessing in-force policies for relevance every three years is a requirement of the specific duties. It is not clear, however, whether the failure to review (and therefore assess) would also constitute non-compliance with the general duty. (iii) The High Court *in Elias* (paras 91-104) appeared to accept that there had been no requirement to assess the proposed scheme (since the proposal stage predated section 71 coming into force), but that the in-force scheme should have been assessed when section 71 came into force. (iv) The High Court in *BAPIO* (paras. 64-70) appeared to determine that there should have been a significant examination of the section 71 issues involved in the change to the Immigration Rules. (v) There appears to be no suggestion in either *Elias* or *BAPIO* that the assessment requirements are not comparable between proposed and inforce policies.	(i) medium-high (ii) requirement of the SDO = medium-high Requirement of the section 71 = low-medium (iii) medium-high (iv) medium (v) medium

(b) There is, instead of the requirements being as suggested at (a) above, a general requirement to assess whether each of their policies is relevant to section 71, and to assess how the relevant policies are relevant; but with there being some circumstances in which it will not be necessary to conduct the second type of assessment and, perhaps, circumstances in which it will not be necessary to conduct the first type.	First, if, as suggested at (a)(iii) above, *Elias* indicates that there is a requirement to assess in-force policies when the 'failure' to assess the proposed policy had not been a breach (on account of section 71 not having come into force), there may be some requirement when the failure was a breach (including on account of section 71 having come into force). Second, continuing with an unassessed policy is a policy decision relevant to section 71; and, therefore, should be assessed. Further, assessing the decision to continue with a unassessed policy would appear to require some assesssment of the unassessed policy. Third, to not assess unassssed polcies - unless the circumstances, such as, for example, if the policy in question was about to be superseded - might be thought to not constitute 'due regard'. Fourth, it might be argued that the implication of the case law is not that there is a requirement to assess all proposed policy decisions; but, instead, to not decide upon or put in-force policy proposals which have not been assessed. In this sense, it is not proposed or in-force policies which are subject to the requirement to assess but the policy process (including the transformation of a proposal into a policy).	medium

(c) (i) In certain circumstances, the assessment requirements in relation to unassessed in-force policies will, in some respects, be less than in relation to proposed policies. (ii) In particular, there may be less need for a formal assessment if monitoring (whether formal or incidental observation) of the policy has been sufficient to make it plain that the policy is not relevant to race equality; or the monitoring indicated that the policy is relevant to race equality, and served as a proper assessment (including, for example, an assessment of how any adverse impact could be minimised).	The overriding need is to have 'due regard'. What constitutes 'due regard' will depend upon the circumstances, and an important element of the circumstances will be whether the policy is inforce - both because more will be known about the actual impact of in-force policies (and so there will be less need to conduct more formal predictive assessments); and because changing in-force policies will tend to be more difficult (which might go to the question of what is 'due'). Another way of looking at this is in relation to what appears to be the purpose of section 71(1) i.e. to ensure that proper consideration is given to race equality in decision making (including decision making about whether to change or continue with a policy). In some circumstances, observing an in-force policy (whether through formal monitoring or simply being unavoidably aware of what some of its effects have been) might be thought to constitute proper consideration. Further, as suggested at 4.2.2.2(b), the SDO might be thought to lend some support to this conceptualisation of monitoring as assessment for in-force policies.	medium
5.1.4.4 <u>monitoring policies</u>		

(a) There is some requirement to monitor policies for adverse impact on the promotion of race equality (either under the SDO or under the SDO and section 71).	Some arguments for why there might be a requirement to monitor are set out at 4.2.2.3(a) and (in relation to functions) at 5.1.3.4. Central to determining whether monitoring is a requirement of section 71 might be thought to include determining whether the SDO implies some requirement to monitor as well as to state the arrangements for monitoring, and whether any requirement to monitor is a requirement under section 71 as well as under the SDO (see 4.2.4 on the relationship between the specific and general duties).	medium

5.2 INDICATORS OF COMPLIANCE

We have set-out some of what we assumed (before beginning the main data collection and analysis) would be useful indicators of whether the CRE had been meeting some of the standards which we suggested (with various degrees of confidence) might also be requirements under section 71 (see 5.1.1 to 5.1.4); and consider some of the possible strengths and limitations of these indicators. We have not here, however, covered each standard-requirement, but, instead, have selected examples which appear to illustrate some of the main issues involved (including, for example, the need to triangulate findings from FIA responses when there are doubts about an organisation's information systems, and, therefore, about whether it knows the answers to the questions being asked).

5.2.1 indicators of requirements being met in relation to functions

5.2.1.1. <u>assessment of functions for relevance ('whether' assessments)</u>

Requirement: conduct an assessment of each function for relevance to the CRE's performance of its duties under section 71 (supra 5.1.3.2(a)).

possible indicators	comments

(a) full or summary reports of assessments of each function or of assessments which together cover all functions.	The CRE stated in its 2002-03 RES that it will publish "a summary of all assessments" (CRE, 2002c: 25), and reiterates the point in its 2005-08 RES (CRE, 2005e). If, therefore, neither a full or summary report of an assessment has been published this would appear to be supportive of the conclusion that no assessment was conducted. However, the CRE may well have conducted some sort of assessment without either writing it up or publishing it (although, in the former case at least, it might be questioned whether it constituted an assessment of the kind referred to in SDO article 2(2)).
(b) (i) CRE saying, in response to FIA requests, that it has conducted such assessments, and (ii) not saying that it hasn't.	There appears no doubt that this type of information is not excepted under the Freedom of Information Act. However, the CRE has in the past provided information in responses to FIA requests which has later turned out to be in some respects incorrect (not, as far as we could tell, through any attempt to mislead, but simply as a result of problems with such matters as record keeping). Consequently, responses to requests ideally need to be verified; including through 'triangulation' (eg Fine et al, 2003: 187).

(c) Indication in the RES that there has been an assessment. (i) Statement that it has carried out assessments for relevance. (ii) A list of functions which it indicates is a list of relevant functions. (iii) Evidence that a function has been assessed for relevance, and, in particular, the ascription of relevance or non-relevance to a function or the assignment of a level of relevance.	(i) The 2002-05 RES (CRE, 2002c: 17), for example, states that it assesed the relevance of its functions. However, such a statement would not appear to be definitive evidence either that functions were assessed or that the assessment was sufficient to meet what we understand to be the requirements of section 71. (ii) The 2002-05 RES (CRE, 2002c) indicates that it has listed all its functions and policies in its appendix 2, and that its appendix 3 consists of the results of the assessment of its functions and policies for relevance. This would suggest that there has been an assessment for relevance. However, the impression in appendix 3 is that it lists policies not functions (although in some cases, such as 'research' it is not clear if it is referring to a function or policy or both) - suggesting that, perhaps, it did not assess it functions or that it assessed them and incredibly found that none were relevant. (iii) An allocation of relevance would suggest that some thought has been given to the individual function in question. Further, in stating, as it does in both RESs, that it will assess functions on the complete list for levels of relevance appears to indicate that the CRE doesn't regard drawing up the complete list as having constituted an assessment for relevance. Unfortunately, the point at (ii) applies and we appear set to be unable to reach definitive conclusions.
(d) evidence in other documents.	If any significant assessment took place, we would expect there to be some written reference (even if there is no written report of the assessments), such as in, for example, in the minutes of management committee meetings. It should be noted, however, that, while the CRE provided a large number of documents, it wasn't possible to obtain some of the documents which we thought most likely to contain references to assessments.

5.2.1.2. <u>assessment of relevant functions ('how' assessments)</u>

Requirements: In the case of functions which are relevant - to its performance of its

duties under section 71 - there is some requirement to conduct a more detailed assessment of how the function is relevant (5.1.3.3(a)); and this needs to include some attempt to assess adverse impact and to consider possible ways of reducing or eliminating any identified adverse impact (5.1.3.3(b)).

possible indicators	**comments**
indicators that a 'how' assessment took place	
(a) full or summary reports of assessments of relevant functions.	It seems more likely that there will be a written record of any assessment of how a function is relevant than any assessment of whether a function is relevant (including because the primary conclusion of the latter will be 'yes' or 'no' - albeit presumably with substantiation - whereas the conclusions of the former should provide sufficient detail to make decisions about, for example, how to reduce any adverse impacts). Consequently, the absence of a written report of a 'how' assessment would appear to be a stronger indication, than in the case of a 'whether' assessment, that no assessment had taken place or that any assessment that took place would have been inadequate to its intended purpose and possibly non-compliant with section 71. In relation to this point, it is worth noting Justice Burnton's comment in *BAPIO* in the High Court (para. 69) that "If there had been a significant examination of the race relations issues involved in the change to the Immigration Rules, there would have been a written record of it". Further, as referred to above (5.2.1.1(a)), the CRE has said that it will publish summary reports of all its assessments.

(b) (i) CRE saying, in response to FIA requests, that it has conducted such assessments, and (ii) not saying that it hasn't.	See 5.2.1.1(b) for applicable comments. However, including for the reasons set out at 5.2.1.2(a), the CRE is, perhaps, more likely to know, or be able to find out, whether it has conducted the more detailed 'how' assessment. For example, such an assessment is likely to have involved input from more staff (in order to deal with its different aspects); and, therefore, asking around the office (which seems, in some organisations, to sometimes be the central approach to answering FIA requests) is more likely to hit on someone who knows of the 'how' assessments which took place.
(c) Indication in the RES that there has been an assessment or that one is planned.	Clearly, of course, the CRE may not have done what it intended to do; any statements of intent may not have been accurate reflections of intent; and what is said to have happened may not have happened (since, for example, the person writing up the RES may have misinterpreted the meaning of some of the information provided by others in the organisation). It should also be borne in mind that there appears not to be a specific duty to state (in the RES) arrangements for assessing functions found to be relvant, or to state which relevant functions had been assessed, but there is a requirement, at SDO article 2(2), to state which functions had been assessed as relevant. Therefore, it would appear reasonable to give less weight to the absence of a reference, in the RES, to a 'how' assessment than to the absence of reference to a 'whether' assessment.

(d) evidence in other documents.	For comparable reasons to those set out at 5.2.1.2 (a), it appears more likely that there will be some written reference to any 'how' assessment than to any 'whether' assessment (which may just have involved someone going down the list of functions and ticking those considered to be relevant). Possibilities to look at might include, for example, minutes of the 'quality and equality' team, which, according to the RES (CRE, 2005e: 15), is responsible for day to day coordination of the RES.
indicators that the how assessment was adequate	

(e) (i) Written assessment seen and it indicates that assessment included essential elements. (ii) Reference in other documents strongly suggest that an assessment, including the essential elements, took place. (iii) FIA answers or interviews with CRE suggest that such an assessment took place.	Assuming that (as suggested at 5.1.3.3(b)) a compliant 'how' assessment will need to have included some attempt to assess and address adverse impacts, judging whether an assessment was minimally adequate will require a means of determining whether there was such an attempt. (i) The ideal means would be to look at the full, or even summary, report of the assessment. (ii) However, it may be that the assessment conclusions will be evident in other documents. For example, a strategy covering a functional area might include a statement that a proposed policy has been included to address an adverse impact identified in an assessment of the function. (iii) In the case of information in an FIA response, or provided during an interview, it would need to be borne in mind that the information in the form provided did not necessarily pre-exist the questions asked (for example it may not simply be a case of forwarding an extract of an internal report which the CRE had previously conducted into its compliance with section 71), and that, therefore, the impact of the researcher on the information may be greater than in the case of (i) and (ii). In addition, it might be argued that considerable weight should be put on the absence of a report of an assessment - even if the sort of evidence referred to at (ii) and (iii) appears to indicate that there was an assessment. This is both because it is not clear that there can be a proper 'how' assessment without there having been some written record - since the assessment should if possible include recommendations, sometimes dealing with complex matters, on how to address any adverse impacts; and because it seems very unlikely (bearing in mind the legal significance of REIAs and their special significance to the organisation which is tasked with enforcing the duties) that any assessments which were written would not still be in existence and accessible.

5.2.2 indicators of requirements being met in relation to policies

5.2.21. assessment of proposed policies for relevance to section 71 ('whether' assessment)

Requirement: Before making a policy decision, proper consideration (involving some sort of assessment) must be given to whether section 71 is relevant (see 5.1.4.1(a)).

possible indicators	comments
(a) full or summary reports of assessments of each policy or of assessments which together cover all functions	Comparable points to those made at 5.2.1.1(a), in relation to 'whether' assessments of functions, would appear to apply. However, it appears possible that the CRE would have felt that there was less need to write up reports of 'whether' assessments of policies, than 'whether' assessments of functions, on account of it only having 19 functions but producing 100s of policies. Consequently, the absence of a 'whether' assessment of a policy may be less of an indicator that no assessment took place. A more fundamental difference is that it is more difficult to determine how many assessments there should have been of policies than how many there should have been of functions i.e. to determine what to compare the number of conducted assessments against. It could be reasonably concluded that there should have been 19 'whether' assessments of the 19 functions we identified or assessments which together adequately covered all 19 functions (although it might reasonably be disputed whether one or two of the 19 should be considered functions for the purposes of section 71). However, the definition that the Code gives of policies (see our appendix 1C) is potentially so wide that there could be said to be hundreds of policies produced each year, and it is not clear what should be understood to constitute a policy requiring an assessment, and to what extent policies can be grouped together for assessments purposes (with groups being determined to be relevant or not relevant).

(b) (i) CRE saying, in response to FIA requests, that it has conducted such assessments, and (ii) not saying that it hasn't.	Comparable points to those made at 5.2.1.1(b) would appear to apply but with provisos comparable to those suggested at 5.2.2.1(a). It might, for example, be wondered whether - bearing in mind the number of policy proposals likely to be generated - individuals developing particular policy proposals will often consider that it is sufficient for them to take an informed view on whether a proposal is relevant. In contrast, assessing the 19 functions, if it happens, is likely to involve more people (including because there will tend to be more staff responsible for operating a function than for developing a particular policy), and, including for this reason, there is more likely to be accessible corporate knowledge of whether a function has been assessed than whether a policy proposal has been assessed.

(b) Indication in the RES that there has been an assessment.	The RES may indicate some of the proposed policies which may have been assessed for relevance, since there is a requirement, at SDO article 2(2)(a), to state, in the RES, the functions and policies, or proposed policies, which have been assessed as relevant. Further, if there is a longer list of policies, which the RES says is a list of all its policies, and/ or which it says is a list of policies which it assessed for relevance, and some of the policies on this list are on (and some are not on) the list of policies which it says were assessed as relevant, this might be thought to suggest that all the policies on both lists have been in some way assessed for relevance. We wonder, however, whether the RES may, in some respects, be a potentially more reliable indicator (of whether there has been a 'whether' assessment) in the case of functions than policies. This is because the requirements, under SDO articles 2(2)(a) and 2(3), are to list policies and functions found to be relevant, and to review these assessments at least every three years (which might be taken as a requirement to include the findings of such a review in a new RES at least every three years). It might be assumed, however, that there are unlikely to be many new functions created between assessments (and there may be none) and that not-relevant functions are unlikely to become relevant and vice versa (but see 5.1.3.4(b)). Therefore, the list of relevant functions in the current RES may well be thought to be relatively close to a list of all the functions which an authority has assessed as relevant (i.e. up to the time of the reader reading the current RES). In contrast, there may well have been many policies proposed and adopted between one RES and another (some or all of which may or should have been assessed for relevance); and, therefore, the current RES is less likely to provide an accurate list of policies (than of functions) which had been assessed at the time of reading the RES.

5.3 FINDINGS IN RELATION TO FUNCTIONS

We have set-out below our conclusions in relation to whether (between January 2002 and July 2007) the CRE appears to have been meeting, in relation to its functions, what appear to be its main duties under section 71. It is suggested that this section is read with reference to 5.1.3 ('What is required in relation to functions') and 5.2.1 ('Indicators of requirements being met in relation to functions').

5.3.1 uncertainties

There appear to be a number of areas of substantial uncertainty, which together make it impossible to draw other than tentative conclusions about CRE compliance in relation to its functions. The main areas of uncertainty are:

- It appears unclear (partly on account of the lack of case law specifically addressing the question of functions) what authorities need to do in relation to their functions to be compliant with section 71;
- It is unclear what the CRE understands to be required or how it is suggesting that authorities should set about meeting whatever requirements there might be. A particular problem is that the Code of Practice, which the CRE produced under section 71C RRA, appears to suggest that there should be a general attempt to identify and address adverse impacts (eg CRE, 2002a: 3.16); the CRE's Race Equality Schemes (CRE, 2002c; CRE, 2005e) appear to suggest that it is sufficient to assign a level of relevance and priority to each function (eg CRE, 2002c: p. 17), or, perhaps, that it is sufficient to do so after addressing the questions in its recommended grid (which appear to relate to the identification of a limited range of potential impacts); and the CRE's *Guide for Public Authorities* appears to indicate that identifying and addressing adverse impacts and assigning levels of relevance and priority are complimentary approaches (CRE, 2002d).
- It is unclear what the CRE has and hasn't done in relation to its functions; and there are some important apparent contradictions between what it says it has done and what other evidence suggests that it has done. In its 2005-2008 RES (CRE, 2005e: p. 17), for example, it indicates that Appendix 2 to the RES includes the results of an assessment of its functions, and policies and practices, for level of relevance and priority, but Appendix 2 only appears to show an assigned level of relevance and a priority level for policies and practices (and there appears to be no indication in the

rest of the RES, or in any other CRE documents we looked at, what the results are of any such assessment of functions). In these circumstances, it would be difficult to be confident that an assessment of functions for level of relevance, or priority level, did, in fact, take place.

5.3.2 what are the CRE's functions

5.3.2.1 criteria for deeming functions

We took functions to mean what the Code of Practice states that functions are - "the full range of a public authority's powers and duties" (CRE, 2002a: glossary); and took 'full range' to include all those powers and duties which are prescribed in the RRA for the CRE alone (which appears to be the understanding of function which the CRE adopted in drawing up lists of its functions for its race equality schemes). However, for reasons set out below at 5.3.2.1(a), we also took its duties to include a duty to comply with duties under the RRA which it is not alone in being subject to; and a duty to comply with certain duties under some other acts. We also assumed (see 5.3.2.1(b)) that the section 71 assessment duties are, in general, as great in relation to inactive functions as in relation to current ones (i.e. ones being exercised).

5.3.2.1 (a) duties under other acts and duties in the RRA which the CRE is not alone in being subject to.

We would argue that the CRE's duties, at least for the purposes of section 71, should be taken to include a duty to comply with its duties under other statutes (including, in particular, its duties under all the equality enactments). For example, the CRE taking steps to 'eliminate discrimination that is unlawful under' the Disability Discrimination Act (DDA) 1995, in pursuance of its Disability Equality Duty (section 49A of the DDA), could be done in such a way (perhaps through improving management training and supervision) that it would also tend to reduce employment discrimination in general (including racial 'Discrimination against applicants and employees' as set out at section 4 of the RRA). Consequently, how the CRE carries out its duties under the DDA (including under section 49A) would appear to be of potential relevance to section 71; and should, therefore, be subject to a section 71 assessment for relevance. Such an approach - with authorities keeping an eye on strands additional to the one in relation to which a duty arose - would arguably have helped join-up thinking between the equality commissions; and, in particular, have assisted in cross-strand working and in addressing multiple

discrimination.

Similarly, we would argue that the CRE's duties (again, at least for the purposes of section 71) should be taken to include those duties under the RRA - and under regulations made under it - which the CRE is not alone in being subject to. Among these, of course, is section 71. Indeed, it might be argued that compliance with section 71 is the function of most relevance to section 71; and, therefore, the function which would benefit most from an assessment. How the CRE carried out its employment duties under Part II of the RRA may also have benefited from a more conscious application of its section 71 duties. For example, comments by Phillip Davies, during the Commons debate on the Equality Bill, suggest that there has been some perception that the CRE may have not been a model employer in respect to avoiding discrimination (although we have not been able to find out how accurate or off the mark his estimate is). He states (House of Commons Hansard, 21 November 2005: 1245) - "Will the Minister comment on the fact that in the past 10 years the Commission for Racial Equality has faced about 20 claims of racial discrimination from its employees, some of which have been settled out of court with tax payers' money?".

However, the CRE might (although there is no positive indication that it did) have conceived its duties under other acts, and those in the RRA which it is not alone in being subject to, as being, in part at least, entailed in the functions which it has included in the race equality schemes. For example, its employment duties under Part II of the RRA might be thought to be entailed in its 'employment of staff function' at paragraph 8, schedule 1 to the Act, and its section 71 duties thought to be entailed across all its functions.

5.3.2.1 (b) inactive functions

It might be argued that the powers which the CRE has not used or not used for some time, and which it does not intend to use, should be regarded as inactive functions, and as not requiring an assessment (including, for example, because an unexercised power will not have an impact). We would suggest, however, that 'due regard' 'in carrying out its functions' (section 71(1) RRA) entails 'due regard' in deciding which to carry out or not carry out, and, therefore, the decision to carry out or not carry out a function should be assessed for relevance to section 71. Assessing such a decision, however, would

appear to necessitate an assessment of whether the function - which will or won't be carried out as a result of the decision - is relevant to section 71. In other words, the inactive function would need to be assessed.

It is not clear, for example, that the 2002-05 RES (CRE, 2002c) has listed its powers in relation to 'persistent discrimination' (provided for at section 62 RRA) as among its functions. It does list (ibid: 32) - "Formal investigations and issuing non-discrimination notices (sections 48-52, and 58-62)", and so includes reference to section '62'. However, the failure to refer to 'persistent discrimination', either here or elsewhere in the RES, creates some suspicion that either the CRE forgot that sections 58-62 go beyond 'non-discrimination notices' and into 'persistent discrimination', and that it had not intended to include reference to the persistent discrimination section; or that the reference had only been intended to be to section 62 in so far as section 62 relates to non-discrimination notices i.e. to be a reference to section 62(a) but not to sections 62(b) and (c). In addition, if it had meant the reference to be to the whole of section 62, the function would presumably have been described as 'Formal investigations and issuing non-discrimination notices, and persistent discrimination ...'. It is also notable that the only policy or practice shown as within the function (in Appendix 2 to the RES) is 'formal investigations policy and manual', which seems to reinforce the impression that it did not have persistent discrimination in mind; and, perhaps, also raises some doubts as to whether it had non-discrimination notices in mind.

We would also argue that the failure to clearly include 'persistent discrimination' powers amongst its functions is something which may have contributed to the power not having been used; that the decision to use or not use the power is of substantial relevance to section 71 (and so should have been subject to an assessment); and that not using the power may well have had some adverse impact on the promotion of race equality. PIRU's recent report, for example, found (Harwood, 2006: para.1.2.1) that, out of the three equality commissions, only the Equal Opportunities Commission had applied for a persistent discrimination injunction during the period studied (1 January 1999 to 1 June 2006). The report also, referring to all three commissions, argued that persistent discrimination injunctions 'could, and perhaps should, have been applied for in the case of a good number' of the repeat discriminators that the research identified from court judgements (which included large companies, and local authorities, with the potential to

discriminate against thousands of employees and tens of thousands of customers or constituents) (ibid: para. 1.3.1).

5.3.2.1(c) implied and deduced functions

It might be argued that the CRE has powers (and therefore functions) which can be deduced from what might be called its 'general' duties at section 43(1). However, we are not clear that the CRE has the same degree of latitude that section 2(2) of the DRCA 1999 appears to give the DRC (with section 2(2) DRCA providing that 'Nothing' in subsection 2(2) - which sets out Commission powers – 'is to be regarded as limiting the Commission's powers'). Further, we would argue that the assessment of the general duties at section 43, and of the specific powers set-out elsewhere in the RRA, should include consideration of deducible powers; and that, therefore, there would not necessarily be the need for separate assessments.

Conversely, it might be argued that to assess the general duties at section 43 (and the general powers therein implied), and the specific powers elsewhere in the Act, would be to assess some functions twice (since the specific powers could be regarded as sub-categories of the general powers or as means of achieving the general duties). We would suggest, however, that a 'how' assessment of the general duties would tend to be more strategic than a 'how' assessment of the specific powers; that a 'how' assessment of the specific powers would tend to be more detailed than a 'how' assessment of the general duties (and would, in particular, need to give more attention to planned actions); and that both perspectives could further the purposes of section 71. For example, an assessment of the general duties might indicate some of the possible consequences, for the matters at section 71(1), of the balance struck (in terms of focus and resources) between different specific powers (including, of particular note, between education at section 45 and the enforcement powers in Part VIII).

5.3.2.2 list of identified CRE functions

CRE functions *References to sections, and schedules, are references to the RRA (except where otherwise stated i.e. at functions 26 and 27).*	**RESs shown as function in** *(i)*
(1) Work towards the elimination of discrimination (s43(1)(a))	02 & 05
(2) Promote equality of opportunity between persons of different racial groups generally (s43(1)(b))	02 & 05
(3) Promote good relations between persons of different racial groups generally (s43(1)(a))	02 & 05
(4) Keep under review the working of the RRA and submit proposals for its amendment (s43(1)(c))	02 & 05
(5) Assistance to organisations (s44)	02
(6) Undertake, or assist others in undertaking, educational activities (s45)	_ *(ii)*
(7) Undertake, or assist others in undertaking, research (s45)	02 & 05
(8) Annual report on activities, with general survey of developments (s46)	02
(9) Issuing codes of practice (s47)	02 & 05
(10) Conducting formal investigations, making recommendations in the light of findings, and publishing reports of investigations (s48-52)	02 & 05
(11) Issuing non-discrimination-notices, investigating compliance with notices, and establishing and maintaining register of notices (s58-61)	02 & 05
(12) Enforcement action in relation to 'persistent discrimination' (s62)	_ *(iii)*
(13) Enforcement action in relation to instructions and pressure to discriminate (s63)	02 & 05
(14) Enforcement action in relation to discriminatory advertisements (s63)	02 & 05
(15) Preliminary action in employment cases (s64)	02 & 05

(16) Assistance to actual or prospective claimants/ complainants in relation to proceedings or prospective proceedings under the RRA (s66)	02 & 05
(17) Serving and enforcing general statutory duty compliance notices (s71D-E)	02 & 05
(18) Delivering services in the English regions. Taken from list of functions in RES 2005-08 (CRE, 2005e: 57) *(iv)*	05
(19) Delivering services in Scotland. Taken from list of functions in RES 2005-08 (CRE, 2005e: 57) *(iv)*	05
(20) Delivering services in Wales *(iv).* Taken from list of functions in RES 2005-08 (CRE, 2005e: 57)	05
(21) Employment of staff (sch1, para. 8)	02 & 05
(22) Appointing advisory committees (schedule 1, para. 12)	02
(23) Arrangements for discharge of business (Sch1, para. 13)	02 & 05
(24) Keeping proper accounts and preparing a statement each accounting year for the Home Secretary and Comptroller and Auditor General (schedule 1, para. 17)	02
(25) Corporate services	02
(26) Compliance with duties in RRA which CRE is not alone in being subject to (e.g. section 4 RRA)	_ *(v)*
(27) Compliance with statutory duties additional to those in RRA (eg section 49A DDA)	_ *(v)*

notes on table

(i) '02' refers to the CRE's *Race Equality Scheme 2002 - 2005* (CRE, 2002c); and '05' to its 05-08 scheme (CRE, 2005e). The '02' scheme, unlike the '05' scheme, includes (at appendix 2) what it says is a list of all its functions; whereas the '05' scheme only includes a list of what it says is its relevant functions. This difference may partly explain why (as reflected in this right-hand column in our table) some of the functions listed in

the '02' scheme are not listed in the '05' scheme; but would not appear to explain the converse.

(ii) The '02' and '05' schemes both include ‘carrying out research (section 45)’ in the lists of their functions, and therefore refer to 'section 45' (which includes educational activities). However, 'research' and 'educational activities' are clearly delineated under section 45 (which is entitled ‘Research and education’). Consequently, including 'carrying out research ...', without reference to 'education', would appear to suggest that only the research part of section 45 is being referred to. The impression that this is, indeed, the case is strongly reinforced by the fact that the only policy or practice listed alongside the function in the '02' scheme is 'research activity' (CRE, 2002c: 32); and the only one listed alongside it in the '05' scheme is 'research strategy' (CRE, 2005e: 52).

(iii) See discussion above, at 5.3.2.1(b), of whether the CRE appears to have included its powers in relation to 'persistent discrimination' among its functions in either of its race equality schemes.

(iv) The '05' scheme has included the three functions, which we have shown separately at 18, 19, and 20, together in the appendix as - 'Delivering services in the English regions, Scotland and Wales' (CRE 2005e: 57). We would argue that the CRE's overall approaches to England, Wales and Scotland should be (and presumably are) distinct in important respects - so as to reflect, in particular, different devolved powers, political cultures, problems and opportunities, and, of course, wishes - and that, therefore, the approach to each merits a separate function assessment. The CRE does not explain what statutory power or duty this 'delivering services ... ' function derives from; but we assume that it is taken to derive from all those duties and powers which are applicable to these places. For example, its power to conduct research empowers it to conduct research in or in relation to Scotland.

(v) The reasons for including items 26 and 27 in the list of identified functions are explained at 5.3.2.1 (a) above.

5.3.3 the CRE's recommended approach to assessing functions

5.3.3.1 <u>how does the CRE recommend that authorities assess their functions for relevance</u>

The CRE’s *Guide for Public Authorities* (CRE 2002d) explains, in the section entitled ‘the assessment grid’ (our copy doesn’t include page or paragraph numbers), that "The questions in the first two columns (of the grid) will help you decide whether the function

has any relevance to the general duty. The questions in the second two columns will help you to decide how relevant the function is". The questions in each column are as follows:

"*Is it relevant to the general duty?*

- Column one. Which of the three parts does it apply to (if any)? 1/ Eliminating discrimination? 2/ Promoting equal opportunities? 3/ Promoting good race relations?
- Column two: Is there evidence or reason to believe that some racial groups could be efficiently (sic) affected? Which racial groups are affected?

How relevant is it?

- Column three: How much evidence do you have? 1/ None or little. 2/ Some. 3/ Substantial.
- Column four: Is there any public concern that the function or policy is being carried out in a discriminatory way?"

5.3.3.2 <u>possible problems with the recommended assessment grid</u>

The assessment grid (CRE, 2002d) appears to combine elements of a 'whether' assessment (comparable to the type which the courts appear to have indicated is required in the case of all policy decisions) and a 'how' assessment (comparable to the type which the courts appear to have indicated in the case of policies found to be relevant). It is not clear, however, that the general approach that it appears to encourage would tend to meet what appear to the requirements (in relation to functions) of either type of assessment; or that (even if formal compliance was not an issue) that such an approach would be ideally designed to further the main aims of section 71. We have set out below (i to iv) what appear to be some of the possible problems with the grid.

(i) Unclear what is being suggested. It is unclear, in places, what is being suggested. For example, it seems to suggest (in column one) that the authority should attempt to determine which 3 parts of the general duty the function applies to, but it is unclear in what sense a function would 'apply' to the general duty. It is also unclear how the two stated functions of the grid - assessing whether a function is relevant and assigning a level of relevance - should work together. In particular, it might be thought to be anomalous to suggest that functions should be assessed as relevant or not relevant; but to also suggest that all functions should be assigned to three levels of relevance (high, medium, or low relevance), which, in turn, appears to suggest that all functions should

be considered relevant.

(ii) Suggested dimensions are inadequate indicators of whether a function is relevant. It is not clear that the two dimensions considered in the first two columns of the grid - whether the function is relevant to 'most parts' of the three parts of the duty and whether some racial groups will be affected differently - are together adequate to their stated purpose of informing decisions as to whether the function is relevant to section 71.

First, there is little or no support - in the statute, code, or case law - for the conclusion (which appears to be implied in the grid read with the 'guide to evaluating your answers') that a function might tend not to be relevant if it is not relevant to all three parts of the duty (or, perhaps, at least to two parts - 'most parts'). Indeed, in *Elias* in the High Court, the judge suggested (paras 100-101) that the two parts in section 71(1)(b) 'had no real relevance to' the case, but still found that there had been a breach in not assessing the compensation scheme (although it should be noted, of course, that the compensation scheme would appear to have been more of a policy than a function). We would argue that a more informative approach, than that which seems to be suggested in the grid, might involve some attempt to determine whether there is a minimum total level of relevance (which would be a better indicator of the potential impact of the function on race equality). Alternatively, authorities could assume that all functions are of some relevance, and go straight to assigning levels of relevance (since all or most public authority functions would appear to be of some potential relevance and we can not think of any which are of no potential relevance).

Second, attempting to determine whether or not there is 'evidence or reason to believe that some racial groups could be (differently) affected' may only capture some of the potential relevance in functions (although how much it captures might depend upon what 'some racial groups', and what 'differently affected', are understood to mean). A local authority housing function, for example, might affect all 'racial groups' equally in the sense that all groups might be treated the same, and, therefore, the function might be thought, on the basis of the 'grid', to not be relevant to section 71. However, some 'racial groups' might well start out from a position of substantial disadvantage (the result, perhaps, of past institutional discrimination in relation to the housing function or current institutional discrimination across socio-economic areas which affect access to the

housing market as a whole, including, in particular, employment). Therefore, whether or not the council decides to address existing housing disadvantage (i.e. whether or not it decides to treat racial groups differently), the housing function will be relevant to the 'need', at section 71(1)(b), 'to promote equality of opportunity ...'.

(iii) Suggested dimensions are inadequate indicators of how relevant a function is. It is also not clear that the two dimensions considered in the last two columns of the grid - how much evidence the authority has that racial groups are (or could be) differently affected and is there any public concern that the function is being carried out in a discriminatory way - are together adequate to their stated purpose of informing decisions as to how relevant a function is to section 71.

First, there is no indication, at least in the 'grid', as to whether the question about 'evidence or reason to believe' should be asked with or without some attempt having been made to collect and review the evidence (it being notable that the Code of Practice does suggest that some sort of search for information would be appropriate (e.g. CRE, 2002 a: 3.14)). Without a proper attempt, it might be argued, 'evidence' might merge with 'reason to believe', and sometimes consist of little more than established presumptions (which might themselves be part of any race equality problem). In particular, there might be an assumption that the equal treatment set out in policies and procedures will be reflected in equal treatment in practice. Another problem with the evidence dimension is that, including for the reasons set out at (ii) above, it is not apparent why any consideration of evidence should - as appears to be implied in the grid - be restricted to that which relates to whether different racial groups are affected differently. Relevant evidence should, it might be argued, be that which goes to the question of whether, to what extent, and how, the function is relevant to the matters in section 71(1).

Second, we would argue that 'public concern' - while an important indicator of potential impact - should be considered alongside research findings and other evidence (as appears to be suggested in the Code of Practice, including, for example, at para. 3.14). A particular limitation would appear to be that issues affecting larger, and better organised, groups will tend to result in more apparent 'public concern' (such, as for example, in the form of public meetings, MPs being lobbied, and the CRE being written to) than issues affecting smaller, and less well organised, groups. The latter, however,

may well be facing the greater racial discrimination and disadvantage (including on account of being more isolated and less able to fight back).

Third, it is not clear why the public concern question should be restricted to whether there is public concern that the policy or function is being carried out in a discriminatory way (rather than public concern in relation to all the matters at section 71(1)).

(iv) should be assessment of how a function is relevant not just of how relevant it is. The grid is clearly intended to help address two questions about a function (as apparent, for example, from the two subheadings to the columns) - 'Is it relevant to the general duty?' and 'how relevant is it?' The Code of Practice, however, states (CRE, 2002a: 3.4) that "Public authorities should ... assess whether, and how, race equality is relevant to each of their functions", and the case law to also indicate (see 5.1.4.2 above) that a 'how' assessment is required in the case of policy decisions (which might be thought to suggest that the courts would reach a comparable determination if they were to address the question of functions)

Arguably, answers to the questions in the columns would (if accurate) provide some idea of some of the ways in which a function might be relevant. However, as discussed at (ii) above, the questions only cover some of the ways in which a function might be relevant, and appear, in relation to these, to be primarily looking for 'yes' or 'no' answers, or 'none' to 'substantial' categorisations, not for the particular ways in which a particular function is relevant. Clearly, for example, if an authority is only looking for the existence, or non-existence, of public concern that a function is being carried out in a discriminatory way, it might be less likely to notice public concern that it is being carried out in a way which damages race relations (or, if the person conducting the assessment notices this, he or she is less likely to record the information); and, in addition, the authority is less likely to notice discriminatory practices which are not the subject of public concern.

Even if an assessment collects considerable information about how the function is relevant, the approach suggested in the grid, and its supporting material, would seem to make it less likely that this is put to the use that the Code suggests (and the case law suggests in the case of policies) that such information should be put i.e. to assist in reducing any identified adverse impacts upon race equality. This is because there is no

clear suggestion made in relation to the grid that the information about how a function is relevant should be put to further use once it has been used to prioritise a function, and no clear indication of the further uses to which it might be put. In other words, there is the impression that prioritisation is an end in itself. In these circumstances, there is some danger that the allocation of relevance to functions will distort the assessment of policies within functions. In particular, some policy proposals of substantial relevance to race equality may not be assessed under section 71 if they happen to arise within a function which had (perhaps several years ago) been assessed as of little relevance (and, therefore, as being of low priority).

5.3.4 CRE compliance in relation to assessing functions for relevance ('whether' assessments)

5.3.4.1 what are the main requirements

5.3.4.1 (a) assessment of each CRE function for relevance

We concluded above (5.1.3.2 (a)), with an assigned 'medium-high' level of confidence, that there is a requirement on the CRE to assess each of its functions (taken to mean how each is carried out) for relevance to the performance of its duties under section 71. We did not assume, however, that each identified function should have been subject to a discrete assessment exercise, since it seems possible that some functions could have been assessed together (so long as such assessments included an assessment for relevance of each of the identified functions, and fulfilled what we thought, for reasons set out at 5.1.3.3, might be the main purposes of such assessments, including, in particular, ensuring the identification of all functions which should be subject to the more detailed 'how' assessment).

5.3.4.1 (b) assessing policies could go towards such an assessment

We also concluded that an assessment of the policies which relate to a function could, depending upon the circumstances, be regarded as constituting (or at least as going some way towards) a 'whether' assessment of the function. The policies assessed, however, would together need to provide a realistic picture of what was planned across the function in question. For example, the CRE's 'initial screening' assessment (CRE, 2004d) of its 'Equal Opportunities is Your Business Too' booklet (CRE, 2004b) might be thought to have constituted a partial assessment for relevance of its education function (although the CRE does not suggest that it did), since the booklet would appear to be

aimed at educating business. Producing the booklet, however, will only have been a very small part of the CRE's education function; and, therefore, finding that such a booklet is or is not relevant to section 71 should not in itself lead to a conclusion as to whether the education function is relevant. In contrast, an assessment of a strategy might be regarded as sometimes being a relatively reliable indicator of whether the related function is relevant to section 71, since strategies will often straddle much of the related function. For example, the CRE's REIA (CRE, 2005g) of its *Strategy for the English Regions* could, perhaps, have provided a substantial contribution to any attempt to determine whether the function 'Delivering Services in the English Regions' was relevant to section 71.

However, we would argue that assessing a strategy will not be equivalent to assessing the function it is related to. First, a strategy will tend not to coincide very exactly with a related function. For example, the *European and International Legal Strategy 2006-07*, which the CRE conducted a full REIA on (CRE, 2006e), would appear to have focussed on legal work at the European level, and, therefore, did not cover a good deal of the domestic work entailed in the enforcement functions (such as 'Preliminary action in employment cases' at section 64 RRA). Second, even when a strategy coincides with a particular function, the function, as discussed above (see 4.2.2.1(f)-(h)), will involve more than that covered in the strategy, including, for example, structures and processes. Third, an assessment should, if it is to adequately predict future impact and consequent relevance to section 71, take account of what has happened in the past. Strategies, however, tend to focus on setting out future plans (although these might be explained with reference to the effects of past plans). Including for the above reasons, we would argue that an assessment of a strategy - despite, in some cases, providing a fairly reliable indicator of whether a function is relevant to section 71 - will probably not be an adequate substitute for the more detailed 'how' assessment.

5.3.4.2 <u>evidence relating to whether the CRE has, in compliance with section 71, assessed its functions for relevance</u>

It is not at all certain which functions the CRE has assessed for relevance, as the evidence is limited and, in places, contradictory. We have, therefore, set-out below (5.3.4.2 (a - d)) some of the reasons for the uncertainty and some of the limited conclusions (with provisos) that we felt able to draw.

5.3.4.2 (a) Freedom of Information requests

In a Freedom of Information (FIA) request to the CRE, dated 23 November 2006 (see appendix 5, letter 2.1(a)), a PIRU trustee asked - “What race equality impact assessments has the CRE undertaken, and what REIA reports has it produced. Please include all instances of initial ‘screening’ and of ‘full impact assessment’... ?”. The response to this question, in a letter from the CRE dated 15 December 2006 (letter 2.2(a)), was that the trustee would find the information on a specified page on the CRE website. However, when we looked on this page, it only appeared to list five race equality impact assessments as having been completed, none of which appeared to have been assessments of functions. Further, we could not find reference to any other completed REIAs anywhere else of the CRE's website.

To clarify whether the five REIAs were the only assessments that had been completed, the trustee wrote back to the CRE, in a letter dated 14 January 2007 (letter 2.1(b)), and asked (question 1(a)) whether the five REIAs listed on the website are “the only REIAs which have been completed by the CRE since the Race Relations (amendment) Act came into force”; and (question 1(d)) “Has the CRE carried out any ‘initial screenings’ (see CRE Race Equality Scheme for meaning) REIAs?” In response, in a letter dated 1 June 2007 (2.2(b)), the CRE explained that, in addition to the five completed assessments listed on the website, it had now completed an REIA of its statutory Code of Practice on Racial Equality in Housing, and had carried out initial screenings on its supplier diversity guide and its 2005-08 strategic plan. It also said that it had "carried out an REIA involving a group of staff from across the Commission" on a draft version of its Public Duty Monitoring Plan.

None of these assessments appeared to constitute assessments of functions (although, as discussed above at 5.3.4.1 (b), some might be regarded as representing partial assessments of functions related to the policies assessed). However, on reflection, we suspect that we phrased the questions in such a way that the CRE might have assumed that we were only asking about policies. It is notable, in particular, that the current RES (CRE, 2005e) presents (with one exception) REIAs as something which are conducted on policies (rather than as also being conducted on functions). For example, it explains (ibid: 20) that the 'Full Impact Assessment' stage of its REIA process is "A systematic way of fully assessing a relevant proposed policy to make sure it will not have adverse effects

on different racial groups". The one exception in the 2005-08 RES is that it includes among the stated aims of an REIA - "(v) ensure all new functions and policies promote the statutory general duty as far as possible" (CRE, 2002e: 20).

Allowing that the CRE may primarily think of an REIA as something that is conducted on policies, there is nothing in the terms Race Equality Impact Assessment or 'initial screening processes ...' to indicate that they refer exclusively to race equality impact assessments of policies; there appears to be no alternative distinct term for an impact assessment of functions, other than descriptions such as 'assessing the relevance' (CRE, 2005e: p. 17); and, as noted above, the 2005-08 RES does suggest that REIAs might at least be something that they think should be conducted on 'all new functions'. Further, our relevant FIAs (appendix 5, letters 2.1(a) and (b)) do not specify that we are only asking about policies; and, indeed, the only explicit references to policies in the two letters are coupled with references to functions i.e. "What policies and functions has the CRE monitored and/ or reviewed for adverse impacts ... ". Consequently, the fact that the CRE did not refer to assessments of functions in its FIA response (to our questions about REIAs) might be thought to support a conclusion that it did not conduct assessments of functions comparable to what it sets out (e.g. CRE, 2005e: p. 21) as being the full REIA process, and also provides some possible support for the conclusion that it did not conduct assessment on functions comparable to the 'initial screening process ...' (ibid) - not withstanding that this does not mean that it did not in some way assess functions for relevance or, indeed, for their degree of relevance (albeit there is no clear evidence that it did, apart from statements in its RESs that it did).

5.3.4.2(b) 2002-05 Race Equality Scheme

This, the CRE's first RES, states (CRE 2002c: 17) under 'objective 2 - identifying relevant functions and policies', - "We followed a three-stage process to identify functions and policies relevant to the duty to promote race equality. This consisted of:

- listing all our functions and policies (see appendix 2);
- assessing the relevance of our functions and policies (see appendices 3 and 4);
- and consulting staff, and selected partners outside the CRE, on this list of functions and policies to determine a final list and priorities".

This would appear to indicate that appendix 2 lists all of the CRE's functions; that all of these were assessed for relevance (since, after the reference to 'all our functions ...', it

refers to ‘assessing the relevance of our functions ...’, rather than, for example, ’some of our functions’); and that all those that were assessed as relevant were listed in appendix 3 or 4.

The RES continues (CRE 2002c: 17-18), after the extract quoted above, "Using the suggested assessment grids in *A Guide for Public Authorities* ..., we developed a simple scoring system. We used this system to work out how relevant our functions and policies are to race equality, and what priority they would be given in our RES.”; and, in the next paragraph, adds - “Appendices 3 and 4 set out our functions and policies in order of relevance ... “. This would appear to indicate that it assessed the level of relevance, and priority, of its functions, and that their functions appear in order of priority in appendices 3 and 4.

It is not clear, however, that what is indicated in this section of the RES is also what happened. We attempt below (*5.3.4.2 (b) (*i) to (v)) to assess the validity of some of the statements.

(i) might not list all of its functions **in appendix 2** There are, in particular, some possible doubts as to whether it listed functions (6), (12), (18), (19), (20, (26), and (27) in our table 5.3.2.2; and, if it didn't, it might be argued that it should have. If a function is not recognised as a function, at least not for the purposes of section 71 assessment, it would appear to make it considerably less likely that it will be assessed under section 71 (except, perhaps, in so far as it is assessed as part of functions which are recognised and assessed).

(ii) listed functions might not have been assessed for relevance. Everything listed in appendix 3 (which, according to the heading, shows the ‘Results of the assessment of statutory functions and related policies for relevance to the general duty’) appears to be from the ‘policies and practices’ column of appendix 2 (the appendix which says that its lists all the CRE’s functions, policies, and practices), and it is not clear that anything specifically from the functions column in appendix 2 has been included in appendix 3. Consequently, an impression might reasonably be gained that either the CRE had not reviewed its functions for relevance (but had reviewed some policies within the functions) or that it had reviewed its functions and found none of its functions to be relevant (which would be

at variance with both common sense - bearing in mind the nature and purpose of the organisation - and the fact that it had found major policies within the functions to be relevant).

However, some of the references in appendix 3 might be to a function, or a policy or a practice, or to both categories. For example, a function listed in appendix 2 is 'carrying out research (section 45)', the policy or practice listed next to it is 'research activity'; and appendix 3 simply lists 'research'. In such cases, it is not clear what had been assessed. It is notable, however, that all the policies and practices in appendix 2 can be ticked off exhaustively against all the items in appendix 3. This, and other elements of the context (including, most of the items in appendix 3 being worded exactly the same as the 'policies and practices' in appendix 2), would appear to indicate that there was some kind of assessment for relevance (including level of relevance) of all the policies and practices listed in appendix 2; that the functions were not specifically assessed; but that some of the assessments of the policies and practices may together, or individually, have come close to constituting assessments of the related functions (such as in the case of 'research' and 'reviewing the Act') or that the description of a policy or practice is similar to the description of a function.

(iii) listed functions might not have been assigned a level of relevance or priority. Level of relevance appears to be indicated by the subheading (such as 'high relevance') under which an item is placed in appendix 3. Therefore, to the extent that the functions have not (as discussed at ii above) been included in appendix 3, they have not been assigned a level of relevance or priority. Even in the case of those functions (such as 'carrying out research') which might, at a stretch, be argued to have been included in appendix 3, it is not clear what the level of relevance, and priority, assigned to them should be taken to mean or what use it could be put to - bearing in mind that few if any of the other functions have been assigned levels, and that priority, in particular, would appear to be a relative concept.

5.3.4.2 (c) 2005-08 Race Equality Scheme

The CRE appears to have adopted a significantly different approach, in its 2005-08 RES, to the assessment of its functions, or at least to how it presents its activities in relation to assessing its functions (it not being clear, in all instances, whether an apparent

difference is the result of a change in practice or presentation). There may well have been important advantages to the new approach, but it has made it more difficult to compare and combine conclusions from the 2002-05 RES with those from the 2005-08 RES. Further, it is not clear that the new approach did, at least not in all respects, 'improve transparency and understanding of this latest review' (CRE, 2005e: p. 17).

Under 'The review and assessment process' (CRE, 2005e: p. 17), it states -
"In identifying our relevant functions and policies, we followed a four-stage process. This consisted of:

- reviewing the functions and policies listed in the 2002-2005 RES;
- drawing up a new list of all our functions and policies, including policies proposed for 2005-2008.
- assessing the relevance of all functions and policies, and the priority they should receive ... by using the grids recommended in *A Guide for Public Authorities* ... to develop a simple scoring system; and
- consulting key staff on a list of relevant functions and policies, and their priorities, and drawing up a final list (see Appendix 2)."

The important points, for our purposes here, would appear to be that it says that it has drawn up a new list of all its functions; and assessed all its functions for relevance and priority. As with comparable statements made in the 2002-05 RES (see 5.3.4.2(b) above), however, there would appear to be reasons to treat these statements with some caution.

(i) no list of all its functions. The 2005-08 RES, unlike the 2002-05 RES, does not include what the CRE says is a list of all its functions; and we have not come across such a list elsewhere (although we have not specifically asked about the existence of one). The only list of functions in the RES appears to be the one in appendix 2 (CRE, 2005e: p. 52), which it says is a 'final list' of relevant functions (ibid: p. 17) i.e. the sort of list which should be the product of the assessment for relevance. Consequently, we do not know whether any list which was drawn up included all the CRE's functions; and, indeed, cannot be certain that the CRE drew up such a list. This lack of clarity, and evidence, must, in turn, cast some doubt upon whether the CRE conducted an assessment for relevance on all of its functions.

(ii) does not appear to have assessed the level of relevance or priority of all or any of its functions.

Despite saying that it assessed "the relevance of all functions and policies, and the priority they should receive if they were relevant ..." (ibid: 17), appendix 2 - which is headed 'Results of the assessment of statutory functions and related policies for relevance ...' - does not appear to assign levels of relevance or priority to any of the functions it lists. What appears to have possibly happened - judging by how the appendix 2 table is set out - is that the CRE started with a list of policies and practices, assigned a level of relevance and priority to each of these, and then indicated on the table what functions these policies and practices are related to. Since, however, the same functions are shown alongside policies and practices with different levels of assigned relevance, it does not appear to be possible to deduce an assigned level of relevance or priority for the functions from that assigned to the policies and practices. Further, each policy or practice is shown alongside just one function, and in the majority of cases this is the general duty at section 43 - suggesting, perhaps, that this section was chosen for convenience (on account of being applicable to all policies and practices), rather than as a result of a careful assessment of which functions were most closely related to particular policies and practices.

It cannot be ruled out, however, that the CRE conducted an assessment of its functions for level of relevance and priority but did not record the results in appendix 2 or elsewhere in the RES.

(iii) may not have assessed all or any of its functions for relevance (i.e. a basic 'whether' assessment).

The RES seems to give the impression that the assessment of whether a function is relevant will be combined with the assessment of level of relevance and priority level. For example, it states that its assessment process included (CRE, 2005e: p. 17) - 'assessing the relevance of all functions and policies, and the priority they should receive if they are relevant ...'. Consequently, the apparent failure to assign levels of relevance or priority to the functions in appendix 2 might be thought to support the conclusion that there also wasn't an assessment of whether the function was relevant.

It might be argued that, despite not having assigned levels of relevance and priority, the simple inclusion of a function in appendix 2 indicates that it was assessed for relevance and found to be relevant. However, as indicated above, the functions appear to have been included on the basis of the being the functions which the policies and practices,

found to be relevant to, arise from or are otherwise related to, rather than being included following an assessment of their own relevance. That a function is shown alongside a policy or practice which has been assessed as relevant does, of course, support a conclusion that the function is also relevant. However, this suggests that appendix 2 provides a useful input into any assessment of functions for relevance, it does not mean that it represents the results of such an assessment.

(iv) if appendix 2 is a list of all the functions it assessed as relevant, its approach to assessment may be inadequate

If the list of functions in appendix 2 includes all of the functions which the CRE has assessed as relevant, it would appear to indicate either that it did not assess all of its functions for relevance or that it assessed all of its functions and assessed a significant number as not relevant - since the list in appendix 2 does not, we would argue, include all of its functions. The functions it omits from our table at 5.3.2.2 are - (5), (6), (8), (12), (22), (24), (25), (26), and (27). These include functions also omitted in the 2002-05 RES, such as, for example, undertaking educational activities; but also some of those included in the 2002-05 RES, such as, for example, appointing advisory committees. Some of the omissions (of items in the previous RES) could, perhaps, be explained by a different way of delineating and describing functions. For example, corporate services might be conceived as a level at which functions might be exercised rather than as statutory function itself. However, the omissions of items, such as assistance to organisations under section 44, which are clearly functions, and clearly relevant to section 71, would appear to support a conclusion that appendix 2 (despite what the RES says) does not contain the results of an assessment of functions.

5.3.4.2 (d) other documents

The CRE stated in its 2002-03 RES that it will publish "a summary of all assessments" (CRE, 2002c: 25), and reiterates the point in its 2005-08 RES (CRE, 2005e: p. 33). Since there appear to be no published reports of its assessment of functions for relevance, this might be suggestive of there having been no such assessments (or at least no substantial assessments, as opposed to, for example, going down a list of functions and ticking those which were thought to be relevant).

5.3.5 CRE compliance in relation to reviewing assessments of functions

5.3.5.1 <u>what are the main requirements</u>

We concluded above (5.1.3.4 (a)), with an assigned high level of confidence, that, to comply with the SDO, previous assessments of functions for relevance to section 71 ('whether' assessments) must be reviewed at least every three years; and concluded, with a low-medium level of confidence, that doing so was also a requirement under the general duty.

5.3.5.1 evidence relating to whether the CRE has reviewed any assessments of its functions

5.3.5.1 (a) Freedom of Information Requests

The letters (referred to above at 5.3.4.2(a)) to the CRE, from the PIRU trustee, also asked "What policies and functions has the CRE monitored and/ or reviewed for adverse impacts on the promotion of race equality and/ or on other matters relevant to the race equality duty; and what reports of any such monitoring/ reviews has it produced?". The CRE's reply to this question was as follows (letter 2.2(b)) - "The CRE, like all public authorities listed in schedule 1A of the Race Relations Act 1976, as amended, are required to monitor their employment functions and policies for any adverse impact on race equality". This would appear to refer to the requirement, under article 5 of the SDO, for employers to monitor, 'by reference to the racial groups to which they belong', staff in post and applicants for employment, training and promotion; and, where the employer has 150 or more full-time employees, 'the numbers from each such group who' fall into specified categories - such as, for example, receive training.

It might be thought that such monitoring would entail on-going assessment of the employment function, that on-going assessment would entail re-assessment, and re-assessment would entail some sort of review of the original assessment - and that, therefore, the monitoring would, in relation to the employment function, meet the requirement (at SDO article 2(3)) to review the assessment of relevance. It is not clear, however, that a formal assessment of relevance would, in any event, be needed in the case of the employment function, since it should, perhaps, be deemed to be relevant to section 71 (bearing in mind, for example, that the 'unlawful discrimination' referred to at 71(1)(a) includes employment discrimination). The question, therefore, might be whether the monitoring would meet any requirement (if such exists) to review the assessment of how a function is relevant (i.e. the more detailed ‘how’ assessment); and it is not clear that it necessarily would.

A particular deficiency might be that the monitoring appears designed to reveal numbers in specified categories - such as the number of staff from particular groups - whereas a 'how' assessment should, perhaps, be aimed at discovering some of the processes in the function which might have led to these outcomes. However, some of the information from the monitoring - such as, for example, numbers from particular groups who suffer detriment as a result of performance assessment procedures - would appear to be well suited to contributing to this purpose (in so far as, for example, anomalies in the figures may alert the authority to potential problems which required more detailed attention). The more serious problem, of course, is that there is no suggestion in the FIA answer (letter 2.2(b)), referred to above, that the CRE had reviewed functions other than its employment function (and, as discussed above, it did not say that it had reviewed, as opposed to monitored, its employment function).

Our question, however, may have been insufficiently clear (letter 2.1(b)). In particular, in putting 'monitored' and 'reviewed' together, and referring to 'adverse impacts', it may have concluded that we were talking about ongoing monitoring, and may not have realised that we were also asking about the kind of review referred to at SDO article 2(3).

5.3.5.1 (b) Race Equality Schemes

The 2002-05 RES states (CRE 2002c: p. 18) - "We will use the knowledge and information gathered as we implement the RES to review the relevance and rank (by priority) of all our functions and policies throughout the three Years of the RES". The 2005-08 RES (CRE, 2005e: p.17) repeats this statement, and adds (ibid) "Each directorate will ensure that its functions and policies are reviewed at least once over the three-year life time of the scheme; and that these reviews are included in their directorate operating plan".

Since, however, it is not clear that functions have been assessed in the first place (see 5.3.4.2 above) i.e. when section 71 came into force, it is not clear that there will have been assessments to review. Further, it is not clear that functions were assessed for the 2005-08 RES; and, therefore, even if there had been assessments to review, it is not clear that these were, in fact, reviewed.

5.3.5.1 (c) other documents

As noted above at 5.3.5.1 (c), the 2005-08 RES states that each directorate will ensure that its functions are reviewed and that the reviews are included in the directorate operating plans. This does not appear, however, to be the case in any of the directorate operating plans (CRE, 2003 c,d,e,f,g; 2005g; 2006f, g), or CRE-wide business plans *(CRE, 2003h; 2004f; 2005i)*, which we looked at; all of which appear to focus on objectives, performance indicators, and future plans. It may, of course, be that we did not look at those which included reviews of assessment of functions (not withstanding that the format of the plans appears to have been based upon a template, and there appeared to be no place on the template for assessments or reviews).

5.3.6 CRE compliance in relation to assessing relevant functions ('how' assessments)

5.3.6.1 <u>what are the main requirements</u>

We concluded above (5.1.3.3), with a medium level of confidence, that, in the case of functions which are relevant - to its performance of its duties under section 71 - there is some requirement to conduct a more detailed assessment of how the function is relevant; and, with a low-medium level of confidence, that the assessment, of how a function is relevant, to be proper, should include - (i) an attempt to assess the extent of any adverse impact on race equality; and (ii) an attempt to assess possible ways of eliminating or minimising any adverse impact.

5.3.6.1 <u>evidence relating to whether the CRE has conducted 'how' assessments of the functions it found to be relevant</u>

5.3.6.1 (a) Freedom of Information requests

We noted above (5.3.4.2(a)) that the CRE FIA responses do not appear to indicate that the CRE has conducted assessments of its functions, but that the failure to address functions in their responses may have been the result of the CRE not realising that we were asking about functions.

5.3.6.1 (b) Race Equality Schemes

We also noted (5.3.4.2 (b) and (c)) that the only assessment of functions that the Race Equality Schemes (CRE, 2002c; CRE 2005e) appear to refer to are assessments for relevance, and level of relevance and priority, using the grids in their *Guide for Public*

Authorities; that such an assessment may not meet the requirements for a 'how' assessment of functions (assuming that such an assessment is required and that what is required is similar to what the courts appear to have indicated is required in the case of a how assessment of policies); and that it is not completely clear that the CRE conducted any kind of assessment of its functions.

5.3.6.1 (c) other documents

Bearing in mind that the purpose of a 'how' assessment (at least in the case of policies) would appear to be to identify adverse impacts and means of addressing these (see 5.1.3.3 (b)), it might be expected that the findings of any such assessments would be evident in directorate plans and strategies (including, for example, indicating what changes had been made to draft proposals as a consequence of impact assessments). We have not, however, been able to find what appeared to us to be any such indications in any of the operating plans we looked at (CRE, 2003 c,d,e, f, g, h; 2004f, 2005g, i; 2006f, g), but our search was limited to a quite limited selection of documents.

5.4 FINDINGS IN RELATION TO POLICIES

We have set-out below our conclusions in relation to whether (between 1 April 2001 and 1 June 2007) the CRE appears to have been meeting, in relation to its policies, what appear to be its main duties under section 71 RRA. It is suggested that this part of the report is read with reference to 5.1.4 ('What is required in relation to policies') and 5.2.3 ('Indicators of requirements being met in relation to policies').

5.4.1 what are the 'policies' which need to be assessed

5.4.1.1 definitions of policies

5.4.1.1 (a) definition in the Code of Practice and the CRE's definition

Under "policies' in the glossary at the beginning of the Code of Practice (CRE, 2002a), it says - 'the formal and informal decisions about how a public authority carries out its duties and uses its powers". Some of the CRE's own REIAs, however, appear to provide a different, and it seems (in some respects at least) narrower, definition. In the REIA (CRE, 2006e) of its *European and international Legal Strategy 2006-07*, for example, it states -

"4.1 The Commission is required under the Race Relations Act 1976, as amended to assess each proposed policy for relevance to the general duty under section 71 of the Act.

“4.2 A policy is defined as:
'any practice or written document, which sets out a course of action, guiding principles or procedure, which is adopted and implemented by the Authority."'

By putting its definition in italics and speech marks, the clear impression is given that it is quoting from something and someone else; and, since the only other document referred to is the Race Relations Act, and since it says 'A policy is defined as' (rather than, for example, 'We define a policy as', it seems likely to give the impression that the definition is from the Race Relations Act (whereas, in fact, section 71(1) does not refer to policies). Further, there is no reference to the Code of Practice definition and no explanation for what appears to be the departure from it.

In an attempt to find out why the CRE had adopted a different definition to the one in the Code of Practice, a PIRU trustee wrote to the CRE, in a letter (appendix 5, letter 1.1f) dated 26 February 2007, asking to know "where the definition at para 4.2 of the quoted REIA comes from; why it has, in this instance, replaced the definition provided in the Code of Practice; and whether the CRE believes that this para. 4.1 definition (which also appears in other CRE documents) should now be taken to be the correct definition (rather than the definition in the Code of Practice)". In its reply, dated 19 March 2007 (letter 1.2(f)), the CRE states - “The CRE’s definition used in its impact assessments is reflected in internal guidance and is designed to give effect to the definition contained in the code and is not incompatible with it. Other authorities may use their own enhanced definition as long as it does not conflict with the definition in the code”.

It seems, however, that the definition in the REIAs represents, in some respects at least, a narrowing down of the definition in the Code - since the definition in the Code would appear to encompass all policies encompassed in the definition in the REIAs, but the definition in the REIAs (henceforth referred to as ‘the CRE‘s new definition’) would appear to not encompass all the policies encompassed in the definition in the Code. Consequently, if it had any legal standing, the CRE’s new definition would require (again in some respects at least) considerably less of an authority; and, therefore, contrary to the assertion in the CRE's letter (letter 1.2f), the new definition appears to be incompatible with the definition in the Code.

We say ‘in some respects at least’ because it is not at all clear what is meant, in the CRE’s new definition, by ‘any practice’, or how (if at all) the phrase is intended to relate to other sub-clauses in the definition (such as whether it needs to be in some sense ‘adopted‘ and what, in this context, ‘adopted’ would mean); and, therefore, we are uncertain as to whether, in relation to ‘practices’, the new definition might encompass more than the definition in the Code. Our suspicion, however, is that it wouldn’t. This is because we assume that any assessment of a ‘practice’ (taking 'practice' to refer to an established way of doing something) would need to include some assessment of the policies and procedures which it draws upon, but would - bearing in mind that the practice will not be wholly explained by, and may run counter to, any related policies and procedures - also need to include some assessment of the, perhaps informal, decision to continue with the practice (which might often be better understood as the absence of a formal decision to change the practice). Such a decision, however, would appear to be an example of a partly informal and partly formal decision about how to carry out some of its duties and/ or use some of its powers; and would, therefore, appear to be encompassed in the definition of policy in the Code of Practice.

In relation to the rest of the CRE’s new definition (i.e. after ‘any practices’), it seems much clearer that it encompasses less than the definition in the Code of Practice. The difference of particular note is that the Code definition encompasses all formal and informal decisions (’all‘ being deducible from something less not being specified); whereas the CRE’s new definition does not appear to encompass unwritten policies (since its appears to specify that, for there to be a ‘policy’, the matters referred to need to be set out in a ‘written document’); or policies which are not of the kind which are adopted (since it says ‘adopted and implemented’ not ‘... or implemented‘). It is not clear what exactly is meant by ‘adopted‘, but it might well tend to be understood to require a significant degree of formality and as something which involves, for example, drafts being consulted on and adoption through formal decision making processes (such as relevant committees).

We also suspect that the two definitions (from the Code and from the CRE’s new definition) could have quite different effects on how an organisation approaches the matters at section 71(1). A particular concern is that the CRE’s new definition would appear to have the capacity to exempt (or to encourage the assumption of exemption)

policy making ‘on the hoof’ from the need for an assessment (because the policy might be neither written nor formally adopted). For example, as we argue below, the CRE’s apparent shift from its traditional support for multiculturalism appears to have involved a succession of policy statements in speeches and to the media (which went further than related policy decisions in written documents or preceded the production of written policy documents). It might also be argued that the CRE’s new definition might tend to discourage formal decision making (so as to avoid the need to assess), which, in addition to the potential impact on the matters at section 71(1), might also tend to make an organisation’s decision making less democratic, accountable, transparent, and considered.

If taken at face value, the CRE’s new definition might be even more restrictive than we suggest above. Specifically, it appears to suggest (although this may have been unintentional) that a policy is a written document of a particular kind, not that, to be a policy, a policy needs to be included in a written document. The potential importance of such a distinction would seem to arise in relation to organisational decisions about what an REIA needs to be conducted on, and, in particular, about how many policies or other matters is it reasonable to subject to one REIA (i.e. to combine for assessment purposes). If each document is considered to be a policy (regardless of how many policies it contains), it may make it considerably less likely that the policies within the document (regardless of how relevant they are to section 71) will be separately assessed (or assessed in groupings of related policies within the document); and it may well be that they receive insufficient attention in the REIA of the whole document (bearing in mind that some policy documents, such as operating plans, will contain several hundred policies, plans and programmes of work).

5.4.1.1 (b) another way to interpret the requirement

While the CRE’s new definition (see 5.4.1.1(a) above) appears incompatible with the definition in the Code of Practice, it might not be practicable for an authority to conduct formal assessments on all those policies which could fall within the Code’s potentially very wide definition.

Rather than taking policies to be decisions, and assuming that there is a requirement to assess all decisions (which would appear to cover everything from 5 year plans to the

decision about where to hold the office party), it might be more useful to assume - drawing, in particular, upon the reference to 'any policy decision' in para. 274 in *Elias* in the Court of Appeal (see our appendix 1d for the whole paragraph) - that the requirement, at least in relation to more formal assessments, is to assess policy decisions. Further, we would argue that the term ‘policy decision’ should, perhaps, be interpreted in the light of 'due regard', and what the debate in Parliament suggests might be some of the central purposes of section 71.

The Code of Practice states (CRE, 2002a: 3.5) that having 'due regard' to the three parts of the duty "means that the weight given to race equality should be proportionate to its relevance to a particular function". As discussed above (4.4.3.1(b)), however, this would not appear to be a generally satisfactory explanation; and, in addition, it appears particularly unsuited to our present purposes, including because we are looking at policies as well as functions. We wonder, instead, whether 'due regard' should be taken to mean that public authorities should make a reasonable effort (as suggested in ‘due’) in relation to the matters at section 71(1); and whether this reasonable effort should be taken to include reasonable effort in relation to assessing policies (and, indeed, it might be argued that the case law suggests that reasonable effort can be limited to such assessment). In addition, however, it might be thought that, consistent with this, reasonable effort should, in particular, include reasonable effort to further what appears (including from debate in Parliament) to have been a central motivation behind, and purpose of, section 71 - to tackle institutional discrimination (see, for example, 4.1.1 above).

Further, we would argue that reasonable effort needs to be judged partly in terms of an authority's overall effort and partly in terms of effort in individual cases; that some weight needs to be given to the effectiveness of the approach (since, for example, it would not appear to be reasonable effort to put enormous effort into something which the authority did not believe would work); and that, for these reasons, it would not necessarily be useful to set hard and fast rules (based upon precise definitions) about what sorts of policies need to be assessed, or to judge an authority’s compliance on the basis of whether it had met any such hard and fast rules. In particular, if it adequately assesses functions, strategies, and operating plans, and makes appropriate changes to these in the light of its findings, there might be thought to be less need (in relation to ‘due regard’)

to conduct detailed assessments of policies arising from them. This is because functions, strategies, and operating plans, would appear to, in general, have greater potential, than lower level policies, to have an impact on the matters at section 71(1) (and upon institutional discrimination) - including, in particular, on account of their influence on the production and implimentation of lower level decisions. Strategies, for example, should have a particular influence on individual policies (as well as, of course, on annual operating plans); and annual operating plans should have a particular influence on monthly and weekly work plans, and on specific intended actions (such as research projects or conferences). There might also be reason to focus assessment effort on decisions affecting organisational structure, control systems, practices (including employment practice), and culture, since such decisions might tend to have wide ranging and long lasting effects.

However, there would still, we would suggest, be a need to monitor all levels of policies, and proposed policies, for indications that more detailed assessment would be required or useful. This is because strategies, and, to a lesser extent, operating plans, will tend not to include all the substantial constituent intended actions, or not in sufficient detail to enable them to be adequately assessed; and because plans set out in strategies and annual operating plans might be changed, including as a result of unforeseen circumstances, problems with implementation, better ideas, organisational politics, and the influence of what Mintzberg sometime ago called ‘emergent strategies’ (eg. Mintzberg, 1978), and which Hill and Jones (1998: p. 18) explained as involving the autonomous actions of lower levels employees within an organisation. It is notable, for example, that our review of CRE press releases (CRE, 2004g,h, i; CRE, 2005c,j,k, l; CRE, 2006c, h; 2007a, b) found a considerable number of announcements which did not appear to have close counter-parts in relevant strategies or plans.

5.4.2 what are the CRE 'policies' which might need to be assessed

5.4.2.1 <u>strategies</u>

5.4.2.1 (a) does the CRE think that its strategies should be assessed

We have set out, in table 5.4.2.1(b), the CRE strategies which we identified from the limited number of CRE documents looked at. It should be noted that we have only included what the CRE described as strategies; and have, as a consequence, omitted a significant number of action and other plans which appeared to be strategies in all but

name or at least substantially strategic in nature.

There are indications that the CRE believes that all, or most, strategies should be subject to an REIA. Of particular note, all the strategies listed in the 05-08 RES (CRE, 2005e) are listed as being scheduled for an REIA in 05/06 (ibid: appendix 2). Further, two of the total five full REIAs which it has conducted have been on strategies (see 5.4.3 below).

table 5.4.2.1(b) strategies in existence and assessments of them

strategies	**source** *(i)*	**REIA scheduled** *(ii)*	**priority** (CRE assigned) *(iii)*	**relevance to general duty** (CRE assigned) *(iv)*	**REIA conducted** *(v)*
(1) Campaigns and Marketing Str.	RES 02-05	_	_	high	N
(2) Communications Str.	RES 02-05	_	_	high	N
(3) Connecting with Communities Str.	RES 02-05	_	_	high	N
(4) Legal Str.	RES 02-05	_	_	high	N
(5) Str. on the Duty to Promote Race Equality	RES 02-05	_	_	high	N
(6) Str. on Standards for RECs and Grants	RES 02-05	_	_	high	N
(7) CRE Strategic and Business Plan	RES 02-05	_	_	medium	N
(8) Criminal Justice Str.	RES 02-05	_	_	medium	N
(9) Education Str.	RES 02-5	_	_	medium	N

(10) European Str.	RES 02-5	_	_	medium	N
(11) Health Str.	RES 02-5	_	_	medium	N
(12) Housing Str.	RES 02-5	_	_	medium	N
(13) Local Government Str.	RES 02-5	_	_	medium	N
(14) Private Sector Str	RES 02-5	_	_	medium	N
(15) Regeneration Str.	RES 02-5	_	_	medium	N
(16) Research Str. *(vi)*	RES 02-5	_	_	medium	N
(17) Youth Str.	RES 02-05	_	_	medium	N
(18) Parliamentary Strategy	CM: 16/12/3	_	_	_	N
(19) European and International Str.	CM 21/7/04	_	_	_	N
(20) Gypsy and Traveller Str.	IBP 04/05	_	_	_	N
(21) Str. on Asylum and Immigration	IBP 04/05	_	_	_	N
(22) Str. on Religion and Belief	IBP 04/05	_	_	_	N
(23) Strs to Counter Far Right Activities	IBP 04/05	_	_	_	N
(24) European and International Legal Str.	IBP 04/05	_	_	_	Y (CRE, 2006e)
(25) Internal Communications Strategy *(vii)*	BP 05/06	_	_	_	N

(26) Communications Str.	RES 05-08	05/06	high	3	N
(27) Research Str. *(vi)*	RES 05-08	05/06	high	3	N
(26) Public Sector Str.	RES 05-08	05/06	high	3	N
(27) Migration Str.	RES 05-08	05/06	high	3	N
(28) Regional Str.	RES 05-08	05/06	high	3	N
(29) Private Sector Str.	RES 05-08	05/06	high	3	N
(30) Corporate and Government Relations Str.	RES 05-08	05/06	high	3	N
(31) English Regional Str./ Str. for the English Regions *(viii)*	CM 24/1/06 + copy of REIA	_	_	_	Y (CRE, 2005g)
(32) Diversity Race Equality Str.	CM 9/3/06	_	_	_	N
(33) CRE Strategic Plan 05 -08	CRE letter (A5, 2.2 (b)) *(viiii)*	_	_	_	IS

notes on table

(i) RES: CRE Race Equality Scheme (CRE, 2002c; CRE 2005e). CM: minutes of meetings of CRE commissioners (CRE, 2003i; 2004j; 2006i and j).

IBP: CRE interim Business Planning for remainder of 2004/05 (CRE, 2004k). BP: CRE Business Plan 2005-06 (CRE, 2005i).

(ii) Only the 05-08 RES shows when REIAs have been scheduled for.

(iii) The 02-05 RES does not appear to specifically assign priority levels. It appears to indicate, however, that the higher the assigned level of relevance (the results of which

are reproduced in our table), the higher the priority level - with those of high relevance to be reviewed in year one, those of medium relevance in year two, and those of low relevance in year three.
The 05-08 RES, which does show priority levels, does not explain exactly what priority this is intended to refer to. However, the correlation, in appendix 2 of the 05-08 RES, between priority level and when the review is scheduled for, suggests that it might relate to the priority for review.
(iv) The 02-05 RES assigns three levels of relevance - high, medium, and low. The 05-08 RES assigns the following - 0 = none, 1 = little, 2 = some, 3 = substantial.
(v) Y = yes; N = no; IS = initial screening assessment (see our glossary at start of the report).
(vi) Research Strategy appears twice in this table because these appear to be separate strategies covering different periods.
(vii) We are not clear whether this is more of strategy or a plan of action but it is called a strategy in the CRE Business Plan.
(viii) We assume (but are not certain) that the English Regional Strategy and the Strategy for the English Regions are one and the same.
(viiii) Copies of Freedom of Information Request letters we sent to the CRE, and summaries of letters sent from the CRE, are in appendix 5 to this report.

5.4.2.2 Directorate annual operating plans, corporate business plans, and annual plans for Scotland and Wales

5.4.2.2 (a) does the CRE think that its operating and corporate plans should be assessed

There are also indications that the CRE believes that all, or most, directorate annual operating plans, and corporate plans, should be subject to an REIA. Of particular note, where appendix 2 of the 05-08 RES (CRE, 2005e) lists directorate operating plans, and the corporate business plan, it lists them as of 'high priority' and scheduled for an REIA in 05/06. In addition, since the 05-8 RES lists (ibid: appendix 2) a five page leaflet, *Race Equality is Your Business*, as scheduled for an REIA, it seems unlikely that the CRE would regard an operating plan as not also needing one (bearing in mind that each annual plan appears to include over a hundred projects and plans).

However, it should be noted that appendix 2 of the 05-08 RES only lists the operating

plans of two directorates (public sector and private sector). This might be thought to indicate that it had assessed the other directorates (or at least their annual plans) as not relevant to race equality, since the RES states (ibid: 17) that appendix 2 is a list of the policies which it assessed as relevant to section 71. Since, however, the other directorates include legal services and enforcement, and countries, regions and communities, which are undoutedly of high relevance to race equality, the inclusion of just two directorate plans might simply reflect the general level of thoroughness involved in drawing up appendix 2. It might also be noted that there is the appearance, in appendix 2 of the 05-08 RES, that the CRE may have scheduled plans and strategies for assessment at a time after the plan or strategy would have been implemented, which, if this were the case (and it is not clear how to interpret the information in the RES), would appear to run counter to the central purpose of an impact assessment (i.e. to improve policies before implementation).

5.4.2.2 (b) did the plans exist to be assessed

We only obtained copies of some of the operating plans. We have, however, made what would appear to be the relatively safe assumption that all the directorates would have had an annual operating plan covering each year, or at least most years, of their existence. When we were not fairly sure that a directorate was in existence during a particular year (having, for example, failed to find a reference to it in the relevant annual report), we did not show (in the table below) there as being an annual operating plan for the year in question.

Even if and when a directorate did not have a formal written plan for a particular year, whatever annual plans it had would arguably still require an assessment. Indeed, the lack of such a document might tend to suggest inadequate planning - including inadequate consideration of the matters at section 71 - and, therefore, there would be greater reason to assess whatever informal or scattered annual plans could be discerned.

5.4.2.2 (c) Wales and Scotland offices

We have also included annual plans for the CRE offices in Wales and in Scotland, on the grounds that (while we have not as yet asked about the existence of annual plans) the Wales and Scotland editions of the CRE annuals reports (eg CRE, 2005m) indicate

that these offices had implemented quite extensive programmes of work in the respective countries during the 12 months covered in the reports. Further, as discussed at 5.4.2.2 (b), it is the existence of the plans not the existence of plans in one document which would appear to give rise to the requirement to assess.

Table 5.4.2.2 (d) operating and corporate plans in existence and assessments of them

operating plan	**source** *(i)*	**REIA conducted** *(ii)*
(1) Communities, Regions and Countries 03/04	CP	N
(2) Private Sector 03/04	CP	N
(3) Legal and Enforcement Services 03/04	CP	N
(4) Communications and Information 03/04	CP	N
(5) Public Duty and Public Policy 03/04	CP	N
(6) Annual plans for office in Scotland 03/04.	existence of Scotland office *(iii)*	N
(7) Annual plans for office in Wales 03/04.	existence of Wales office *(iii)*	N
(8) CRE Business Plan 03/04	RES 02-05 + BPEY *(iv)*	N
(9) Communications and Strategy 04/05	DFED(05-08 RES)	N
(10) Countries, Regions and Communities 04/05	DFED (05-08 RES)	N
(11) Legal Services and Enforcement 04/05	DFED (05-08 RES)	N
(12) Finance and Support Services 04/05	DFED (05-08 RES)	N
(13) Policy and Public Sector 04/05	DFED (05-08 RES)	N
(14) Private Sector 04/05	DEFED (05-08 RES)	N

(15) Human Resources and Organisational Development 0/4/05	DFED (05-08 RES)	N
(16) Annual plans for office in Wales 04/05	existence of Wales office *(iii)*	N
(17) Annual plans for office in Scotland 04/05	existence of Scotland office *(iii)*	N
(18) CRE Business Plan 04/05	RES 02-05 + BPEY *(iv)*	N
(19) Legal Services 05/06	DFED (RES 05-08)	N
(20) Policy and Public Sector 05/06	CP	N
(21) Strategy and Communications 05/06	DFED (BP 05-06)	N
(22) Private Sector 05/06	DFED (BP 05-06)	N
(23) Countries, Regions and Communities 05/06	DFED (BP 05-06)	N
(24) Finance and Support Services 05/06	DFED (BP 05-06)	N
(25) Government and Corporate Relations 05/06	DFED (BP 05-06)	N
(26) Human Resources and Organisation Development 05/06	DFED (RES 05-08)	N
(27) Annual plans for office in Scotland 05/ 06	existence of Scotland office *(iii)*	N
(28) Annual plans for office in Wales 05/06	existence of Wales office *(iii)*	N
(29) CRE Iterim BP for remainder of 05/06	CP	N
(30) CRE BP 05/06	CP	N
(31) Strategy and Communications 06/07	CP	N

(32) Legal 06/ 07	CP	N
(33) Private sector 06/07	CP	N
(34) Policy and Public Sector 06/07	DFED (ODP 06/07)	N
(35) Countries, Regions and Communities 06/07	DFED (ODP 06/07)	N
(36) Finance 06/07	DFED (ODP 06/07)	N
(37) Human Resources and Organisational Development 06/ 07	DFED (ODP 06/07)	N
(38) Annual plans for office in Wales 06/07	existence of Wales office *(iii)*	N
(39) Annual plans for office in Scotland 06/07	existence of Scotland office *(iii)*	N
(40) CRE BP 06/07	RES 05-08 + BPEY *(iv)*	N

notes on table

(i) CP: a copy of plan in question has been seen. DFED: the existence of the plan was Deduced from the Existence of the Directorate. DFED (...): reference to directorate in document in brackets was basis for concluding that directorate was in existence during the year in question. (... RES): Race Equality Scheme; (BP ...): CRE Business Plan. (ODP ...): reference to directorate in Other Directorate Plan.

(ii) N: no REIA conducted.

(iii) See discussion at 5.4.2.2 (c).

(iv) We assumed that the CRE had a corporate business plan each year - on the grounds that we obtained them for the years we requested them for, corporate business plans are referred to in the 02-05 and 05-08 RESs, and because such an organisation would be expected to have a business plan. BPEY: Business Plan Expected for Each Year.

5.4.2.3 Policies, procedures, practices, programmes and publications (PPPP)

5.4.2.3 (a) does the CRE think PPPPs should be subject to assessment

In addition to strategies and annual plans, it appears that the CRE also believes that

some individual policies, procedures, practices, programmes and publications should be subject to an REIA. Of particular note, its 05-08 RES (CRE, 2005e: appendix 2) lists examples of all of these as scheduled for an REIA (see 5.4.2.3 (b) below); and two of the five REIAs it has conducted were on Codes of Practice and one of its initial screening assessment was on a leaflet/ booklet and another was on a guide for business.

5.4.2.3 (b) Policies, procedures, practices, programmes and publications scheduled for an REIA in 05-08 RES

N.B. We have omitted from this table all the items which we included as functions, strategies, or operating plans in previous tables (5.3.2.2, 5.4.2.1(b), 5.4.2.2 (d)).

PPPPPs	**priority** (CRE assigned)	**scheduled for REIA**	**REIA conducted**
(1) National Information and Assistance Centre	high	05/06	N
(2) Guide to good race relations	high	05/06	N
(3) Housing code of practice	high	05/06	Y conducted in 2007
(4) Getting Results: grant aid allocations	high	annually	N
(5) Sporting Equals	high	annually	N
(6) Safe Communities Initiative	high	annually	N
(7) Employment Code of Practice	high	06/07	Y (CRE, 2005n)
(8) Racial equality and the Smaller business	medium	06/07	IS (CRE, 2004c)
(9) TUC/ CRE memorandum of understanding	high	06/07	N
(10) Equal Opportunities is Your Business Too	medium	06/07	IS (CRE, 2004d)

(11) The Football Action Plan	high	05/06	N
(12) IT policy	low	05/06	N
(13) Procurement policy and procedure	high	05/06	N
(14) Dignity at work/ bullying and harassment policy	high	05/06	N
(15) Equal Opportunity and Diversity policy	high	05/06	N
(16) European relations	high	05/06	N
(17) Commission shadowing scheme	high	05/06	N
(18) Race Equality Scheme	high	05/06	N

5.4.2.3 (c) employment policies, procedures and practices

As discussed above, we would argue that employment policies, procedures and practices, appear in general to be of particular relevance to section 71(1) and institutional discrimination, both because they help determine how employees and applicants are treated but also because they can have a substantial influence upon how employees carry out the authorities functions (including how they provide services to the public). We would, therefore, argue that the main employment policies and procedures should be subject to REIAs (perhaps with a number of related policies and procedures being assessed together). Further, as can be seen from the table below, the CRE has assessed a substantial number of them as being of high or medium relevance to the general duty.

policies, procedures, and practices *(i) (ii)*	**source**	**relevance to general duty** (CRE assigned) *(i)(ii) (iii)*	**priority level** (CRE assigned in 05-08 RES)*(ii)*	**REIA conducted**

(1) Appraisal procedures/ Appraisal policy *(and practices)*	RES 02-05/ 05-08	high/ 3	high	N
(2) Bullying and harassment policy, including dignity at work *(and practices)*	RES 02-05/ 05-08	high/ 3	high	N
(3) Disciplinary procedures *(and practices)*	RES 02-05/ 05-08	high/ 3	high	N
(4) Capability procedure *(and practices)*	RES 05-08	3	high	N
(5) Equal opportunities policy *(and practices) (iv)*	RES 02-05	high	_	N
(6) Equal opportunity and diversity policy *(and practices) (iv)*	RES 05-08	3	high	N
(7) Grievance procedures *(and practices)*	RES 02-05/ 05-08	high/ 3	high	N
(8) Pay policy/ Pay and conditions policy *(and practices)*	RES 02-05/ 05-08	high/2	medium	N
(9) Recruitment, selection and retention (including promotion)/ Recruitment and selection *(and practices)*	RES 02-05/ 05-08	high/ 3	high	N
(10) Training and development/ Training and development policy and action programme *(and practices)*	RES 02-05/ 05-08	high/ 3	high	N
(11) Transfer and secondment/ Transfers and secondment activity *(and practices)*	RES 02-05/ 05-08	high/ 3	high	N

(12) CRE code of Conduct	RES 02-05	medium	_	N
(13) Exit procedures/ Exit procedure policy *(and practices)*	RES 02-05/ 05-08	medium/ 1	low	N
(14) Flexible working/ Flexible working arrangements policy *(and practices)*	RES 02-05/ 05-08	medium/ 2	medium	N
(15) Health and safety: sickness, absence, stress and welfare/ Health and safety policy and procedures *(and practices)*	RES 02-05/ 05-08	medium/ 1	low	N
(16) Induction/ Induction policy *(and practices)*	RES 02-05/ 05-08	medium/ 1	low	N
(17) Probation/ Probation policy *(and practices)*	RES 02-05/ 05-08	medium/ 2	medium	N
(18) Contracts of employment	RES 02-05/ 05-08	low/ 1	low	N
(19) Data protection *(and practices)*	RES 02-05/ 05-08	low	_	N
(20) Joint negotiating committee constitution *(and negotiating practices)*	RES 02-05/ 05-08	low/ 1	low	N
(21) Pensions/ Pensions policy and procedure *(and practices)*	RES 02-05/ 05-08	low/ 1	low	N
(22) Relocation	RES 02-05	low	_	N

notes on table

(i) In the first and third columns, in this table, the information before a '/' is from the 02-05 RES (CRE, 2002c: appendix 3) and that after a '/' is from the 05-08 RES (CRE, 2005e: appendix 2), except '*(and practices)*', which we have added for the reasons given at (ii)

below.
(ii) We have added '*(and practices)'* on the grounds that an REIA should, we would argue, look at what happens as well as what is meant to happen. In addition, it will be noted that the CRE includes 'policies and practices' together in column 2 in appendix 2 of the 02-05 RES and also in column 2 in appendix 2 of the 05-08 RES. It should be noted, however, that the CRE's assignments of relevance and priority (reproduced in columns 3 and 4 of our table) were assignments which the CRE made with reference to the descriptions, before or after the '/', reproduced in column 1 of our table, but without, of course, our addition of 'and practices'.
(iii) The 02-05 RES assigned high, medium or low relevance. The 05-08 RES assigned 0 (none), 1 (a little), 2 (some), or 3 (substantial).
(iv) The two equal opportunities policies would appear to be distinct. Presumably, for example, the latter one will have reflected changes in equalities law since the earlier one was produced.

5.4.2.3 (d) Policies, procedures, programmes, practices and publications in the 2005-06 Business Plan

The 05-08 RES (CRE, 2005e: appendix 2) appears to only include some of the policies, and proposals, which appear - from looking at the directorate operating plans and the corporate business plan - to have been in place at the time that the RES would have been written. Further, policies and proposals omitted from the RES include ones which appear to be of substantial relevance to section 71(1) (such as, for example, those around the Equality Bill and the transition to the CEHR), while some of those included (such as, for example, 'the gifts and hospitality policy') appear to be of quite limited potential relevance.

We have, therefore, gone through the CRE's 05-6 Business Plan (CRE, 2005i) in an attempt to identify additional policies and proposals which might have benefited from an REIA. It should be stressed that we are suggesting that the items in each 'PPPPP grouping', in the table below, could usefully have been assessed together (as, on account of their relatedness, they provide the context for each other). We are not, however, suggesting that each PPPPP grouping should have been subject to a separate REIA (as some of the groups - perhaps, for example, (27), (28) and (29) - might have been combined for assessment purposes).

Of course, the PPPPPs in the 05-06 business plan will not include all those in the more detailed 05-06 directorate operating plans; and, in addition, will be different to those in the 02-03, 03-04, 04-5, or 06-7 business plans (although there will be overlaps between them). Therefore, to gain a proper idea of the number and nature of policies which have been generated since the general duty came into force, the business plans for all the relevant years (and, at least, a sample of the directorate operating plans) should ideally have been looked at.

2005-2006 P5 groupings (policies, procedures, programmes, practices and publications)	**reference**	**REIA conducted**
(1) P5s around supporting and monitoring the public sector in implementing the employment duty. *Examples:* monitoring of the employment duty in each key sector; good practice examples collated and disseminated.	W1	N *(i)*
(2) P5s around working with public sector to reduce the 'snow peaks' issue and to ensure greater equality in recruitment, retention and promotion. *Examples:* work towards more representative workforce in civil service; towards race equality being mainstreamed in NOMS and local government BVPIs.	W2	N
(3) Use of section 66 funds to extend reach of RRA 1976	W3	N
(4) Targeted use RRA compliance action aimed at changing Government and public authority practice.	W4	N
(5) P5s around exploitation and illegal working. *Examples:* mapping; development of action plan; joint programme of action with TUC and CBI.	W5	N
(6) P5s around employment Code of Practice, including, in particular, communication plan.	W6	N *(ii)*

(7) P5s around procurement. *Examples*: work in relation procurement and supplier diversity guidance.	W7	N *(iii)*
(8) P5s around possibilities for implimentation of race equality duty in private sector. *Examples:* pilot for the implimentation of the race equality duty in a sample of private sector organisations; pilot programme to engage shareholder activists in support of race equality goals in sample of publicly quoted companies.	W9-10	N
(9) Implementation programme for Football Action Plan. *Examples:* gaining commitment from football authorities towards achieving race equality in football; supporting increased participation of BME groups at all levels in the football industry.	W13	N
(10) Plan and undertake formal investigation work and follow up activities. *Examples:* work in relation to police service agencies implementing CRE recommendations, and in relation to CPS employment targets.	W14	N
(11) Race in the Media Awards	W16	N
(12) Implement a programme of work on integration and citizenship and, in particular, how the public sector can act as an agent of change. *Examples:* develop evidence base around integration issues; articulate public policy approach; acquire intelligence of relevant government policies so as to be able to make effective interventions; CRE intervention in citizenship policies; CRE to intervene to secure race equality and integration outcomes for ethnic minority women.	C1	N
(13) Produce, publish, and disseminate good race relations guide.	C2	N

(14) P5s around Gypsy and Irish Travellers Formal Investigation; including, in particular, completion of scrutiny, follow-up programme, and communication plan.	C3	N
(15) Use of section 44 funding programme to strengthen ability of voluntary sector to ensure adequate provision of support to communities. *Examples*: review getting results programme; implimentation of regional structure, revise and publish section 44 guidance.	C4	N *(iv)*
(16) P5s around achieving closer relationships with the voluntary sector, including, in particular, through increased contact and through co-location and co-operation in new regional structure. *Examples:* Provide funding for BFOREC annual conference; production of racial equality hatred toolkit.	C5	N *(iv)*
(17) P5s around SCI Five Cities Project implimentation. *Examples:* monitoring; good practice report; conflict resolution tool kit; interventions with key partners to improve relations in five cities.	C6	N
(18) Continuation and evaluation of pilot private sector programme 'Oldham United'. *Examples:* toolkit produced; project rolled out to three further towns.	C8	N
(19) P5s around integration of new migrants and migration strategy.	C9	N
(20) Work with local government and ODPM to have a greater community leadership role; including, in particular, in relation to ensuring that local government works towards greater inclusion of all groups, with a BVPI indicator developed to benchmark progress.	C10	N

(21) P5s around provision of support to victims of racial discrimination and harassement. *Examples*: improving co-ordination of s44 funding; improving standards in support to victims; targetted national influence	C11	N
(22) Summer camp with young people exploring issues of identity, interaction and civic engagement.	C12	N
(23) Develop a programme of work building on the government's race equality and community cohesion. *Examples:* provide support to strategy and monitor implimentation.	S1	N
(24) A detailed programme for the CRE and Home Office on the delivery of key PSA targets.	S2	N
(25) Memorandum of Understanding with public service inspectorates to incorporate race equality targets into assessment of service provision.	S3	N
(26) Agreement with Public Service Appointments Commission on targets for public appointments to strategic bodies and ways to secure greater diversity and competance; and CRE exemplar programme of shadowing to prepare candidates for public office.	S4, S5	N
(27) Monitor public bodies progress on meeting race equality targets and obligations under RRA s71. *Examples*: improved evidence base of key public sector areas complying with RED.	S7	N *(i)*
(28) Develop online library of race equality good practice information to be used as a tool by public authorities.	S8	N *(i)*
(29) Deliver a programme of work around the need for public authorities to comply with the 3 year race equality duty review. *Examples:* sending out messages about the deadline; monitoring to establish extent of compliance.	S9	N *(i)*

(30) P5s around procurement guidance. *Examples:* promoting guidance and its implementation; building evidence base of procurement activity; and promoting pilot scheme.	S10	N
(31) P5s around the Race Equality Index; and the CRE Life Chances Series	E1	N
(32) Production and implimentation of DTI/HO/CRE standard for race equality advice providers.	E2	N
(33) Programme of information provision to clients and allies explaining CRE capabilities and priorities; work around the 'critical friends' network and Race Equality Champions; and developing capacity for communicating key messages effectively and for effective crisis management.	E3	N
(34) P5s around providing information advice centre. *Examples:* establishment of knowledge management system; legal advice giving.	E4	N
(35) Producing and promoting Information resources for media and opinion formers. *Examples*: recognised and authoritative series of basic fact sheets; recognised and pace setting series of occasional papers (including policy papers); re-launching Catalyst magazine.	E5-6; and E15	N
(36) P5s around influencing opinion formers and decision makers in countries of UK and regions; including, in particular, implimentation of regional strategy; and work of CRE boards for Scotland, Wales and London.	E7	N *(iv)*
(37) P5s around recruitment and training, including preparation for transition to CEHR. . Example of objectives: preparation for CEHR.	E8	N
(38) P5s around achieving 'step change improvement in HR management'. *Examples*: new procedures; and management information.	E9	N

(39) P5s around budgeting and finance. *Examples:* accurate budget forecasts; establishment of permanent finance team.	E10	N
(40) P5s around impacting upon CEHR Bill.	E11	N
(41) CEHR transition plan finalised and agreed.	E11	N
(42) Programme of activities to improve the quality of CRE services. *Examples:* 'mystery shoppers'; internal audit; conduct REIAs.	E12	N
(43) P5s around international presence, influence and activities. *Examples:* developing alliances with sister organisations and stakeholders in EU 25; fostering international engagement on race relations; a programme of agenda setting projects and events.	E13-14	N
(44) Work in relation to relaunching and ongoing development of CRE website.	E16	N
(45) Development and delivery of internal communications strategy.	E17	N

notes on table

(i) The CRE, in a letter (letter 2.2(b)) dated 1 June 2007, states, referring to its draft 'Public Duty Monitoring Plan', - "we took a decision that it would be useful to use our REIA auditing tool to test whether a draft version of the plan contained the right focus". This testing, however, appears to have been in 2007, and it appears from the letter (although it is not clear) that the Public Duty Monitoring Plan will be passed on to the CEHR to implement or otherwise make use of. Consequently, it would not appear to have been an REIA of plans for 05-06 in the 05-06 Business Plan.

(ii) The CRE had conducted an REIA (CRE, 2005n) on the employment Code itself.

(iii) The CRE, in a letter (letter 2.2(b)) dated 1 June 2007, states that it conducted an 'initial screening' on its *Supplier Diversity Guide*. This, however, was not an REIA; and,

in addition, the initial screening appears (although it is not clear) to have taken place in 2007. Consequently, it would not appear to have been an REIA of the plans in the 05-06 Business Plan.

(iv) The CRE did conduct an REIA (CRE, 2005g) on its *Strategy for the English Regions*, which may have been of some relevance to this P5 grouping.

(v) The CRE did conduct an REIA (CRE, 2006e) on its *European and International Legal Strategy 2006-2007,* which, despite, perhaps, being produced at the end of the 05-06 Business Plan period, may have been of some relevance to this P5 grouping.

5.4.3 CRE compliance in relation to assessing policies for relevance ('whether' assessments)

5.4.3.1 <u>what are the main requirements</u>

5.4.3.1(a) proper consideration in relation to proposed policies

(i) We concluded above (5.1.4.1(a)(i)), with an assigned high level of confidence, that - before making a policy decision, proper consideration (involving some sort of assessment) must be given to whether section 71 is relevant.

(ii) Drawing, in particular, upon *Elias* in the High Court at paragraphs 96-98, we concluded (5.1.4.1(a)(ii)), with an assigned low-medium level of confidence, that, to be proper, consideration must be at least cursory but cursory consideration is only sufficient if such consideration makes it plain that section 71 is not relevant, and that 'cursory' consideration would need to include a 'careful attempt' to assess whether the policy decision raised issues relating to race equality.

5.4.3.1(b) proper consideration in relation to existing policies

(i) We concluded above (5.1.4.3(b)), with a medium level of confidence, that there is a general requirement to assess in-force policies for relevance to section 71. It was also noted above ((5.1.4.3(a)-(b))) that there appears to be considerable support for this conclusion in the regulations, Code of Practice, and case law.

(ii) We concluded (5.1.4.3(a)(ii)) that the general requirement to assess in-force policies included a general requirement to assess them for relevance every three years. We assigned a medium-high level of confidence to the conclusion that this is a requirement under SDO article 2; and a low-medium level of confidence to the conclusion that it is also a requirement under section 71.

5.4.3.2 evidence relating to whether the CRE has assessed its policies and proposed policies for relevance

5.4.3.2 (a) Freedom of Information Act requests

In a Freedom of Information Act (FIA) request to the CRE, dated 23 November 2006 (see appendix 5, letter 2.1(a)), a PIRU trustee asked - “What race equality impact assessments has the CRE undertaken, and what REIA reports has it produced. Please include all instances of initial ‘screening’ and of ‘full impact assessment’... ?”. As noted above (5.3.4.2(a)), the original response from the CRE was that we would find the information on the CRE’s website. Since, however, we could only find reference to five completed assessments there, we wrote to the CRE to clarify whether these were the only assessments which had been completed.

The CRE’s response, in a letter dated 1 June 2007 (see appendix 5, letter 2.2(b)), indicated, in respect to our question about ‘initial screening assessments‘, that (in addition to the five assessments referred to in our letter) it had also carried out ‘initial screening assessments’ on its *Supplier Diversity Guide* and on the CRE’s *Strategic plan 2005-08.* The CRE’s letter also stated that it had now conducted an REIA on its *Statutory Code of Practice on Racial Equality in Housing*, but didn’t specify whether this involved an ‘initial screening assessment’. However, the letter did state that initial screening assessments were conducted in the case of the full REIAs published on the website, which might be thought to support a conclusion that an initial screening assessment was not conducted in the case of the full REIA on *the Statutory Code of Practice on Racial Equality in Housing* (since, if it had been, this would have been referred to as well).

The letter also states - "we took a decision to use our REIA auditing tool to test whether a draft version of" the Public Duty Monitoring Plan "contained the right focus. We carried out a REIA involving a group of staff from across the Commission. We tested the content of the plan for coverage of all strands of the duty and to identify any gaps in its coverage". It is not clear from the information in the letter, however, whether it is likely to have involved an initial screening assessment, or indeed, whether it, in fact, constituted an REIA. It would also appear difficult to find out more, as the letter adds - “In the light of the confidential nature of the details contained within the monitoring and enforcement plan ... it would not be in any interest to publish the REIA". It may be that the

assessment falls somewhere between the CRE's understanding of an 'initial screening assessment' and its understanding of a full REIA. A particular deficiency, if it was meant to be an REIA, would be that it did not appear to have involved any consultation (as opposed to involving CRE staff). It might also be noted that the CRE has stated (including, for example, in both RES's) that it will publish all its impact assessments; and that, while there may be sensitive elements to the Public Duty Monitoring Plan (such as, for example, information which could assist public authorities in avoiding effective monitoring), such information could presumably have be omitted from the impact assessment report. Further, since the CRE's approach to enforcement has been the subject of some concern - with, for example, Trevor Phillips having been recently questioned about it in the Communities and Local Government Committee - it might be thought inappropriate to so completely remove an important element of its approach from public scrutiny.

5.4.3.2 (b) CRE's 2002-05 Race Equality Scheme

The RES states (CRE, 2002c: p.17) that - as part of its process to identify policies relevant to section 71 - it listed all of its policies, and implies that these are shown in appendix 2 to the RES; and indicates that it assessed all of these for relevance, and that the results of this assessment are provided in appendices 3 and 4 to the RES. It also states (CRE, 2002c: p.17) that it used the assessment grids in its *Guide for Public Authorities* (CRE, 2002d) "to work out how relevant" its policies "are to race equality and what priority they would be given in" the RES (CRE, 2002c: p.17).

All 39 non-employment policies and practices shown in the list of 'all' its policies and practices (appendix 2) appear in the list of found to be relevant policies and practices (appendix 3), and each of these has been assigned a relevance level, on account of being put under 'high', 'medium', or 'low' relevance headings. This would appear to suggest that each of these 39 policies and practices had been assessed as to whether they were relevant to section 71. It might be wondered whether they had been transferred whole sale from appendix 2 to 3, without assessment of their relevance. Arguing against this, however, is the appearance that there is some considerable correlation between the relevance heading each has been put under and what would appear to be the general relevance of each. For example, the legal strategy is under 'high relevance' and 'accommodation' (presumably referring to the CRE's

accommodation) is under ‘low relevance’.

However, some of the assignments of relevance appear to not be the kind that even the briefest proper consideration would decide upon, casting some doubt on whether there was a proper assessment for relevance in all cases. For example, ‘review of the act’ is under low relevance, despite this being one of the CRE’s three general duties at section 43 RRA, and despite changes to the Race Relations Act (which will sometimes result from or be influenced by CRE review and subsequent submissions) being of obviously high relevance to section 71. In addition, under the ‘low relevance’ sub-heading, it says ’functions and policies scoring 0-2 points’. Since we assume that 0 points means no relevance, this would seem to indicate - perhaps with some element of logical contradiction - that policies of no relevance can also be policies of low relevance. It would also appear to mean that, in relation to the policies under the low relevance sub-heading, the CRE has not met the requirement at SDO article 2(2) to state the policies that it has assessed as relevant. The RES does state that appendix 3 sets out the policies and functions in order of priority. This, however, does not tell us which, under the low sub-heading, were found to be relevant, as the list under that subheading doesn’t indicate where any cut-off is between 0 and more than 0. It is notable, however, that ‘review the Act’ is at the bottom of the list, suggesting (assuming that the CRE did in fact put the policies in order of relevance) that it considers reviewing the Race Relations Act to be its policy and practice of least relevance to section 71 (and, perhaps, considers it to be no relevance to section 71).

It also not clear that all the 39 polices and practices from appendix 2 have been included in appendix 3. For example, appendix 3 includes ‘CRE Strategic and annual business plan (including divisional/ regional annual operating plans)’ but appendix 3 only includes ‘CRE strategic and business plan’. Since divisional/ and regional operating plans are separate from the CRE annual business plan, and since appendix 3 does not include (not even in brackets) divisional/ regional operating plans, this might be thought to mean that the CRE assessed the annual operating plans for all its divisions (i.e. directorates) as not relevant to race equality, which might be interpreted as having found that nothing it does is relevant to race equality. Since, however, we assume that the CRE would not have reached this monumentally self-critical conclusion, it is not clear how the information should be understood.

Even if we assume that all the 39 non-employment policies and practices in appendix 2 were adequately assessed for relevance, and all were included in appendix 3, there remains the problem that the polices and practices listed in appendix 2 do not appear to have been all the CRE's policies and practices current at the time. Consequently, assessing all the policies in appendix 2 would not constitute assessing all the CRE's policies. It is difficult to estimate what number should have been included, since the number 'found' will depend upon the definitions of policies and practices adopted, as well as upon the thoroughness of the search (with the case law providing little idea of what the correct definition should be taken to be). We would argue (including for the reasons set-out at 5.4.1.1(b) above), however, that the CRE should have included important individual policies and programmes, as well a strategies. It is notable, for example, that we identified, what appeared to us to be, more than 70 important policies and practices in one directorate annual operating plan (CRE 2003c). If the plans of the other six directorates contained (to take a conservative estimate) 50 'important' policies and practices, this would mean that there were around 370 such policies and practices current in one year. It might be argued, of course, that our definitions were not restrictive enough; and indeed we have used far more restrictive definitions in reaching our final estimates (see table below).

Another problem with the list of 39 policies and practices is that none of them are described as proposals. If none of them were, in fact, proposals, this omission would appear to raise some doubts about whether the RES is compliant with SDO article 2; and might be thought to work against one of the main purposes of section 71 (apparent from LJ Arden's comments at para 274 in *Elias* in the Court of Appeal) - 'to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them'. The 05-08 RES, however, appears to suggest that the list in the 02-05 RES included proposals. Specifically, it states (CRE, 2005e: p.17) - "A review of the functions and policies listed in the first scheme revealed that there was no distinction between current, new, and proposed policies".

5.4.3.2 (c) CRE's 2005-08 Race Equality Scheme

This says (CRE, 2005e: p.17) that it drew up a new list of all of its policies; that it assessed 'the relevance of all functions and policies, and the priority they should receive if they

were relevant, by using the grids recommended in the ... *Guide for Public Authorities...";* and that it drew-up a final list of relevant functions included at appendix 2. Unlike the 02-05 RES, there is not included what the CRE says is a list of all its policies and functions, and, therefore, it is not possible to see what was and wasn't included in any list of policies drawn-up for assessment purposes. However, bearing in mind that the 02-05 RES showed all of its policies and practices (with the possible exception, as discussed at (a) above, of directorate operating plans) from its list of all its policies and practices (in appendix 2) in its list of found to be relevant policies and practices (in appendix 3), it seems possible that the same approach was taken in producing the 05-08 RES, in which case the list of policies and practices in appendix 2 of the 05-08 RES would be both a list of the policies and practices assessed and those found to be relevant. If this were the case (and it is far from certain), it might, in turn, be argued - as we did in respect to the 02-05 RES - that the CRE had not assessed all of its policies and practices for relevance (since, as the 02-05 list of 'all' its policies and practices includes just 39 non-employment items, the 05-08 list includes just 41 non-employment items). There are also, as with the 02-05 RES, some surprises in the assignments of relevance. For example, despite, in general, an assigned relevance of 3 ('substantial') being matched in the list to 'high' priority, the 'Standing orders for CRE', are assigned a relevance of 3 but a low priority.

5.4.3.2 (d) suitability in principle of CRE's stated approach to assessment

For comparable reasons to those put forward in relation to functions (at 5.3.3.2 above), we would suggest that the assessment grids approach, in the CRE's *Guide for Public Authorities* (CRE, 2002d), may in principle be adequate for what appear to be the requirements of a 'whether' assessment of policies. In particular, it would appear to encourage the assessor to consider whether a policy is relevant to each of the three parts of the section 71(1) general duty. Indeed, the CRE's 05-08 RES includes a column for recording which of the three parts a policy is relevant to.

However, it is not clear that the initial screening assessment approach, as set out in the 05-08 RES (CRE, 2005e: p.21 and appendix 4), sufficiently, or at all, directs attention to the two parts of the duty in section 71(1)(b) i.e. 'due regard to the need - ... (b) to promote equality of opportunity and good relations between persons of different racial groups'. Question (d) of the 'REIA screening questions' (CRE, 2005e: appendix 4) asks "Is there any evidence to suggest that any part of the proposed policy could discriminate

unlawfully, directly or indirectly, against people from some racial groups?", and, therefore, appears to direct attention to the matters at section 71(1)(a) i.e. 'due regard to the need - (a) to eliminate unlawful racial discrimination'. There is no reference in the questions, however, to race relations or equality of opportunity (although the reference in question (e) to 'racial equality' might reasonably be understood to be a reference to all three parts of the duty.

Even in relation to unlawful discrimination, it is not clear that the questions adequately address the apparent purposes of section 71(1). First, question (d) concerns whether the policy could discriminate, but, for there to be unlawful discrimination, there would appear to need to be unlawful discrimination against a particular person; and such discrimination will tend to be in the form of actions arising in relation to a policy rather than in the form of the policy itself. Consequently, the question should, perhaps, also ask whether the policy is likely to encourage actions which constitute unlawful discrimination. Second, since the duty concerns ‘the need to eliminate unlawful racial discrimination’ (not just the need to ensure that a particular policy does not constitute or lead to unlawful discrimination), the question might also usefully address whether a policy has the potential to reduce discrimination and whether this potential can be further developed. Indeed, it is in this positive sense that most of a ’race’ equality commission’s policies should be relevant to section 71.

5.4.3.2 (e) sufficiency of the CRE’s initial screening assessments

Problems with how particular assessments are carried out would appear, in general, to matter more when the policy is found not to be relevant - as a finding of no relevance will be the end, at least for the time being, of the assessment process; whereas a finding of relevance should, according to the CRE‘s stated assessment process (CRE, 2005e: p.21), lead to a full REIA (during which there might be opportunities to correct inadequacies in the original assessment). We, therefore, looked at the two initial screening assessments which we knew resulted in a finding of no relevance - the one on *'Equal Opportunities is Your Business Too'* and the one on *'Race Equality and the Smaller Business: a Practical Guide'.*

(i) 'Equal Opportunities is Your Business Too'

It is, perhaps, surprising that one of the eight initial screening assessments conducted

since 2001 was - despite the CRE having generated 100s of strategies and plans - on a five page booklet (which did not appear to meet the CRE's own definition of policies, although the plans for producing or promoting it might have done). It could be argued, for example, that the CRE's strategy for enforcing race relations law would have been a more obvious choice. Another apparent anomaly is that, while the initial screening assessment (CRE, 2004b) found the booklet to be not relevant to section 71, the 05-08 RES (CRE, 2005e: appendix 2) assesses it as relevant and as scheduled for a REIA in 06/07.

The report of the initial screening process could leave an impression that the assessment may have been embarked upon with consideration having been given to finding the booklet not relevant to section 71, and that such consideration may have encouraged answers which appear by turns both ingenious and obtuse.

Question (b) is - "Is there any evidence, or other reason to believe, that different groups have different needs, experiences, issues and priorities in relation to this particular policy?" The box ticked is the 'no' one, and the full explanation given is that "There is no evidence or reason to believe that different groups have different needs, experiences and issues in relation to this guidance". This, of course, appears to be little more than a full sentence version of ticking the 'no' box, and, therefore, does not tell the reader much about the reason for ticking that box. Determining the possible reason would appear to depend, in part, upon knowing whether the assessment was an assessment of the decision to produce a booklet, of the content of the booklet, or of how the book was promoted, distributed and otherwise used (and this is not at all clear from the report of the assessment, which might, itself, be thought to suggest that the exercise was somewhat lacking in purpose). Assuming, however, that it concerned the decision to produce a booklet and what was to go into it, we would argue that the answer to question would be a certain 'yes'. This is, in particular, because a 'no' answer would be to claim that all 'racial groups' have the same 'needs, experiences, issues and priorities' in relation to employment discrimination, which, of course, would appear to not be the case. For example, 'white' English nationals would appear to suffer the least employment discrimination, and some 'non-white' groups would appear to suffer more discrimination than others, or more discrimination in particular sectors. If, instead, it is assumed that the assessment is an assessment of the relevance of the plans relating to

how the booklet will be promoted, distributed and used, the answer would still appear to be ‘yes’ (since, for example, how it is used will influence the impact which it has on the discrimination suffered by different ‘racial’ groups).

(ii) 'Racial Equality and the smaller business: a practical guide'

This also ticks 'no' for question (b), and gives word for word the same 'explanation' i.e. reproduces the question as a negative answer; and, as with the booklet discussed at (ii) above, and for comparable reasons, this answer does not appear particularly convincing. It might also be wondered why the Commission for Racial Equality was doing things (in this case producing a booklet and a guide) which it said it believed would be of no relevance to racial equality. Indeed, it is not clear under what statutory power it would be able to do so.

The assessment on *Racial Equality and the Smaller Business* also takes what is arguably an unsatisfactory approach to question (c), in that it gives the impression (which, since the CRE produced the questions, is unlikely to be correct) that it failed to understand the question. Question (c) is - “Is there any evidence, or other reason to believe that different groups could be affected differently by the proposed policy?”. It ticks the ‘no’ box, and states “The key principles covered in the guidance while aimed at smaller businesses are equally relevant to all businesses.” It seems clear, however, from the Code of Practice (CRE, 2002a), and the CRE’s *Guide for Public Authorities* (CRE, 2002d), that by ‘different groups’ this and the other screening questions mean different ‘racial groups’ (or at least mean different racial groups to be included in the understanding of different groups and to be the main focus of attention). For example, the Code of Practice (CRE, 2002a: 3.16), under ‘Assessing impact and considering change’, suggests that - “public authorities could ask themselves the following questions. a. Could the policy or the way the function is carried out have an adverse impact on racial equality for some racial groups? In other words, does it put some racial groups at a disadvantage”. The question about whether the principles in the *Racial Equality and the Smaller Business* guide are relevant to all businesses is an important one, but it concerns effectiveness, and could, therefore, have been better considered in response to question (e) - “Is there an opportunity to promote racial equality more effectively by altering this policy or considering working with others in the wider community?”. It should not, it might be argued, have been used in such a way that it gave the, perhaps

misleading, impression that question (c) had been addressed.

Indeed, the answer given to question (e), when considered alongside that given to question (c), might tend to reinforce an impression that the questions are being addressed in such a way as to avoid any 'yes' answers; perhaps because one or more 'yes' answers, according to the CRE's RES 05-05 (CRE, 2005e: p.21), should lead to a full REIA being launched. The answer to (c), reproduced above, seems to indicate that the guide is, in some respects, applicable to all businesses; and, since this indication is provided as the explanation to question (c), the implication appears to be that the applicability to all businesses is the basis upon which it decided that there was no reason to believe that it would affect different groups differently. The answer to question (e) (also reproduced above), however, seems to indicate that the guide is targeted specifically at smaller businesses; and the implication appears to be that there is no opportunity to promote race equality more effectively (such as, one imagines, through making it more applicable to all businesses) because it is more important to specifically target a hard to reach group. There may not, in a strict sense, be a logical contradiction between the answers to (c) and (e). However, it does appear that the generality of the guide is used to justify a 'no' to (c) and the specificity of the guide is used to justify a no to (e).

This possible searching for reasons to say 'no' suggests that, in some instances, the existence of the race equality duty might have led the CRE to have less (not more) regard to the matters at section 71. For example, part of question (e) is - "Is there an opportunity to promote race equality more effectively by ... considering working with others in the wider community?". To answer 'no' to this question, as the CRE did, would appear to mean that the CRE is saying that working with others outside the CRE, in relation to the guide, would not help promote racial equality more effectively. This, of course, would appear to be a surprising conclusion. To begin with, getting businesses to get copies of the guide and put its ideas into practice, which we assume were CRE aims, would appear to necessitate working with businesses. In addition, of course, one might image that the CRE might find it useful to work with the CBI and other business organisations and the TUC and individual trade unions. Indeed, we assume that these are the types of things that the CRE will have done. The problem is that the CRE's approach to screening assessments might discourage a systematic approach to

improving policies, and encourage a double-think in which policies are improved despite deciding that there is no room for improvement.

5.4.3.2 (f) problem of policies produced between Race Equality Schemes

Even if all the CRE's policies had been assessed for relevance as part of the RES process (which, as we suggest at 5.4.3.2 (b)-(c) above, appears not to have been the case), these assessments will not, of course, cover policy proposals made after one RES has been published and adopted before the next RES process begins. In addition, there are likely to be, between RES assessments, changes to policies which are of sufficient magnitude that a new assessment might be needed; and changes to circumstances of sufficient magnitude that unchanged policies will need to be re-assessed (since the impact of the policy will be partly the outcome of the interaction between the policy and the circumstances in which its applied). Indeed, the 05-08 RES appears to recognise some of these problems, stating (CRE, 2005e: p.17) - "because of a shift in the CRE's strategic direction a number of proposed policies were not implemented and in many cases were replaced with new initiatives".

Bearing in mind that there was an approximately three year gap between RESs, it appears that each directorate is likely to have produced two annual operating plans which had not been covered in the RES assessment process. In addition, since the RES process would appear to take months, but each RES will be in place for around three years, it seems that strategies, plans and policies are more likely to fall outside the RES process than inside (and, as suggested under 5.4.2 above, there could be hundreds of important plans and programmes generated each year).

Apart from the RES assessments, however, the CRE only appears to have conducted 8 assessments for relevance since the duty came into force in 2001.

5.4.3.2 (g) CRE initial screening assessments

'policies'	**IS assessment conducted** (and source of answer) *(i)*	**IS assessment found policy relevant to section 71** (ii)	**IS assessment published**
(1) 'Equal Opportunities is Your Business Too' (a 5 page booklet) (CRE, 2004b)	Y (CRE, 2004d)	N	Y
(2) 'Racial Equality and the Smaller Business: a Practical Guide' (CRE, 2004c)	Y (2004e)	N	Y
(3) Statutory Code of Practice on Racial Equality in Employment	Y (CRE, 2005n: appendix 1)	N *(v)*	Y
(4) CRE's Strategy for the English Regions (CRE, 2005g: appendix 1)	Y (CRE, 2005g: appendix 1)	Y	Y
(5) European and International legal Strategy 2006-2007	Y (CRE, 2006d: appendix 1)	Y	Y
(6) Supplier Diversity Guide (the private sector)	Y (cre letter, 2.2(b))	UC	N (last checked in July 07)
(7) CRE Strategic Plan 2005-2008	Y (cre letter, 2.2(b))	UC	N (last checked in July 07)
(8) Public Duty Monitoring Plan (cre letter, 2.2(b))	Prb *(iii)* (cre letter, 2.2(b))	UC	N *(iv)*
(9) Statutory Code of Practice on Racial Equality in Housing	Y (cre, 2007c: appendix 1)	N *(vi)*	Y

Key

IS: initial screening. Y: yes. N: no. Prb: an initial screening assessment probably took place. UC: uncertain.

notes on table

(i) The conclusion that an initial screening (IS) assessment had taken place was either based upon having seen a copy of the report of the IS assessment (in which case the reference is given) or the CRE having stated, in its letter dated 1 June 2007 (CRE, letter 2.2(b)), that an IS assessment had taken place. CRE letter 2.2(b) refers to 2.2(b) in our appendix 5 (which provides details of Freedom of Information correspondence with the CRE).

(ii) The CRE appears to conclude that a policy is relevant to section 71 if the answer is 'yes' to one or more of the initial screening questions.

(iii) We have not seen the report of the assessment, and the CRE has not said whether it involved or constitutes an IS, but we suspect that it fell somewhere between an IS and an REIA, and, therefore, fulfilled the purpose of an IS (see 5.4.3.2(a) above for more information).

(iv) The CRE has told us (CRE letter, 2.2(b)) that 'it would not be in any interest to publish the REIA' (see 5.4.3.2(a) above).

(v) The report of the REIA states (CRE, 2005n: para. 5.1) - "Although the screening showed that the code did not need a full impact assessment, the CRE carried one out all the same."

(vi) The answers to all the relevance questions in the pubished intial screening assessment are 'no'. We could find no explanation as to why, having found it not relevant, it went onto conduct a full REIA.

5.4.4 CRE compliance in relation to assessing relevant policies ('how assessments)

5.4.4.1 <u>what are the main requirements</u>

(i) We concluded above (5.1.4.2(a)), with an assigned high level of confidence, that - if a proposed policy is assessed as being relevant to section 71, there needs to be some sort of assessment of how it is relevant.

(ii) We concluded (5.1.4.2(b)), with an assigned medium-high level of confidence, that this assessment would need to include some attempt to assess the extent of any adverse impact upon race equality and to assess possible ways of minimising or eliminating any adverse impact.
(iv) We concluded (5.1.4.3(b)), with an assigned medium level of confidence, that there is a general requirement to assess found to be relevant in-force policies; and that the requirements for such an assessment are comparable to those for proposed policies (but with possible difference including, for example, there being less need for a formal assessment when monitoring of an in-force policy has performed an equivalent function).
(v) We concluded (5.1.4.4), with an assigned medium level of confidence, that there is some requirement (under the SDO or under the SDO and section 71) to monitor policies for adverse impact on the promotion of race equality.

5.4.4.2 <u>what assessment process would meet these requirements</u>
The CRE has indicated that its initial screening assessment is aimed at determining whether a policy is relevant not at determining how it is relevant (see, for example, CRE 2005e: appendices 4-5); and, as suggested above (5.3.3.1-5.3.3.2), the assessment grids approach (CRE, 2002d) does not appear to be adequate for the more detailed 'how' assessment (nor, indeed, does the CRE appear to have suggested that it is). However, the third approach that the CRE has taken to assessment, the Race Equality Impact Assess (REIA), would appear to have the potential to meet the requirements of a 'how' assessment (not withstanding that, as touched upon below, there appear to be substantial problems with it; and, in addition, compliance will, of course, depend upon the manner in which the approach is implemented).

The CRE explains (CRE, 2005e: p.21) that policies found to be relevant in the initial screening assessment will be subject to a full REIA; and that -
"A full REIA consists of the following eight stages:
- identify all the aims of the policy;
- consider the evidence used to conduct the REIA;
- assess the likely impact;
- consider policy alternatives;
- consult formally;
- decide whether to adopt the policy;

- implement monitoring arrangements; and
- publish assessment results."

It continues, under 'Dealing with adverse impact', - "If evidence of any adverse impact is found during the REIA process, the policy writer has four options:

- Change the proposed policy ...
- Consider ways of putting the proposed policy into place that will remove or reduce its potential for adversely affecting some racial groups.
- Find alternative means for achieving the aims of the policy ...
- Justify the policy as originally proposed...".

The approach, if followed, would appear to have the potential to meet the possible requirements (5.4.4.1) for a 'how' assessment. In particular, to 'assess the likely impact' (presumably on the matters at section 71(1)) would appear to entail some attempt to assess how the policy is relevant to the matters at section 71(1) (5.4.4.1(i)) and some attempt to assess the extent of any adverse impact on race equality (5.4.4.1(ii)); and 'consider policy alternatives', and the 'dealing with adverse impact' section, would appear to entail some attempt to assess possible ways of eliminating any adverse impact (ibid). However, we will argue, in a forthcoming addition to this report, that the stated approach does not make the most of the potential of an assessment to assist in furthering the needs set out in section 71(1); including, for example, on account of an apparent failure to focus attention on how a policy could be developed to increase its positive impacts.

5.4.4.3 Race Equality Impact Assessments (REIAs) conducted between 1 April 2001 and 1 June 2007

5.4.4.3(a) REIAs conducted

The CRE has confirmed, in a letter dated 1 June 2007 (letter, 2.2(b), that the REIAs shown in the table below are the only ones which it completed between 1 April 2001 and 1 June 2007 (see above 5.3.4.2(a) and 5.4.3.2(a)). Further, a search of CRE documents (including, for example, its annual reports), and its website, did not suggest that any others had been completed.

REIA	consultation (outside the CRE) on likely impact of policy on race equality	REIA report published	REIA produces recommendation for change to policy
(1) new Statutory Code of Practice on Racial Equality in Employment (CRE, 2005n)	PSCI *(i)*	Y	N *(ii)*
(2) CRE's Strategy for the English Regions (CRE, 2005g)	Y	Y	Y *(iii)*
(3) European and International legal Strategy 2006-2007 (CRE, 2006d)	N *(iv)*	Y	N
(4) Statutory Code of Practice on Racial Equality in Housing (CRE, 2007c)	Y *(v)*	Y	Y *(v)*
(5) Public Duty Monitoring Plan (cre letter, 2.2(b)) *(ii)*	N *(vi)*	N *(vi)*	_

key

PSCI: probably some consultation on impact. Y: yes. N: no.

notes on table

(i) We assigned a 'PSCI' (probably some consultation on impact) on the grounds that it was not clear whether the consultation was approached as a consultation for the purposes of section 47(3) (the general requirement to consult on statutory codes of practice), section 71(1), or both; and that, in part as a consequence, it was not clear to what extent, if at all, the consultation exercise addressed the question of likely impact of the proposed policy on the promotion of race equality (which would appear either to be a requirement of section 71(1) consultations or, at least, likely to be their central focus). Of particular not, none of the 'critical comments', under 'Results of consultation' (2005n: appendix 2), appear to refer to the likely impact on the promotion of race equality, which

might be thought to support a conclusion that consultees were not specifically asked about such impact (not withstanding, of course, that they might have been asked but not commented or that their comments on impact may not have been recorded in the report).

(ii) Under 'REIA recommendations' (CRE, 2005n: 11.1), it states - "The code should be made available widely, and its effectiveness reviewed each year". Under 'conclusion', it states (ibid: 12.1) - "At this stage, no further assessment is required".

It does appear that consultation on the policy led to significant changes to the policy. However, the impression (including because change is not recommended under 'recommendations') is that the REIA was conducted on a version of the code which had been amended as the result of the consultation (although this is not at all clear); and that, therefore, the changes predated the REIA and were not recommendations arising from it.

(iii) There are no recommendations for changes under 'Race Equality Impact Assessment Recommendations' (CRE, 2005g: para. 12.1) or under 'Conclusion' (ibid: para. 13). However, the impression is that the consultation was part of the REIA process and that significant changes were made to the strategy as a result of the consultation.

(iv) The report (CRE, 2006d: para. 7.1) states that it undertook a consultation "in 2004 in relation to the Corporate European and International Strategy which includes the legal aspects of European and International Work". This was not, however, consultation on the 2006 European and International Strategy (although the findings, not withstanding the passage of time and the difference in focus between a corporate strategy and a legal one) may well have been of relevance to it.

(v) The REIA report indicates that the consultation was in line with section 47(3). However, it also states (CRE, 2007c: para. 7.3) - "The questionnaire drew attention to the REIA and asked if respondents considered that the draft code might have an adverse impact on any racial group. None thought so. However, several respondents did point out that the code failed to mention smaller, more recent migrant groups ... We have taken account of this in the amendments we have made to the code ...". This would appear to suggest some consultation on the impact on racial equality (although there is no suggestion that consultees were asked about any adverse impact on race relations); and that some changes were made as a result of having done so.

(vi) The CRE has told us (CRE letter, 2.2(b)) that 'it would not be in any interest to publish the REIA' (see 5.4.3.2(a) above)

5.4.4.3 (b) adequacy of REIAs conducted

The follow-up to this report will look in more detail at the quality of the REIAs conducted. However, even a brief look was sufficient to indicate that - whether or not a judge would deem each to have met the legal requirements - the assessments did not appear in general to have closely followed the good practice guidance in the Code of Practice (CRE, 2002a), or in the CRE's *Guide for Public Authorities* (CRE, 2002d); and, in addition, the CRE appeared to have quite frequently departed from the 'eights stages' which its Race Equality Scheme states (CRE, 2005e: p.21) that its REIA consists of (see 5.4.4.2 above). Some possible problems with the REIAs are outlined below:

- Two of the REIAs (on the two codes of practice) were on 'policies' which the initial screening process had declared to not be relevant to racial equality (see table 5.4.3.2(g) above). Deciding that, for example, the *Code of Practice on Racial Equality in Employment* is not relevant to racial equality would appear surprising (including on account of the clue in the title), but it would also appear surprising to then go on and conduct a full Race Equality Impact Assessment on a policy which was found to be of no relevance to racial equality.
- The RES states (CRE, 2005e: p.21) that its REIA will include a 'consult formally' stage. There appeared, however, to have been no consultation (apart from within the CRE) on two of the five 'policies' (5.4.4.3(a)(3) and (5)). Further, consultation on two more (5.4.4.3(a)(1) and (4)) appeared to have taken place under the general requirement at section 47(3) RRA to consult on codes of practice, and should have occurred without section 71. In one case (5.4.4.3(a)(1)), we found no evidence that the consultees had been specifically asked about impact on the promotion of racial equality (raising some doubt as to whether it would have fulfilled the purpose of a section 71 assessment). In the other case (5.4.4.3(a)(4)), the report states - "The questionnaire drew attention to the REIA and asked if respondents considered that the draft code might have an adverse impact on any racial group" (CRE, 2007c), which suggests that it may have at least partly fulfilled the purpose of section 71 (although it does not appear that consultees were asked about good race relations).
- The RES also states (CRE, 2005e: p.21) that its REIA will publish the results of its assessments. It did not, however, publish any of the results of its assessment of the Public Monitoring Duty ((5.4.4.3(a)(5)). For more information, including the CRE's stated reasons for not publishing, see 5.4.3.2(a) above.

- Bearing in mind that the purpose of REIAs appears to be to feed constructively into the policy making process, the greatest concern, perhaps, is that two of the five reports recommend no changes; one report has not been published and so we have been unable to tell whether it recommends anything; and the remaining two reports include no formal recommendations but there is an indication that consultation undertaken with the REIA in mind led to some significant changes to the policies. This dearth of recommendations leaves some suspicion that there may not have been a great deal of point to at least some of the REIAs (other than to be able to state that they had been conducted).

5.4.4.4 <u>The Race Equality Impact Assessments shortfall between 1 April 2001 and 1 June 2007</u>

We set-out above (at 5.4.2) those CRE policy decisions which appear to have required (whether singly or in groups) an REIA. In the table below, we summarise some of this information and set it alongside the REIAs which, as discussed at 5.4.4.3 above, appear to have been conducted.

5.4.4.4(a) Policy decisions which appear to have required an REIA and REIAs conducted (1 April 2001 to 1 June 2007)

n.b. PDRA = policy decisions appearing to require an assessment. It is not assumed, however, that each required a separate assessment (as it appears that some could have been adequately assessed together).

PDRAs	**PDRAs identified in sampled documents**	**estimated total number of PDRAs**	**Number subject to an REIA**
(1) Strategies	33 *(i)*	40 *(ii) (iii)*	2 *(iv)*
(2) Directorate annual operating plans and corporate business plans	32 *(v)*	40 *(vi)*	0

(3) Annuals plans for office in Wales and for office in Scotland	8 *(vii)*	10	0
(4) Employment policies, procedures and practices	22 *(viii)*	32	0 *(ix)*
(5) Other policies, procedures, programmes, practices and publications	45 (from 05-06 business plan) *(x)*	150 *(xi)*	3
totals	**140**	**272**	**5**

notes on table

(i) See table 5.4.2.1(b) above for list of strategies identified from sampled documents.

(ii) Since strategies tend to be in place for a couple of years, and to be referred to quite frequently across an organisation's documents, we concluded that the majority of strategies that had existed would have been referred to in the documents we sampled, and that, therefore, the estimate of total number of strategies should not be a great deal higher than the number of strategies identified in the sampled documents.

(iii) It should be noted, however, that we only included strategies which the CRE both referred to as strategies and appeared to regard as formal strategies. This meant that we did not include the substantial number of major plans (referred to in sampled documents) which we felt were (on account of their strategic nature) also strategies.

(iv) Those subject to an REIA were the CRE's Strategy for the English Regions (CRE, 2005g) and its European and International legal Strategy 2006-2007 (CRE, 2006d).

(v) See table 5.4.2.2(d) for list of plans identified from sampled documents.

(vi) The main additions to the figure (32) for the number of identified plans (to arrive at the estimated figure of 40) were to take account of the sampled documents missing out an entire year (in which we assume that there were a similar number of plans to the number in sampled years), but also to take account of having omitted, from the figure for identified plans, annual directorate operating plans for years in which we suspected, but were not certain, that the directorate in question was in existence (see notes to table 5.4.2.2 (d) for further explanation).

(vii) See table 5.4.2.2(d) for list of country annual plans. The addition of two annual plans

(to arrive at the estimated figure of 10) was to take account of the one year not covered in the sampled documents.
(viii) See table 5.4.2.3(b) for list of identified employment policies, procedures, and practices. We would argue that these would be particularly amenable to assessment in groups; and that, therefore, the total number of REIAs required would be significantly less than the number of policies, procedures, and practices.
(ix) While there appear to have been no employment REIAs, it should be noted that the CRE monitored its workforce and job applicants, 'by reference to their racial group', in pursuance of the requirements under article 5 of the SDO. Some of the information from this monitoring could have usefully fed into REIAs; and would probably have given some indication of the overall level of 'racial equality'. However, the article 5 monitoring does not itself involve assessments of any policies, or procedures; and, therefore could not be regarded as a substitute for REIAs of policies and procedures.
(x) See table 5.4.2.3(d) for list of policies from 05-06 Business Plan.
(Xi) The estimate was based upon extrapolating from the number in the 05-06 plan to the whole period but with a considerable allowance for the likelihood that some plans will cover several years. Arguably, however, the plan for one year will always - because of different circumstances - be different from the plan for the previous year (regardless of whether it is referred to as if its the same plan), and, therefore, we have made too much allowance for overlap between years.

Please see separate document for 5.5 and appendices.

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