## *Introduction*

Whilst the scope of the Race Relations Act 1976 is comprehensive it is not a superior or constitutional rule of law. It does not provide for a legal right to equality or a general prohibition on discrimination and there are many exceptions to the Act.

The RRA is drafted so that there is a list of specific exceptions and each exception contains within its clause the requirements which must be met for the exception to apply. There have been few cases on statutory exceptions but when they are examined by the courts and tribunals they are, rightly, subject to strict scrutiny, as an exception is a derogation from the principle of non discrimination.

The RRA does not set out the principles which govern these exceptions and since there is no purpose clause it is possible to rely on an exception without reference to the general objective of equality. For example, the requirement for a positive action measure is that there be under-representation of a particular racial group in particular work: it is a statistical fact. As one employer sought to argue there is under-representation of White nurses in the care home sector so she should be able to encourage applications from White applicants. The relevant provisions of the RRA do not require any examination or discussion of the reasons for the under-representation or the goal to be achieved.

Such approaches to exceptions are thankfully rare but that is not to say that the reliance on exceptions is never controversial: the use of exceptions – their misuse and abuse – has the potential to undermine the RRA, create a 'backlash' and dissent. It is important therefore that there be:

- clarity on the principles which govern exceptions, and
- safeguards from abuse - this will usually take the form of a justification or proportionality test.

## *Exceptions which the Government Intends to Repeal*

The list of exceptions which are to be repealed includes those exceptions which were partially repealed in 2003 by the Race Relations Act 1976 (Amendment) Regulations 2003 (the '2003 Regulations'). The 2003 Regulations transposed the EU Race Directive into GB law.

The Government argued that its decision to transpose the Directive by secondary legislation meant that it could not extend the new definitions and levels of protection to grounds or activities which were outside the scope of the Directive. Given that the RRA76 was wider in scope and application than the Directive this decision created discrepancies and anomalies in the RRA76.

In particular, the EU Race Directive prohibits discrimination on grounds of race, ethnic or national origin. Nationality discrimination is expressly excluded by art.12 of the Race Directive and it is silent on colour.

The RRA prohibits discrimination on grounds of colour, race, ethnic or national origin and nationality.

The 2003 Regulations make changes only to acts of discrimination on grounds of race, ethnic and national origin. Many statutory exceptions were partially repealed only insofar as they related to acts of discrimination on these grounds.

The Government has agreed to remedy the anomalies created by the 2003 Regulations. This would mean the complete abolition of the following exceptions:

- Employment for the purposes of a private household s4(3)
- Partnerships of 6 or less
- Private sales of premises s21(3)
- Small dwellings ('lodgers') s22
- Consent for sublettings s24.
- Training in skills to be exercised outside GB (s6)

**CRE Response**

The CRE supports the complete repeal of most of these exceptions.

In relation to the exception for training in skills to be exercised outside GB we see no reason for repeal. This exception allows an employer to discriminate on grounds of nationality where the purpose of the employment is to train the employee in skills which he or she will use outside GB. We have no evidence on whether or how this exception is being used but understand that at one time the Deaneries relied upon this provision to employ and train overseas doctors.

It is not a controversial exception and is probably useful to foreign policies on international co-operation, mutual assistance and development.

This exception would not appear relevant to other strands.

## 3. Exceptions to be retained

### i. Merchant Seamen

Currently, the RRA permits discrimination in pay to seamen who are recruited abroad. In practice this means that non EEA nationals working on British ships are paid less than EEA nationals, (but not less than the minimum wage when working within UK jurisdiction).

Originally, the scope of s.9 included all terms and conditions of employment and so non EEA nationals were discriminated against in relation to tasks (e.g. below deck, not above), living arrangements (where they slept), and pay. Section 9 was amended by The Race Relations Act 1976 (Seamen Recruited Abroad) Order 2003 but not in relation to pay conditions.

RMT, the trade union, oppose the retention of this exception and are lobbying strongly for its repeal. The union argues that it exploits non EEA nationals who are used as cheap labour. It also has a detrimental impact on the employment of British merchant seamen.

The Department of Shipping, in support of the retention, argue that without it 'flags' (the registration of ships in GB) would move to other countries and the British shipping industry would suffer and diminish. RMT denies this.

The CRE supports the repeal of this exception.

### ii. Immigration and nationality s19D

The RRA s.19D provides that:

> 19D.-(1) Section 19B does not make it unlawful for a relevant person to discriminate against another person on grounds of nationality or ethnic or national origins in carrying out immigration and nationality functions.

The CRE opposes the power to authorise discrimination on grounds of ethnic or national origins and has consistently called for the repeal of this provision.

In January 2005 the CRE gave evidence to the Joint Committee on Human Rights on this issue and stated:

- Immigration control is based on nationality discrimination and CERD permits distinctions and restrictions between citizens and non citizens.

- The CRE's concern has always been that s19D authorises in statute discrimination on grounds of ethnic and national origin which said characteristics are not synonymous with nationality and cannot be easily separated from race (discrimination on grounds of race or colour is unlawful). For example, we would want to see a difference in treatment of White Zimbabweans and Black Zimbabweans purely on grounds of ethnic origin.

- The parliamentary debates suggested that that authorisations would be used rarely and to permit special measures to be taken on humanitarian grounds. The example given was of an authorization to permit entry to Albanian Kosovars. We do not believe that this has been the case. The Race Monitor in her annual report for 2002/03 referred to 10 Ministerial

Authorisations on functions such as the examination of passengers, declining or refusing entry removals, language tests. None permitted special measures.

- As the Race Monitor observed, there is a risk that caseworkers become casehardened against particular groups: once it is decided that a particular nationality or ethnic group is a suspect one, and there is an authorization to take extra measures, then a caseworker finds more reasons to be suspicious.

- This also has an impact on good race relations where particular racial groups become identified as illegal workers, overstayers and immigration offenders in general

- The CRE recommends that ethnic and national origin removed from s19D.

- We also recommend that where the authorisation is for a limited period of less than 28 days then at the conclusion of the operation a report must be submitted to the Home Secretary on the outcome.

- If the authorisation is for a longer period or without fixed duration then a report must be submitted to the Home Secretary every 28 days.

- The reports should include information on number of persons affected, by age, by nationality and ethnic or national origin, number of persons found to have been in breach of immigration laws and what further action has been taken.

The Green Paper proposes the retention of this exception. The CRE recommends that it be repealed.

### iii. Acts done under statutory authority s41

This provision provides that if an act of discrimination on grounds of colour or nationality is expressly authorised by other statutory law in the field of employment, education, goods facilities or services, education or social advantage then the act is not unlawful under the RRA. For example, charging higher tuition fees for foreign students is lawful provided it is authorised by statute.

Section 41 also provides that an act of discrimination on all racial grounds which is expressly authorised by other statutory law on enforcement and control functions e.g. stop and search, is not unlawful.

The effect of section 41 has been that many discriminatory and controversial acts cannot be challenged under the RRA. For example, the challenge to the indefinite detention of foreign nationals under the Anti Terrorism Crime and Security Act 2000 was made under the Human Rights Act, not the RRA.

The Green Paper states that s.41 will be retained. It makes no mention of remedying the anomalies. The CRE recommends that it be repealed or modified (see compatibility statements below).

### iv. Crown Employment s. 79(5)

This section provides that the operation of the Civil Service nationality rules is specifically excluded from the provisions of the Race Relations Act 1976. Observance of the rules cannot therefore be held to be an infringement of the Act.

Currently there are two main types of nationality restrictions on recruitment to the civil service: non-reserved and reserved. Non-reserved posts, which constitute the majority of posts in the Civil Service, are only open to Commonwealth citizens, EU and certain European Free Trade Association (EFTA) nationals and certain family members; and [1]exceptionally to other nationals under the provisions of the Aliens' Employment Act, 1955.

Reserved Posts are open only to UK nationals, under the provisions of Article 48.4 of the EC Treaty of Rome, because they require special allegiance to the State – as distinct from security requirements. It is for departments, agencies and the devolved administrations in Scotland and Wales to allocate and defend posts as reserved, taking Cabinet Office guidance and EU case law into account.

Currently, 850,000 residents of working age who are not UK, Commonwealth, or EAA citizens, and are excluded entirely from applying to the Civil Service.

The Cabinet Office estimates that 25% of the 470 000 Civil Service posts are reserved for UK nationals (based on a 1994 audit). Anecdotally we have heard that an increasing number of posts are being reserved. Government departments, agencies and the devolved administrations in Scotland and Wales allocate and defend posts as reserved, taking Cabinet Office guidance and EU case law into account. Grade is not an issue and some departments have reserved all posts.

In London 350,000 people, 9% of the working age population, are entirely excluded even from applying for the most junior social security clerk's job.

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[1] For the year 1999-2000, the number of persons employed under those certificates was a mere 20.

Skilled public servants from outside the EEA or Commonwealth cannot be employed in the UK in reserved posts unless they have very special and rare permission.

It is a criminal offence, even if done by mistake, to employ a non- EEA national in a public service reserved post; to employ any alien in any civil service post at all, apart from the tiny number of certificated exceptions, and although it is legal to employ in a non-reserved post the alien spouse of an EEA national living in the UK, under the freedom of movement provisions, it remains an offence to employ the alien spouse of a UK national.

The CRE has repeatedly asked for the abolition of this exception.

In 2004 a Private Member's Bill brought forward by Andrew Dismore sought to remove all restrictions with regard to non-reserved posts and to reduce the number of reserved posts.

It was largely unopposed but was talked out by Eric Forth.

The absence of Government opposition to the Bill suggests a willingness to abolish the exception and in a meeting with the DLR team the latter indicated that it would be repealed. In practice, this is an exception which is relied upon frequently by the Civil Service particularly for posts in defence and intelligence, as seen by the statistics.

Had there been a strong political commitment to its abolition then one would have expected at the very least a policy restricting its use.

The Green Paper is silent on this exception.

**s.4A Genuine Occupational Requirement**

This permits direct discrimination in employment on grounds of race, ethnic or national origin where having regard to the nature of the employment or the context in which it is carried out being of a particular race, ethnic or national origin is a genuine and determining occupational requirement and it is proportionate to apply that requirement.

This exception is most commonly used for jobs where the postholder has to provide a personal service such as sexual health counselling to Asian men.

The exception exists for other strands. In a Single Equality Act it is likely to be a generic one which is retained for all strands.

**S19C Judicial acts**

The prohibition on discrimination in the exercise of public functions (s19B) does not apply to judicial functions such as sentencing. The exception maintains the independence of the judiciary by preventing claims against individual judges. Moreover, discrimination by a judge would give grounds for an appeal and so there is a remedy and probably an effective one if it meant that a sentence would be reduced but there would not normally be any award of damages.

Critics of s19C will argue that it does not provide for judicial accountability. Judges are not disciplined following a successful appeal against a decision or finding. In practice, it is very difficult if not impossible to prove discrimination and what a complainant might describe as discrimination would probably be argued as erroneous interpretation of the law or some other technical argument. The discrimination is masked by other arguments.

However, opening up the judiciary to proceedings for damages is arguably not the solution.

**S19E Decisions not to prosecute**

A decision not to prosecute a person which is made on grounds of race cannot be challenged under the RRA.

This exception was considered necessary to comply with article 6 the Human Rights Act (fair trials). A challenge to a decision would involve an examination of the facts – of whether a suspect had committed an offence – in a civil court without the attendance of the suspect and without the safeguards available in criminal proceedings.

A decision not to prosecute may be judicially reviewed, however, and discrimination may be form part of the arguments for the review but an award of damages will not be made.

Section 19E also captures prosecutions by public bodies other than the CPS, local authorities and inspectorates for example. We consider that the exception should be expressly restricted to prosecutions by the CPS.

- **House of Commons**
- **House of Lords**
- **Intelligence Services**

The functions of these public bodies which do not fall under other sections of the RRA (e.g. employment) are exempt from the RRA.

**s.23(2) Care within the family/Fostering**
This exception permits the fostering of children of the same racial group as the foster parents.

**s.26 Private Clubs**

It is unlawful for an association of 25 members or more to discriminate on racial grounds in membership to the club and in the terms and conditions of membership, (s.25).

An exception is made for associations where the benefits of membership are intended for persons belonging to a group which is defined by reference to race, ethnic or national origin or nationality. Such associations may restrict membership to a particular racial group.

It is accepted that people of the same racial, ethnic or national origin will want to socialise together or congregate.

Section 26 may also be used to create professional networks and societies such as the Society of Black Lawyers, the National Association of Black Police Officers or the National Association of Black Probation Officers, but only where the society complies with the requirements of s.25. Quite often they do not.

Section 34: Charities

Charities may discriminate on grounds of race, ethnic or national origin or nationality in the provision of services e.g. an educational charity which provides tuition only to African Caribbean children or a housing association, which is also a registered charity, and which provides housing to Asian tenants. (There are a number of housing associations which restrict housing to particular racial groups).

Section 35 Meeting Special Needs – see paper on positive action

Section 42 National Security

This section provides that an act of discrimination is lawful if it is done to protect national security.

Section 76(Z) Office-holders: appointments to office (but not election to office)

An appointment to political office is an exception to the RRA. We cannot see any justification for retaining the exception but presumably it exists because such

appointments are not made after competition for the office but are the personal choices of the Prime Minister and Secretaries of State.

## D List Approach or Generic Exceptions

Currently, the RRA follows the list approach to exceptions. A list approach in a Single Equality Act which covers 6 strands may be unworkable.

An alternative approach is to provide for generic exceptions provided there is clarity on the principles and objectives. For example, a generic exception for positive action may be used for all strands where there is consensus that positive action is needed to prevent discrimination and compensate for disadvantage (see briefing paper on balancing measures).

Some groups have argued for a generic exception in service delivery using a Genuine Service Requirement.

The characteristics of the generic approach are:

- Simplicity within the legislation
- The provisions can be drafted to include a proportionality test
- Flexibility and adaptability to modern day needs (i.e a purposive approach is followed
- It is developed by courts who apply a purposive approach
- Guidance will be needed

The characteristics of the list approach are:

- Parliament decides on the exceptions rather than the courts (and Parliament may be influenced by interest groups)
- It provides clarity for employers, public authorities and service providers
- It can be inflexible
- It may be comprehensive but not exhaustive
- Legislation becomes long and inaccessible
- Guidance is useful but the legislation speaks for itself.

The Green Paper proposes a combination of the genuine service requirement and list of specific exceptions. We can see no benefit in the combined approach. In addition there is a risk that the genuine service requirement may be used to allow in through the back door those exceptions which the Government has repealed and will repeal e.g. small dwellings.

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## E Compatibility Statements

As previously explained, the RRA is not a superior or constitutional rule of law: until the Human Rights Act, the principle of non-discrimination did not take precedent over earlier or subsequent legislation.

Under the Human Rights Act all legislation has to be read in conformity with the HRA which includes a right to protection from discrimination in the enjoyment of Convention rights. The doctrine of precedent, where human rights and freedoms are concerned, is pushed aside.

The doctrine of parliamentary sovereignty and legislation is also altered: s19C Human Rights Act 1999 requires a Minster to certify upon presenting a Bill to Parliament that it complies with the HRA. Also, the Act provides that where the House of Lords finds that a statute breaches the HRA it is not struck down but must be amended by Parliament following a fast track procedure.

It is a CRE recommendation that the a single equality act should enjoy a similar status. In essence the principle of equality and non discrimination which is a human rights guarantee should apply to all legislation. In the CRE's Third Periodic Report we recommended that compatibility statements similar to those in s19C be required of a Minister. A Minster may introduce legislation which is discriminatory but must explain to Parliament the reasons for doing so and it is for Parliament to scrutinise and hold the Minister to account or approve the discriminatory provisions.