

**Department for Work and Pensions**

**Research Report No 406**

# **Developing positive action policies: learning from the experiences of Europe and North America**

**Dr Ravinder Singh Dhani, Professor Judith Squires and Professor Tariq Modood**

A report of research carried out by the Centre for the Study of Ethnicity and Citizenship, University of Bristol on behalf of the Department for Work and Pensions

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# Contents

Acknowledgements .....	vii
The Authors .....	viii
Summary .....	1
1 Introduction .....	9
1.1 Methodology .....	11
1.2 Structure of the report .....	11
2 Key concepts and terms .....	13
3 British Race Equality policies .....	19
4 European Race Equality policies .....	25
4.1 European Union Race Equality policies .....	25
4.2 Equality policies in EU Member States .....	31
4.3 Positive action in the Netherlands .....	40
4.3.1 <i>Context</i> .....	40
4.3.2 <i>Policies</i> .....	42
4.3.3 <i>Evaluation</i> .....	43
4.3.4 <i>Lessons for Britain</i> .....	46
4.4 Positive action in Northern Ireland .....	47
4.4.1 <i>Context</i> .....	47
4.4.2 <i>Policies</i> .....	48
4.4.3 <i>Evaluation</i> .....	48
4.4.4 <i>Lessons for Britain</i> .....	51
5 Affirmative action in the United States .....	53
5.1 Context: the development of affirmative action .....	54
5.2 Policies: the implementation of affirmative action .....	62

5.3	Evaluation: the impact of affirmative action policies .....	64
5.3.1	<i>Fairness</i> .....	65
5.3.2	<i>Effectiveness</i> .....	69
5.3.3	<i>Conclusion</i> .....	78
5.4	Lessons for Britain .....	79
6	Employment equity in Canada .....	81
6.1	Context .....	81
6.2	Policies: The development of employment equity in Canada .....	82
6.3	Evaluation: The impact of employment equity policies .....	88
6.4	Lessons for Britain .....	97
7	Learning from the experiences of Europe and North America .....	99
7.1	The collection of statistical evidence .....	100
7.2	How contract compliance works .....	102
7.3	Changing cultural attitudes .....	106
7.4	The risks of employment equity and affirmative action programmes .....	108
7.4.1	<i>Backlash and resentment</i> .....	108
7.4.2	<i>Tension between groups</i> .....	112
7.4.3	<i>Public relations</i> .....	114
8	Conclusions and implications for policy .....	117
8.1	The Netherlands .....	117
8.2	Northern Ireland .....	117
8.3	The United States .....	118
8.4	Canada .....	119
8.5	General summary .....	119
Appendix	List of interviewees .....	123
References	.....	129

## List of tables

Table 2.1	Key equality terms .....	13
Table 3.1	British Race Equality Policies .....	20
Table 4.1	European Union Race Equality declarations .....	26
Table 4.2	State of implementation of the EU Race Equality and Employment Equality Directives 2000 in EU Member States.....	31
Table 4.3	Affirmative action in the labour market in five European countries, 2002 .....	39
Table 4.4	Ethnic minorities in the Netherlands (in absolute numbers x 1,000) .....	41
Table 4.5	Ethnic minority unemployment in the Netherlands .....	41
Table 5.1	US Equal Employment Opportunity Laws .....	55
Table 5.2	Supreme Court Rulings .....	57
Table 6.1	Canadian workplace equity legislation .....	83
Table 6.2	Supreme Court of Canada and Tribunal Decisions.....	87
Table 6.3	Labour force participation rates for immigrants, non-immigrants and visible minorities in Canada.....	89
Table 6.4	Percentage of visible minorities by sector .....	94

## List of figures

Figure 6.1	Proportion of visible minorities, Canada, 1981-2001 .....	81
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# Summary

The aim of this study was to:

- review positive action labour market policies in Europe and North America;
- explore how these policies were implemented and identify which organisations were involved in the development and implementation of these policies;
- establish whether and in what respects these policies have been deemed successful in improving ethnic minority employment rates and social mobility;
- reflect on the lessons to be learnt from these experiences for the UK.

The report is intended to enable policy makers to consider a range of strategy and policy options that would facilitate increases in ethnic minority employment rates and to identify good practice in terms of the implementation of these policies. The research comprised a desktop literature review of positive action policies in the European Union (EU) and in North America, fieldwork observation and interviews carried out during November 2005. The interviews took the form of semi-structured, in-depth interviews with key actors (Chapter 1). Internationally respected academics, known for their expertise in the field of race equality and affirmative action policies, were employed as consultants. These were Professor Harry Holzer (Professor of Public Policy, Georgetown Public Policy Institute, Washington) for the United States of America (USA), and Professor Harish Jain (Professor Emeritus, DeGroote School of Business, McMaster University, Hamilton) for Canada.

## Key context

Whilst the *Race Relations Act 1976* does not permit positive discrimination, it does allow for positive action (see Chapter 2 for a glossary of key terms). The *Race Relations (amendment) Act 2000* aims to help public authorities to provide fair and accessible services, and to improve equal opportunities in employment. Public bodies listed in Schedule A are subject to a statutory general duty to promote race equality (see Chapter 3 for a summary of British race equality policies). In 2000 the EU introduced two directives: *The Racial Equality Directive (2000/43/EC)*, which

implements the equal treatment of persons irrespective of racial or ethnic origin and the *Employment Directive* (2000/78/EC), which establishes a general framework for equal treatment in employment and occupation. Whilst the Directives are based on the principle of non-discrimination they do allow some exceptions. Positive action is allowed in order to prevent or compensate for disadvantages linked to one of the specified grounds of discrimination (Section 4.1). EU member states have responded to the Race Equality Directive in various ways, reflecting a wide degree of variation in conceptions of equality and levels of activity to combat racial discrimination (Section 4.2). Within the comparative European literature, Britain and the Netherlands stand out as countries that are actively promoting race equality policies (Section 4.3).

## Key findings

### The Netherlands

- The *Dutch Equal Treatment Act* and the law on the Encouragement of Proportional Labour Participation by Ethnic Minorities (the *Equity Law*), which came into effect in 1994, allow for positive action measures to be used to reduce under-representation of ethnic minorities in the workforce.
- In 2001 The Netherlands also introduced **covenants**, non-binding contracts between the Government and the trade association for small and medium-sized entrepreneurs and public labour exchanges (Minorities Covenants) and between government and a number of large Dutch firms (Large Corporation Covenant). Evaluations suggest that the covenants have been effective, though it is hard to disentangle their effect from the impact of the business cycle (Section 4.3).
- The developments in the Netherlands suggest firstly that the employment equity measures need to be backed up by **enforcement mechanisms** if employers are to comply, but that too much **red-tape** risks alienating employers. Secondly, they suggest that supply-side issues of **education and skills training** need to be addressed if employment policies are to be successful. Thirdly, they suggest that schemes that facilitate **co-ordination** between employers with vacancies and labour exchanges with access to ethnic minority jobseekers can increase ethnic minority employment rates.

### Northern Ireland

- A second example of good practice within EU member states is to be found in Northern Ireland. Since the enactment of the *Fair Employment (Northern Ireland) Act* (FEA) 1989, Northern Ireland has been perceived to be in the vanguard of employment equality law within the EU. The FEA makes discrimination on grounds of perceived **religious affiliation** and/or political opinion unlawful in employment, in the provision of goods facilities and services, the sale or management of land or property, further and higher education, and partnerships and barristers. The legislation covers direct discrimination, indirect discrimination and victimisation and specifically allows affirmative action.

- Recent evaluations indicate that those organisations that had **affirmative action agreements** with the Commission were able to show demonstrable change during the decade and concluded that the agreements were an integral part of the processes that created change in the Northern Ireland labour market during the 1990s (Section 4.3). The developments in Northern Ireland suggest that the introduction of **proactive equality instruments** accompanied by the political will to bring about social change can have an observable impact on employment equity. The case of Northern Ireland and positive action on religious equality in employment may also be particularly pertinent for Britain at a time when many Muslims, Sikhs and others complain of **religious discrimination**, when the most disadvantaged groups in the labour market are Muslims, and when discussion about Muslims and integration is dominating the agendas of the Commission for Racial Equality and others.

### The United States

- In the United States, the phrase 'affirmative action' was first used in *Executive Order 10925* (1961), which required federal contractors to take 'affirmative action to ensure that applicants are treated equally without regard to race, colour, religion, sex or national origin'. Affirmative action is not a single policy, but is a combination of sections of other legislation and court rulings. Affirmative action policies in the US have generally focused on both gender and race in the fields of both employment and education. Recent debate has increasingly focused on race and **college admissions** in particular.
- The main body of United States (US) **employment discrimination laws** is composed of federal and state statutes. The United States Constitution and some state constitutions provide additional protection where the employer is a governmental body. In the employment context the right of equal protection limits the power of the state and federal governments to discriminate in their employment practices by treating employees, former employees, or job applicants unequally because of group membership (including race or sex) (Section 5.1).
- *Executive Order 11246* (1965) required contractors on federally funded projects to take affirmative action to ensure that applicants are employed, and employees are treated during their employment, without regard to race, creed, colour, or national origin. It applies to all contractors and subcontractors holding any federal or federally assisted contracts above a set annual minimum amount (currently \$50,000). **The Office of Federal Contract Compliance Programs** (OFCCP) in the Department of Labor enforces Executive Order 11246. The OFCCP is responsible for ensuring that employers doing business with the Federal Government comply with the laws and regulations requiring non-discrimination. These employers are required to report annually to the OFCCP on their employment of minority workers by major occupational group, and to compare these rates with the availability of such workers. They are also required to have an affirmative action programme with **numerical goals** and **timetables** for meeting the target of employing these workers in accordance with their availability.

- The **Equal Employment Opportunity Commission** (EEOC), established by Title VII of the Civil Rights Act (1964) interprets and enforces the Equal Payment Act, Age Discrimination in Employment Act, Title VII, Americans with Disabilities Act, and sections of the Rehabilitation Act. Affirmative action policies also include **proactive measures** for achieving equality, resulting from court findings that unlawful discrimination had taken place and that 'affirmative action' be adopted by the discriminator as a remedy; or as settlements adopted to end legal action which alleged such discrimination; or administrative findings that there was 'under-representation' and this required the adoption of 'affirmative action' to tackle the situation.
- In addition to these equal employment opportunity laws and executive orders, affirmative action policies have developed via various **Supreme Court rulings**. In the late 1970s the Supreme Court considered cases of '**reverse discrimination**', with the Bakke case of 1978 ruling **quotas** illegal in university admissions. While the Weber case of 1979 upheld their use in voluntary employment cases, the Bakke case was widely interpreted as banning formal quotas in governmentally required employment practices. The controversies surrounding the use of 'quotas' now tend to focus on the use of goals and timetables, regarded as the functional equivalent of quotas (which have been legally banned since 1978). In three cases in 1989, the Supreme Court undercut court-approved affirmative action plans by endorsing claims of reverse discrimination, by invalidating the use of minority set-asides where past discrimination against minority contractors was unproven, and by restricting the use of statistics to prove discrimination, since statistics did not prove intent. A 1995 Supreme Court decision placed limits on the use of race in awarding government contracts. However, a 2003 Supreme Court decision concerning affirmative action in universities allowed educational institutions to consider race as a factor in admitting students as long as it was not used in a **mechanical**, formulaic manner (Section 5.1).
- In March 1995 President Clinton commissioned an **Affirmative Action Review** with the aim of establishing firstly what kinds of Federal programs and initiatives were in place, and how were they designed; and secondly, what was known about their effects both to the specified beneficiaries and to others. The Review focused on whether the programmes **worked** and whether they were **fair**. The Review recommended the review of all affirmative action programmes and that proposals be prepared to eliminate or reform any program that: created quotas; created preferential treatment for unqualified individuals; created reverse discrimination; or continued to operate even after its equal opportunity purposes had been achieved.

- As a result of these various developments, there are currently four main types of affirmative action: that required by **federal contractors**; required by **government agencies**; **court-ordered**; and **voluntary**. Affirmative Action is required in at least 35 states and the District of Columbia. Executive orders or statutes apply to all state agencies, state universities, state contractors and subcontractors. Court-Ordered Affirmative Action is ordered by Federal Courts under the *Equal Employment Opportunity Act* (1972), which is an amendment to Title VII of the Civil Rights Act. This power applies where a firm is found guilty of discrimination and is required by the court to adopt affirmative action. Voluntary Affirmative Action covers voluntary activities by employers. Survey data suggests that many more employers engage in some form of voluntary affirmative action than are required to do so by executive orders or the courts (Section 5.2).
- The experiences of the USA suggest firstly that preferential treatment for unqualified individuals does not carry popular support and can therefore be counter-productive but that there is also **legal, popular and corporate support** for affirmative action policies that promote diversity in a non-mechanistic manner. Secondly, that **contract compliance** is the most effective instrument for promoting positive action in employment and particularly well suited to changing key employers' practices with minimum pain and resistance. Thirdly, that successful employment equity programmes need to pay attention to both **demand and supply-side** issues. The importance of securing an adequate supply of suitably qualified and trained individuals means that employment policies need to be attentive to educational equity. Fourthly, that a **continual review** of positive programmes in relation to effectiveness, business efficiency and fairness may be useful for the acceptance and effectiveness of the programmes (Section 5.3).

## Canada

- Canada is often presented and perceived as a model of multiculturalism, following the introduction of the **Multiculturalism Act** (1988). Here, the debate about ethnic minority employment rates is framed in terms of '**employment equity**' for '**visible minorities**', which applies to persons who are identified as being 'non-Caucasian in race or non-white in colour' (but not aboriginal persons). The number of members of visible minorities within Canada increased significantly during the last decade. Much of this growth was achieved through immigration (Section 6.1).
- The *Employment Equity Act* (1995) covers both federal government departments and agencies and federally regulated private sector inter-provincial industrial sectors. It requires efforts by employers in those sectors covered by the Act (communications, transportation and banking) to reduce disparities in employment and workforce representation between designated groups. Employment equity focuses on four designated groups: women, Aboriginal peoples, persons with disabilities, and members of visible minorities.

- The **Federal Contractors Program** (1986) was adopted following the proclamation of the **Employment Equity Act**. Under this programme, non-federally regulated federal contractors, such as provincially regulated employers, with a resident workforce in Canada of 100 or more employees, and in receipt of federal contracts for goods and services of \$200,000 or more, are required to commit themselves to implement **employment equity** as a condition of their bid by signing a Certificate of Commitment. In implementing employment equity, organisations must develop positive policies and practices and, as required, provide accommodation and special measures for designated groups. Contractors that fail to meet their commitment may lose the right to receive further federal contracts for goods and services (Section 6.2).
- Studies exploring the employment participation of visible minorities in Canada both before and after the introduction of the Employment Equity legislation found continuing patterns of employment discrimination (including both a **representation gap** and a **pay gap**) against racial minorities following its introduction. However, the representation gap has **reduced** considerably following the introduction of the 1995 Employment Equity Act especially for visible minorities and for women, although a glass ceiling still exists. Visible minority representation varies considerably by **industrial sector**. Overall representation exceeds labour markets availability for visible minorities and women in the banking sector. Employment equity policies have succeeded to some extent in reducing systemic discrimination in employment. Some studies partly attribute their limited impact on poor implementation and lack of **vigorous enforcement** (Section 6.3).
- The Canadian experiences suggest that, following the introduction of the Multiculturalism Act, **expectations** of employment equity have generally been high, leading many Canadian studies to highlight the gap between rhetoric and reality. Nonetheless, **comparative evidence** indicates that levels of ethnic and racial disadvantage are low in Canada. Secondly, while there is little **direct evidence** that positive action policies have been responsible for these comparatively low levels of disadvantage, the federal **contract compliance** programme is regarded as 'stronger and more comprehensive' than other Canadian government-mandated programmes. Thirdly, care must be taken to ensure that initiatives at the highest levels of government are carried through at **lower levels of government**, especially in the context of devolution. Fourthly, the implementation of a contract compliance programme needs to be well resourced. Finally, it also needs to entail mandatory goal-setting and **vigorous enforcement**, including sanctions, by government (Section 6.4).

This report concludes by suggesting possible implications for policy. On the basis of our research, we would argue that stronger positive action policies are needed. More specifically, we argue that:

- **Political will.** The introduction of proactive equality instruments accompanied by the political will to bring about social change can have an observable impact on employment equity. But political will is needed to implement positive action policies effectively.
- **Liberal democratic rationale.** The rationale for the policies should appeal to an over-arching liberal democratic culture and respect for diversity and should be able to win broad support both amongst the targeted groups and their co-citizens rather than to specific arguments based on group privilege.
- **Economic rationale.** The rationale for these policies should also embrace the business case for employment equity.
- **Public relations.** Both the liberal democratic and the business rationale need to be clearly articulated in a coherent communications strategy.
- **Statistical data.** Detailed statistical data is needed to pinpoint which groups require positive action and to evaluate the impact of programmes that incorporate targets or timetables for such groups in quantitative terms.
- **Contract compliance.** The experience from the USA (and to a lesser extent Canada) suggests that contract compliance is an effective positive action policy, changing key employers' practices with minimum pain and resistance and resulting in improved employment and retention rates amongst large corporations.
- **Covenants.** The experience of the Netherlands suggests that the small-scale direct approach adopted for the Covenants that facilitate co-ordination between employers with vacancies and labour exchanges with access to ethnic minority jobseekers can increase ethnic minority employment rates.
- **Enforcement mechanisms.** In addition to being clearly and coherently explained and defended, positive action policies need to be backed up by robust enforcement mechanisms if employers are to comply. These should entail mandatory goal-setting and vigorous enforcement, including sanctions (such as debarment), by government.
- **Availability index.** The experience from the USA suggests that the creation of availability indices is an important mechanism for establishing who is qualified and potentially available for work.
- **Overseer.** The experiences of the USA and Canada suggest that the creation of an institution responsible for overseeing contract compliance programmes is crucial for the effective implementation of the policy.
- **Resources.** The implementation of a contract compliance programme needs to be well resourced.
- **Bureaucracy-light.** The policies also need to be bureaucracy-light if employers are to embrace the scheme with any degree of enthusiasm. Too much red-tape places a particular burden on small employers, and may risk alienating employers generally.

- **Review.** Positive action programmes should be regularly reviewed in relation to effectiveness, business efficiency and fairness.
- **Supply-side.** Ethnic minority education and job skills levels need to be addressed.
- **Religion.** Positive action programmes should consider both religious and ethnic minority equality measures.

The evidence from this research has shown that there can be **clear benefits** from a programme of **positive action**. Existing policy approaches have been limited in redressing persisting ethnic penalties. In our view, a government committed to eradicating social exclusion can legitimately and confidently engage with an advanced programme of positive action, which includes **contract compliance**. The implementation of such a policy would send the right signal both to the intended beneficiaries and to those organisations and individuals that continue to deny ethnic groups and visible minorities their full part in the economic and social life of the country. As it is over four decades since the first Race Relations Act, and given that ethnic inequality continues to be a part of the social fabric of our country, the time is now right for such steps.



# 1 Introduction

*'After four decades, we are still debating how much impact affirmative action can and should have on opportunities and outcomes at work.'*

(Blau and Winkler, 2005)

The Centre for the Study of Ethnicity and Citizenship at the University of Bristol was engaged during July 2005 – February 2006 by the Department for Work and Pensions (DWP) to identify successful positive action labour market policies in the United States of America (USA) and Canada; review these policies in the context of current European Union (EU) policies and directives; and comment on the possibility/desirability of implementing similar policies within the United Kingdom (UK). The research primarily aimed to:

- identify the context in which these policies were developed;
- identify how these policies were implemented (focusing on best practice);
- identify which organisations were involved in the development and implementation of these policies;
- comment on their relative success; and
- comment on problems/risks associated with these policies.

The report aims to enable policy makers to consider a range of strategy and policy options that would facilitate increases in ethnic minority employment rates and to identify good practice in terms of the implementation of these policies. Our report addresses four central issues:

- Context: background and policy development.
- Policies: adoption and implementation.
- Evaluation: impact, success and risks.
- Lessons: policy recommendations.

In recent years, there have been a number of international studies designed to evaluate the effectiveness of positive action policies in different countries. These

indicate that countries largely founded on immigration, such as the USA, Canada and Australia, have the most comprehensive civil legislation against discrimination with provisions for affirmative or positive action (Coussey, 2002; Holzer and Neumark, 2000; Jain, 2001). India, Malaysia and South Africa also have well-established policies (see Menski, 1992; Phillips, 1992; Ncholo, 1992)<sup>1</sup>. Meanwhile European countries have generally favoured the encouragement of tolerance, with legislation directed at the prevention of hate speech and the organisation of fascist and racist groups (Coussey, 2002). Overall, analysis suggests that the USA, Canada, Britain and the Netherlands have the most comprehensive legal approaches in the developed world (Coussey, 2002). Our research is primarily concerned with the effectiveness of these policies and their outcomes.

Given that the United States (US) and Canada have a long history of developing employment equity and affirmative action policies, this report focuses on their record of success, exploring what counts as 'success' in this field, the circumstances which determined that policies worked or did not; how key stakeholders responded, what was kept and built on, what was discarded; and what are the lessons, if any, for countries such as Britain. The report also explores positive action policies adopted in other parts of Europe, focusing on Northern Ireland and the Netherlands as examples of developments nearer home from which lessons can be learnt.

Positive action policies have been developed to address a wide range of inequalities, frequently focusing on minority groups (such as castes in India), but also including targeted majorities (such as gender in the EU, or ethnicity in Malaysia and South Africa). The nature of the minority group targeted obviously depends on the nature of discrimination and social divisions in each society. Our concern here is with positive action policies addressing ethnic minority labour market participation. However, it is worth noting that these policies are often developed alongside, or in the light of, equality policies aimed at other equality strands (notably sex equality in the EU), and alongside policies pertaining to other policies fields (notably higher education in the US).

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<sup>1</sup> In India, certain positions in university and government are reserved for the 'untouchables'. In Malaysia, the 'bumiputra' laws provide more opportunity for the majority ethnic Malay population in relation to the Malaysian Chinese and Indian populations. In South Africa, the Employment Equity Act aims to promote and achieve equity in the workplace, by identifying reasons for inequalities and changing the employment rates of previously under-represented groups for a more equitable job market.

## 1.1 Methodology

The research upon which this report is based was conducted during the period July 2005 to February 2006.

The project comprised a desktop literature review of positive action policies in the EU, focusing on the Netherlands and Northern Ireland, and in North America, focusing on the range of policies currently implemented in the USA and Canada, the process by which these policies were adopted, the key institutions involved in their implementation, and the impact of the policies on ethnic minority employment rates and social mobility. The literature review surveys key relevant sources on positive action policies and employment equity, including Government Department reports, legal rulings and academic research. It details the nature of the policies under consideration and summarises the existing evidence as to their effectiveness. The project also includes fieldwork observation and interviews, carried out during November 2005. The interviews took the form of semi-structured, in-depth interviews with key actors, using an interview guide to facilitate 'guided conversation[s]' (Fielding, 1993: 144).

Internationally respected academics, known for their expertise in the field of race equality and affirmative action policies, were employed as consultants. These are Professor Harry Holzer (Professor of Public Policy, Georgetown Public Policy Institute, Washington) for the US, and Professor Harish Jain (Professor Emeritus of the DeGroote School of Business, McMaster University, Hamilton) for Canada. The consultants offered advice and commented on drafts of the report.

## 1.2 Structure of the report

The report begins by explaining in brief the key concepts involved in discussions about positive action policies addressing ethnic minority labour market participation. This involves some consideration of the varieties of terminologies that are used in such discussions and the nature of some of the debates that are common in this field. The **proactive** nature of positive action or affirmative action policies is highlighted here as the main driving force behind our concerns about effectiveness and outcomes.

The report goes on to describe chronologically some of the relevant policy developments in recent years in Britain, and the European Union. Consideration is then given to how European Member States have broadly responded to these developments including their reactions to the Race and Employment Equality Directives. These are then evaluated against some of the models or typologies of equality policy currently in use in the academic literature, to assess their effectiveness and outcomes. We suggest that Northern Ireland and the Netherlands are potentially relevant examples of policy developments in this area. Consideration of positive action in Northern Ireland focuses on its Fair Employment Policies, which are specifically designed to address inequalities arising out of **religious** discrimination,

rather than the **racial, ethnic or colour** discrimination and inequality that is the focus of this report. However, there is clear policy relevance nonetheless. Recent developments, both nationally and internationally, indicate the growing potential for **racial/ethnic** and **religious** conflicts and discrimination, and for their overlap and interaction (for the UK see Modood, 2005). This suggests that positive action policies in the UK will need to address the multiple bases of such discrimination and inequality.

The next section of the report surveys developments in the US and Canada. Although close neighbours these two countries have had markedly different histories and reactions to racial/ethnic conflicts, and have developed distinct approaches to positive, or affirmative, action accordingly. We outline the development, implementation and impact of race equality affirmative action policies in the US and Canada. Specifically, we: outline the range of policies currently implemented in each of the two countries; survey the process by which these policies were adopted; outline the key institutions involved in their implementation; and evaluate the impact of the policies on ethnic minority employment rates.

In light of our US and Canadian case study findings, we conclude the report with a discussion of the varieties of policy responses open to the UK in addressing continuing ethnic employment inequalities.

## 2 Key concepts and terms

In this section we briefly summarise the theoretical debates about equality policies, outlining the meaning of equality opportunities, positive action, positive discrimination, diversity management and mainstreaming.

**Table 2.1 Key equality terms**

**Affirmative action (United States (US)):** a variety of measures designed to increase the education and employment outcomes of 'under-represented minorities' or 'protected groups' regardless of their source. Many advocates of affirmative action view these measures as a means to eliminate discrimination and to remedy the effects of past discrimination against designated groups, usually in the area of employment and higher education. These cover a range of measures, some of which would, in the United Kingdom (UK), be called positive action, and some, like quotas, positive discrimination. In employment, affirmative action in the US is sometimes also referred to as **preferential hiring** (or, in relation to contracts, set-asides).

**Contract compliance:** a programme in which public authorities specify certain social criteria that a contractor who wants to obtain government contracts must meet.

**Direct discrimination:** an act or practice where people are treated differently (usually less favourably) based on personal characteristics such as their race or gender.

**Discrimination:** any practice or standard that, intentionally or not, has the effect of limiting the opportunities available to certain individuals or groups, identified on the basis of shared personal characteristics such as race or colour, in a way that perpetuates the view that they are less capable, or are less worthy of recognition or value.

Continued

**Table 2.1 Continued**

**Disparities:** refers to inequality in outcomes across race/ethnic/gender groups regardless of their cause, as distinct from 'discrimination', which refers to disparity that remains after controlling for skills.

**Diversity management:** a process intended to create and maintain a positive work environment where the differences of individuals are valued so that all can reach their potential and maximise their contributions to the organisations strategic goals.

**Equality of opportunity:** requires that positions and posts that confer advantages should be open to all applicants and that policies are required to attract non-traditional applicants and to be fair to them. Applications, however, are assessed on their merits, and the applicant deemed most qualified according to appropriate criteria is offered the position.

**Equality of outcome:** seeks to reduce or eliminate differences between individuals or groups defined for example by race or ethnicity in a society, usually differences of income and occupational status.

**Equal treatment:** defined in European Union (EU) 1976 Equal Treatment Directive (ETD) as entailing that there is no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

**Ethnic minority:** a group that shares, or believes it shares, a common history, tradition, language, ancestry or religion, and is usually marked by 'visible' or phenotypical characteristics.

**Gender mainstreaming:** involves ensuring that gender perspectives and attention to the goal of gender equality are central to all activities – policy development, research, advocacy, legislation, resource allocation, and planning, implementation and monitoring of programmes and projects.

**Harassment:** unwanted conduct that violates people's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment.

**Indirect discrimination:** when a rule, condition or requirement is applied equally to all groups but results in an unbalanced negative effect on a particular group and cannot be justified as necessary for the job. Such discrimination is also called adverse effect discrimination, systemic discrimination, or 'disparate impact' in the US.

Continued

Table 2.1 Continued

**Institutional racism:** a term used in the Stephen Lawrence Inquiry report to convey the **everyday** nature of racism in an **institutional** context. Defined as: 'the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racial stereotyping which disadvantages minority ethnic people.'

**Positive action (UK):** when employers and others provide encouragement and do recruitment outreach in relation to people of a particular racial group, if they are under-represented in particular work; and training, including pre-employment training as allowed, in certain limited circumstances, by the Race Relations Act 1976.

**Positive discrimination (UK):** a policy or a programme providing recruitment or promotion advantages for people of a minority group who are seen to have traditionally been discriminated against, with the aim of creating a more equitable society. While targets are usually formulated, preferring one candidate over another on grounds of race or ethnicity is unlawful.

**Preferential hiring:** where preference is given to one or more designated groups in a job competition.

**Quotas:** A form of affirmative action or positive discrimination, which are illegal in the US following the Bakke case and are not currently permissible in the UK.

**Racism:** attitudes, practices and other factors that disadvantage and/or oppress one person or a group of people because of their race, colour or ethnicity.

**Victimisation:** treating people less favourably because of something they have done under, or in connection with, Equality Regulations, e.g. made a formal complaint of discrimination or given evidence in a tribunal case.

Source: These terms have been drawn from a range of sources, and modified for consistency.

It has been suggested that political policy-makers and theorists operate on an 'egalitarian plateau', in which everyone accepts that citizens should be treated as equals (see Kymlicka, 1990: 5). However, there is a profound disagreement as to what 'treating people as equals' requires. Whilst previous generations debated the relative merits of **equality of opportunity** versus equality of outcome (see Tawney, 1931: 291) few now hold **equality of outcome** as a political ideal (Dworkin, 2002, though see Phillips 2004 for a defence of equality of outcome). Perhaps because equalising outcomes has come to be viewed as denying choice (see Phillips 2004: 1), the liberal egalitarian literature is characterised, with a very few exceptions, not by a debate between equality of opportunities and outcomes, but by consideration of

different sorts of equality of opportunity<sup>2</sup>. The debate about varieties of equality of opportunity can be understood in relation to a three-fold typology of minimal, conventional and radical (Swift, 2001).

On a **minimal** conception of equality of opportunity, 'a person's race or gender or religion should not be allowed to affect their chances of being selected for a job, of getting a good education, and so on.' (Swift 2001:99) What matters are their skills and their talents. The **conventional** conception, on the other hand, holds that in addition to the minimal concern with relevant competencies, one should also be concerned to ensure that everyone has an equal chance to acquire the relevant competencies, skills, and qualifications. Removing the influence of social background altogether may be a forlorn task, but this approach seeks to limit the constraints on the acquisition of skills for all. In this way, the distinction between equality of opportunity and equality of outcome diminishes, equality of opportunity requiring some redistribution of resources in order to compensate some for social disadvantage. By contrast, the **radical** conception of equality of opportunity challenges the assumption, implicit in the two approaches above, that inequality is acceptable as long as it is based on talent alone, rather than social or cultural factors. On the radical conception the talented and untalented should be equally entitled to rewards, given that talent is a product of luck rather than choice.

The minimal conception of equality of opportunity has been criticised by many **liberal egalitarians** on the basis that the meritocratic system generated by a commitment to equality of opportunities is widely perceived to be compatible with, and indeed to generate, a society with huge disparities in income and status in which a talented elite dominate whilst the disadvantaged are deemed to have failed as a result of their own personal deficiencies. John Rawls describes this approach to equality as an 'equal chance to leave the less fortunate behind in a personal quest for influence and social position.' (Rawls, 1972: 108) Meanwhile, Ronald Dworkin articulates a radical form of equality of opportunity by recommending that people start with 'equal resources' (which may require the state to compensate some people for their 'natural' disabilities and lack of talent), and then be allowed to pursue their ambitions within the marketplace (with a *laissez-faire* state) (2002:87). He suggests that the distribution of resources be allowed to be ambition-sensitive, but not talent-sensitive – because talents are 'traceable to genetic luck' and therefore arbitrary with respect to social justice (2002:108). Whilst this radical conception of equality of opportunity gains widespread attention within theoretical debates about equality, policy-makers have tended to work with the minimal and conventional conceptions of equality of opportunity, aiming to eradicate discrimination in the spheres of education and employment.

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<sup>2</sup> Cavanagh, M., *Against Equality of Opportunity*, (Oxford: Oxford, 2002) is one of the very few texts that argue against equality of opportunity.



Another significant trend within recent theoretical writings on equality has been the emergence of '**difference theory**', which insists that liberal egalitarianism has privatised cultural, religious and other differences, failing to focus on the importance of the diversity of ways of thought, of life, tastes and moral perspectives (see Parekh, 2000). From this perspective, treating people as equals requires giving due acknowledgement to each person's identity, and this entails recognition of what is peculiar to each (Taylor, 1992: 39). Accordingly, laws may legitimately grant exemptions to some groups and not to others and public policies may focus on those groups whose cultures are under threat (see Kymlicka 1995).

Drawing on some aspects of this 'difference' theory, human resource professionals have become increasingly supportive of '**diversity management**'. Within the corporate world, there is an increasing emphasis on diversity policies as an important complement to equal opportunity policies (Price 2003). These diversity initiatives are widely argued to improve the quality of organisations' workforces and act as a catalyst for a better return on companies' investment in human capital. They are also argued to help businesses to capitalise on new markets, attract the best and the brightest employees, increase creativity, and keep the organisation flexible (see Cartwright 2001). The promotion of diversity has also emerged as a central political priority. In 2003, the European Commission (EC) launched a five-year, EU-wide information campaign, 'For Diversity – Against Discrimination', aiming to 'promote the positive benefits of diversity for business and for society as a whole' (EC Green Paper 2004:13). The pursuit of equality of opportunity is therefore increasingly augmented by the positive recognition of diversity. The EU, for example, aims to establish an integrated equality strategy 'based on the premise that equal treatment and respect for diversity are in the interests of society as a whole.' (EC Green Paper, 2004: 10).

Meanwhile, another new concept in theories of equality has been the emergence of '**mainstreaming**', which was initially developed in relation to gender equality, but which is increasingly being applied to race/ethnic minorities also (see Shaw 2004). Gender mainstreaming, entails 'the systematic integration of the respective situations, priorities and needs of women and men in all policies and with a view to promoting equality between women and men and mobilising all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account, at the planning stage, their effects on the respective situation of women and men in implementation, monitoring and evaluation.' (Commission of the European Communities 1996:2), was adopted by the United Nations (UN) at the 1995 conference on women in Beijing and then taken up by the EU and its member states. It is now widely viewed as a third equality approach that augments the previous equal treatment and positive action strategies (Rees 1998).

Nonetheless, the importance of positive action policies has not diminished. Many advocates of diversity management and mainstreaming also accept the continued need for equal opportunity and positive action policies. Action programmes

designed to favour and promote the interests of disadvantaged groups at the point of recruitment have usually been called positive discrimination in Britain and **preferential hiring** in the US (see Table 2.1).

Positive or affirmative action entails policies or programmes that seek to redress past discrimination through active measures to improve the educational or employment opportunities of members of minority groups or women. The policies usually require employers and institutions to set goals for hiring or admitting minorities. The term is usually applied to the use of racial, ethnic, or gender preferences in allocating social benefits. The groups receiving such benefits, such as African-Americans, Native Americans, or women, are assumed to have been victims of systematic discrimination in the past.

It has so far been considered important in Britain to draw a distinction between positive action and positive discrimination. **Positive action** entails action being taken to assist members of a particular group to gain employment, such as by providing training. **Positive discrimination** entails members of a particular group being given preference over others at the point of recruitment in order to redress past discrimination and is unlawful in Britain. Advocates of positive discrimination argue that we have a moral duty to help disadvantaged groups in our society, and that this duty entails a programme of positive discrimination (see Parekh, 1992: 261-281). This may entail preferential treatment and a system of quotas in areas such as education, employment and political representation. Critics suggest that these programmes would disregard merit and violate individual rights. Advocates reply that whilst merit should never be disregarded, definitions of merit are contested and may currently be drawn in ways that lead to systematic discrimination (see Young 1990: 192-222). The range of measures known as affirmative action in the US and employment equity in Canada include both what is understood as positive action and positive discrimination in the UK.

The public and private pursuit of employment equity may therefore now entail the use of a wide range of equality strategies, including equal opportunity, positive action, positive discrimination, diversity management and/or mainstreaming policies.

## 3 British Race Equality policies

Equal opportunities policies came to prominence in the employment sphere in the early 1980s in the United Kingdom (UK). They were designed to demonstrate a commitment to the equal treatment of individuals competing for jobs. Whilst over time many organisations developed such policies in the light of continuing discrimination, some began to question their achievements and to analyse their claims. In a seminal piece of research Jewson and Mason (1986) divided equal opportunity policies in terms of liberal and radical modes of operation. At the liberal end of the spectrum they were perceived as having been instigated to promote **fair treatment** in the recruitment process. However, those of a radical perspective perceived them as aiming to achieve **representative distributions** of jobs for black people and other (hitherto) under-represented groups. It was to these different interpretations upon equal opportunity policies and their goals, that Jewson and Mason attributed much of the controversy that such initiatives gave rise. These different ways of seeing equal opportunity policies have also been presented as **minimalist** and **maximalist** approaches (Blakemore and Drake, 1996), or minimal and radical, as outlined above (Swift 2001).

Whilst the *Race Relations Act 1976* and the *Sex Discrimination Act* do not permit positive discrimination, they do allow for positive action. Under both Acts if at any time in the previous 12 months there were no persons of a particular gender or racial group doing particular work within an establishment's workforce, it is lawful to provide access to training or to encourage and help members of the under-represented group to undertake such work.

**Table 3.1 British Race Equality Policies****The Race Relations Act 1976**

This makes it unlawful to discriminate against a person, directly or indirectly, on racial grounds in the fields of employment, education, training, housing; and in the provision of goods, facilities and services.

**The Race Relations (Amendment) Act 2000**

This amended the 1976 Act. It fulfilled recommendation 11 of the Stephen Lawrence Inquiry report and went further, prohibiting race discrimination in all public functions, with only a few limited exceptions. It aims to help public authorities to provide fair and accessible services, and to improve equal opportunities in employment. Public bodies listed in Schedule 1A to the amended 1976 Act are also subject to a statutory general duty to promote race equality.

**The Race Relations Act 1976 (Amendment) Regulations 2003**

These implement the EC Article 13 Race Directive. The Regulations enhance the Race Relations Act by, for example, amending the definition of indirect discrimination and changing the way in which the burden of proof applies, as well as removing a number of exceptions from the legislation.

Positive action policies as permitted within the 1976 Act were designed to overcome the under-representation of ethnic minorities through the provision of encouragement and training opportunities, which would enable them to compete more effectively for jobs. There was no provision for the appointment of under-represented groups purely to achieve ethnic balance. Positive action could be used within a programme of equality targets to achieve fairer representation, but even here persons could only be appointed if they were qualified and experienced for the relevant posts. Hence, the law does not allow for positive discrimination or affirmative action: an employer cannot attempt to change the balance of the workforce by selecting someone on racial grounds.

As the Commission for Racial Equality states: 'The aim of positive action is to ensure that people from previously excluded ethnic minority groups can compete on equal terms with other applicants. It is intended to make up for the accumulated effects of past discrimination. Selection itself must be based on merit and treat all applicants equally. The law does not compel employers to take positive action, but it allows them to do so.' <[http://www.cre.gov.uk/legal/rra\\_positive.html](http://www.cre.gov.uk/legal/rra_positive.html)>

The *Race Relations Amendment Act 2000*, which was precipitated by the McPherson Inquiry (1999) into the death of Stephen Lawrence, strengthened the 1976 Act by extending protection against discrimination by public bodies and placing a new and enforceable statutory general duty on public bodies to promote equality. This entails:

- eliminating unlawful discrimination;
- promoting equal opportunities;
- promoting good race relations between persons of different racial groups.

The duty to promote race equality is commonly referred to as the 'race equality duty'. Approximately 43,000 public authorities are bound by this duty, which entails considering the implications for racial equality in all aspects of their work, including council house allocation, prison management, hospital closures etc. Section 71 of the Race Relations Act places a general statutory duty on listed public authorities in England, Scotland, and Wales to promote race equality. These Regulations do not extend to Northern Ireland.

The *Race Relations Act 1976 (Amendment) Regulations 2003*, which were made under section 2(2)(a) and (b) of the European Communities Act 1972 and come into force on 19th July 2003, implement (in Great Britain) Council Directive 2000/43 EC of 29th June 2000 ('the Directive') and include provision for matters arising out of or relating to such implementation. The Directive is concerned with the principle of equal treatment between persons, irrespective of racial or ethnic origin, in the areas of employment (and related matters), social protection, social advantage, education and access to and supply of, goods and services which are available to the public, including housing.

The Directive necessitates amendment of the Race Relations Act 1976 ('the 1976 Act'), in particular to reflect the provisions of the Directive which deal with the definition of indirect discrimination, harassment, genuine and determining occupational requirements, the burden of proof in proceedings, and abolition of statutory provisions which are contrary to the principle of equal treatment. Regulations 3 and 4 set out a new definition of indirect discrimination, on grounds of race or ethnic or national origins, in those areas with which the Directive is concerned. Regulation 5 sets out a new definition of harassment, on the grounds of a person's race or ethnic or national origins, which will apply in the areas with which the Directive is concerned. Regulation 6 makes it unlawful for an employer to subject to harassment an employee or an applicant for employment, and removes, partially, the exception (from the discrimination in employment provisions) for employment in a private household.

In addition to these race equality policies, there have been a series of other new equality regulations introduced in recent years, relating to other 'equality strands'. These include *The Employment Equality (Sexual Orientation) Regulations 2003* (which came into force on 1 December 2003) and the *Employment Equality (Religion or Belief) Regulations 2003* (which came into force on 2 December 2003) implement strands of the European Employment Directive (Council Directive 2000/78/EC). The Employment Directive outlaws discrimination on grounds of sexual orientation, religion or belief, disability and age in employment and vocational training. The Sexual Orientation Regulations apply to discrimination on grounds of orientation towards persons of the same sex (lesbians and gays), the opposite sex (heterosexuals)

and the same and opposite sex (bisexuals); of perceived as well as actual sexual orientation (i.e. assuming – correctly or incorrectly – that someone is lesbian, gay, heterosexual or bisexual); and of the sexual orientation of those with whom you associate (for example, friends and/or family). The Religion or Belief Regulations apply to discrimination on grounds of religion, religious belief or similar philosophical belief; of perceived as well as actual religion or belief (i.e. assuming – correctly or incorrectly – that someone has a particular religion or belief) and of the religion or belief of those with whom you associate (for example, friends and/or family).

These two *Employment Equality Regulations 2003* outlaw:

- **Direct discrimination** – treating people less favourably than others on grounds of sexual orientation or religion or belief;
- **Indirect discrimination** – applying a provision, criterion or practice which disadvantages people of a particular sexual orientation or religion or belief and which is not justified as a proportionate means of achieving a legitimate aim;
- **Harassment** – unwanted conduct that violates people’s dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment;
- **Victimisation** – treating people less favourably because of something they have done under or in connection with the Regulations, e.g. made a formal complaint of discrimination or given evidence in a tribunal case.

Amendments to the *Disability Discrimination Act 1995* also came into force in October 2004 and new legislation outlawing discrimination on grounds of age will come into force by the end of 2006.

On 30 October 2003 the Government announced plans to bring together the work of the equality commissions in a new body that will take responsibility for new laws on age, religion or belief and sexual orientation and for the first time provide institutional support for human rights. The Government published a White Paper concerning the proposed **Commission for Equality and Human Rights** (CEHR) on 12 May 2004, and confirmed in the Queen’s speech on 23 November that it will establish the CEHR. A joint Department for Trade & Industry (DTI)/Cabinet Office press release of 25 February announced that the creation of a Single Equality Act would be an early task for the CEHR. After an extensive process of consultation with stakeholders including existing equality agencies, the social partners and advocacy organisations from across the sectors, the Government’s Equality Bill was published on 3 March 2005.

Cheung and Heath’s recent research on ethnic minority labour market participation explores the extent to which ‘ethnic penalties’ apply to minority groups. They define ethnic penalties as ‘estimates of the extent to which ethnic minorities are disadvantaged in comparison with people belonging to the charter population who have the same age, educational qualifications and marital status (Cheung and Heath forthcoming). Working with data from the 1991-2001 General Household Surveys, they find that first-generation visible minority men (African, Caribbean, Indian and

Pakistani/Bangladeshi) 'had poorer chances of avoiding unemployment than did men of British ancestry of the same age and marital status and with similar educational qualifications' (Cheung and Heath forthcoming). Neither of the white groupings (Irish and West European) experienced a significant ethnic penalty. The results were very similar for women. They also found there to be no significant difference in the ethnic penalties experienced by the first and the second generation and that at all levels of education the visible minorities had much higher probabilities of being unemployed than the charter population. Of the minorities who gained work, Cheung and Heather find that first-generation male visible minorities all suffer ethnic penalties in gaining access to the salariat, routine non-manual work and to skilled manual work, with similar patterns obtained for women (with the exception of first-generation Caribbean women). However, their findings were quite different for the second generation, where none of the visible minorities, male or female (Caribbeans, Indians and Pakistanis/Bangladeshis), experience a significant ethnic penalty in access to the higher classes. They conclude that second generation ethnic minorities 'appear to have similar chances of gaining access to the higher classes as do the charter population'. Overall, they find that 'second-generation members of visible minorities (Black Caribbeans and Indians) continue to experience disadvantages in gaining employment, but those who have gained employment appear to obtain the same kinds of jobs as people of British ancestry with the same qualifications.' (Cheung and Heath forthcoming).

Their research suggests that we are witnessing the continuing presence of ethnic penalties in unemployment, but their disappearance with respect to the salariat. In other words, when second generation visible minorities get in jobs, 'they are the same kinds and with the same remuneration as their white British peers get', but at all levels of qualification they are 'simply less likely to get a job'. Cheung and Heath suggest that discrimination is a likely explanation for the ethnic penalties experienced by second-generation visible minorities in unemployment.





## 4 European Race Equality policies

In this section we briefly survey the race equality policies within the European Union (EU), including the EU itself and its member states. Having surveyed each of the member states we focus in particular on the Netherlands and Northern Ireland as developments within these two countries are of particular interest to British policymakers, given that they are frequently perceived to be examples of good practice, which might offer important lessons for Britain.

### 4.1 European Union Race Equality policies

Article 1 of the International Convention on the Elimination of all forms of Discrimination (1965) defines racial discrimination as:

*'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social cultural or any other field of public life.'*

Article 141 (previously 119) of the Treaty of Rome laid down the foundations for equal pay between women and men and is generally seen as the point at which anti-discrimination policy in the European community began. The basis for adopting this initiative was in fact economic and less social. It was designed to reduce any competitive distortion because of the low wages of women in some Member States. The primary purpose was not, therefore, to promote the equal treatment of women and men. Nevertheless, the provision contributed to groundbreaking decisions at the European Court of Justice. This in turn meant that the issue of the equal treatment of women and men came to be seen as not simply a national one but the focus of further EC directives which prohibited gender discrimination in employment (Liegl *et al.*, 2004).

The European Parliament, the Council and the Commission have, since the late 1970s, issued various declarations, documents and recommendations designed to combat race discrimination (see below). The most significant of these, in relation to our concerns in this report, are the Racial Equality and the Employment Equality Directives of 2000.

**Table 4.1 European Union Race Equality declarations**

**1977.** The Joint Declaration by the European Parliament, the Council and the Commission on Fundamental Rights.

**1985.** The European Parliament agreed to establish a Committee of Inquiry into the Rise of Racism and Fascism in Europe, which delivered the so-called Evrigenis Report, including a recommendation of a wide range of measures to be implemented at the national levels and supplemented by European-level action.

**1986.** The Joint Declaration by the European Parliament, the Council and the Commission against racism and xenophobia.

**1988.** The Commission submitted a proposal to the Council for a resolution on racism, moving forward from the general principles expressed in the 1986 Joint Declaration and specifying a number of legal developments to be encouraged in the 1986 *Joint Declaration*.

**1990.** The European Parliament initiated a second Committee of Inquiry, which produced the so-called Ford Report, giving 77 recommendations for action and European legislation to combat racism. As the proposals were not acted upon, the European Parliament stressed the need for legislative action at the European level.

**1994.** The Corfu European Council agreed in establishing a Consultative Commission on Racism and Xenophobia (the so-called Kahn Commission), consisting of a representative from each of the Member States, two MEPs, a representative from the Commission and an Observer from the Council of Europe. The Commission expressed the conviction that an essential prerequisite for effective action by the Community would be an amendment of the Treaty to insert a specific reference to combat racial discrimination.

**1995.** Following this recommendation, both the Parliament and the Commission published a Communication on Racism, Xenophobia and Anti-Semitism, underlining that the treaties should be amended in the 1996 inter-governmental conference (IGC) to provide competence for the Community in this sphere.

Continued

**Table 4.1 Continued**

<p><b>1996.</b> Presidency Conclusions of the European Council, 21 and 22 June in Florence, on the Union's determination to combat racism and xenophobia with the utmost determination.</p> <p><b>1996.</b> Proposal for a Council Regulation, establishing a European Monitoring Centre for Racism and Xenophobia (COM (96) 615 final).</p> <p><b>1997.</b> Declarations of Intent: Europe Against Racism, signed at the launching of the European Year against Racism, The Hague.</p> <p><b>1997.</b> Creation of the Monitoring Centre on Racism and Xenophobia, set up by virtue Council Regulation No. 1035/97.</p> <p><b>2000.</b> The Racial Equality Directive 2000/43/EC provides protection against discrimination in employment, training and education, social protection (including social security and health care) membership and involvement in organisations of workers and employers and access to goods and services including housing.</p> <p><b>2000.</b> The Employment Equality Directive 2000/78/EC principle of equal treatment in employment and training irrespective of religion or belief, disability, age or sexual orientation in employment, training and membership and involvement of workers and employers.</p>
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Source: Appelt and Jarosch, 2000: 4-5, updated to include the 2000 Equality Directives.

The past 30 years have seen the development of a body of European legislation aimed at tackling gender discrimination in relation to pay, working conditions and social security. The pursuit of equality between women and men is now recognised as a core EU objective (see Bell, 2003; Bernard, 1999). In addition, since 1996 it has been EU policy to promote gender equality in all policies (Rees, 1999), mainstreaming the gender dimension into all Union activity (European Commission Green Paper, 2004). Its purpose is to ensure that all mainstream policies incorporated a gender equality perspective (Beveridge and Shaw 2002; Stratigaki, 2005; Pollack and Hafner-Burton, 2000; Rees, 1999).

Whilst some have questioned its transformative role, arguing that it has become a technocratic tool of governance (see True, 2003), others have questioned the conceptual newness of the initiative. For although mainstreaming is often presented as an innovative approach to EU equality policy-making, similar policy approaches in the field of race equality were discernible in the mid 1980s in the United Kingdom (UK) (see Dhimi, 2003). It is argued that it was commonplace for policy professionals during this period to require that all committee reports and decision-making include an equality dimension, which would specify the impacts upon particular disadvantaged groups. The fact that gender mainstreaming has now become an integral part of EU policy making, but does not yet appear to have permeated through to race equality

matters may be attributable to the relative size and activism of the groups that have championed mainstreaming in the EU. Another factor may be that the pursuit of gender equality is currently less contested within Europe than is the pursuit of racial or religious equality, especially in the current climate of suspicion towards Muslims in particular.

As highlighted above, the focus of much EU policy action for many years was on gender. During the mid-90s concern grew within the European Commission (EC) of the need to develop wider policy, to tackle issues beyond that of gender discrimination, and to develop a more coherent and integrated approach to combat discrimination. This led to the adoption of Article 13 in the EC Treaty, following the entry into force of the 1997 Amsterdam Treaty. Article 13 of the 1997 Treaty of Amsterdam, which was unanimously approved by Member States, granted the European Community powers to combat discrimination on the ground of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Treaty came into effect in 1999 and since then two key Directives have been enacted in the anti-discrimination arena: the Racial Equality Directive 2000/43/EC which implements the equal treatment of persons irrespective of racial or ethnic origin and the Employment Directive 2000/78/EC which establishes a general framework for equal treatment in employment and occupation (European Commission Green Paper, 2004).

*The Racial Equality Directive 2000/43/EC* lays down the following principles:

- It provides the basis for the equal treatment of persons irrespective of racial or ethnic origin.
- It provides protection against discrimination in employment, training and education, social protection (including social security and health care) membership and involvement in organisations of workers and employers and access to goods and services including housing.
- Defines direct and indirect discrimination and harassment, and prohibits instructions to discriminate, and victimisation.
- Permits the use of positive action measures to ensure full equality in practice.
- Gives victims of discrimination the right to pursue a complaint through a judicial or administrative route with penalties for those that discriminate.
- Permits limited exemptions to the principle of equal treatment, where difference in race or ethnic origin constitutes a genuine occupational requirement.
- Shifts the burden of proof between complainant and respondent in civil and administrative cases, such that once an alleged victim establishes facts consistent with a presumption of discrimination, it falls upon the respondent to prove there has been no breach of the equal treatment principle.
- Provides for each Member State to establish an organisation to promote equal treatment and provide independent assistance to victims of racial discrimination.

*The Employment Equality Directive 2000/78/EC* provides:

- The principle of equal treatment in employment and training irrespective of religion or belief, disability, age or sexual orientation in employment, training and membership and involvement of workers and employers.
- Identical provisions to the Racial Equality Directive on definitions of discrimination and harassment, the prohibition of instructions to discriminate and victimisation, on positive action, rights to legal redress and the shifting of the burden of proof.
- The requirement for employers to make **reasonable accommodation** to enable a person with a disability who is qualified to do the job in question to participate in training or paid labour.
- Limited exceptions to the principle of equal treatment, where, for example, the ethos of the religious organisation needs to be preserved, or where an employer legitimately requires an employee to be from a certain age group to be recruited.

Whilst the Directives are based on the principle of non-discrimination they do allow some exceptions. The first exemption is for positive action whereby some groups can be treated more favourably than others, in order to prevent or compensate for disadvantages linked to one of the specified grounds of discrimination. The second exemption allows for differences in treatment where the nature of the employment activity concerned genuinely requires the person carrying out the duty to be of certain ethnic origin, religion, or age etc. In other words, it must be a **genuine and determining occupational requirement** for this exemption to succeed, and does not constitute discrimination (European Commission, 2005a).

The Two Directives do not apply to the conditions for third country nationals and stateless persons to enter and reside in a Member State or to treatment arising from their legal status. Nevertheless, the EU's *Long Term Residents Directive* (Directive 2003/109/EC) guarantees third country nationals who are long-term residents of the EU equal treatment. EU citizens are protected from discrimination on the grounds of nationality in the EU under Article 12 of the EC Treaty. It is also worth noting that the *Employment Equality Directive* (concerning discrimination based on religion or belief, disability, age and sexual orientation) does not apply to:

- those measures laid down by national law which in a democratic society, are necessary for public security, maintaining public order and preventing criminal offences, protecting health and the rights and freedoms of others;
- payments made by state schemes or similar, including social security or social protection schemes.

Furthermore, Member States can exempt the armed forces from the provisions of the *Employment Equality Directive* in respect of age and disability (European Commission, 2005a).

There has been some analysis of the protection afforded by the 1950 European Convention on Human Rights, the 1961 European Social Charter and 1996 Revised

Social Charter and their influence on questions of interpretation of the Race Equality Directive and the Employment Equality Directive. It has been concluded that the progressive development of anti-discrimination law is increasingly being influenced by the two Social Charters and less by the Convention on Human Rights, leading to the development of:

*'...a jurisprudence on the need for an active labour policy aimed at the integration of target groups and, more generally, on the need for affirmative action – in the field of employment but also in the fields of education, housing, or social policy – directed towards the social and professional integration of the most vulnerable segments of the population.'*

(European Commission, 2005b: 6)

It is further argued that this approach needs to be part of wider employment strategy thus:

*'...combating discrimination requires more than prohibitions: as exhibited within the EU by the complementarity between the anti-discrimination directives and the European Employment Strategy, it requires an active social and employment policy commensurate to the aim of realising integration.'*

(European Commission, 2005b:6)

One problem that has been noted in relation to the development of EU equality policies is the unevenness across equality strands. For instance, mainstreaming is being implemented in relation to gender, though not systematically in relation to race. However, the language of mainstreaming has entered into anti-racism policy since the 1998 Action Plan Against Racism (see Shaw 2004). Also, the *Race Equality Directive* is stronger than the *Employment Directive*, both in terms of coverage and actions. The *Employment Directive* outlaws discrimination on grounds of sexual orientation, religion or belief, disability and age in employment and vocational training. The *Race Directive* outlaws discrimination on grounds of racial or ethnic origin in the areas of employment, vocational training, goods and services, social protection, education and housing. Current legislation therefore gives more rights to some people than to others. In particular, it is still legal for suppliers of goods and services to discriminate against people on grounds of their religion, sexual orientation and age. Another source of unevenness lies in the disparity amongst EU member states: for example, the *Race Equality Directive* is weaker than UK legislation, and the two directives have still not been implemented by some EU member states (see Table 4.2).

Another problem that has been identified with the current EU Directive Model, is the tendency to adopt interpretations of the Directives which ensure a 'superficial consistency', for example in the way in which concepts common to all grounds of discrimination are seen. Whilst the Directives are open to considerable interpretation, there is pressure to adopt common legal regulations to essentially different forms of discrimination, and to comply with existing gender discrimination jurisprudence (McCrudden, 2005).

More positively, Fredman explores the various notions of equality being incorporated in the EU Race Equality Directive and the Employment Equality Directives (Fredman, 2001). She suggests that whilst there are limitations to the current policy and legislation, it is the 'positive action' provisions or *'proactive approaches, which symbolise the only genuine focus on equality of results, which we must look (to) if real change is to be brought about'* (Fredman, 2001: 163).

## 4.2 Equality policies in EU Member States

There have been a number of studies that explore the diverse ways in which EU member states conceptualise equality, respond to EU Directives, and implement equality policies (see for example, Webb, 1997; Jewson and Mason, 1986). These studies have focused on a range of issues, including: the policy developments achieved by member states in relation to their EU obligations (Chopin and Niessen 2001); approaches to legislation against race discrimination in European countries (Coussey 2002); the levels of activity adopted to combat discrimination (Wrench 2002); the ways in which policies and tools are implemented (Liegl *et al.* 2004); the nature of local policies towards migrants across Europe (Alexander 2004); and equal employment regimes found amongst EU member states (Wahl 2005). We summarise these studies briefly in this section.

**Table 4.2 State of implementation of the EU Race Equality and Employment Equality Directives 2000 in EU Member States**

<b>Austria</b>	Federal level: Federal Equal Treatment Act (adopted 1993, amended 2004), Equal Treatment Act, Law on the Equal Treatment Commission and the Office for Equal Treatment (all in force from 1 July 2004). Provincial level: Styrian Equal Treatment Act, Viennese Service Order, Viennese Anti-discrimination Act, Lower Austrian Equal Treatment Act, Carinthian Anti-discrimination Act. Covers all grounds in two Directives and sex. So far disability only in provincial legislation
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Continued

**Table 4.2 Continued**

<b>Belgium</b>	Federal level: Law of 25 February 2003 on combating discrimination and amending the Act of 15 February 1993 setting up the Centre for Equal Opportunities and Opposition to Racism; Law of 20 January 2003 on concerning the reinforcement of anti-racism legislation amending the Law of 30 July 1981 criminalising certain acts inspired by racism or xenophobia. Regional level: Flemish Region/Community Decree of 8 May 2002 on proportionate participation in the employment market; French-speaking Community Decree of 19 May 2004 on the implementation of the principle of equal treatment; Walloon Region Decree of 27 May 2004 on the equal treatment in employment and vocational professional training; German-speaking Community Decree of 17 May 2004 on the guarantee of equal treatment in the labour market; Ordinance of 26 June 2003 on the mixed management of the labour employment market in the Brussels-Capital region. Covers all grounds in two Directives and additional grounds including sex.
<b>Cyprus</b>	Equal Treatment (Racial or Ethnic Origin) Law No 59 (I)/2004; Law on Persons with Disabilities (Amendment) No 57(I)/2004; Equal Treatment in Employment and Occupation Law No 58 (I)/2004. Covers racial or ethnic origin, religion or belief, age, sexual orientation. Commissioner for Administration (Amendment) Law No 36 (I)/2004; Combating of Racism and Other Discrimination (Commissioner) Law No 42 (1)/2004. Covers all grounds in two Directives and additional grounds.
<b>Czech Republic</b>	Law No 65/1964 Coll. Labour Code, last amended in 2004; Law No 361/2003 Coll. on the service relations of members of the security forces; Law No 221/1999 Coll. on the service relations of members of the armed forces, as amended in 2002; Law No 218/2002 Coll. on official service in State administration and on remuneration of officials and other employees; School Law No 561/2004 Coll. Covers all grounds in two Directives and additional grounds including sex.

Continued



Table 4.2 Continued

<b>Denmark</b>	Act No 960 (2004) on Section 266(b) of the Penal Code; Act No 626 (1987) prohibiting racial discrimination etc.; Act No 459 (1996) amended by Act No 253 (2004) and Act No 1416 (2004) prohibiting discrimination in respect of employment and occupation etc.; Act No 374 (2003) prohibiting unequal treatment due to race and ethnicity; Act No 1417 of 22 December (2004) on the prohibition of direct and indirect discrimination on the grounds of age and disability; Act No 411 (2002) on the Institute for International Studies and Human Rights. Covers all grounds in two Directives and additional grounds.
<b>Estonia</b>	Law on Amendments to the Law on Legal Chancellor and Related Laws; Law of the Republic of Estonia on Employment Contract, amended 22 April 2004; Penal Code. Covers all grounds in two Directives and additional grounds including sex.
<b>Finland</b>	Non-Discrimination Act 21/2004; Penal Code, as amended by Law 302/2004; Employment Contracts Act, as amended by Law 23/2004. Covers all grounds in two Directives and additional grounds including sex.
<b>France</b>	Law of the Press 1881 (last amended February 2005); Law Combating Discrimination, No 2001-1066; Law of Social Modernisation, No 2002-73; Law creating the specialised body (HALDE) of 21 December 2004; Law on Social Cohesion of 20 December 2004. Covers all grounds in two Directives and additional grounds including sex.
<b>Germany</b>	Industrial Relations Law, amended 2001; Federal Personnel Representation Law, amended 2001; Law on the Equal Treatment of Disabled Persons. Covers all grounds in two Directives and additional grounds including sex.
<b>Greece</b>	Law on the Application of the Principle of Equal treatment regardless of racial or ethnic origin, religious or other beliefs, disability, age, or sexual orientation (published on 27 January 2005). Covers all grounds in two Directives.
<b>Hungary</b>	Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities; Government Decree 362/2004 on the Equal Treatment Authority and the Detailed Rules of its Procedure. Covers all grounds in two Directives and additional grounds including sex.

Continued

**Table 4.2 Continued**

<b>Ireland</b>	Equality Act 2004, amending Employment Equality Act 1998 and the Equal Status Act 2000; Pensions Act 1990–2004; Intoxicating Liquor Act 2003. Covers all grounds in two Directives and additional grounds including sex.
<b>Italy</b>	Legislative Decree No 215 of 9 July 2003 transposing directive 2000/43, subsequently amended by Legislative Decree No 256 of 2 August 2004; Decree of 11 December 2003 on internal structures and competencies of specialised body. Covers racial and ethnic origin. Legislative Decree No 216 of 9 July 2003 transposing directive 2000/78, amended by Legislative Decree No 256 of 2 August 2004. Covers all grounds in Employment Equality Directive.
<b>Latvia</b>	Labour Law, adopted 2001, amended 7 May 2004. Covers inexhaustive list of grounds and no express reference to sexual orientation.
<b>Lithuania</b>	Law on Equal Opportunities, in force from 1 January 2005; Criminal Code as amended on 1 May 2003. Covers all grounds in two Directives.
<b>Luxembourg</b>	No legislation adopted or amended since Directives adopted.
<b>Malta</b>	Employment and Industrial Relations Act 2002 and Legal Notice 461 of 2004 (Equal Treatment in Employment Regulations); Equal Opportunities (Persons with Disabilities) Act 2000. Covers all grounds in two Directives.
<b>Netherlands</b>	General Equal Treatment Act of 1994, amended by EC Implementation Act 2004; Age Discrimination Act of 17 December 2003; Act on Equal Treatment on the grounds of disability or chronic disease of 3 April 2003. Covers all grounds in two Directives and additional grounds including sex
<b>Poland</b>	Labour Code (last amended 14 November 2003); Act of 20 April 2004 on the Promotion of Employment and the Institutions of Labour Market; Council of Ministers Ordinance of 25 June 2002 on Government's Plenipotentiary for Equal Status of Men and Women; Law on National and Ethnic Minorities and on Regional Language (adopted on 6 January 2005, in force from 1 May 2005). Covers all grounds in two Directives and additional grounds including sex.

Continued

**Table 4.2 Continued**

<b>Portugal</b>	Law 18/2004 on racial ethnic origin discrimination; Decree Law 251/2002; Law 38/2004 on measures for the rehabilitation and participation of persons with disabilities; Law 16/2001 on religious freedom; Labour Code Law 99/2003; Law 35/2004 regulating the Labour Code. Covers all grounds in two Directives and additional grounds including sex.
<b>Slovak Republic</b>	Act No 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination, amending and supplementing certain other laws (Anti-Discrimination Act); Act No 308/1993 Coll. on establishing the Slovak National Centre for Human Rights, last amended in 2004 Coll.; Labour Code No 311/2001 Coll. last amended by Act No 365/2004. Covers all grounds in two Directives.
<b>Slovenia</b>	Implementation of the Principle of Equal Treatment Act 2004; Vocational Rehabilitation and Employment of Disabled Persons Act 2004; Employment Relations Act 2003. Covers all grounds in two Directives and additional grounds including sex.
<b>Spain</b>	Law 62/2003 of 30 December 2003 on fiscal, administrative and social measures; Legal Decree 5/2000 of 4 August 2000; Law on Infractions and Sanctions on the Social Order, amended January 2004; Law 51/2003 of 2 December 2003 on Equal Opportunities, Non-Discrimination, and Universal Access for Persons with Disability. Covers all grounds in two directives. Decree 1865/2004 creating the National Disability Council.
<b>Sweden</b>	Prohibition of Ethnic Discrimination Act (1999:130), last amended by Act 2003:308; Prohibition of Discrimination in Working Life of People with Disability Act (1999:132), amended by Act 2003:309; Act on a Ban against Discrimination in Working Life on grounds of Sexual Orientation (1999:133), amended by Act 2003:310; Equal Treatment of Students at Universities Act (2001:1286), amended by Act 2003:311; Prohibition of Discrimination Act (2003:307), amended by Act 2004:1089. Legislation against discrimination on grounds of sexual orientation in respect of social security entered into force in January 2005. Covers all grounds in two Directives except age.

Continued

**Table 4.2 Continued**

<b>UK</b>	Great Britain: Race Relations Act 1976, last amended by the Race Relations Regulations in 2003. Northern Ireland: Race Relations (NI) Order 1997, last amended by Race Relations Order Regulations 2003. Covers race and national origin. Great Britain: Disability Discrimination Act 1995, last amended by Disability Discrimination Regulations 2003; Disability Discrimination Act 1995 (Pensions) Regulations 2003, Employment Equality (Religion or Belief) Regulations 2003; Employment Equality (Sexual Orientation) (Amendment) Regulations 2003. Northern Ireland: Fair Employment and Treatment (NI) Order 1998, last amended by Fair Employment Regulations in 2003; Employment Equality (Sexual Orientation) Regulations (NI) 2003; Disability Discrimination Act 1995 (Amendment) Regulations (NI) 2004. Covers religion or belief, disability, sexual orientation and in NI political opinion.
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Source: European Commission's website on anti-discrimination  
<http://www.stop-discrimination.info/4563.0.html>

It is clear (see Table 4.2) that EU member states have responded to the Race Equality Directive in various ways, and that some member states still need to take steps to meet their obligations under the Directive. This diversity reflects, in part, different approaches amongst EU member states to legislations against race discrimination.

Approaches to legislation against race discrimination in European countries include: specific **civil legislation** outlawing race discrimination, as in the UK and Netherlands; specific provisions in the **criminal code** as in France, Italy, and Portugal; and **constitutional provisions** against racial discrimination, as in Austria, Germany, Spain, and Italy (see Coussey, 2002). The legislation in Great Britain and the Netherlands also specifically covers indirect discrimination and allows for the use of affirmative action or positive action measures to be used to reduce under-representation of ethnic minorities in the workforce. The Netherlands requires employers to monitor the proportion of ethnic minorities in their workforce and have plans to promote proportional representation.

Some countries have **specialist advisory bodies** dealing with racial discrimination, as in France, Germany, Denmark, and Portugal. Others such as Belgium, Sweden, Great Britain, Ireland and the Netherlands have **legal powers** (Coussey, 2002). Some countries publish **information** about the positive contribution that ethnic minorities make: Germany, for example, produces a quarterly journal and regular statistical bulletins; Britain publishes a wide range of statistical information on ethnic minorities; and the Netherlands produces an annual Integration Monitor and a variety of statistical reports. Britain, the Netherlands, Norway, Denmark and Sweden have active programmes designed to improve the representation of ethnic minority groups in national and local government services (Coussey, 2002).

There are also differing levels of activity in relation to measures designed to combat discrimination. In his comparative European study Wrench (2002), finds six common levels of activity:

- **Training immigrants:** measures directed specifically at migrants and ethnic minorities to ensure their effective integration into society, such as training to improve their education and skills, enabling them to learn the relevant languages culture and customs of the new society.
- **Making cultural allowances:** taking 'special needs' measures that recognise and make appropriate provisions for the different religious and cultural needs of the migrant and ethnic minority communities, such as dietary variations in company canteens, allowing celebration of different religious holidays, or the wearing of different clothing items such as headscarves or trousers for women.
- **Challenging racist attitudes:** adopting policies that are premised on the notion that attitudes and prejudice are central, through publicity, information campaigns and training courses which seek to change people's attitudes.
- **Combating discrimination:** attempting to change people's behaviour as opposed to their (prejudiced) attitudes, through the introduction of fair recruitment and selection, anti-harassment policies, and disciplinary measures.
- **Equal opportunities policies with positive action;** which involves a combination of the above within an equal opportunities package, including a handbook of policy intentions and procedures with targets for the fairer representation of ethnic minorities in the workforce. In some cases this may involve the use of positive action measures that go beyond the minimal equal treatment.
- **Diversity management:** these contain elements of all of the above within a 'valuing diversity' dimension and whole organisation approach.

He finds that amongst European member states the majority of activities fall within the first category of 'training immigrants', with relatively few countries pursuing categories five and six, 'equal opportunities policies with positive action' and 'diversity management'. The study suggests that this is consistent with the wider public discourse, which focuses on the need to integrate immigrants into the EU and emphasises human capital resources, focusing on the need to develop individual capacities within the immigrant population and its descendants. Wrench argues that this widespread public discourse tends to neglect the structural tensions that induce the social exclusion of minorities, including various forms of discrimination. Yet he also suggests that a wide variety of interpretations as to what constitutes 'good practice' amongst employers in combating discrimination are emerging across member states.

Other studies also suggest that approaches to equality differ across Europe, reflecting in part the divergent approaches to citizenship amongst member states, which influences how countries perceive 'outsiders'. For example, Alexander's

analysis of local policies towards migrants in Europe (2004) indicates that the policies adopted by European cities towards migrants and ethnic groups reflect different national citizenship models. In other words, the conceptual frameworks adopted by (member) states at the macro level are likely to influence the manner in which policies are operationalised at the local level.

More directly relevant to our concerns in this report, Wahl has sought to understand approaches to employment equality in the European Union in terms of equal employment regimes: liberal, conservative and social democratic (Wahl, 2005). She argues that: '...different speeds of (European) integration matter crucially in creating different equal employment policy regimes because equal employment measures lie exactly at the nexus of social and economic policy' (2005:69). Although all equality policies regimes face the same EU directives, each one imposes challenges specific to its individual state's features. Therefore the process of Europeanisation is 'fundamentally uneven and specific' (Wahl, 2005: 76). In this context, she considers whether a new **European equal employment regime** is emerging or if current ones persist in each member state, and finds that a European equal employment regime is emerging, '...through non-redistributive policies to increase employment access, openness and a nominally equal playing field.' (Wahl, 2005: 90).

Overall, the literature on equality approaches and policies amongst EU members shows a wide degree of **variation** in conceptions of equality, and levels of activity to combat racial discrimination. A few countries in the EU have demonstrated considerable commitment to change, whilst others appear to have lagged behind. This situation appears to be changing, as more countries are required to meet the provisions of the recent Race Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC). Within the comparative European literature Britain and the Netherlands stand out as countries that are actively promoting race equality policies. However, even amongst those which had previously shown high levels of commitment, this has been tested somewhat in the light of recent political events.

A recent survey of immigration and ethnic relations emphasises the cross-national differences amongst the five most 'important immigration countries in Europe': Britain, France, Germany, the Netherlands and Switzerland (Koopmans, Statham Giugni and Passy, 2005). These countries are usually argued to have different citizenship models: with '**ethnic citizenship**' in Germany denying migrants and their descendents access to the political community; '**republican citizenship**' in France providing easy access to citizenship but requiring a high degree of assimilation in the public sphere; and the '**multicultural citizenship**' in the Netherlands and Britain providing both easy formal access to citizenship and recognition of the right of ethnic minority groups to maintain their cultural differences' (Koopmans, Statham, Giugni and Passy 2005: 8). Other countries frequently included in this last group include the United States, Canada, Australia and Sweden. Our report focuses on those countries deemed to work with a multicultural citizenship model.

Koopmans *et al.* find in their study that all five of their chosen Western European countries subscribe to the basic principle of equal treatment regardless of race, ethnicity or national origin, but encompassing anti-discrimination legislation in civil law exists only in Britain and the Netherlands (2005, 45). The French Labour Code offers additional protection against discrimination in the field of employment, but remains 'limited in scope because it covers only employment, professional training, and labour related issues, and not areas such as education, housing, and leisure activities.' (2005:47-8) All five countries have expressed concern that immigrants and their descendents are disproportionately concentrated at the bottom of the labour market and have developed policies to improve their labour market opportunities. Koopmans *et al.* survey the affirmative action policies implemented by the five countries in both **public** and **private** sectors. They find that whereas Britain and the Netherlands have affirmative action programmes in the public sector, Germany, Switzerland and France have no affirmative action for immigrant groups in either sector (2005:68). Within the private sector, the Netherlands has practiced a system of contract compliance, in which public authorities specify certain social criteria that a contractor who wants to obtain government contracts must meet, since the mid 1990s.

**Table 4.3 Affirmative action in the labour market in five European countries, 2002**

Sectors	Netherlands	Britain	France	Germany	Switzerland
Public	1	1	-1	-1	-1
Private	1	-1	-1	-1	-1
Ave. Score	1	0	-1	-1	-1

Source: Koopmans, Statham, Giugni and Passy, 2005:70. Scores are based on a coding system, for details see Koopmans *et al.* 2005: 254-65. These indicators are based on secondary sources to empirically measure political claims making in the public sphere, measures by way of a content analysis of daily newspapers in the five countries.

Before moving on to survey affirmative actions policies in the US and Canada, we will briefly therefore detail recent developments within the Netherlands, selected because it may offer potential lessons for Britain in its further development of its race equality policies. We also briefly survey recent developments in Northern Ireland, which also offers interesting lessons for Britain. The other European country of interest, because frequently classified as having a multicultural citizenship model, is Sweden. It is therefore worth mentioning surveying its policies on ethnic minority labour market participation.

**Sweden** was the first Nordic country to become a country of net immigration. During the 1950s and 1960s there were virtually no restrictions on immigrant labour, but since 1968 Sweden adopted a more restrictive immigration policy with very few work permits being granted each year. During the 1990s most new entrants were refugees, asylum seekers or entering under the family reunification procedure (Council of Europe, 1996: 107-9). In 1994 the Swedish Parliament

passed the *Act against Ethnic Discrimination*, prohibiting discriminatory treatment in hiring, working, and termination of employees in both public and private sectors. The law is enforced by the Discrimination Ombudsman (DO), which can initiate measures against ethnic discrimination by means of consultations with authorities, companies and organisations. The DO is entitled to bring cases concerning unfair treatment of job applicants and employees before the Labour Court. In 1995 the Immigrant Policy Committee produced a report arguing for positive action in the labour market because of the high unemployment rates amongst immigrants: at that time immigrant unemployment rates were 22.8 per cent as compared to 7.7 per cent amongst the non-immigrant population (Statens Invandrarverk, 1995:4). By 2005 research has shown that structural discrimination exists within the Swedish labour market 'as well as the subordination of immigrants in working life', with a high concentration of immigrants in low-wage jobs, especially in the service sector (Lappalainen, 2005: 7). Lappalainen, the head of the Swedish government inquiry into structural discrimination due to ethnicity and religion, recommends that the DO be strengthened in order to oversee new positive action measures, including public procurement contracts (Lappalainen, 2005: 11).

## 4.3 Positive action in the Netherlands

### 4.3.1 Context

Employment policies in the Netherlands relate to five principal immigrant groups: the Turks, the Surinamese, the Moroccans, Dutch Antilleans and others of non-Western ethnic origins (see Table 4.4). Immigration from Surinam and the Dutch Antilles is historically linked to the colonial past, whilst other immigration to the Netherlands is attributed to post-Second World War demands for unskilled labour. Between 1945 and 1973 immigration was mainly of a post-colonial nature, consisting of Moluccans and Hindustanis from the former Dutch East Indies. The mid-1960 onwards was characterised by guest worker migration from Southern Europe, Turkey and Morocco. Following the 'oil-crisis' of 1973 the Dutch economy deteriorated, official immigration policy was restrictive, and social tensions between the native populations and immigrants emerged (Tesser and Dronkers, forthcoming). However, the granting of official independence to the Dutch colony of Suriname in 1976 led to a large influx of Surinamese people into the Netherlands (Engelen, 2005: 3) until the immigration of Surinamese people was also restricted in 1980 (Tesser and Dronkers, forthcoming). From 1985, international constraints obliged the Dutch government to accept growing numbers of asylum seekers who came from countries with no former migratory ties with the Netherlands. Throughout the 1990s, the average number of refugees and asylum seekers was about 40,000 people each year (Tesser and Dronkers, forthcoming).



**Table 4.4 Ethnic minorities in the Netherlands (in absolute numbers x 1,000)**

	1971	1980	1990	1997	1998	1999	2000	2001	2002	2003
Turkish	30	120	206	280	289	299	308	319	330	341
Moroccans	22	72	168	233	241	252	262	272	284	295
Surinamese	38	146	237	287	290	296	302	308	315	320
Antilleans	18	36	81	95	92	99	107	117	124	129
Moluccans	26	35	35	.	.	.	.	.	.	.
Remaining Non-Western countries	10	33	64	435	366	400	429	467	505	622

Source: STATLINE, CBS.NL, cited in Engelen, 'The Economic Incorporation of Immigrants: The Netherlands', p.3.

Whilst the labour-intensive industrial sector and the expansion of the service sector during the late sixties and seventies created a demand for Turkish and Moroccan workers, the economic crisis of 1980 signalled an economic reconstruction that significantly changed the position of immigrants in the labour market, and by 1983 unemployment levels among Turkish and Moroccan men rose to one in three (Tesser and Dronkers, forthcoming). In the mid-1990s unemployment among minorities did decrease, yet in 1998 the risk of unemployment for members of ethnic minorities remained between two and seven times higher than for the Dutch native labour force (Tesser and Dronkers, forthcoming). By the end of the 1990s the unemployment rate among different minorities in the Netherlands was between 22 and 25 per cent and therefore between three and five times higher than the indigenous majority population (Kang You and Mulder, 2000). This is variously attributed to either supply-side problems of lower educational attainments, poor command of the Dutch language and lack of social networks in the labour market, or to direct and indirect discrimination. Research shows that around one-third of personnel staff acknowledge that they discriminate in recruitment and selection. Positive action policies in the Netherlands are limited to employment and do not relate to education, such as admissions policies in schools and universities (Kang You and Mulder, 2000).

**Table 4.5 Ethnic minority unemployment in the Netherlands**

	1994	1995	2000	2001	2002
Turks	22	21	9	8	9
Moroccans	29	32	13	10	10
Surinamese	19	19	9	6	8
Antillians	22	23	8	8	10
Overall	8	8	4	3	4

Source: STATLINE, CBS.NL, cited in Engelen, 2005.

The political context in the Netherlands changed following the electoral defeat of the left-centre coalition in 2001, which ushered in a populist, anti-immigration 'revolution' in the wake of the assassination of Pim Fortuyn. A new centre-right coalition of liberals and Christian-democrats was installed in May 2003.

### 4.3.2 Policies

In 1983 Article 1 was introduced into the Dutch Constitution, requiring that all persons be treated equally under equal circumstances. Since then three types of policy instruments have been used: **foundation agreements; affirmative action;** and **covenants** (Engelen 2002: 14).

**Foundation agreements** ('Stichtingsakkoorden') contained targets, time paths and suggestions for better recruitment and selection programs. They represent a corporatist strategy of allowing employers to regulate themselves, with the threat that legislation would be introduced should they fail to do so. When these agreements failed to yield expected results, statutory laws were introduced. The affirmative action statutory laws comprised *The Equal Treatment Act* and *The Law on the Encouragement of Proportional Labour Participation by Ethnic Minorities* (the *Equity Law*). Both came into effect in 1994. Covenants have been introduced more recently.

The Equal Treatment Act 1994 established an Equal Treatment Commission to interpret and enforce the law. This considers complaints and gives rulings on direct and indirect discrimination based on religion, personal conviction and views, political orientation, race, gender, nationality, sexual preference or marital status. In relation to employment, Article 5 of the Equal Treatment Act outlaws differential treatment in recruitment and selection procedures, the commencement or termination of employment, terms and conditions of employment and promotion. The act also outlines general exceptions to these principles of equal treatment on the grounds of race or nationality, where positive action is permitted because belonging to a particular ethnic or cultural minority group is seen as a determining factor.

The Law on the Encouragement of Proportional Labour Participation by Ethnic Minorities (the Equity Law) came into effect in June 1994. Employers in the public and private sectors with more than 35 employees were obliged to move towards the greater representation of ethnic minority groups within their workforces. (This was not initially a general provision and did not extend to cover women or disabled people, but has since been amended by the EC Implementation Act 2004.) Employers are required to register the ethnic identity of their staff, not by self-identification, but with reference to the 'native country' of the employees or their parents. They are also required to provide data on workforce ethnic representation and develop plans for improvements in employment equity, in co-operation with workers' councils. The ethnic representation statistics must be annually reported to chambers of commerce, where they can be checked and made public by ethnic minorities or other interested parties. However, the action plans are not disclosed to the public and must be lodged with state funded employment agencies. This

legislation focused on the creation of an ethnic map of composition of the labour force, while effectiveness in terms of extra employment for migrants is hardly measured at all (Engelen 2002: 16).

The third, and most recent, type of policy instrument is the **covenant** – a non-binding contract between two parties. This includes **Large Corporation Covenants** and **Minorities Covenants**. The **Large Corporation Covenant** operates between the government and a number of large Dutch firms. Under this scheme the trade association set up a central co-ordination unit where employers report their vacancies, while the labour exchanges guaranteed to ensure that a qualified jobseeker would apply for the job within 72 hours, and that two out of three applicants would be migrants. The **Minorities Covenant** dates from 18 April 2000 and was intended to help 30,000 registered unemployed migrants to find employment in the small and medium-sized business sector, of which at least half were supposed to be permanent (longer than six months). A central coordination unit where employers report their vacancies was established, while labour exchanges ensured that a qualified jobseeker would apply for the job within 72 hours. The labour exchanges guaranteed that of each three applicants, two would be migrants. The programme was supported by a publicity campaign, consisting of multi-lingual brochures, a website and a newsletter.

### 4.3.3 Evaluation

In 1990 the first *Foundation Agreement* was reached by labour unions and employer associations to create 60,000 additional jobs for migrants, aiming at proportional employment within five years. As a result the government postponed its legislative proposals. However, the Foundation Agreement did not contain specific goals or timetables, nor did it prescribe methods or instruments (Engelen 2002: 14). Only 35 per cent of all firms have made 'standard setting schedules' and of those only 19 per cent mentioned the Foundation Agreement as a reason for doing so. When this agreement failed to yield the expected results, the Government introduced affirmative action statutory laws.

The Dutch *Equity Law* does not command broad consent, having been criticised since its inception by employer's organisations, which favoured integration of ethnic minority groups through education to improve their qualification levels. They saw the law as a 'bureaucratic monstrosity', which would cost too much and would not achieve the desired effect (Glastra *et al.*, 1998). Whilst debates about affirmative action in the US have focused on issues to do with meritocracy, in the Netherlands debate centred on the extent of the administrative burdens. The Equity Law also lacked legitimacy because the initiative came from the opposition, and because the program was exclusively a matter of the **Department of Social Affairs** and was hence perceived as a 'soft' issue (Engelen, 2005: 10). Even though firms could be tried under criminal law for lack of compliance, only a small minority complied fully. The first two years of the Equity Law were evaluated at the end of 1996. It was shown that whilst 57 per cent of employers had complied with the requirement to register ethnic minority employees and that 26 per cent had filed their annual

reports at the chamber of commerce, only 12 per cent had produced action plans (Glastra *et al.*, 1998:170). Moreover, some scholars suggest that only 14 per cent of employers complied **fully** with the provisions (Kang You and Mulder, 2000: 176). No legal action was taken against any employer. Minority group organisations and state funded employment agencies did not undertake any monitoring of the statistics or actions out of concerns that this might affect their relationships with employers. This reluctance to engage was attributed by researchers to the '...dominant opinion among employers, that the weak position of ethnic minority groups on the labour market was a supply-side rather than a demand-side problem.' (Glastra *et al.*, 1998: 171) Because the program did not provide for control and enforcement mechanisms, employers were tempted to think that sanctions would not be forthcoming, as was indeed the case

In response to this, the Government overhauled the programme in 1997, extending it to all minorities and aiming to reduce the bureaucratic burden on employers, and making non-compliance into a civil, rather than a criminal, law issue. This new programme is thought to have resulted in increased rates of compliance, with 75 per cent of employers now reporting on the ethnic composition of its workforce (Engelen 2002:18). Nearly 57 per cent of all firms did mention that specific measures had been undertaken, but these consisted mainly of courses in multiculturalism for personnel managers (Engelen, 2005:11). However, its effectiveness is more debateable. A recent study, which considered the impact of legal instruments designed to reduce the discrepancy in the labour market position of ethnic minorities, found them to have had only a 'limited positive effect...', and to have been, 'observed in letter but not in spirit.' (Houtzager and Rodrigues, 2002: 5).

Drawing on the *Social Position and Facilities Use of Ethnic Minorities (SPVA)* data sets (1988, 1991, 1994 and 1998) of the four largest immigrant ethnic minority groups (Turks, Moroccans, Surinamese and Antilleans), Tesser and Dronkers find that:

- all four groups tend to have lower levels of education than the indigenous population in both first and second generations, with the Turks and Moroccans heavily concentrated in the lowest educational level;
- Turks and Moroccans are concentrated in the manual workers category, Surinamese and Antilleans in the routine non-manual category, and indigenous workers in the salariat category;
- being a male member of a first-generation ethnic minority group reduces the labour market participation to about 50 per cent compared to that of the indigenous male population. However, the lower-educated migrants (especially the first generation Turks, Moroccans and Surinamese) have higher labour market participation than equally low-educated indigenous men;
- second-generation men have better chances of entering the higher classes of Dutch society than first-generation men, but there still appears to be closure of the salariat class. This is also true, albeit to a lesser degree, for second-generation female migrants.

Overall, they conclude that minority men have consistently lower rates of labour market participation than do indigenous men and their risk of unemployment is consistently higher, though for women the patterns of participation and unemployment are more complex. Whilst the chances of being in a particular occupational class are generally the same as for second-generation ethnic minorities as for indigenous population, the salariat remains more closed to migrants. First-generation migrants also have lower incomes than the indigenous population, though some second-generation ethnic groups who have an unskilled job have higher incomes than the comparable indigenous people.

Recent evaluations suggest that the **covenants** may have been effective, though it is hard to disentangle their effect from the impact of the business cycle (Engelen 2002: 19). By April 2001, 30,000 vacancies had been reported of which 18,000 had been filled, 80 per cent by migrants. Due to this success the employer association prolonged the project until January 2003 and offered another 13,000 vacancies and this target was reached: by 9 December 2002, when the program was officially closed, 78,000 vacancies had been offered of which 62,000 had been filled by immigrants. In addition, 63 per cent of the immigrants were still at work a year after they had taken up their job (though only half of these were still working for the same employer) (Engelen, 2005: 14). A recent report suggests that these successes were due to the **directness** of the approach: by using mobile sound systems near Turkish tearooms and mosques, local labour exchanges were able to reach clients directly. In addition, labour exchanges had appointed 250 counsellors to support migrants during the interview, which proved to be an effective means of overcoming ethnic stereotyping (Engelen, 2005:14).

In terms of the impact of these policies, it is clear that unemployment among the immigrant groups targeted by Foundation agreements, Equity legislation and covenants has declined substantially during the 1990s, but has subsequently levelled out since 2001 (see Table 4.5). Significantly, ethnic minority unemployment rates continue to be three times higher than those for non-ethnic minority Dutch. Engelen suggests that 'there are good **theoretical** reasons to suggest that these successes are primarily due to the business cycle, suggesting that the slow growth of 1.2 per cent in 2001, 0.2 per cent in 2002, zero per cent in 2003 and one per cent in 2004 will result in a substantial rise in unemployment, especially among immigrants' (2005: 15).

Another recent study of ethnic wage differentials in the Netherlands found that immigrant workers earn 10.2 per cent lower wages than non-immigrant workers. This was partly attributed to lower human capital, but the report suggests that 42 per cent of the wage difference was due to discrimination (Zorlu, 2002). This suggests that the discrimination continues to be a problem in the Netherlands.

So, whilst the second half of the 1990s saw improvements in the position of ethnic minorities in the labour market (see Table 4.5), there was still a structural disadvantage for these groups and it now appears that the situation is getting worse. For example, in 2000 unemployment was nearly four times higher amongst ethnic minorities (at

11 per cent) than in the native Dutch population (at three per cent) (Houtzager and Rodrigues, 2002). Nonetheless, despite the growing unemployment rates among immigrants since 2001, the Dutch government has announced that the affirmative action program will not be continued, because compliance is high and the duty to report is at odds with the aim to diminish red tape (Engelen, 2005: 12). In its place the Government proposes a set of voluntary measures aimed at facilitating private initiatives, including 'diversity contracts' with employer organisations, the establishment of a national 'Centre for the management of diversity', and the extension of voluntary 'covenants'.

#### **4.3.4 Lessons for Britain**

The developments in the Netherlands suggest that neither the introduction of voluntary agreements nor race equality laws necessarily guarantee results, and that political will is also needed. Employment equity measures need to be backed up by enforcement mechanisms if employers are to comply.

They also need to be bureaucracy-light if employers are to embrace the scheme with any degree of enthusiasm. Too much red-tape risks alienating employers

It also suggests that attention needs to be paid to 'supply-side' issues, ensuring that ethnic minority job skills levels are addressed. This in turn suggests that race equality policies that target the labour market without due regard to education and skills training are less likely to be successful. Education and skills training needs to be addressed

Finally, the experience of the Netherlands suggests that the small-scale direct approach adopted for the covenants can be highly effective in addressing high levels of ethnic minority unemployment. In particular, schemes that facilitate co-ordination between employers with vacancies and labour exchanges with access to ethnic minority jobseekers can increase ethnic minority employment rates.

#### **Lessons for Britain**

- Employment equity measures need to be backed up by enforcement mechanisms if employers are to comply.
- Too much red-tape risks alienating employers.
- Supply-side issues of education and skills training need to be addressed if employment policies are to be successful.
- Schemes that facilitate co-ordination between employers with vacancies and labour exchanges with access to ethnic minority jobseekers can increase ethnic minority employment rates.

## 4.4 Positive action in Northern Ireland

### 4.4.1 Context

'While legislation against religious discrimination has always played an important role in Ireland, racial discrimination was regarded as irrelevant for a long time' (Blaschke and Schlenzka, 2001: 189). It was not until the end of the nineties that there was legislation prohibiting race discrimination in employment in Northern Ireland. Although, the Unfair Dismissal of 1977 (reformed in 1993) could be used as protection because dismissals could be held unfair on the grounds of race, colour, age, religious or political opinion or sexual orientation. In 1998 the Employment Equality Act came into force and the Equal Status Act in 2000, and these prohibited discrimination in employment, vocational training, advertising, collective agreements, education, accommodation, and the provision of goods and services (Blascke and Schlenzka, 2001).

The reason for the inclusion of Northern Ireland is that work done on religious discrimination there may have powerful lessons for the rest of the EU. It has been said that 'since the enactment of the Fair Employment (Northern Ireland) Act (FEA) 1989, Northern Ireland has been perceived to be in the vanguard of Employment equality law in the UK and indeed within the European Union.' (Industrial Law Journal 1999: 336)

The *Fair Employment Act* was introduced in response to concerns about employment equality generated by the long-standing religious conflict in Northern Ireland, which dates back to 1921 when it was created as an independent state, following a protracted civil war. The civil disorder of the late 1960s led to the sending in of troops by the British Labour government in 1969. Although initially welcomed by the Catholic population, these troops became the target of the Provisional IRA and when the local Northern Irish government appeared to lose control of the situation the Westminster parliament invoked the Government of Ireland Act 1920, imposed direct rule and suspended the NI government. Tensions between the Protestant and Catholic communities extended to the sphere of employment, where there were persistent concerns about religious discrimination.

It is generally accepted that there has been a significant increase in the proportion of Catholics in Northern Ireland since 1971, from around 35 per cent, to estimates of between 40.6 and 43.9 per cent in 1995. In 1993, half of the Northern Ireland population was thought to live in wards with more than 90 per cent Protestant or 90 per cent Catholic; and since 1971 the number of predominantly Catholic wards had almost trebled to 120 whilst wards almost exclusively Protestant had doubled to 115 (Anderson and Shuttleworth, 1998).

#### 4.4.2 Policies

The Fair Employment Act is a unique religious and political anti-discrimination law, which makes discrimination on grounds of perceived religious affiliation and/or political opinion unlawful in employment. The act also makes discrimination unlawful in other areas, including goods facilities and services, the sale or management of land or property, further and higher education, and partnerships and barristers. The legislation is constructed in similar terms to the Race Relations, Sex Discrimination and Disability Discrimination Acts, and covers direct discrimination, indirect discrimination and victimisation. The Northern Ireland Fair Employment legislation differs from these in that it specifically allows affirmative action.

To ensure that fair employment is actively pursued in Northern Ireland, the law imposes five duties on employers with eleven or more employees:

- registration with the Equality Commission;
- monitoring of the religious composition of the workforce and applicants for posts and submission of returns to Equality Commission on an annual basis;
- reviewing of the composition of the workforce and employment practices every three years to ensure that each community enjoys fair participation in employment;
- to take affirmative action where under-representation of one community is identified within the workforce;
- the setting of goals and timetables to assist in the evaluation of progress towards fair participation.

#### 4.4.3 Evaluation

Recent studies have engaged in an empirical assessment of this Act and analysed the patterns of affirmative action agreements between the Fair Employment Commission and employers in Northern Ireland between 1990 and 2000 (see Heaton and Teague, 1997; Osborne and Shuttleworth 2004; McCrudden *et al.*, 2004). Their findings are summarised below.

Writing in 1997, Heaton and Teague argued that since 1989 the institutional and legal framework had created the potential for real improvement, although this could be undermined by economic and social conditions. They argued that the pursuit of Catholic labour market equality had been placed in a positive institutional context, but that this was against the backdrop of negative ground level circumstances. It was concluded that this underlying tension could be better managed in a climate of peace.

More recently, Osborne and Shuttleworth (2004) considered the effects of the legislation 'a generation on'. They address the following key issues in relation to Fair Employment in Northern Ireland:



- Changes in the labour market over the last quarter century in terms of the types of jobs that exist.
- Whether the employment profiles of Catholics and Protestants have changed.
- The influence of educational qualifications in chances of employment and types of job, and whether Protestants and Catholics have the same levels of qualifications.
- The chances of people doing better than their parents in the job market.
- The importance of grievance mechanisms for individuals who feel they have been treated unfairly.
- The success of affirmative action measures in securing change.
- Public perceptions about fair employment legislation and equality.

The main finding was that there has been major change in fair employment since the mid-70s and that is markedly different from things over a quarter of a century ago. Indeed there has been a substantial improvement in the employment profile of Catholics (Osborne and Shuttleworth, 2004), who are now well represented in managerial, professional and senior administrative positions. Although there are some areas of under-representation, such as in local government and security, the general picture emerging is a positive one. However, Catholics are still more likely to be unemployed than Protestants, and there are areas of Protestant under-representation emerging in the public sector, notably in health and education. Whilst, generally speaking, workplaces are becoming more integrated places, public housing remains almost completely segregated.

The 14<sup>th</sup> Annual Monitoring Report for 2003 contains details of all monitored employment, which accounts for 72 per cent of employee jobs. Certain groups are not monitored: self-employed persons, those on government training schemes, the unemployed, school teachers and those organisations with ten or less employees. The monitored workforce now comprises public and private, and full and part-time workforces. The total number of employees monitored stands at 486,420, which represents an increase of 5,303 (1.1 per cent) on the corresponding figure for 2002. Of those for whom a community composition could be determined, 58.3 per cent were Protestant and 41.7 per cent were Roman Catholic. This compares with a Roman Catholic population of 42.7 per cent of those of working age available for work, according to the Census of Population 2001. If these figures are compared with the same sections of the monitored workforce in 1990 we find that the Roman Catholic share has increased by 5.9 per cent (6.2 for males and 5.1 for females) (Equality Commission for Northern Ireland, 2004).

The educational qualification levels of Catholics and Protestants are now essentially the same. However there is evidence that Protestants from poorer backgrounds do less well than Catholics with similar backgrounds. The long standing tendency of Protestants to go to universities and colleges in Britain and not to return means that

it is increasingly likely that Catholic graduates are competing with each other for higher level jobs in Northern Ireland. Previously, community background had largely determined the chances of individuals faring better than their parents in the job market. Now the evidence points to education as the main criterion affecting social mobility, with religion playing no independent role.

According to Osborne and Shuttleworth, both Catholics and Protestants are broadly supportive of the fair employment and equality strategies. However, increasing numbers of Protestants are now expressing concerns about their positions in the workplace. They find clear evidence of real social change resulting in part from the imposition of the fair employment legislation.

In another study, McCrudden *et al.* consider changes in the religio-political compositions of workforces, comparing the data on those employers that had agreements with the Commission and those that did not. They found that those organisations that had agreements with the Commission were able to show demonstrable change during the decade and concluded that the agreements were an integral part of the processes that created change in the Northern Ireland labour market during the 1990s<sup>3</sup>.

They point out that although changes in employment are observed, questions remain about the quality of jobs taken up: noting that representation may be taking place at the 'lowest rungs of the career ladder' (McCrudden *et al.*, 2004: 414). In fact, they conclude that there is: '...a great deal we do not know about the impact of other methods of securing compliance with the fair employment legislation other than the securing of affirmative action agreements.' (McCrudden *et al.*, 2004: 414) They acknowledge that they do not know the extent to which individual anti-discrimination litigation or wider non-governmental activity may have played a part in the process of change, and suggest that more could be learnt about the day-to-day policies and priorities engaged by the Fair Employment Commission employees working with firms. Another issue raised is how the creation of the Equality Commission Northern Ireland, which took over the Fair Employment Commission's employment responsibilities but with a broader remit, affects things. Nevertheless, they 'tentatively' point towards a connection between the activities of the Fair Employment Commission and changes in employment patterns.

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<sup>3</sup> However, one should note that this does not in itself constitute strong evidence to show that the agreements themselves made a difference. The pattern might be explained by selection: organisations that entered into agreements would probably be more progressive and more inclined to achieve equal opportunities than those that did not.

#### 4.4.4 Lessons for Britain

The developments in Northern Ireland suggest that the introduction of proactive equality instruments accompanied by the political will to bring about social change can have a significant impact on employment equity. Whilst the available research does not establish a direct causal link between the introduction of the Fair Employment Act and greater employment equity in Northern Ireland, it is not unreasonable to conclude that to a greater or lesser degree, it was the combination of wider attempts to end the conflict, and to actively tackle discrimination in the workplace that have resulted in significant social change.

The case of Northern Ireland and positive action on religious equality in employment may also be particularly pertinent for Britain at a time when many Muslims, Sikhs and others complain of religious discrimination, when the most disadvantaged groups in the labour market are Muslims, and when discussion about Muslims and integration is dominating the agendas of the Commission for Racial Equality and others.

##### **Lessons for Britain**

The introduction of proactive equality instruments accompanied by the political will to bring about social change can have an observable impact on employment equity.

Positive action programmes should consider both religious and ethnic minority equality measures.



## 5 Affirmative action in the United States

*'Discrimination in education was the target of the original breakthrough civil rights cases. Indeed, because education is the gateway to opportunity, education has consistently been a central focus of civil rights efforts.'*

(Stephanopolous and Edley, 1995: 11)

The 'unlovely racial history of the United States' (Fryer Jr. and Loury, 2005), rooted in plantation slavery and the historical persistence of race inequality, coupled with the demands and struggles of the civil rights movement, have precipitated advances in affirmative action policy within the United States (US). Many more black people are now in professional and administrative positions and attending college in the United States than was the case in the 1960s. This is, in part, due to the imposition of affirmative action policies, which nonetheless remain deeply controversial within the US. Legal and constitutional questions have been raised, and the precise notion of equal opportunity upon which they rely has been challenged over the years (Beckwith and Jones, 1997).

The actual phrase 'affirmative action' was first used in President J.F. Kennedy's 1961 Executive Order 10925, which required federal contractors to take 'affirmative action to ensure that applicants are treated equally without regard to race, colour, religion, sex or national origin'. Since its inception, affirmative action has generated controversy. Early debates in the 1970s and 1980s tended to focus on the pros and cons of the general principle of affirmative action in relation to both gender and race in the fields of both employment and education. However, debate has increasingly tended to focus on college admissions in particular, and given that women now constitute 57 per cent of all college students, this means that the college admissions debate has focused primarily on race and ethnicity. As a result, whilst there is a distinct literature on employment related affirmative action, this is smaller than – and frequently intertwined with – the education admissions debate.

This section of the report will first outline the key landmarks in the development of US affirmative action policies, and survey a range of affirmative action policies currently implemented in the US. It will then summarise the debates for and against affirmative action programme, considering the college admissions debate where relevant, whilst focusing on employment issues. Finally, it will detail existing research on the impact of the policies on ethnic minority employment rates.

## 5.1 Context: the development of affirmative action

*'The need for affirmative action derives from a structural deficit reflected in the long-standing absence of a 'level playing field.'*

(Ratcliffe, 2004:143)

Immigrants currently represent 11.1 per cent of the US population. This means that the USA has the largest immigrant population in absolute numbers in the world (though the proportion is smaller than Canada, which has 17 per cent, and Australia, which has 22.5 per cent) (U.S. Bureau of the Census 2000, cited in Model and Fisher, forthcoming).

Early immigration was predominantly from Europe, but is now primarily from Africa, Asia, and Latin America. There are four main ethnic minority groups in the United States: African Americans (Blacks), Hispanics, Asians and Pacific islanders and American Indians. African Americans are concentrated in the southern states, and some Northern cities, such as Chicago, New York and Washington DC. Hispanics, the most numerous and rapidly increasing non-white group in the US, are mainly concentrated in the south and south-western states, though the Cuban community is concentrated in Florida. Asians and Pacific Islanders are concentrated in California. American Indians now represent a very small minority, mainly concentrated in, or near, reservations in the western states of Oklahoma, Arizona, California and Alaska.

Model and Fisher suggest that US immigration policy differs from many key immigration countries in allowing large numbers of migrants to enter irrespective of their employment prospects. US immigration policy also takes into account humanitarian considerations such as family reunion and political asylum.

The main body of US employment discrimination laws is composed of federal and state statutes. The United States Constitution and some state constitutions provide additional protection where the employer is a governmental body or the government has taken significant steps to foster the discriminatory practice of the employer.

In the employment context, the right of equal protection limits the power of the state and federal governments to discriminate in their employment practices by treating employees, former employees, or job applicants unequally because of group membership (including race or sex). State constitutions may also afford protection from employment discrimination.

Affirmative action is not a single policy, but is a combination of legislation and court rulings (see Holzer and Neumark, 2000: 485 for details of key executive orders, regulations, and court decisions regarding affirmative action in the labour market). We list below some of the key legislative and policy landmarks that have shaped the development of affirmative action in the US in relation to employment policies. We have not included the college admissions related developments, though these have been significant.

**Table 5.1 US Equal Employment Opportunity Laws**

**1791/1868. The Fifth and Fourteenth Amendments of the United States Constitution**

These amendments limit the power of the federal and state governments to discriminate. The Fifth Amendment has an explicit requirement that the federal government not deprive individuals of 'life, liberty, or property', without due process of the law. It also contains an implicit guarantee that each person receives equal protection of the laws. The Fourteenth Amendment explicitly prohibits states from violating an individual's rights of due process and equal protection.

**1940-1. President Franklyn Roosevelt's Executive Order (E.O.) 8587 and 8802**

E.O. 8587 asserted the principle that public employment could not be denied for reason of race, creed or colour. E.O. 8802 bans discriminatory employment practices by Federal Agencies and all unions and companies engaged in war-related work. The Order also established the Fair Employment Practices Commission to enforce the policy.

**1961. President John F. Kennedy's Executive Order (E.O.) 10925**

This used affirmative action for the first time by instructing federal contractors to take 'affirmative action to ensure that applicants are treated equally without regard to race, colour, religion, sex, or national origin.' Created the Committee on Equal Employment Opportunity.

**1963. The Equal Pay Act**

This amended the Fair Labour Standards Act. The Equal Pay Act prohibits paying wages based on sex by employers and unions. It does not prohibit other discriminatory practices bias in hiring.

Continued

**Table 5.1 US Equal Employment Opportunity Laws****1964. Title VII of the Civil Rights Act**

This applies to most employers engaged in interstate commerce with more than 15 employees, labour organisations, and employment agencies. The Act prohibits discrimination based on race, colour, religion, sex or national origin. It makes it illegal for employers to discriminate in hiring, discharging, compensation, or terms, conditions, and privileges of employment. Employment agencies may not discriminate when hiring or referring applicants. Labour organisations are also prohibited from basing membership or union classifications on race, colour, religion, sex, or national origin. It established the Equal Employment Opportunity Commission (EEOC).

**1965. President Lyndon B. Johnson's Executive Order 11246**

This requires all government contractors and subcontractors to take affirmative action to expand job opportunities for minorities. The Office of Federal Contract Compliance (OFCC) in the Department of Labor was established to administer this order.

**1972. Equal Employment Opportunity Act**

This is an amendment to Title VII of the Civil Rights Act to include federal, state and local governments.

**1991. Civil Rights Act**

This reinstated the use of statistics regarding 'disparate impact' of hiring procedures (reversing the 'Wards Cove' decision on 1989) and the burden of proof on employers to justify their procedures if they create such impacts.

**1995. Affirmative Action Review**

President Bill Clinton reviewed all affirmative action guidelines by federal agencies and declared his support for affirmative action programs by announcing the Administration's policy of 'Mend it, don't end it.'

**State statutes**

These also provide extensive protection from employment discrimination. Some laws extend similar protection as provided by the federal acts to employers who are not covered by those statutes. Other statutes provide protection to groups not covered by the federal acts.

Sources: Legal Information Institute, Cornell University  
[http://www.law.cornell.edu/topics/employment\\_discrimination.html](http://www.law.cornell.edu/topics/employment_discrimination.html)  
 The U.S. Equal Employment Opportunity Commission: <<http://www.eeoc.gov/facts/>>

The Fifth Amendment is part of the Bill of Rights and was proposed by Congress in 1789 in response to concerns that the Constitution did not include adequate guarantees of civil liberties. It was ratified in 1791. The amendment has an explicit



requirement that the federal government not deprive individuals of 'life, liberty, or property', without due process of the law and contains an implicit guarantee that each person receives equal protection of the laws. The Fourteenth Amendment provides a broad definition of national citizenship, requiring states to provide equal protection under the law to all persons (not merely citizens) within their jurisdictions. The amendment was intended to ensure equal protection regardless of race.

Nonetheless, by the 1960s racial inequality remained a reality across the US. Blacks held few government positions, faced segregated private and public facilities (including restaurants, and public buses) and schooling and did not all have equal access to the vote. In his Presidential Inaugural Address in 1961 Kennedy promised to end racial discrimination. This was a period of intense civil rights activism, culminating in The Civil Rights Act of 1964, which made it unlawful for employers to fail to hire, discharge, or otherwise discriminate against any person in the terms, conditions, or privileges of employment because of their race, colour, religion, sex or national origin. Since then various legal challenges have been made and the legislation has not been without controversy.

A year later, following Kennedy's death, President Lyndon Johnson issued Executive Order 11246, which prohibits discrimination in hiring or employment opportunities on the basis of race, colour, gender, religion, and national origin<sup>4</sup>.

In addition to these equal employment opportunity laws and executive orders, affirmative action policies have developed via various Supreme Court rulings. We detail key rulings, which pertain to employment below.

## Table 5.2 Supreme Court Rulings

**1978.** The U.S. Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 912 (1978) upheld the use of race as one factor in choosing among qualified applicants for admission. At the same time, it also ruled unlawful the University Medical School's practice of reserving 18 seats in each entering class of 100 for disadvantaged minority students.

**1979.** The Supreme Court ruled in *United Steel Workers of America, AFL-CIO v. Weber*, 444 U.S. 889 (1979) that race-conscious affirmative action efforts designed to eliminate a conspicuous racial imbalance in an employer's workforce resulting from past discrimination are permissible if they are temporary and do not violate the rights of white employees.

Continued

<sup>4</sup> Given that 'religion' was omitted from the British 1976 Race Relations Act it is worth noting that discrimination on the basis of religion is prohibited under the Civil Rights Act of 1964. However, interestingly, religion appears to play no role in Affirmative Action in the US.

**Table 5.2 Continued**

**1987.** The Supreme Court ruled in *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1987) that a severe underrepresentation of women and minorities justified the use of race or sex as 'one factor' in choosing among qualified candidates.

**1989.** The Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) struck down Richmond's minority contracting program as unconstitutional, requiring that a state or local affirmative action program be supported by a 'compelling interest' and be narrowly tailored to ensure that the program furthers that interest.

**1995.** In *Adarand Constructors, Inc. v. Peña*, 513 U.S. 1012 (1995) the Supreme Court held that a federal affirmative action program remains constitutional when narrowly tailored to accomplish a compelling government interest such as remedying discrimination.

**2000.** In an effort to promote equal pay, the US Department of Labor promulgated new affirmative action regulations including an Equal Opportunity Survey, which requires federal contractors to report hiring, termination, promotions and compensation data by minority status and gender. This is the first time in history that employers have been required to report information regarding compensation by gender and minority status to the federal equal employment agencies.

**2003.** The Supreme Court ruled, in *Grutter v. Bollinger*, that race could be used as a criterion in school admissions and that it would not be in violation of the equal protection clause of the 14<sup>th</sup> Amendment. The Court found that the University of Michigan Law School's narrowly-tailored policy was constitutional and appropriate 'to further a compelling interest in obtaining the educational benefits that flow from a diverse study body.'

**2003.** The Supreme Court ruled, in *Gratz v. Bollinger*, that the University of Michigan's point-based undergraduate admissions policy that took race into account numerically was too mechanical and unconstitutional.

Source: Selected data from a table published in *In Motion Magazine*, October 12, 2003. Updated.

It has been suggested that the law of affirmative action, as handed down in twenty-five years of Supreme Court decisions, reflects the formal culture of contemporary race relations in the United States. Spann suggests that these Supreme Court decisions provide: '...the set of organising and interpretative categories that a group of people use to understand the world in which they live.' (Spann, 2000: 2). A brief consideration of the Supreme Court decisions on affirmative action of the past twenty-five years suggests that the policy remains deeply controversial throughout.

The establishment of racial quotas in the name of affirmative action brought charges of so-called 'reverse discrimination' in the late 1970s, which were upheld by the U.S. Supreme Court in *Regents of the University of California v. Bakke* (1978), which ruled the use of quotas illegal in university admissions<sup>5</sup>. Although the case of *United Steel Workers of America, AFL-CIO v. Weber* (1979) upheld the use of quotas in relation to voluntary affirmative-action programs in unions and private businesses, (see *United Steel Workers of America, AFL-CIO v. Weber*),<sup>6</sup> the Bakke rulings was widely interpreted as banning formal quotas in governmentally-required employment practices.

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<sup>5</sup> *Regents of the University of California v. Bakke* (1978): Bakke was a white 38 year-old engineer who decided to shift career and applied to university medical schools as a mature student. He was twice rejected by the University of California at Davis (UCD) in 1973 and 1974. Under the University Affirmative Action Program 16 out of the 100 first year places were reserved for students from economically and educationally disadvantaged minority groups. He pursued a case against the University on the grounds that its admissions policy was contrary to the equal protection clause of the Fourteenth Amendment of the Constitution. The Yolo County California Supreme Court held that the UCD had discriminated against him on the grounds of race. However the court did not make an order that he should be admitted. The decision was appealed by both parties, and in 1976 decided in his favour and the University was ordered to admit him. Although the court allowed the University to retain its policy pending a review by the US Supreme Court, this determined by a majority of five to four that the admissions policy was in contravention of Title VII of the Civil Rights Act 1964, and was therefore, illegal.

<sup>6</sup> *United Steel Workers v. Weber* (1979): Weber was a 32 year-old white employee of Kaiser Aluminium who claimed that the company policy to increase the numbers of minority employees was in contravention of Title VII. The Steelworkers union had through collective bargaining with their employer, agreed an affirmative action programme. This had been brought about because in the first ten years of its existence the company had less than ten per cent black people in its workforce compared to a local labour market of 40 per cent. As part of its programme, black people and women were to be admitted to better paid skilled jobs, through admission to a training programme on a fifty-fifty basis, with one minority or women worker for every one white male. Weber was turned down for the training programme as he did not have enough seniority, even though he had more than some of the black people who were successful. After unsuccessfully pursuing the matter through his union's grievance procedures and the EEOC he pursued a class action on behalf of all white workers at Kaiser. The case was upheld by the Federal District Court on the basis that those black workers who were benefiting from the programme were not actually victims of discrimination in themselves. It was decided in the US Supreme Court that the company policy did not contravene Title VII and was therefore legal.

The 1980s saw a reduction in the federal government's role in affirmative action. In three cases in 1989, the Supreme Court undercut court-approved affirmative action plans by endorsing claims of reverse discrimination, by invalidating the use of minority set-asides where past discrimination against minority contractors was unproven, and by restricting the use of statistics to prove discrimination, since statistics did not prove intent (see, for example, *City of Richmond v. J.A. Croson Co.*)

A 1995 Supreme Court decision placed limits on the use of race in awarding government contracts (see *Adarand Constructors, Inc. v. Peña*)<sup>7</sup>. They ruled that race-sensitive affirmative action in the context of public contracting can be justified as a means of remedying past discrimination by the specific public entity if the appropriate factual predicate is established. Significantly, the Court also emphasised the importance of shaping such an affirmative action program so that it is **narrowly tailored**: it must involve flexible numerical goals (if any) rather than quotas, must be revisited periodically to ensure the program remains necessary, and should, if feasible, not be racially exclusive.

Whilst some have questioned the appropriateness of the Supreme Court's role in the social policy process (see Spann 2000), it does appear that the Supreme Court decision-making process largely replicates the political decision-making process, and that both have held an ambivalent and oscillating approach to affirmative action programmes. As Kelly and Dobbin, note '...neither Bush nor Clinton offered unqualified support' for affirmative action' (1998: 963). Indeed they suggest that: 'Clinton dealt a greater blow to anti-discrimination law in some ways, for he was the first Democratic leader to offer tepid support.' (Kelly and Dobbin, 1998: 972) Others suggest that 1995, which was marked by both the Clinton policy review and the Supreme Court ruling in the *Adarand* case, provided the framework for a thorough assessment of federal agency programs, some of which were revised ('mended') or eliminated (Edley, 2005). Edley suggests that the *Adarand* ruling and the Clinton Review combined ended serious efforts among Republicans in Congress, and then in the Bush Administration, to dismantle Federal affirmative action programmes.

Nonetheless, in November 1995 California voters approved a ballot initiative (Proposition 209), which amended that state's constitution to prohibit voluntary public sector affirmative action, even if such policies would be **permissible** under the U.S. Constitution and federal law (Edley, 2005). This Proposition remains in

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<sup>7</sup> *Adarand Constructors, Inc. v. Peña* (1995): In this case, a contractor argued that federal government use of race specifically for preferential treatment in the granting of highway construction contracts contravened his constitutional right to due process and equal protection. The Supreme Court applied a strict scrutiny requirement in the determining of allocation of government contracts. This means that the use of benign and invidious race classification must be necessary and narrowly tailored for the achievement of a 'compelling government interest'. In other words, the use of race in the allocation of contracts became more restrictive.

force, and its detractors argue that it is responsible for a significant decline in the number of government contracts awarded to minority-owned businesses in California. In addition, in the spring of 1996, a three-judge panel of the United States Court of Appeals for the Fifth Circuit (covering Texas, Louisiana and Mississippi) ruled that the race-conscious affirmative action program at the University of Texas (Austin) Law School violated the Equal Protection Clause of the U.S. Constitution. This *Hopwood* case asked whether **diversity**, rather than **remediation**, could provide a constitutionally acceptable justification for affirmative action. Although the panel ruled that it could not, 'observers predicted that the 1996 *Hopwood* holding would inevitably reach the U.S. Supreme Court because that Fifth Circuit interpretation of the Equal Protection Clause was inconsistent with decisions in other parts of the country before and since, and also because countless organisations, public and private, were, by the 1990s, strongly committed to affirmative action policies' (Edley, 2005).

In the late 1990s, there was a public backlash against perceived 'reverse discrimination', with California and other states banning the use of race- and sex-based preferences in state and local programmes. However, a 2003 Supreme Court decision concerning affirmative action in universities (*Grutter v. Bollinger*) allowed educational institutions to consider race as a factor in admitting students as long as it was not used in a mechanical, formulaic manner. The decisions in both *Grutter v. Bollinger* and *Gratz v. Bollinger*, two University of Michigan cases decided by the U.S. Supreme Court in mid-2003, overturned the ruling in *Hopwood* and established that promoting diversity or inclusion *can* provide the compelling interest needed to justify race-sensitive admissions decisions, **provided** those diversity policies are narrowly tailored (Edley, 2005).

More recently, in light of public debate, Supreme Court rulings and the Clinton Affirmative Action Review, there has been a trend towards developing 'soft' affirmative action programmes, which do not rely on numerical targets and quotas. For instance, many institutions have promoted diversity in the workforce as voluntary affirmative action plans. There is much greater support for these types of affirmative action programmes, not least because there is evidence that promoting workforce diversity is correlated with high quality employees, reduced rates of absenteeism, and increased customer satisfaction (Beauchamp 1998:152-3).

The US has witnessed an increasing emphasis on diversity policies as an important complement to equal opportunity policies (Price 2003). These diversity initiatives are widely argued to improve the quality of organisations' workforces and act as a catalyst for a better return on companies' investment in human capital. They are also argued to help businesses to capitalise on new markets, attract the best and the brightest employees, increase creativity, and keep the organisation flexible (see Cartwright 2001). Tapping into the benefits of diversity requires new managerial practices, which recognise that 'there will be different personalities and aspirations' within any workforce (2001, 2). It is common to find advocates emphasising the business case for diversity. 'Under this scenario, capitalising on diversity is seen as a

strategic approach to business that contributes to organisational goals such as profits and productivity. It also does not involve any legal requirements and is not implemented just to avoid lawsuits. Managing diversity moves beyond valuing diversity in that it is a way in which to do business and should be aligned with other organisational strategic plans.' (Society for Human Resource Management, 2004) Diversity management is therefore most frequently represented as distinct to an equal opportunities or affirmative action approach, which are depicted as based in earlier social justice arguments. Diversity management, by contrast, is usually cast as a managerial strategy rather than a social justice measure (Noon, 2005). Critics fear that this approach may undermine advances made by affirmative action policies, not least because it may entail an economic-based rationale for discrimination in some cases (Noon, 2005; Wrench, 2005), though in practice, diversity management tends to be viewed as a complement to affirmative action procedures rather than a substitute.

It should also be noted that while there is an extensive debate as to the merits of diversity management (Kelly and Dobbin, 1998; Grossman, 2000; Kersten, 2000), the notion of diversity itself as a 'compelling state interest' plays a significant role in affirmative action debates. Indeed, the need for affirmative action is frequently justified by the perceived need for diversity, with Supreme Court Justice Lewis Powell's defense of affirmative action in the Bakke case in 1978 and Justice Sandra Day O'Connor's defense in the Grutter case in 2003, relying heavily on the argument that diversity is a 'compelling state interest' (Holzer, 2006).

## 5.2 Policies: the implementation of affirmative action

As a result of this development of equal employment opportunity legislation, there are currently four main types of affirmative action in the employment sphere:

- **Affirmative action required by Federal Contractors (Contract compliance)**

This provision dates back to a 1941 executive order that barred race discrimination in Federal and war industries, issued by President Franklyn Roosevelt. As a result of the long history of executive orders, to win lucrative Federal contracts companies must now identify and eliminate discriminatory employment practices. In particular, Executive Order 11246 directs that contractors on federally funded projects 'take affirmative action to ensure that applicants are employed, and employees are treated during their employment, without regard to the race, creed, colour, or national origin'. (Mosley and Capaldi, 1996) It applies to all contractors and subcontractors holding any federal or federally assisted contracts above a set annual minimum amount (currently \$50,000). The Executive Order also requires Government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment. The Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor enforces Executive Order 11246.

- **Affirmative Action in Government Agencies**

Executive Order 11246 also requires Government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment. By 1989, at least 35 states and the District of Columbia were covered by executive orders or statutes that required them to instigate affirmative action in employment. They apply to all state agencies, state universities, state contractors and subcontractors. In 1986, cities and counties with populations over 100,000 were surveyed and this showed that more than four out of five required affirmative action in public employment. Enforcement varies greatly, but in the mid-1990s there were approximately five million workers in state and local government employment.

- **Court-Ordered Affirmative Action**

Federal Courts also order affirmative action under the Equal Employment Opportunity Act 1972, which is an amendment to Title VII of the Civil Rights Act. This power applies where a firm is found guilty of discrimination and is required by the court to adopt affirmative action. The courts can also implement affirmative action through negotiated settlement of a discrimination case, by a consent decree. The EEOC, established by Title VII of the Civil Rights Act of 1964, interprets and enforces the Equal Payment Act, Age Discrimination in Employment Act, Title VII, Americans with Disabilities Act, and sections of the Rehabilitation Act.

- **Voluntary Affirmative Action**

Some affirmative action also results from voluntary activities by employers. Survey data suggests that many more employers engage in some form of voluntary affirmative action than are required to do so by executive orders or the courts. There is growing support for affirmative action in the corporate community, with many affirmative action procedures viewed as a means of tapping talent (as testified by the briefs filed by the business community in support of the University of Michigan during the Gratz and Grutter cases; see also the discussion below under 'Changing Cultural Attitudes').

The origins and legal status of each of these four types of affirmative action vary, but they all share an emphasis on procedures and policies designed to ensure fairness (Reskin, 1998).

McCrudden (2004) traces the use of government contracting as a mechanism for social regulation back to 19<sup>th</sup> century Europe and North America, focusing in particular on labour standards and unemployment issues. He uses the term 'linkage' to refer to the use of government contracts as a mechanism for achieving desired social policy outcomes, in preference to 'conditionality' in order to capture the diverse and integral ways in which procurement and social policy are linked together, beyond the simple award of contracts on the basis of satisfying certain conditions. Indeed, he suggests that it is the manner in which contracts are defined, the specific qualifications of the contractors and the award criteria which are crucial.

In relation to affirmative action in the US in mid to late 60s, McCrudden argues (McCrudden, 2004: 260) that it went beyond enforcing a prohibition on discrimination to include proactive measures for achieving equality, and resulted from:

- court findings that unlawful discrimination had taken place and that 'affirmative action' be adopted by the discriminator as a remedy; or
- as settlements adopted to end legal action which alleged such discrimination; or
- administrative findings that there were was 'under-representation' and this required the adoption of 'affirmative action' to tackle the situation.

The OFCCP is responsible for ensuring that employers doing business with the Federal government comply with the laws and regulations requiring non-discrimination. It also monitors contractor and subcontractor compliance with the non-discrimination and affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) 1974. The agency aims to:

- prioritise enforcement resources by focusing on the worst offenders;
- encourage employers to engage in self-audits of their employment practices;
- achieve maximum leverage of resources to protect the greatest number of workers from discrimination.

Firms doing a significant amount of business with the federal government are required to report annually to the OFCCP on their employment of both women and minority workers by major occupational group, and to compare these rates with the availability of such workers. They are also required to have an affirmative action programme with numerical goals and timetables for meeting the target of employing these workers in accordance with their availability (see Bergmann, 1996:53-9).

### 5.3 Evaluation: the impact of affirmative action policies

*'Many activists on both sides of the Affirmative Action issue approach it purely as a moral issue – one based clearly on a priori arguments about right and wrong. In some cases, the activists' views are heavily shaped by their own experiences and values – as perhaps they should be. But it is my belief that the future of Affirmative Action, and especially our views on the desirability of preserving these policies, should also be based on the social scientific evidence regarding its effects.'*

(Holzer, 2004:1)

In 1995 President Clinton commissioned an Affirmative Action Review with the aim of establishing, firstly, what kinds of Federal programs and initiatives were in place, and how they were designed and secondly, what was known about their effects both to the specified beneficiaries and to others (Stephanopolous and Edley, 1995). The Review included consideration of the history of affirmative action programmes, and evidence of continuing discrimination. The Review focused on whether the programmes were fair and whether they worked.



In order to assess whether the programmes were fair, they asked five central questions:

1. Does the programme effectively avoid quotas for inclusion of racial minorities?
2. In a programme's design or reconsideration, have options for using various race-neutral decision factors been analysed? Were options reasonably rejected, given the available information and experience, because those alternatives are unlikely to be acceptably effective in advancing the programme objectives?
3. Is the measure applied in a flexible manner, and were less extensive or intrusive uses of race analysed and rejected based on a determination that they would not have been acceptably effective?
4. Is the measure limited in duration, and does the administering agency periodically review the continuing need for the measure?
5. Is the effect on non-beneficiaries sufficiently small and diffuse so as not to unduly burden their opportunities? In other words, are other jobs or other similar benefits available, or is the result of the program to close off an irreplaceable benefit?

In order to assess whether the programmes worked, they considered two central questions:

1. To what extent do the programmes prevent discrimination?
2. To what extent do the programmes expand opportunity through social inclusion?

Following this general framework, we survey recent evaluations of affirmative action programmes, considering first whether they are deemed to be fair, and then whether they are deemed to be effective.

### **5.3.1 Fairness**

Affirmative action policies were introduced as a means of addressing and challenging the apparently intractable discrimination within the US. They can take many forms, including both positive action and positive discrimination as understood in a British context. Affirmative action can, therefore, entail 'soft' non-quota measures such as open advertising of positions and the creation of scholarship programmes to ensure recruitment from specific groups (see Pojman, 1992: 181-206), as well as harder measures including the establishment of timetables, targets and quotas measures. Quotas were ruled illegal in relation to university admissions in the Bakke Case, 1978, but controversy still continues in relation to the use of timetables and targets. As Boylan notes, affirmative action entails:

*'...a policy that gives a preference to individuals based upon their belonging to designated groups who are underrepresented not only in the most desirable occupational classes, but also school admissions and government contracts. This preference can take many forms. It can be an extra point (or points) added on to some rubric for evaluating candidates. It can be extra recruiting money that is allocated for the expressed purpose of obtaining representation from individuals who are members of a disadvantaged group (even when no rubric credits are given). It can even be special training/education/counselling that is given to individuals from a disadvantaged group so that they might be able to compete equally with individuals from advantaged groups.'*

(Boylan, 2002: 117)

Those forms of affirmative action, such as quotas, that in the UK would be labelled as positive discrimination rather than positive action, are frequently criticised on the grounds that they 'unjustifiably elevate the opportunities of members of targeted groups, discriminate against equally qualified or even more qualified members of majorities, and perpetuate racial and sexual paternalism.' (Beauchamp, 1997:143). There are recurrent concerns about what should count as 'morally relevant' characteristic for redress and special consideration through affirmative action (Nickel 1995); about aiming preferential treatment at groups rather than individuals (see Sunstein, 1991:281-310); and about the assumption that past discrimination justifies preferential treatment for a group's current members (see Corlett, 1993, 163-175).

Arguments against affirmative action policies usually focus on the use of timetables and targets, which appear to undercut the commitment to individualism and meritocracy, so revered within the US. For instance, Carl Cohen argues that: 'Racially based numerical instruments have this grave and unavoidable defect: they cannot make the morally crucial distinctions between the blameworthy and the blameless, between the deserving and the undeserving. As compensatory devices they are under-inclusive in failing to remedy the same damage when it has been done to persons of the non-favoured races; they are over-inclusive in benefiting some in the favoured categories who are without claims, often at substantial cost to innocent persons. Except in those cases where the discriminatory policy of the employer is established, and the identity of injured applicants or employees determinable, racial preference in employment is intolerably blunt, incapable of respecting the rights of individuals.' (Cohen, 1995:7)

The debate about affirmative action hinges on how one measures 'skills and talents'. Critics of affirmative action tend to argue that educational attainment, test scores, school grades, years of experience and so on, are our best measure of skills and talents. This suggests that the hiring or promotion of those with weaker measures along these dimensions over those with stronger ones constitutes 'reverse discrimination'. On the other hand, proponents of affirmative action frequently distinguish between 'credentials' and 'performance', arguing that credentials are a weak predictor of performance in many cases and so individuals with weak

credentials might be hired or promoted if there is other evidence of high expected productivity (see Holzer and Neumark, 2000). In this way, many in the US both oppose 'reverse discrimination' and support affirmative action (see Edley and Stephanopolous, 1995; Reskin, 1998).

Some of the critical literature focuses on whether an entitlement to reparations exists. Detractors argue that the people guilty of past discrimination are not in power today, and that those most disadvantaged in the past are not those seeking assistance from affirmative action. As a result, any wrongdoing suffered by groups in the past cannot be rectified by solutions aimed at current groups, and in many cases some members of the 'disadvantaged groups' may be better off than individuals in the advantaged groups. Other critics suggest that the policy prolongs the stereotypes of inferiority that have plagued disadvantaged groups.

In the context of the persistent concerns about these policies, Cornell West offers a rather cautious defence of affirmative action, stating that: 'Progressives should view affirmative action as neither a major solution to poverty nor a sufficient means to equality. We should see it as primarily playing a negative role – namely, to ensure that discriminatory practices against women and people of colour are abated... Even if affirmative action fails significantly to reduce black poverty or contributes to the persistence of racist perceptions in the workplace, without affirmative action, black access to America's prosperity would be even more difficult to obtain and racism in the workplace would persist anyway.' (West 1994:95) More generally, advocates of affirmative action point to the statistical evidence that suggests that racial discrimination is so entrenched in many sectors of society that numerical targets are needed to address institutional discrimination (see Purdy 1994:133-143). These arguments have been lent support by those Supreme Court rulings that have upheld affirmative action programmes with numerically expressed hiring formulas where these are intended to combat a manifest imbalance in traditionally segregated job categories (see *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) above). However, they have also been challenged by those Supreme Court rulings that have found such programmes to be unjustifiable, because they are not aiming to remedy deeply ingrained discriminatory practices based on evidence of identified discrimination (see *City of Richmond v. J.A. Croson Co.* 109 S.Ct. 706 (1989) and *Adarand Constructors Inc. v. Federico Pena*, 63 LW 4523 (1995).)

Proponents of affirmative action argue that it is needed to offset ongoing discrimination and disadvantage for minorities, pointing to evidence of discrimination in housing, consumer and labour markets (Yinger, 1998; Ladd, 1998; Darity and Mason, 1998). It is also argued that disadvantages based on past treatment that have persisted over time, such as segregation of neighbourhoods and schools, limit the opportunities of ethnic minorities to fully pursue their education and develop their skills (Holzer, 2006). It is also argued that businesses, colleges and society generally will benefit from the presence of diversity. However, advocates of numerical targets and timetables generally accept that they are justified 'if and only

if they are necessary to overcome the discriminatory effects that could not otherwise be eliminated with reasonable efficiency.’ (Beauchamp, 1998:149) Reflecting a widespread anxiety about certain forms of affirmative action, the Clinton Affirmative Action Review recommended that programmes that created quotas, preferential treatment for unqualified individuals or reverse discrimination be reformed or eliminated. Nonetheless, there is also growing support for affirmative action in the corporate community, which increasingly views these procedures as enabling them to tap into the talent of diverse parts of the workforce.

Responding to the wealth of debate surrounding affirmative action in the US, Fryer and Loury attempt to disentangle the reality of affirmative action programmes from the ‘myths’ that have emerged around them. They use ‘economic reasoning...with a healthy dose of common sense, to dispel some myths and misconceptions in the racial affirmative action debates.’ (Fryer and Loury, 2005) They identify seven such myths, some held by the ‘pro’ camp, some by the ‘anti’ camp, and many of which pertain to college admissions in particular:

- affirmative action can involve goals and timetables while avoiding quotas;
- colour-blind policy approaches provide an efficient substitute for colour-sighted affirmative action;
- affirmative action undercuts investment incentives;
- Equal Opportunity is sufficient to produce racial equality;
- the implementation of affirmative action in early education and career development is better;
- affirmative action directly affects non-minority citizens;
- affirmative action always helps its beneficiaries.

Fryer and Loury consider the possibility that affirmative action reduces incentives for effort and skill attainment amongst target groups because the policy makes these less important in achieving successful outcomes, arguing that such assertions are unfounded and that economic theory is unable to assist on ‘a subtle and context-dependent empirical question’ (2005:xx). They consider the suggestion that non-minorities incur a cost due to the affirmative policy of racial preference for blacks and Hispanics, arguing that this is premised upon ‘erroneous perceptions’. Finally, they consider the suggestion that in the law profession, affirmative action elite college admissions actually disadvantage black students (who do less well than their peers, resulting in a system that produces less black lawyers than if they attended less demanding colleges, where they could do better), arguing that it is unwise to assume that affirmative action always helps the intended beneficiaries. Overall, whilst Fryer and Loury claim to use the ‘clarifying power of economic analysis’ (2005) to explode the seven myths of affirmative action, their analysis remains rather speculative, and hence contestable.

Indeed, although there is a considerable body of literature arguing for or against affirmative action, much of this is based upon rhetoric, polemic, or political argument. This means that whilst justification or opposition is the mainstay of the literature, the actual evidence demonstrating affirmative actions programmes produce economic improvements for target groups is limited. Consider for example, Button and Rienzo's claims that: 'Despite significant interest in the relation of race and employment, very few studies have been carried out at the level of the firm, or queried employers directly about their hiring and promotion practices or views of affirmative action and black workers...' (Button and Rienzo 2003: 5) Nonetheless, in the next section of the report we focus on this empirical research, evaluating the effectiveness of affirmative action policies.

### 5.3.2 Effectiveness

Measuring the effectiveness of affirmative action policies is a difficult endeavour. Most studies focus on the economic attainment of ethnic minority groups, but whilst some measure gross outcomes, others focus on labour force participation, and others again on earnings. In addition, some studies look at ethnic minorities as a single group, whilst others distinguish between first, second and third generations, and others between Blacks, Hispanics and Asians. These factors all affect the evaluations made.

In her 1998 study, Reskin argues that when affirmative action regulations are implemented, they have reduced discrimination, but that overall affirmative action programmes have had a limited impact (1998). Her research compares firms that are subject to the OFCCP regulations with those that are not. She also compares the impact of affirmative action on minorities and women during periods when the OFCCP enforced the contract compliance programme with periods when it was not. She further compares firms adopting affirmative action policies with those that are not, using case studies of firms, organisations and industries and the shifts in race and sex discrimination during the previous 30-year period. She then goes on to review the evidence of whether affirmative action has had negative impacts for those that were intended to benefit from it. The study draws together sociological, psychological and economic research on affirmative action and addresses five key questions:

- What does affirmative action mean in the employment context?
- Does continued discrimination necessitate affirmative action?
- Has affirmative action reduced sex and race discrimination?
- Which particular affirmative action practices are the most effective at reducing job and promotion discrimination?
- What are the effects of affirmative action on persons not targeted such as employers and society?

In relation to the first of these questions, Reskin argues that affirmative action in employment refers to proactive practices designed to guard against job discrimination. In relation to the second of these questions, she finds that although employment discrimination has declined over the years, the continued use of affirmative action remains justifiable. With respect to the third question she delivers a slightly ambivalent conclusion: '...the available evidence indicates that affirmative action has been effective...(and)...reduced race and sex discrimination...(but it) alone cannot eradicate all race and sex discrimination.' (Reskin, 1998: 89) Responding to the fourth question, she suggests that the evidence points to the contract compliance programme being the most effective when it has the support of the US President, sufficient resources and a growing economy. It appears to work best when it is mandatory, includes goals, monitoring and the threat of sanctions. Finally, on the question about the effect of affirmative action on persons not targeted, she concludes that the policy: '...does not replace one form of favouritism with another; it replaces cronyism with objective personnel practices...Although there are costs associated with affirmative action, it is cheaper than discrimination.' (Reskin, 1998: 90) Given these findings, Reskin's work represents a firm defence of hard forms of affirmative action.

Reskin states that her concern is '...to re-examine the evidence in order to justify what some viewed as an overly non-partisan and others as an overly partisan account.' (Reskin, 1998: xii). Her position is clearly a controversial one. Her work has been described as a 'thought provoking and somewhat controversial monograph, even within the discipline...' (Tsang and Dietz, 2001: 63). Its controversial status no doubt results from Reskin's support for preferential hiring, which has been the most contested aspect of affirmative action programmes. For example, some have found her claim that 'affirmative action replaces cronyism with objective personnel policies' less than compelling given that affirmative action often compels contractors to pay less attention to objective credentials that predict performance. She observes that the impact of affirmative action policies has been less intrusive than many think and presents data showing that many Americans support programmes which are seen to level the employment playing field. However, she also notes that this support drops when references to 'quotas' and 'preferences' are made (1998). Similarly, Bositis (2004) found that the term 'preferential treatment' had a significant negative impact on support for affirmative action programmes.

Tsang and Dietz (2001) examine the effects of being an ethnic minority (as well as gender) on income between 1979 and 1994, using a representative cohort of individuals from the National Longitudinal Survey of Youth, who should have been the first to benefit from affirmative action throughout their working lives. Following a single cohort over time using panel data, their study revealed that racial and ethnic minority disadvantage becomes more pronounced with advancing age. Their results show that: '...race was found to have a statistically significant interaction with time...In fact, race played an increasingly important role in determining one's economic success in contemporary America...Whites were more likely to achieve economic success than non-Whites throughout the 1980's.' (Tsang and Dietz,

2001: 75) This suggests that precisely that section of the American population that the Civil Rights Act was meant to benefit continued to experience increasing levels of disadvantage due to their ethnic background. 'It remains unclear, (though), if these increases are the result of policy changes or rather changes in the economy that have yielded an increased dependence of our capitalist economy upon the labo(u)r of individuals in these categories...' (Tsang and Dietz, 2001: 76)

This research appears to indicate that even though some improvements in employment levels for black people have taken place over time, due ostensibly to the effects of the civil rights movement, and arguably to affirmative action measures, their economic attainment lags behind comparable whites in the same social class. These results challenge those who argue that affirmative action has achieved its goals or that it leads to reverse discrimination against white males on a major scale. However, scholars who have used cross-sections that have been pooled over time rather than panel data sets find that conditions for blacks improved between 1965 and 1975, stagnated or worsened between 1980 and the early 1990s (Bound and Freeman, 1992)<sup>8</sup>, and have improved since (Holzer 2005). Others have noted that the relative outcomes of Hispanics and Asians may be influenced by trends in immigration of less-skilled workers to the US. More detailed analyses also indicate that the trends in disparities vary depending on whether one focuses on employment levels or wages. The effects noted by Tsang and Dietz may therefore reflect life-cycle issues, where levels of racial and ethnic disadvantage increase over a life-cycle but may be improving absolutely.

In a 2006 study of the economic attainment of the second generation Americans, Model and Fisher note that there is little research on the post-1965 immigrants because few data sets contain enough cases to study the children of immigrants by national origin. They found that most non-whites 'face a substantially greater risk of joblessness than their equally qualified white counterparts'. They also found that this difficulty persists into the second generation. They cite one of the causes for these persistently higher levels of unemployment as the fact that the Government commitment to equal opportunity has declined since the 1980s. Within this, their research also indicates that there is substantial variation in unemployment rates, both within generations and amongst different ethnic minority groups: 'In general, Europeans fare best, Cubans, Asians and Blacks fall in the middle, and the remaining Hispanics register large shortfalls. An additional finding is that the second generation tends to have more favourable outcomes than the first or third.' (Model and Fisher, forthcoming)<sup>9</sup>. In relation to occupational class, Model and Fisher find that the only

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<sup>8</sup> Although the stagnant or growing disparities found by Bound and Freeman in the 1980s could reflect the growing importance of skills in the US economy, where wage differentials can be attributed to racial differences in educational attainment (Neal and Johnson).

<sup>9</sup> Model and Fisher define the 'new second generation' as persons born in the last third of the twentieth century.

'first-generation non-European group to access the salariat in the same proportion as the benchmark group is East Asians'. Amongst the second-generation only Mexicans still have a significant 'penalty'. Overall, they conclude that first-generation non-Europeans do not fare as well as their European counterparts, though most second-generation non-European groups do, though this is truer for women than men, and of earnings and access to the salariat than of unemployment. Interestingly, this is a very similar generational pattern in relation to unemployment and occupational levels that Heath and Cheung, forthcoming find for Britain – indeed it seems to be the common pattern across many other countries (Heath and Cheung (eds), forthcoming). Amongst the second-generation group only Mexicans seem to do less well, though this is still a young group (average age 29.2) and studies of socio-economic inequalities generally indicate that as people's careers develop, they usually exhibit greater differentials.

Holzer and Neumark (1999, 2000) estimate the effects of affirmative action on minority and female hiring, based on a cross-section of over 2,000 firms in the period 1992-1994, so representing the effects of affirmative action on hiring in that time period. Although they allowed firms to self-define their use of affirmative action, either in the recruitment process only or in hiring as well as recruitment, their estimates are based on the latter only as the controversial aspects of affirmative action occur when firms use affirmative action in hiring. Their sample of firms therefore included contractors, as well as firms who choose to practice affirmative action, or those of whom the courts might have required affirmative action as part of an anti-discrimination settlement. This sample of firms was drawn from four large metropolitan areas in the US: Atlanta, Boston, Detroit, and Los Angeles. Their results, based on different estimation procedures, show that the use of affirmative action in hiring increases the employment of black males by one – two per cent, but has insignificant effects on black females and Hispanics. However, they also found, when using total employment in the establishment as the dependent variable, but without occupational controls, increases of about a one per cent each for black males and females, and even larger positive effects for Hispanics. They regard the first set of estimates as more trustworthy, but the comparison shows that the exact results were sensitive to exactly how they measured things. Research that has used the contractor data and definitions from the US Department of Labour (Leonard 1984; Rodgers and Spriggs 1996) get somewhat different answers, but with many fewer controls in their estimates.

Holzer and Neumark also estimated the effects of affirmative action on wages paid to minorities (1999, Table 4.5). They find that black and Hispanic males earning roughly 20 per cent more in affirmative action firms, black females about ten per cent more, and Hispanic females about five per cent more than they earn in non-affirmative action firms. These estimates are based on starting wages or current wages fairly soon after hiring, and control for establishment size and unionisation. Without these controls, and allowing for more time for differential promotion effects, these estimates would be likely to rise. All in all Holzer suggests that the effects of affirmative action on wages paid could be estimated to fall in the range of 15-20 per cent for all groups (Holzer, 2006).



In a more focused study, Button and Rienzo (2003) assess the impact of affirmative action on black employment in six Southern cities, by using data from 167 randomly selected businesses. Their research shows that employer support for affirmative action programmes results in a significant and positive influence on the employment prospects for black people especially at higher-level jobs. Interestingly, they found black employment opportunities to be better in the Old South than in the New South, with businesses in the Old South cities revealing higher black employment figures in each category of firm except financial institutions and motels, where the tourist economies of the New South appear to create an advantage<sup>10</sup>. They also found a 'clear linear relationship between the proportion of blacks in the population and those in employment.' (Button and Rienzo, 2003: 7) In fact, majority black communities show better employment of black people in all kinds of businesses and at all skills levels, with only motels and apartments as the exception.

In relation to the role of affirmative action in shifting employment patterns, they found employer's support for the affirmative action programmes to be positively and directly linked to total black employment. In fact, they found this process to be most statistically significant in the appointment of blacks to higher-level professional and managerial positions. Minority and female managers were revealed to be likely to hire black people and to encourage applicants from this group. Thirty-two per cent of employers advocated preferences to black people and women in hiring and promotions, whilst only 31 of these (54) employers actually claimed to have a formal affirmative action policy. Support for affirmative action (even without a formal policy) appears to have a major effect on African-American employment and promotion. Employers professing support for affirmative action had black employment rates of 32 per cent, compared with 24 per cent black employment rates with those not professing support. This difference increased with professional and managerial level posts to 25 per cent and ten per cent<sup>11</sup>. Interestingly, a similar study in the same cities in the early 1990s revealed formal affirmative action policies to have no significant effects on black employment (Button and Corrigan, 1997). Button and Rienzo (2003) therefore draw a crucial distinction between having a formal policy and support for affirmative action, signalling that cultural change is crucial.

Kelly and Dobbin's research is relevant in this context. Focusing on that group of employers that recognises the need for and supports affirmative action, Kelly and Dobbin, (1998) looked at those organisations that had managed to maintain their broad commitments to equality programmes in spite of government retrenchments. They found that where affirmative action measures had been dropped, diversity management programmes emerged within organisations where employers

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<sup>10</sup> The 'old south' here refers to what used to be known as the 'Deep South' and 'new south' refers to the Border South.

<sup>11</sup> Though one should note that expressions of support may be driven by employment rather than vice-versa.

recognised the need for affirmative action of some kind. As affirmative action programmes came to be continually challenged in the courts, these employers shifted their focus to the economic arguments in favour of diverse workforces instead of relying upon legal compliance measures, which had been the mainstay of affirmative action. As a result: 'Practices designed to achieve legal compliance were re-theorised as efficient when the original impetus for adopting them was removed...' (Kelly and Dobbin, 1998: 962)

Of particular relevance to our study is the exploration of the economic effects of affirmative action conducted by Holzer and Neumark (2000). They focus on whether affirmative action impedes or promotes efficiency or productivity, noting that there has been an absence of research in this area (2000, 484). They find that anti-discrimination laws have improved the economic situation of black people, and that affirmative action does result in positive employment opportunities for black people: the employment of white males in affirmative action establishments is lower by roughly ten-15 per cent, which is redistributed mainly to white females and black males (Holzer and Neumark, 2000: 506). They also find evidence that relative wage gains flow from affirmative action programmes (2000: 507). Whilst they found that affirmative action policies had resulted in firms hiring minorities with lower qualifications than other employees, they suggest that this did not impact significantly on job performance. Interestingly, they found minority-owned businesses that received contracts under the policy to have weaker performances, but suggest that this could be corrected with technical assistance and better vetting. They also found that those employers that implemented affirmative action programmes were more willing to hire from stigmatised groups, with increased numbers of minority applicants as well as the number actually employed. These employers were also more likely to provide training and to formally evaluate their employees.

Whilst they acknowledge that the various studies they consider used different methods and were often flawed in some ways and cannot be relied on for definitive conclusions about the efficiency or performance effects of affirmative action on employees and establishments, some things do emerge with some frequency.

- There is 'virtually no evidence' of significantly weaker qualifications or performance among white women in establishments engaging in affirmative action
- There is 'some evidence' of lower qualifications among hired minorities under affirmative action, although this evidence appears 'less consistently or convincingly'.
- Extensive recruitment and training enable firms to generate qualified minority applicants and employees under affirmative action.

There is 'mixed evidence' on whether affirmative action in contracting and procurement props up weak companies. Some that benefit from the programmes and then move in to a 'non set-asides environment' do not fail at any higher rates than comparable firms. However, some evidence suggests that minority businesses that get a large part of their revenue from local government are more likely to go out

of business. Some of this is attributed to fraudulent information by front companies for the purpose of qualifying for the programmes, but local government programmes with genuine assistance to small enterprises and penalties for fraudulent activity are able to promote successful minority business enterprises.

Holzer and Neumark's assessment of affirmative action focuses on the key 'efficiency' performance. They suggest there is little compelling evidence of adverse effects on efficiency and that the empirical case against the policy on these grounds is weak at best. Within this, one might distinguish between evidence pertaining to the advantages or adverse effects of affirmative action for the direct beneficiaries and for employers or the economy as a whole. Groups who might benefit from affirmative action besides the direct beneficiaries include: consumers, who get better treatment from black service providers; other employees, who are more likely to be hired by black managers, or who benefit from role models and networks that involve affirmative action beneficiaries; and employers, who might have difficulty recruiting effectively in minority communities without affirmative action (especially in tight labour markets), or who, with more minority workers, benefit from minority customer satisfaction. Holzer suggests that 'the evidence on these factors is not very strong either way' (Holzer, 2005). Holzer and Neumark (2000) note clear evidence of better medical care to minorities and low-income people from affirmative action in medical schools. Holzer and Ihlanfeldt (1998) suggest that customers often like being served by co-ethnics, implying that minority customers might be happier (and white customers less happy) due to affirmative action. Role model effects have been studied in universities but much less in labour markets. Networks are important in labour markets (see Ionnides and Datcher Loury, 2004), and black employers tend to hire more black employees than do white employers (see Holzer, Raphael and Stoll, 2001). These provide indirect evidence of broader effects of affirmative action, but not direct evidence.

Holzer (2004) summarises his reading of the empirical evidence regarding the effectiveness of affirmative actions programmes with five propositions.

- Minorities continue to face systematic disadvantage in schools and employment.
- Affirmative action is redistributive (but) in a limited way.
- The system can lead to hiring and promotion of minorities with lower credentials and qualifications but little evidence of lower relative performance in jobs.
- Affirmative action has benefits beyond the individuals who are hired or promoted.
- The absence of race consideration in university admissions will lead to a decline in the share of minority students at prestigious universities.

He argues that the 'net effects' of the affirmative action approach are 'fairly positive'. He notes that the presence of minorities in the US population, especially Hispanics, will continue to grow and that they are now seen by political analysts of both major parties as the 'prize' (Holzer, 2004). As the affirmative action system is popular with this group, and enhances employment and educational opportunity

for them, it is likely that they would be alienated by any new assault on the policy, and therefore probable that affirmative action programmes will survive in some shape or form.

Significantly, whilst Holzer's evaluation of the effectiveness of affirmative action programmes covers both employment and education, he relies upon two major education legal decisions to argue the need for the continued reliance on affirmative action: the *Grutter* case, which focuses on the University of Michigan Law Schools affirmative action programme (which was upheld by the Supreme Court on the grounds that it was narrowly tailored to meet the compelling state interest of realising the educational value of diversity in the context of public and private schools); and the *Gratz* case, in which the same University's College of Literature, Science, and the Arts affirmative action programme failed the test of needing to narrowly tailor its use of racial means to the state's compelling interest of diversity (the mechanical nature of the 'point system' that automatically granted black, Hispanic and Native American applicants 20 admission points that was considered to be too crude to satisfy the diversity requirement). This is indicative of the extent to which employment and education are inextricably linked in the public debate about affirmative action in the US.

### *The effectiveness of Contract Compliance*

There have also been a number of studies that focus on the effectiveness of the OFCCP in particular. These include the Affirmative Action Review, which found that the OFCCP was effective during the 1970s, but less so during the 1980s.

The Review found that the work of the OFCCP had a discernable impact during the 1970s. Specifically:

- active enforcement by the OFCCP during the 1970s caused government contractors to moderately increase their hiring of minority workers;
- contractor establishments that underwent an OFCCP review in the 1970s subsequently had faster rates of white female and black employment growth than contracting firms that did not have a review;
- non-government contractors often took active steps to ensure diversity and compliance with equal opportunity laws, even though they were not covered by the OFCCP;
- the recruitment efforts of both contractors and non-contractors may have bid up the wages of minorities and women, reducing wage disparities regardless of the effect on occupational disparities.

However, they also found that OFCCP enforcement was greatly scaled back during the 1980s<sup>12</sup>. This meant that:

- during this period fewer administrative complaints were filed and back-pay awards were phased out;
- the OFCCP had no noticeable impact on the hiring of minority workers by contractor firms in the early and mid-1980s;
- there was no systematic qualitative evidence that productivity was lower in contracting firms as a result of OFCCP.

Overall, Stephanopolous and Edley found that the extent to which affirmative action had expanded minority employment in skilled positions was unclear. In general the Review found that the programmes considered were effective, but could possibly be implemented in a fairer manner: 'these programs have worked to advance equal opportunity by helping redress problems of discrimination and by fostering the inclusion needed to strengthen critical institutions, professions and the economy. In addition, we have examined concerns about fairness. The evidence shows that, on the whole, the federal programs are fair and do not unduly burden non-beneficiaries.' (1995: 1) They concluded the Review with the reflection that: 'discrimination and exclusion remain all too common.' (1995: 14)<sup>13</sup>

The report concluded that some reforms would improve the efficiency and fairness of the affirmative action programmes. The report therefore recommended the establishment of a continual process to review the effectiveness and fairness of affirmative action programmes and the review of all affirmative action programmes. They also recommended that proposals be prepared to eliminate or reform any program that created quotas, preferential treatment for unqualified individuals, reverse discrimination, or continued to operate even after its equal opportunity purposes had been achieved.

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<sup>12</sup> While the OFCCP was scaled back during the Republican periods in office in the 1980s, it was strengthened again in the 1990s.

<sup>13</sup> It is worth noting that this implies that affirmative action is primarily designed to end discrimination, which is a contested claim. For example, there is strong evidence that small firms discriminate more against blacks in hiring than larger firms; and that firms with white customers discriminate more than other firms. However, affirmative action mostly targets large firms, which are likely to have government contracts, and firms that do not engage in retail trade (see Holzer, 1998). This suggests that affirmative action may improve outcomes even in the absence of discrimination, and may be designed to offset the market-wide negative effects of discrimination (past or current), rather than to eliminate it at the employer-level.

**Affirmative Action Review****Recommendations**

The establishment of a continual process to review the effectiveness and fairness of affirmative action programmes.

The preparation of proposals to eliminate or reform any program that created: quotas, preferential treatment for unqualified individuals, reverse discrimination

The preparation of proposals to eliminate or reform any program that continued to operate even after its equal opportunity purposes had been achieved.

Other critical evaluations of the OFCCP also emphasise its limited effectiveness during the 1980s and 90s. For example, Bergman argues that the OFCCP, the main government agency pushing affirmative action in the workplace, is 'understaffed, has few effective ways of encouraging compliance, lacks vigor, and has probably been poorly managed.' (1996: 54) She suggests that as the OFCCP is not limited to responding to complaints, as the EEOC is, it could take on a proactive role, concentrating on the 'most egregious offenders among the larger corporations, where the most impact might be made' (1996:55). However, she suggested in 1996 that this potential impact has been largely unrealised: 'While the OFCCP has probably been somewhat more influential in changing corporate practices than the EEOC or the individual plaintiffs who have brought lawsuits charging race or sex discrimination, it has nevertheless been of quite limited effectiveness.' (1996:57)

Given that its main sanction is the debarment of corporations from the approved list of federal contractors, it is significant that between 1972 and 1996 only forty-one firms were debarred. Of the companies debarred in this period, only four were large corporations, all four were reinstated within three months. All were debarred during the Democratic administration of Jimmy Carter. Bergmann concludes that 'the OFCCP has done very little enforcement. Firms have been allowed to do pretty much what they feel like doing. In the private sector, affirmative action has been largely voluntary.' (1996:58) However, it should be noted that there are other costs besides debarment, including legal costs and bad press, that give contractors incentives to comply, which Bergman does not consider here. There is also some evidence that enforcement of affirmative action improved in the 1990s, after falling off in the 1980s (Rodgers and Spriggs, 1996).

**5.3.3 Conclusion**

Overall, affirmative action has been controversial yet the use of affirmative action measures have been deemed both fair and effective where these measures are applied in a flexible manner and subject to periodic review. Research suggests that affirmative action programmes have the most positive influence on ethnic minority employment rates where there is employer support for the programmes. This

suggests that formal policies are more effective when accompanied by a cultural shift in which employers come to actively support affirmative action programmes. Significantly, research indicates that affirmative action does result in greater employment opportunities and relative wage gains for black people, without impacting on job performance or the efficiency of employers. More specifically, the contract compliance programme appears to have been a particularly effective form of affirmative action in relation to ethnic minority employment rates. This programme appears to work best when it has the support of the US President, has sufficient resources and operates in a growing economy. To be effective it needs to include goals, monitoring and the threat of sanctions.

#### 5.4 Lessons for Britain

Overall, the lessons from the experience of affirmative action in the US is that policies which simply favour a (minority) candidate on the grounds of race, where objective measures indicate that candidate is less qualified, do not carry popular support – even amongst blacks and minorities – for long, and will be subject to successful legal challenges given that *Bakke* outlawed quotas and *Gratz v Bollinger* disallowed mechanical or automatic ways of favouring a black candidate. However, affirmative action programmes, including the use of targets and timetables, can find both popular and legal support given that *Grutter v Bollinger* allowed race to be one amongst other factors which may be taken into account in college recruitment or college admissions, though there seems to be an understanding in the US that the continuation of affirmative action programmes requires a continual review in relation to effectiveness, business efficiency and fairness.

Another lesson seems to be that one of the most effective instruments for promoting positive action in employment is contract compliance by the government as a purchaser of goods and services. Whilst the government is usually able to impose higher standards of equality (and other kinds of) policies on the grounds that it is taxpayers money that is being spent and so civic equality must be respected, governments hesitate to impose equivalent duties upon private sector employers so as to not seem overly intrusive or alienate the engines of the economy. This is exactly the situation in Britain where positive action is sometimes perceived by some employers as a government wielding a big stick. Contract compliance, however, is not just a stick, but also a carrot. For businesses get a direct benefit, namely government contracts. Moreover, the taxpayer has a right to see equality where his/her money is spent applies as equally to government spending as to the government as an employer.

A third lesson from the US may be that affirmative action, as regards the better quality jobs, is unlikely to be successful without an adequate supply of suitably qualified and trained individuals, in particular graduates and professionals such as doctors and lawyers. Hence, universities, law and medical schools have been at the eye of the storm in the affirmative action political and legal turbulence, especially as there has been and continues to be a shortage of black graduates and trained

professionals (the same applies to Hispanics, but not Asians). In Britain, there is not a parallel shortage if we take ethnic minorities as a whole. On the other hand, most ethnic minority groups are under-represented in the most prestigious universities, and some groups much more than others (e.g., black men).

### **Lessons for Britain**

- Numerical goals and preferential treatment for unqualified individuals do not carry popular support and can therefore be counter-productive.
- Contract compliance is the most effective instrument for promoting positive action in employment and particularly well suited to changing key employers' practices with minimum pain and resistance.
- Successful employment equity programmes need to pay attention to both demand and supply-side issues. The important of securing an adequate supply of suitably qualified and trained individuals means that employment policies need to be attentive to educational equity.
- A continual review of positive programmes in relation to effectiveness, business efficiency and fairness may be useful for the acceptance and effectiveness of the programmes.

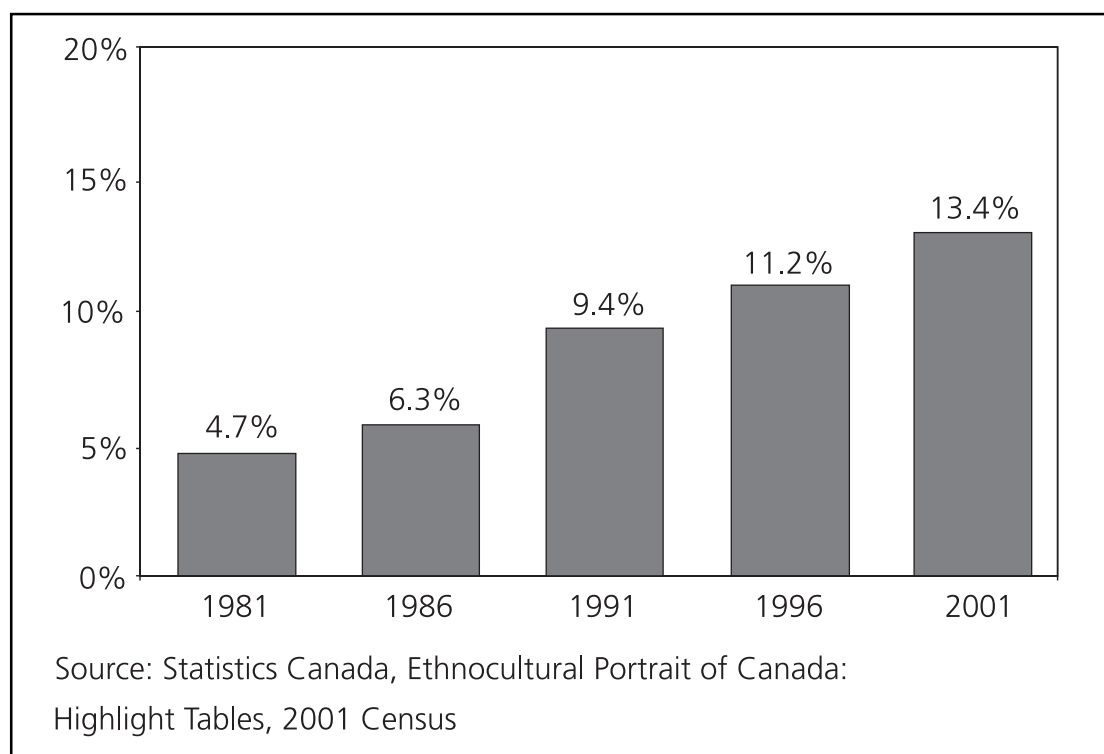


## 6 Employment equity in Canada

Debate about ethnic minority employment rates in Canada is framed in terms of 'employment equity' for 'visible minorities'. These terms derive their public salience from the Employment Equity Act (1995) and originate in the Abella Royal Commission Report (1984). The concept of visible minority applies to persons who are identified according to the Act as being 'non-Caucasian in race or non-white in colour'. Under the Act, Aboriginal persons are not considered to be members of visible minority groups. The number of visible minorities within Canada increased significantly during the last decade (see Table 4.5).

### 6.1 Context

**Figure 6.1** Proportion of visible minorities, Canada, 1981-2001



Much of this growth was achieved through immigration. According to the 1996 census, visible minorities comprised 11.2 per cent of the Canadian population and 10.3 per cent of the workforce. In the 2001 Census, this had risen to 13.4 per cent of the Canadian population and 12.6 per cent of the workforce. The representation of visible minorities in the industries covered by the 1995 Employment Equity legislation rose from five per cent in 1987, to 12.2 per cent in 2002, to 12.7 per cent in 2003. This indicates that during the census period (1996-2001), the percentage of the Canadian population who are visible minorities increased: during this period the total Canadian population grew by 3.9 per cent, while the visible minority population increased by 24.6 per cent (Teelucksingh and Galabuzzi, 2005). However, there is evidence of a continued disparity in both participation rates of visible minorities in relation to the total population, and of an income gap between these groups.

Canada is often presented and perceived as a model of multiculturalism (Pendakur and Hennebry, 1996, Stelcner, 2000). Indeed, it is described by Thomas and Jain, (2004:38) as a 'multicultural mosaic', but this description sits somewhat uncomfortably with the evidence of continuing race inequalities. For example, Kobayashi and Peake, (1997) reached a 'most disturbing conclusion' that racism continues to be a daily fact of life for immigrants of colour, a group that now makes up the majority of immigrants to Canada.

## 6.2 Policies: the development of employment equity in Canada

In their investigation of attitudes towards affirmative action in the United States (US) and Canada, Brutus *et al.* (1998) suggest that the close proximity of the two countries both geographically and culturally might have influenced some Canadian attitudes. However, Mentzer (2002) notes that although employment equity is likely to remain controversial in Canada, the country has not seen the large-scale reaction against affirmative action that has occurred in the US.

**Table 6.1 Canadian workplace equity legislation****1971. Canadian Multiculturalism Policy**

The key objectives of these policies were to assist cultural groups to foster and retain their identity; to overcome barriers to their full participation in Canadian society; to promote cultural exchanges between all Canadian cultural groups; and to assist immigrants in acquiring at least one of the official Canadian languages.

**1985. Canadian Charter of Rights and Freedoms**

This guarantees fundamental freedoms and democratic rights, including equality rights. This stipulates that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, nationality or ethnic origin, colour, religion, sex, age or mental or physical disability. This does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups, including those that are disadvantaged because of race, nationality or ethnic origin, colour, religion, sex, age or mental or physical disability. The Charter applies to federal, provincial and municipal government departments and agencies across Canada, but not to private sector employers.

**1985. Canadian Human Rights Act (R.S. 1985, c. H-6)**

This Act extends the laws in Canada to give effect to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, nationality or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

**1985. Public Service Employment Act (R.S. 1985 c. P-33)**

This Act established a Public Service Commission to implement an employment equity program in the Public Service.

**1985. Canadian Labour Code (R.S. 1985, c. L-2)****1986. Federal Contractors Program**

This requires organisations doing business with the Canadian Government to commit themselves to implement employment equity as a condition of their bid by signing a Certificate of Commitment.

Continued

**Table 6.1 Continued****1986. Equal Wage Guidelines (SOR/86-1082)****1988. Multiculturalism Act (R.S. 1985 c.24)**

This Act declares that the Canadian Government will recognise and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage.

**1995. Employment Equity Act**

This Act aims to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences.

The 1988 *Multiculturalism Act* declared it to be the policy of the Canadian Government to:

- recognise and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage;
- recognise and promote the understanding that multiculturalism is a fundamental characteristic of the Canadian heritage and identity and that it provides an invaluable resource in the shaping of Canada's future;
- promote the full and equitable participation of individuals and communities of all origins in the continuing evolution and shaping of all aspects of Canadian society and assist them in the elimination of any barrier to that participation;
- recognise the existence of communities whose members share a common origin and their historic contribution to Canadian society, and enhance their development;
- ensure that all individuals receive equal treatment and equal protection under the law, while respecting and valuing their diversity;
- encourage and assist the social, cultural, economic and political institutions of Canada to be both respectful and inclusive of Canada's multicultural character;
- promote the understanding and creativity that arise from the interaction between individuals and communities of different origins;

- foster the recognition and appreciation of the diverse cultures of Canadian society and promote the reflection and the evolving expressions of those cultures;
- preserve and enhance the use of languages other than English and French, while strengthening the status and use of the official languages of Canada;
- advance multiculturalism throughout Canada in harmony with the national commitment to the official languages of Canada.

It is further declared to be the policy of the Government of Canada that all federal institutions shall ensure that Canadians of all origins have an equal opportunity to obtain employment and advancement in those institutions.

However, Canada has a complex provincial and federal legal framework (Bakan and Kobayashi, 2002). Employment, Health and Education are under exclusive jurisdiction of ten Provinces and three territories (Jain, 2005). The Canadian Human Rights Act is wide-ranging in its coverage and safeguards Canadians against discriminatory practices based on race, nationality or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted. Section 2 of the Act promotes the 'principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society.' However, it applies to federal government departments and agencies with 100 or more employees, private sector employers and federal crown corporations.

The *Employment Equity Act*, which was first passed in August 1986 and then significantly amended in 1995, covers the federal jurisdiction. Thus, it applies to only three inter-provincial industrial sectors—banking, transportation and communications, and to federal Crown Corporations such as the Post Office. It also clearly applies to federal government departments and its agencies. It requires efforts by employers in those sectors covered by the Act to reduce disparities in employment and workforce representation between designated groups. These groups are: women, Aboriginal peoples, persons with disabilities, and members of visible minorities (see Jain 2004:585). Specifically, it requires employers covered by the Act to:

- identify and eliminate employment barriers against persons in designated groups that result from the employer's employment systems, policies and practices that are not authorised by law;
- institute such positive policies and practices and make such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in (i) the Canadian workforce, or (ii) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees.

The obligation to implement employment equity under the 1995 Act does not require employers covered by the Act:

- to take a particular measure to implement employment equity where the taking of that measure would cause undue hardship to the employer;
- to hire or promote unqualified persons;
- with respect to the public sector, to hire or promote persons without basing the hiring or promotion on selection according to merit in cases where the *Public Service Employment Act* requires that hiring or promotion be based on selection according to merit; or
- to create new positions in its workforce.

In addition, the *Federal Contractors Program* was implemented in October 1986 following the proclamation of the *Employment Equity Act*. This Program targeted contractors with a resident workforce in Canada of 100 or more employees, which received federal contracts for goods and services of \$200,000 or more. The contractors programme covers most universities and medium size and large employers under provincial jurisdiction who wish to do contract work with the federal government. These organisations are required to commit themselves to implement employment equity as a condition of their bid by signing a Certificate of Commitment. They must:

- collect and maintain data on all employees, analyse the representation of each of the designated groups in all occupational groups, compare this representation with the external representation and identify under-representation of designated groups;
- based on this information, organisations must identify and remove all barriers impeding designated groups and must prepare an employment equity plan with achievable and realistic short and long-term goals;
- in implementing employment equity, organisations must develop positive policies and practices and, as required, provide accommodation and special measures for designated groups;
- contractors that fail to meet their commitment may lose the right to receive further federal contracts for goods and services.

Taken together, the Employment Equity Act and the Federal Government Contract Compliance programmes cover approximately 13 per cent of Canadians in 2003: that is over 2.2 million workers, compared to two million in 2002. By implication this means that 87 per cent of the Canadian workforce is exclusively the remit of the provincial jurisdiction.

This picture is further complicated by the fact that all provinces and territories have separate Human Rights legislations, which apply to all private sector and government employers, irrespective of size. The various provincial Human Rights legislations

actually pre-date the federal Employment Equity Act and the federal Human Rights Act. Thus in 1962, Ontario was the first Canadian jurisdiction to combine various pieces of related legislation on race relations and equal pay into a Human Rights Code. The Canadian Human Rights Act (and the Canadian Human Rights Commission) was enacted by Parliament in 1977.

**Table 6.2 Supreme Court of Canada and Tribunal Decisions**

**1982. *Ontario Human Rights Commission et al. v. The Borough of Etobicoke***

This case held that the mandatory retirement policy that required firefighters to retire at sixty had not been shown to be a bona fide occupational requirement.

**1984. *Action Travail des Femmes v. Canadian National Railway***

This case led to the imposition of the affirmative action program in Canada by the Canadian Human Rights Tribunal, whose decision was upheld by the Supreme Court in 1987. *Action travail des femmes* filed a complaint of systemic discrimination against women, and the Canadian Human Rights Tribunal made an order requiring Canadian National to implement an affirmative action program including an objective of hiring one woman for every four blue-collar positions to be filled, which was later upheld by the Supreme Court of Canada, 1987.

**1985. *O'Malley v. Simpsons-Sears***

This case led to a Supreme Court judgement that an apparently neutral rule could have a discriminatory impact on an employer because it was incompatible with religious observance. The Court ruled that equal treatment required that 'reasonable steps towards an accommodation by the employer' be taken.

**1996. *Naraine v. Ford Motor Co. of Canada***

This case held that name-calling and graffiti should be recognised for their inherent destructive effect on racial equality in the workplace. The Board determined that sufficient evidence of direct supervisory involvement of, and knowledge of, the poisoned work environment established corporate liability.

Continued

**Table 6.2 Continued****1997. *National Capital Alliance on Race Relations v. Canada (Health and Welfare)***

This is a significant systemic discrimination case involving visible minorities in the Public Service, focusing on established policies and practices that deprived visible minorities of opportunities in management and senior professional jobs. An extensive employment equity scheme was ordered, which included training and workshops and accelerated appointment and promotion rates for visible minorities.

**1999. *British Columbia Public Service Employees Commission v. British Columbia Govt. Employees Union (the Meiroin decision)***

This case determined that an aerobic standard that kept many women out of a firefighter's job was discriminatory and not justified. The fault was not with the employer's interest in setting standards necessary for a dangerous job, but that it did not consider whether all groups, including women, require the same aerobic capacity to do the job safely.

The Canadian Charter of Rights & Freedoms (a part of the Canadian Constitution), which came into effect in 1985, applies to federal, provincial and municipal government departments and agencies across Canada. It does not apply to private sector employers. For this reason human rights legislations are very important as these statutes do apply to all respective employers, irrespective of size and number of employees.

### 6.3 Evaluation: impact of employment equity policies

A recent comparative study of the 'ethnic penalties' faced by second-generation migrants found the situation in Canada was 'optimistic', showing a gradual reduction in disadvantage across the generations (Heath and Chueng, 2006). Interestingly, this comparative data presents a more positive picture than that painted by many single-country studies. For instance, in 2000 the Canadian Council on Social Development found (using 1996 Census Data) that:

- visible minorities generally have higher education levels than non-visible minorities. Yet, visible minorities with university education are less likely to hold managerial/professional jobs than non-visible minorities with similar levels of education;
- foreign-born visible minorities experience greater education-occupation discrepancies compared with other groups;



- most visible minorities with managerial jobs are self-employed;
- foreign-born visible minorities are over-represented in the lowest income quintile and under-represented in the highest income quintile.

(See Jain and Lawler, 2004 for a summary).

More recently, in 2005 Teelucksingh and Galabuzi evaluated the status of visible minorities in the Canadian labour market, using data from the 1996 and 2001 Census. They found that:

- the growth of the visible minorities population outpaced the Canadian average;
- visible minorities continue to sustain an income gap (12.2 per cent after tax), which is evident among the university educated as well as those without post-secondary education;
- labour market participation rates and unemployment rates show a continuing gap between the experiences of visible minorities and 'non-racialised workers'. In 2001 the participation rate for the total population was 80.3 per cent, and 66 per cent for visible minorities (see Table 5.1). In the same year, the unemployment rate for the total population was 6.7 per cent, but 12.6 per cent for visible minorities;
- the labour market is segmented along racial lines, with visible minorities over-represented in some sectors (such as light manufacturing – machine operators 46 per cent, electronic assemblers 42 per cent, and service sectors – taxi drivers 36.6 per cent), and under-represented in others (including senior management 8.2 per cent, legislators, 2.2 per cent, fire-fighters 2.0 per cent, farmers and farm managers 1.2 per cent).

**Table 6.3 Labour force participation rates for immigrants, non-immigrants and visible minorities in Canada**

	1981	1991	2001
Total labour force	75.5	78.2	80.3
Canadian born	74.6	78.7	81.8
All immigrants	79.3	77.2	75.6
Recent immigrants	75.7	68.6	65.8
Visible minorities	N/A	70.5	66.0

Source: Teelucksingh and Galabuzi, 2004. Statistics Canada, 2003.

Teelucksingh and Galabuzi note that 'an important aspect of the racialised group disadvantage in labour market participation may be attributed to the 'immigration effect'', with substantially higher rates of unemployment for those entering the country for the first year (32.4 per cent) versus those who entered the country eleven to fifteen years ago (8.4 per cent) (2005: 14). This suggests that immigration and race are each significant factors in relation to labour market participation rates. A

study by Pendakur and Pendakur (1998) shows that while immigrant non-racialised men earn as much as Canadian-born non-racialised males, there is a 15.8 per cent income gap between racialised immigrants and non-racialised Canadian born. Moreover, there are changes within the composition of the immigrant group within Canada, which also impact upon labour market participation rates. Teelucksingh and Galabuzi suggest that the experiences of recent immigrants are significantly different to those of previous immigrants: 'the traditional trajectory that saw immigrants 'catch up' with other Canadians over time seems to have shifted with the change in immigrant source country.' (2005:15) There is even some evidence of a divergence, rather than convergence, in the performance of the immigrant and Canadian-born groups (Reitz, 2001; Kazimpaur and Hou, 2003). All this reinforces the fact that 'visible minorities constitute a moving target in terms of representation.' (Jain and Lawler, 2004:586) Agocs points out that the failure of employers to accept the qualifications that immigrants have gained in other countries, constitutes a significant barrier to access in employment that might best be defined as systematic discrimination. She suggests that this undermines the purpose of immigration policy which favours educated immigrants and that the potential benefits to the receiving society are therefore not realised (Agocs, 2002: 2). Overall, Teelucksingh and Galabuzi, find that 'racial discrimination continues to be a major factor in the distribution of opportunities in the Canadian labour market.' (2005:4) Similarly, Jain *et al.* argue that, despite legislative provision outlawing all kinds of discrimination, and the use of various employment equity programmes, '...racial discrimination in employment continues at an increasing level' (Jain *et al.*, 2003: 194; see also Al-Waqfi and Jain 2001).

This suggests that there is a gap between the rhetoric and reality in Canada in relation to the integration of visible minorities in the labour market, which raises questions about the effectiveness of Canadian employment equity and affirmative action policies. There have been a number of studies that explore the effectiveness of these policies. In order to evaluate the effectiveness of employment equity programmes in Canada, a number of studies have explored the employment participation of visible minorities in Canada both before and after the introduction of the Employment Equity legislation (see Jain and Lawler, 2004 for a summary).

Jain *et al.* (2003) highlight that human rights legislation has been enacted in Canada since the 1960s, and identify three stages in its development. Between the 1960s and early 1970s, courts adopted the approach that the law was meant to deal with intentional or direct discrimination. In the early eighties, there was a shift towards equality of treatment, e.g. in the hiring requirements such as height and weight for police officer jobs. Although, neutrality based and designed to treat all groups equally, these created an adverse impact on minorities and women. The third period is referred to as one of systemic discrimination during which courts began to recognise that barriers are integral to employment systems and that equality should be about removing the barriers.

Early studies showed that visible minorities experienced inequality in employment. In 1978 Henry found (using a sample of 617 white individuals in Toronto) over 50 per cent of those interviewed to hold racist attitudes (Henry, 1978). In 1984 another report found that racial discrimination in employment was a real concern and recommended that legislative measures be introduced (Abella, 1984). Later, studies, following the introduction of the Employment Equity Act, reveal 'continuing patterns of employment discrimination against racial minorities.' (Jain and Lawler, 2004:588). Several studies found empirical evidence of a representation gap between whites and visible minorities (Jain, Singh and Agocs, 2000; Jain and Al-Waqfi, 2001; Ornstein, 2000; Reitz and Verma, 1999). Other studies have focused on earning differentials between whites and visible minorities, generally finding that visible minorities have lower wages and earnings than non-visible minorities (see Howland and Sakellariou, 1993; Pendakur and Pendakur, 1995; Gorrie, 2002).

Hodges-Aeberhard and Raskin (1997) examined the pursuit of affirmative action policies in Canada (among other countries). They outline the historical and legislative provisions and concentrate their analysis on the Employment Equity Act and the federally regulated companies, but they do not consider the Government's own Special Measures Programme, which covers its employees. They emphasise that the Employment Equity does not contain any enforcement provisions, but only requires employers to send annual reports to the responsible minister. These reports are public documents and are used to produce the annual 'Employment Equity Report' published by the Department of Human Resources Development. They consider various Canadian studies which have looked at the impact of the Government's programmes on two key areas: the effects on enterprise behaviour and whether they are effectively implementing their own affirmative action plans and becoming more equitable. These indicate that the legislative programmes have encouraged, (especially large) enterprises to engage in equity activities that might not otherwise take place and that the compliance review process has had a profound effect on the level of initiatives undertaken by those within the Federal Contractors Programme (FCP). Whilst this might reasonably be expected, they point out that only 35 per cent of firms had been monitored. Furthermore, they go on to highlight the fact that in spite of the increased activity designated groups that include visible minorities 'have yet to attain workplace equity' (1997: 19). In considering the reasons for this, they suggest that there are three main barriers to the effectiveness of the Canadian affirmative action programme:

- continuing overt discrimination;
- systemic or structural barriers to equitable employment still existent in society;
- an incorrect application of affirmative action by many enterprises.

They point out that although overt hostile acts of discrimination are difficult to document, there is 'ample circumstantial evidence' that this contributes to inequitable employment outcomes despite the existence of programmes. Under structural or systemic barriers they refer to issues of the lack of language training, the failure to

recognise academic and professional credentials, and barriers in recruitment and selection systems, such as the filling of vacancies by 'word of mouth', and the identification of management potential 'in secret'.

Pendakur and Pendakur (1998) found substantial earnings differentials between visible minority and white workers, and that these were not explained by socio-economic variables for which they controlled. The earnings penalties faced by Aboriginal and visible minority men were large and significant and present in both native born and immigrant populations. In general, white immigrants did not face earnings penalties compared to white native-born Canadians. Among women, native-born visible minorities do not appear to suffer an earnings penalty compared with white Canadian-born women. White and visible minority women both suffer penalties compared with native-born white women. The earnings gap for visible minority immigrants is twice that of white immigrants. For immigrants, the place and level of education explains the earnings gap a little for immigrant men and more so for immigrant women. However, even when foreign education is accounted for there still remains a gap. Whilst their findings are more nuanced they argue that this has implications for the human rights and the employment equity legislation and also for immigration and schooling accreditation policies. In spite of having the benefit of Canadian credentials and socialisation, Canadian-born visible minorities continue to face disparities. In fact, their analysis suggests that while accreditation of foreign qualifications may help the situation for European immigrants, it is not likely to be the case for visible minorities. In a more recent study (Abou Najm, 2001) the issue of the devaluation of credentials in Canadians was further examined. This also showed that immigrants with foreign degrees in specific fields of study were penalised in the Canadian labour market. The study also showed that immigrants from Asia, Africa and South America with Canadian credentials were also economically disadvantaged. The examination of the 1996 Canadian Census showed, amongst other things, that clearly there is 'an economic cost to foreign credentials in Canada.' The report states the policy implication(s) for Canada as it admits more immigrants: is the need to instigate appropriate mechanisms for their integration into the labour market and at levels on a par with their competence and training.

Agocs (2002) considered the impact of Canadian employment equity policy and legislation during the period 1987 – 2000. She emphasised the 'preliminary and suggestive' (2002: 261) nature of the study at the time. Considering the data on designated groups from 1987 to 1998 and the Annual Report of the Canadian Human Rights Commission 1999, she suggested that: 'Overall, the numerical representation of women and visible minorities has increased considerably, while that of aboriginal people increased slightly...' (2002: 265) However, she concludes that the promise of employment equity in reducing the impact of systemic discrimination in employment has not been realised, and points to weaknesses in implementation and enforcement. She thus emphasises a persisting gap between employment equity policy and practice.

In the same year, Mentzer (2002) considered the impact of the Canadian Employment Equity Acts and took a rather more optimistic view: '...the nearest to a success story is that of visible minorities, who are represented in covered employers to a greater extent than in the overall labour force, and whose representation climbs steadily upward...' This optimism is qualified however, thus '...the aggregated nature of the data hides inequities in certain segments of the labour market. Also, the visible minority category combines ethnic groups that are very prosperous with groups that are impoverished; hence the combined data can be very misleading.' (2002: 45)

Harish Jain and John Lawler (2004) also explore the effectiveness of the Employment Equity Act with regard to visible minority employees, using quantitative data from employer reports published under the provisions of the Act, which covers the period 1987 – 1999 (Jain and Lawler, 2004:586). This is the first study to examine the longitudinal effect of the federal Employment Equity legislation on visible minorities, and is therefore particularly relevant to our project<sup>14</sup>. They analyse the relationship between employment equity attainment for visible minorities under the provisions of the Employment Equity Act and a variety of contextual factors. They find that:

- larger companies, and also larger employment groups within companies, had higher levels of employment equity attainment;
- there was considerable variation across industrial sectors in terms of employment equity attainment, with the banking sector having the higher levels;
- there was considerable variation across provinces in terms of employment equity attainment, with the levels of attainment surprisingly low in the two provinces with the highest concentrations of visible minorities (Ontario and British Columbia);
- there was a general improvement in employment equity over time;
- there was no evidence to suggest that visible minorities were over-represented in secondary labour market settings;
- that employment equity varied substantially across occupations, with visible minorities particularly disadvantaged in management, professional and sales positions, as well as skilled manual jobs. (Jain and Lawler 2004: 604-5)

Similarly Thomas and Jain (2004) find that:

- in private sector firms that were covered by the Employment Equity Act since 1986, visible minority group representation has more than doubled in the 13 years from 1987 to 1999, from 4.9 per cent to almost ten per cent. However, it is worth noting that this figure remained below the 10.3 per cent availability rate shown by the 1996 Canadian Census;

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<sup>14</sup> They use data drawn from a sample of annual reports filed by companies covered under the Employment Equity Act for the period 1987 – 1999.

- visible minority representation varies considerably by industrial sector (see Figure 6.1). The representation of visible minorities in the banking sector rose to almost 15 per cent in 1999 compared to 9.5 per cent in 1987. Within the communication sector this figure was 4.1 per cent in 1987 and more than doubled to nine per cent in 1999. However, this rate was below that of the available group within the economically active population. The slowest progress was found to be in the transportation sector where visible minority representation rose from 2.6 per cent in 1987 to 8.6 per cent in 1999. With the exception of the National Bank of Canada, where representation shrank from 9.2 per cent in 1996 to 4.5 per cent in 1999, visible minorities have exceeded their census representation in the selected banks both in 1996 and 1999 relative to 1987. They are generally below their census representation in most of the selected companies in the transportation sector.

**Table 6.4 Percentage of visible minorities by sector**

Sector	1987	1994	1996	1999
Banking	9.5	13.7	14.1	14.9
Transport	2.6	4.2	4.8	8.6
Communications	4.1	7.2	8.8	9.0

Source: Thomas and Jain (2004).

Although Thomas and Jain (2004) is essentially an attempt to look at the potential lessons for South Africa based upon the Canadian experience, it concludes with an important point with regard to this report: '...employment equity must be viewed from both macro- and micro-perspectives...the real challenge exists to go beyond compliance in the ensuring of top management commitment to the sentiments that underlie the legislation and the holistic development of people and organisational cultures that are free of historical discrimination' (2004: 51)<sup>15</sup>. In an overall assessment they cite the Canadian Human Rights Commission Annual Report of 1999, which showed that the move towards an equitable federal workplace was continuing 'at a snails pace' and that visible minorities in the public sector were 'not making acceptable gains' (1999: 86).<sup>16</sup>

<sup>15</sup> See also Dhimi (2003), which uses Layder (1994) on the micro – macro dichotomy to connect local and national level equality policy making.

<sup>16</sup> It is also worth noting that since mandatory employment equity policies began in Canada, the available evidence points to no progress having been made with regard to the representation of aboriginal people and people with disabilities in senior management positions within the country (Human Resources Development Canada 1999).

Agocs argues that formalised equity programmes with mandatory goal-setting and vigorous enforcement by government authorities have a significant impact on results. Thus, she reaches the conclusion that '...it is of critical importance that equality policy be mandatory rather than voluntary for employers...' (Agocs, 2002: 22). She acknowledges that there has been some progress for visible minorities in the labour market, but that this does not extend to senior management positions. Agocs notes that relative to other countries, Canadian employment equity legislation is advanced and broad in scope and coverage. She attributes the gap between the promise of the policy and the limited results to a lack of support for implementation and enforcement by political leaders and employers. She says the process has been '...sabotaged by a lack of commitment and resources' (2002: 86).

However, there is also a body of research that explores the effectiveness of the Federal Contract Compliance Program, generally finding that it is 'stronger and more comprehensive' than other government-mandated programmes (see Jain, Sloane and Horwitz, 2003; Jain, 2001; Gunderson, Hyatt and Slinn, 2002; Tagger, Jain and Gunderson, 1997).

Bakan and Kobayashi (2002) highlight the paradoxical Canadian employment equity context, in which there is extensive legislative commitment at the federal level, but at the provincial level policies and programmes are poorly developed and unevenly applied. Against this background they consider the development of a political backlash towards affirmative action and employment equity policies. They suggest that the ideological opponents to such policies have managed to present policy making as taking the form of quotas and undermining the principles of merit. They argue that the success of this backlash has given an 'implicit green light to oppressive practices' in the workplace and society at large, but that this has not gone unchallenged. They consider the case of Ontario because it is unique in three ways. Firstly, developments in employment equity policy there have been the most extensive in any province and it was wider in mandate than the federal legislation. Secondly, the nature of the extreme backlash against these policies is not matched elsewhere in Canada (an equal and opposite reaction some may argue). Thirdly, there is the presence in Ontario of an organised, self-educated and committed non-government community, which continues to advocate such policies.

They acknowledge that they are unable to document the evidence of workplace efficacy of such policies and argue that the legislation is difficult to measure in terms of effectiveness. Indeed, the statistical measurement of workplace representation has itself become the focus of the backlash. Using the term backlash loosely, to define a range of right wing conservative reactions to 'progressive' political trends they argue that it is an ideological and social construction; used deliberately as a mechanism of reactionary politics, but also accommodated by some who otherwise favour the general aims of equity. However, they go on to accept that it is not a 'figment of someone's imagination' and has had real and specific effects; not least in managing to repeal parts of the employment equity legislation and also in eliminating the Anti Racism Secretariat and slashing parts of the budgets of sections

of the state equity apparatus. Agocs suggests that in several countries the neo-liberal political climate of the 1990s in fact led to a reversal from earlier commitments to employment equity or affirmative action policies.

More positively, in 2002 the House of Commons Canada produced a report (*Promoting Equality in the Federal Jurisdiction: Review of the Employment Equity Act*) that looks at changes in workplace representation of all designated groups covered by the Employment Equity Act 1986. Overall, it claims that the picture 'has undeniably improved. This fact was widely recognised by an overwhelming majority of our witnesses' (2002: 3). It reports a steady improvement in the employment of visible minorities during 1987 – 2000 in the federally regulated private sector, and an 'impressive employment growth' in the public sector during the same period. However, these gains are considered later relative to their labour force availability. This shows that in relation to the federally regulated private sector, visible minorities were in fact 'slightly over-represented' by the year 2000. However, there was 'significant under-representation' in federal departments and agencies, in spite of the fact that the availability benchmark as applied to the federal public service was significantly lower than applied to the private sector.

More recently, *The Canadian Labour Program: Annual Report Employment Equity Act 2004*, the Government's 17<sup>th</sup> Annual Report to Parliament on the Employment Equity Act, shows that in 2003, under the federally regulated private sector, the representation of visible minorities at 12.7 per cent, surpassed their labour market availability rate at 12.6 per cent for the first time. Members of this group had higher shares of hirings, promotions and terminations in 2003 as compared with 2002, and that hirings continued to exceed terminations. However, the salary gap widened for visible minority men and visible minority women in 2003.

Finally, a new study of ethnic minorities in Canada conducted by Cheung and Heath explores whether second generation immigrants fare better than the first generation in terms of their access to employment and occupational attainment. They find that overall the second-generation ethnic groups fared better than the first-generation groups on both access to employment and occupational attainment, and that this was particularly noticeable in the case of occupational attainment, where the second generation were noticeably more successful than either the first or the third (and later) generations (Cheung and Heath, forthcoming). They suggest that first generation immigrants, including recent arrivals 'may have particular difficulties in the labour market as they have had little time to learn about the workings of the Canadian labour market and little opportunity to acquire Canadian work experience.' (Cheung and Heath, forthcoming). They argue that recent arrivals have particular difficulties in the labour market, but that there may be real generational improvement in occupational attainment, with intergenerational improvement most marked among those groups that were most disadvantaged in the first generation. Overall, they find that ethnic groups in Canada have shown 'remarkable' success in the second generation, with only Caribbeans experiencing substantial and statistically significant disadvantages with respect to employment. However, they note that it is



impossible to determine whether this success of the second generation is due to Canadian policies of multiculturalism or to other factors. Significantly, they also stress that Aboriginals continue to experience major disadvantages, and that the possible benefits of multiculturalism do not appear to apply to the indigenous peoples.

## 6.4 Lessons for Britain

Overall, the Canadian experiences suggest that, following the introduction of the Multiculturalism Act, **expectations** of employment equity have generally been high, leading many Canadian studies to highlight the gap between rhetoric and reality. Many Canadian studies indicate that Canada's positive action policies have not generally been as successful as they might have expected. This may be due to the large continuous flow of **migration**, which results in high levels of people with on average limited Canadian linguistic facility, work skills, appropriate qualifications (as overseas qualifications frequently count for less), cultural and appropriate interpersonal skills. This may mean that even if from one year to the next some progress in equity is made it will be masked by the new entrants into the pool, especially if, as there is reason to believe, recent immigrants have lower levels of human capital than their peers of ten or twenty years earlier. However, studies that control for the immigration effect and the racialised effect show that **racial discrimination** continues to be a feature of the Canadian labour markets. In this context, it may be significant the Employment Equity Act and the Federal Government Contract Compliance programmes only apply at the **federal level**, leaving 87 per cent of the Canadian workforce exclusively under the remit of the provincial jurisdiction.

Nonetheless, **comparative evidence** indicates that levels of ethnic and racial disadvantage are low in Canada relative to author countries (Heath and Cheung, 2006). Moreover, while there is little **direct evidence** that positive action policies have been responsible for these comparatively low levels of disadvantage, the federal **contract compliance** programme is regarded as 'stronger and more comprehensive' than other Canadian government-mandated programmes. Our survey also suggests that care must be taken to ensure that initiatives at the highest levels of government are carried through at **lower levels of government**, especially in the context of devolution. Also, the implementation of a contract compliance programme needs to be well resourced and should entail mandatory goal-setting and **vigorous enforcement**, including sanctions, by government (Section 6.4).

The lesson, then, appears to be that even a country that is generally regarded as open and positive about immigration and minorities has a need for ongoing positive action policies.

### Lessons for Britain

The **contract compliance** programme is regarded by some as 'stronger and more comprehensive' than other Canadian government-mandated programmes, but there is little evidence, unlike in the United States, that federal contract programmes have been effective. This is partly due to the fact that, unlike employers under the EEA, federal contractors are not required to file a report regarding representation, hiring, turn over or salary distribution.

Care must be taken to ensure that initiatives at the highest levels of government are carried through at **lower levels of government**, especially in the context of devolution.

The implementation of a contract compliance programme needs to be well **resourced**.

It also needs to entail mandatory goal-setting and **vigorous enforcement**, including sanctions, by government.

## 7 Learning from the experiences of Europe and North America

*'... 'positive action' or its equivalent formulation 'affirmative action' needs to be acknowledged and vigorously defended as a core strategic concept in the struggle for racial equality.'*

(Ben-Tovim, 1997)

Reflecting on the developments in Europe and North America in relation to ethnic minority positive action employment policies, we now turn our attention to consider the central issues for Britain that have emerged in these various case studies.

We begin by considering how and why statistical evidence is collected by businesses and government organisations. We then focus on procurement and contract compliance, as this is the positive action policy that has emerged as most widely deemed to be effective in all three of our case studies, the Netherlands, the United States of America (USA) and Canada. Of particular interest is how these programmes work; whether they have the ability to alter cultural attitudes; what sort of effect specific these policies have on both clients and government; and whether they have an effect that extends beyond those companies contracting with government. We will also consider whether any other government measures conducted might contribute to increasing ethnic minority employment.

While in the previous chapters we have relied on the academic literature, in this more practice focused chapter we will rely on our interviews with American and Canadian experts, some of whom are academics, but the majority are either public agency based practitioners, policy advisers or employer-based implementers of affirmative action policies. This enables us to revisit some of the issues so far covered through a practitioner's perspective and to glean some insights that an academic literature can overlook but which may be vital to practitioners in Britain. For a full list of the people we interviewed (see the Appendix).

## 7.1 The collection of statistical evidence

One difficulty in trying to evaluate the necessity for, and impact of, affirmative action policies, is the paucity of relevant statistical data. As one study noted: 'Several studies bemoan the lack of statistical data...which can lead to problems in pinpointing groups deserving of affirmative action or which, more importantly...makes it almost impossible to evaluate – in quantitative terms – the impact of programmes which incorporate quotas or targets for such groups.' (Hodges-Aeberhard and Reskin, 1997)

Moreover, where statistical data does exist, it is frequently not measured in uniform ways. The recent comparative study by Heath and Cheung is particularly significant in this regard, providing a systematic comparison of ethnic penalties (Heath and Cheung, 2006 and forthcoming). However, much of the current research on ethnic and racial disadvantage controls for different factors, and Reskin notes that there is 'considerable variation' in the collection and monitoring of statistics (Reskin, interview). For example, there are differences in the way in which the analysis of progress is measured in Canada, as opposed to the United States (US). For example, Canada has its own terminologies and methodology. In Canada, the 'representativity index' refers to the percentage representation of a designated group against its estimated availability in the Canadian labour market workforce. There is also a 'Report Compliance Index' that measures the extent to which federally regulated private sector employers including crown corporations have met their reporting obligations, and this covers five aspects: timeliness, measures taken, results achieved, consultation held with employee representatives and an explanation of year-on-year variances in the employment data. The Canadian system also uses Flow Data and Clustering Analysis to enhance the focus of the Employment Systems Review. This helps to establish appropriate goals by looking at the systems that may be causing under-representation, and compares:

- shares of hires of a designated group with the groups external availability in the labour market workforce;
- shares of promotions of a designated group with the group's internal representation; and
- shares of terminations of a designated group with the groups internal representation.

Clustering analysis shows whether a higher proportion of any designated group is found in the lower levels of occupational groups compared to non-designated group counterparts (Technical Guide: EEA 2005). It is worth noting that the number of reports from federally regulated employers has steadily increased with almost 460 covering a total workforce of approximately 620,000 submitted in 2003, compared with 423 reports submitted in 2002 (Annual Report: Employment Equity 2004).

It is clear that whatever methods or approaches to monitoring statistics are used, whether the Canadian system or the US each involves considerable complexity. It is also clear that it also involves considerable costs in terms of time and money for employers and the departments that administer these programmes and their progress. Indeed, any system which is considered for the United Kingdom (UK) context would necessarily warrant the creation of a new bureaucracy for managing the process. We are unable to estimate the potential costs in terms of time, effort and money. It would be difficult to engage in a cost benefit analysis that involves a simplistic calculation of these matters and the economic implications. Such a calculation would be further complicated by an attempt to gauge what the political implications might be, though some of these are considered below. Notwithstanding this, as the evidence shows 'In the US, contract compliance is effective...(and) in Canada, there is no such evidence one way or another,' (Jain, 2005) it would not be irrelevant to take account of the perceptions of those who are likely to be the beneficiaries of such schemes. Such schemes are likely to be well received by them and would send a clear message that government is taking ethnic inequality seriously.

Holzer argues that: 'Outside of the firms that practice Affirmative Action, the collection of employment statistics by race and gender for the Government remains a controversial issue. Those reports of statistics are not regularly monitored and there is no enforcement activity based on what's in those reports. Furthermore, some employers regard them as a burden. There was a move at the U.S. Labour Department in 1999 to expand the information included in those reports, to include compensation and wage information by race and gender which is (a) more complicated to figure out because you're not just counting up bodies, and (b) the employers were much more sensitive about their compensation policies and regarded these as a private matter. Therefore there is still some controversy over what data should be required and what is done with it. There are problems with potential fraudulent data, and also those who do not fill them out accurately, and this leads to difficulties with enforcement issues.' (Interview, 2005)

Purdam and Dex (2005) note that many employers in the UK, even those 'chosen as leaders in equal opportunities policies' do not have effective workforce monitoring to even a basic level. They suggest that: 'This was either because they did not collect necessary data according to gender or ethnicity, or because they did not analyse the data they collected on their workforce and applicants.' All employers were faced with problems of incomplete data, especially on classifying the ethnic origin of employees and on disabled people. By contrast, they note that, because legal requirements exist in the US for 'affirmative action' procedures, US companies do have more extensive and complete levels of data collected; regularly updating and maintaining databases; analyses of the data collected; familiarity with the analysis issues; the human resources set aside to work on this; and the written justifications for all decisions. The introduction of positive action measures such as contract compliance, in the UK, would require the production of more detailed statistical data.

## 7.2 How contract compliance works

The Office of Federal Contract Compliance Programs (OFCCP), which oversees the contract compliance programme, is part of the U.S. Department of Labor's Employment Standards Administration and has a national network of six Regional Offices. The agency undertakes the following activities:

- Offers technical assistance to federal contractors and subcontractors to help them understand the regulatory requirements and review process.
- Conducts compliance evaluations and complaint investigations of federal contractors and subcontractors personnel policies and procedures.
- Obtains Conciliation Agreements from contractors and subcontractors who are in violation of regulatory requirements.
- Monitors contractors and subcontractors progress in fulfilling the terms of their agreements through periodic compliance reports.
- Forms linkage agreements between contractors and Labor Department job training programs to help employers identify and recruit qualified workers.
- Recommends enforcement actions to the Solicitor of Labor.
- The ultimate sanction for violations is debarment – the loss of a company's federal contracts. Other forms of relief to victims of discrimination may also be available, including back pay for lost wages.

They state that: 'All contractors and subcontractors who hold a Federal or federally-assisted construction contract in excess of \$10,000 are subject to regulatory requirements under one or more of the laws enforced by OFCCP depending upon the amount of the contract. Once it has been determined that a contractor or subcontractor is subject to OFCCP jurisdiction, the regulations implementing the civil rights requirements enforced by OFCCP apply to all of the contractor's or subcontractor's employees who are engaged in on site construction, including those construction employees who work on a non-Federal or non-federally assisted construction site. Each non-construction contractor/subcontractor with 50 or more employees is required to develop a written Affirmative Action Program (AAP) for each of its establishments within 120 days from the start of the Federal contract, if it: has a Federal contract or subcontract of \$50,000 or more; has government bills of lading which in any 12-month period total, or can reasonably be expected to total, \$50,000 or more; serves as a depository of Federal funds in any amount; or is a financial institution that is an issuing and paying agent for U.S. savings bonds and savings notes in any amount.' (OFCCP, 2006) They continue: 'The internal audit and reporting system is the contractor's way to assess the overall effectiveness of the contractor's AAP and advise senior management of the effectiveness of the AAP. The system should monitor records of all personnel activity (including hires, promotions, transfers and terminations) and compensation at all levels to ensure that non-discriminatory practices have been followed. It is suggested that reporting

be performed on a periodic basis and reviewed by appropriate management. In addition, top officials should be notified of the programme's effectiveness and any recommendations for improvement. The AAP should contain a narrative description of how the system works.' (OFCCP, 2006)

The process of contract compliance monitoring and the use of an **availability pool** has been described by Pincus (2003) as 'a complex issue', and he points out that: 'There are pages of regulations specifying how these figures are calculated.' (Pincus, 2003: 22)

The central US document is that produced by the US Department of Labour, Employment Standards Administration, Office of Federal Contract Compliance Programs (Chapter 60: Equal Employment Opportunity, Title 41, Part 60 of the Code of Federal Regulations: 89-231). This publication outlines the obligations of contractors and sub-contractors. Its purpose is to achieve the aims of part II, III, and IV of Executive Order 11246 for the promotion and ensuring of equal opportunity for all persons. It contains definitions of the relevant administrative procedures and institutions involved in contract compliance. It also outlines the process of compliance evaluations, enforcement proceedings, sanctions, filing complaints, notices, and various other matters governing the relationships between the government department and contractors.

Federal contractors and sub-contractors in the US, (excluding those in construction) which have 50 or more employees and a contract of more than \$50,000 dollars are expected to develop an affirmative action plan within 120 days of receiving the contract. Failure to develop and implement such a plan can result in the firm losing the current contract and also being **ineligible** for further contracts. This process is known as being **debarred**.

The first requirement of the contract is to conduct a utilisation study of the firms' employees. It is possible to state, for example the percentage of skilled blue collar workers in a maintenance department who are black or the percentage of managers in a sales department who are Hispanic.

There is also a requirement to state the percentage of female and minority employees in the **availability pool** i.e. those who are qualified and potentially available for such work. In the case of blue-collar, sales, service, and less skilled clerical jobs, the availability pool will be calculated according to the percentage representation of women and minorities in local labour force. For example, for clerical jobs if the local labour force has six per cent Hispanics, then the availability pool for Hispanic clerical workers is six per cent. For more skilled jobs like carpenters, the availability pool will comprise the percentage of minority or female workers employed in such work locally. So that even if women constitute 40 per cent of the local labour, if the actual availability of women carpenters is six per cent then that will form the availability pool. The availability pool for professional and managerial jobs can be estimated on a state-wide or national basis. For example, for nurses the black availability may be defined as the percentage of blacks obtaining nursing degrees

within the particular state in the last five years. For a college faculty the availability of female psychologists may be defined by reference to the number of females awarded doctorates in the subject in the last five years in the whole country.

Employers are required to compare the actual distribution of minorities or women with the distribution in the availability pool. If the actual employment is equal to or greater than the availability then the employer is considered to be 'in compliance'. Alternatively, if the actual employment is less than the availability the employer is 'under-utilised'. This process is calculated against each job category and each department. If the contractor is under-utilised they are required to include a set of goals and timetables within the affirmative action plan. These will be based on the specific conditions of the employer, and will include job turn over rates and whether the particular industry is expanding, stagnant or contracting. The employer is required to specify the actual procedures that they will engage in to meet their goals. This can include wider, more public advertising and the use of EO policy statements and encouraging statements for target groups to apply. Adverts should be placed in professional journals that target blacks and minorities. Employers should send letters to well-known minorities and women in the particular fields asking for referrals, and letters should be sent to schools that train large numbers from the target groups and recruiting trips to relevant conferences should also be included. The employer is required to go out of their way to increase the hiring pool of minority and women candidates.

The contractor also needs to designate an employee with specific responsibility for overseeing the affirmative action plan. However, the employer does not need to submit the plan for approval to the OFCCP. The plan simply needs to be kept on file in the contractor's office, but the employer is expected to make a 'good faith effort' to implement the plan, though it may not succeed.

The OFCCP does not review the hiring practice of each employer for every year. Each year contractor firms are required to fill out EEO-1 forms that list all employees by race and gender. The OFCCP reviews these forms annually, and picks a subset of firms that are monitored more closely for possible compliance reviews (Holzer, 2006). In the unlikely event that the contractor is investigated it is only required to show that it followed the procedures in the plan, to encourage applications from target groups. If a white male applied for and was appointed in preference to a black person then the employer must be able to show that the white candidate was more qualified for the job. The affirmative action guidelines require meritocratic appointments, and do not permit preferential treatment or quotas, which are illegal, in this context. The regulations do not force employers to hire unqualified people or engage in reverse discrimination. Nevertheless, it is thought that: 'some contractors...may pressure personnel officers to illegally hire unqualified, under-utilised minorities to avoid problems with OFCCP officials. It is difficult to determine how extensive this practice is.' (Pincus, 2003: 24)

Contractors who are suspected of not complying with the guidelines can be subject



to a **compliance review**, which involves on average three weeks of a compliance officer's time. The OFCCP conducted 4,162 compliance reviews in the year 2000, which represents a drop of 33 per cent from 1989 when 6,232 were conducted. As there were 192,000 contractors in 2000, and an even larger number of sub-contractors, even at the rate of 4,162 reviews per year, it is estimated that it would take 46 years to review all the contractors once. Hence, the actual chance of being investigated is relatively small. Actual debarments for non-compliance are in fact extremely rare, and according to OFCCP figures there were only 43 contractors debarred during the first 37 years of the programme – an average of 1.2 per year. Companies can be reinstated after debarment if they make the required changes, and 60 per cent of those were eventually re-instated, within a median period of 9.5 months (Pincus, 2003).

Holzer confirms this trend, stating: 'It is an empirical fact that, very few companies are debarred, i.e. lose their government contracts, although some pressure is brought to bear on them. So critics question how the policy can be taken seriously if no one ever loses their contract? The response has been that, companies don't want the bad press, and they don't like lawsuits which sometimes are pursued by the Department of Labour.' (Holzer, interview)

The Canadian system is equally complex in its own right and detailed guidelines are contained in the Technical Guide, which accompanies the Annual Reports. Federally regulated employers have a statutory duty to conduct an analysis of their workforce and determine the degree of under-representation of designated groups in each occupational category. Employers are required to submit annual employment equity reports to the Minister of Labour. The reports contain a quantitative section describing the progress in achieving an equitable workforce and a qualitative section that summarises the measures taken, results obtained and consultations between management and employee representatives.

The information from all employers who have submitted (there has been a steady increase in submissions, see section on Canada) is consolidated in August of each year by the Labour Program of Canada and published each year in the Minister's Annual Report to Parliament. The Annual Report compares year on year progress that employers have made in achieving workforces representative of the designated groups.

The relevant documents relating to contract compliance in Canada is 'The Canadian Labour Program: Technical Guide – Employment Equity Act'. This document is in English and French. At only 30 pages in length it is considerably shorter and less detailed than the US version. The two countries have different policies and the Canadian approach is for a requirement of annual reports from companies that contribute towards the government annual 'Employment Equity Report'. This document serves as a technical guide to the Annual Report and gives explanations of the terms and statistical methodologies used to verify company performance ratings.

Whilst there is evidence that contract compliance is an effective positive action policy, it should be noted that there are costs attached to the programme. DCI Consulting note that: 'complying with OFCCP requirements and regulations is extremely complicated and time consuming, reducing the time that HR staff have available to conduct other mission critical business functions...An OFCCP compliance evaluation is a very stressful and time-consuming process for federal contractors and subcontractors.'

### 7.3 Changing cultural attitudes

Edwin Bowman argues that affirmative action employment policy is not enough in itself – it cannot address societies wider problems, for example, those of black people or other minority groups who are denied equal educational and employment opportunity (Bowman, interview). Society needs to change at a wider level: affirmative action policies play a role in fostering organisational and individual accountability, but remain only a part of the process.

According to an estimate by Reskin (1998) up to 20 per cent of private employers have voluntarily engaged in some affirmative action policy. During fieldwork she indicated that the policy had resulted in a wider shift amongst employers to engage in voluntary activity. She suggests that this was precipitated by Human Resources professionals, who had adopted this as good practice.

Reskin argues that a process of 'diffusion' has meant that many now engage in some sort of affirmative action, independent of any mandatory requirement, because this is generally perceived to be good practice. She believes that the human resources professionals in organisations have become champions for the promotion of these practices, as they are the ones who become aware of general trends in discrimination cases and how to avoid these. As such, much of what takes place is pre-emptive. Whilst it is the federally mandated employers who are likely to be audited, those that engage in the best practices will have some of sort defence if allegations of discrimination are made (Reskin, interview). However, Kalev, Dobbin and Kelly engage in an analysis of the efficacy of approaches designed to comply with civil rights law and promote diversity. They conclude: 'That there are many reasons to believe...that organisations adopt anti-discrimination measures cynically, with every intention of using them as window-dressing should they be hauled into court but with no intention of making sure that they reduce inequality.' (Kalev *et al.*, 2005: 35)

Similarly, Jain *et al.* (2003) suggest that, although governments can take various measures to encourage compliance by employers, '...(the) real challenge is for organisations to move from a compliance mindset to one of commitment to the spirit of valuing a diverse workforce and respect for the individual.' (Jain *et al.*, 2003: 208) They make the following policy recommendations:

- As a short-term measure anti-discrimination legislation and policy should be updated and strictly enforced.
- The likely cost of unfair discrimination cases should be so high as to induce employers to adopt staffing and managerial policies that prevent such behaviour. They suggest a zero tolerance policy for hurtful, intolerant racially (or gender) offensive language and behaviour. They argue that organisational policy and managerial will are important in this regard, to avoid the erosion of trust and morale that can stem from a gap between policy and practice.
- In the longer term, education and training are a more effective way to eliminate prejudice and misconceptions, which lead to racial intolerance and discrimination. Organisational equity can be achieved through a reward and performance management system that recognises progress towards the elimination of discrimination and the development of people from minority (or majority) designated groups.

They conclude: 'Public policy and its legal instruments have clear limits. Where they end, employers can make strategic choices about employment equity, affirmative action, and skills development. Organisational prerequisites for moving from compliance to a commitment model in respect of employment equity and capacity building are vital.' (Jain *et al.*, 2003: 211) Ravi Pendakur suggests that the situation regarding the recognition of foreign credentials is complex: because you are dealing with qualifications from so many different countries the solutions are complex. He notes that studies have found that immigrants with professional qualifications in areas that are governed by professional organisations (engineers, doctors, lawyers, etc.) take a greater earnings reduction than people who have credentials in the social sciences (Abou Najm 2001). This is because the professions act as gatekeepers, protecting their membership. Whereas the social sciences don't have these organisations and equivalency is difficult when defining what people have learned in a degree. Pendakur suggests that some disciplines have been able to do this, at least informally, but that there is no formal system. Rather, there is a sense, for example, that a bachelor's degree from the Philippines is worth the equivalent of high school in Canada, or a master's degree in economics is worth the equivalent of a bachelor's. On the plus side, universities do allow immigrants to do a 'qualifying year'. This has the effect of actually testing their credentials (at the cost of a year of a person's life).

Dobbin argues that quantitative research shows that in the US diversity training has 'not worked at all' to improve the situation in terms of recruitment (interview, 2005). Even the formalisation of recruitment and selection procedures has not had a profound effect in improving the situation for African Americans. Certainly, the language of equal opportunity has shifted from affirmative action to diversity management, but in real terms this has not meant any significant shifts in approach. He believes that the most successful employment equality strategies are those that assign responsibility to someone specific within organisations and have full support from some form of diversity management committee. He has a

perception, but this is not so far substantiated by actual research, that when black people are actively involved in the recruitment programmes, this can also be a positive effect in terms of increasing representation. Advertising within the black media and visiting high schools and colleges can also help in the process.

## 7.4 The risks of employment equity and affirmative action programmes

The impact of employment equity and affirmative action policies has been diverse. Amongst the negative effects of the policies, the two most significant appear to be: the production of backlash and resentment, and the creation of tensions between minority groups.

### 7.4.1 Backlash and resentment

Many people have argued that affirmative action amounts to 'reverse discrimination'. This fuels a sense of grievance amongst groups not targeted by the policies. Within this framework affirmative action is not seen as necessary, employers are perceived to engage in colour blind hiring, and it is argued that the policy benefits people who are undeserving and do not want to work. Indeed, as Pincus puts it, affirmative action is '...seen as hurting the more deserving white men through reverse discrimination. It is a testimony to the sad state of race and gender relations that, at the beginning of the twenty first century, it is necessary to write a book to prove that discrimination against white men is less common than discrimination against women and people of colour.' (Pincus, 2003: 19-20)

Recent interviews with key affirmative action scholars and practitioners in the US and Canada confirms that perceptions of reverse discrimination, resentment and backlash continue to be a problem.

Kay Blair, Director of Microskills in Canada states: 'One of the main problems with employment equity is that it encourages a perception of reverse discrimination. But there needs to be a recognition of past history – to move forward there has to be an acknowledgement of past injustice. However, it is important that people are appointed according to their skills and abilities, anything else 'fosters hostility'. The Ontario Employment Equity legislation was repealed because of conservative anger and resentment that whites were being marginalised and denied employment opportunity. (Though not aware of) any empirical evidence to show that targeted groups under-perform but the process can be sabotaged because of the perceptions of other workers – belonging to a designated group can induce 'emotional drawbacks'. They can perform and it needs to be recognised that they can meet the challenges. Conflict in the workplace can impact on performance and productivity, depending on the hostility.' (Blair, interview)

Christopher Metzler also argues that because some people see affirmative action as requiring them to hire people who are otherwise unqualified for jobs, there is the problem of a backlash: 'Another reason for the backlash, is that people see

Affirmative Action as requiring them to have a certain amount of people, to meet a quota within the organisation. People have a perception that they are required to hire people based on numbers, and based on what they look like, and not their qualifications – the backlash is the result of this misinformation.’ (Metzler, interview) He thinks that opposition from employers has actually increased over the years, because mandated programmes from the Federal Government, change according to the politics of the country, and the backlash either goes up or goes down. In the context of the United States, there has been a shift away from so-called preferences. Metzler suggests that this protest has undermined the affirmative action policies, practice and procedures.

Rosemary Kilkenny suggests that minority persons who are the potential beneficiaries of the programmes, must be qualified to get the opportunities, and not admitted as an employee or student just so that a goal can be met. It is important that targeted groups are going to be able to achieve and be successful otherwise the policy is undermined: when black people or women are hired and subsequently, unsuccessful, organisations are less likely to hire others from those groups.

Canadian experts also report a backlash against employment equity policies: ‘There has been a significant backlash against employment equity. If the programmes were successful that would mean an increase in competition for jobs. There has been resentment and political mobilisation against the programme. In the early 1990s there was resistance to the policy amongst the police forces and the fire department, where there was low representation of racialised minorities. There is nothing to show that targeted groups underperform when appointed. Nor do they have any adverse effects, but the reaction of others may affect their ability to perform. It is sometimes suggested that racialised minorities do not have soft skills – i.e. interpersonal skills. Affirmative action has become more necessary.’ (Galabuzi, interview) This argument is echoed in relation to the US also, where Reskin suggests that the argument that some groups do not have the necessary ‘soft skills’ (the ability to speak the same kind of English, dress sense, and so on) is widespread.

Indeed, Jain thinks opposition probably extends to some officials in government departments themselves, as evidenced in the Health Canada Case of 1999 (Jain, interview): Health Canada, one of the biggest departments in the country, was taken to a Canadian Human rights tribunal in 1999, which decided that the senior officials were discriminating against visible minorities who were scientists and in senior professional positions. These visible minorities were prevented from becoming managers by systemic discrimination against them.

Regarding the perception that targeted groups are considered unqualified, Holzer suggests that controversy surrounds the predictive power of the credentials with regard to actual performance. Actual performance is very hard to measure. Credentials are much easier, and it is possible to point to shortfalls, ‘...there’s no question that along those measurable dimensions, minorities fall short in educational attainment, grades, test scores, years of experience...and then there’s the question of those predictors, do they predict...performance as well for minorities as they do

for whites? Is the measurement of performance itself sometimes racially biased by who's doing the measurement?...there's a big debate on what the credentials mean and how important they should be.' (Holzer, interview) In his research based on supervisory evaluations even after affirmative action he 'had difficulty finding clear evidence of lower performance...even if you have a handful of individuals whom you believe were promoted or hired without being fully qualified...they're probably not usually large enough to dramatically lower the organisations wider performance.' (Holzer, interview)

However, simply having evidence that shows there are no adverse effects on employing targeted groups is not enough, questions arise about the implication for public relations. Pincus argues that if white men were genuinely victims of discrimination the data would not continue to show as it does that they have so many economic advantages and that women and people of colour are still the true victims. A majority of whites have a perception that discrimination against women and people of colour is no longer a problem and that there is a relatively level playing field. They seek to explain economic inequality as being the result of a 'defective culture' suggesting that high unemployment rates and low incomes amongst blacks and Hispanics are due to broken families, a lack of motivation, a drug culture, etc. Blacks and Hispanics are therefore presented not as victims, but as being responsible for their own situation (see Krysan, 2002). He engages in empirical research to examine the frequency of reverse discrimination, using two different sets: Equal Employment Opportunity Commission (EEOC) data for FY 1995-2000; and appeal court decisions involving alleged reverse discrimination between 1 January 1998 and 31 December 2001. He found that:

- traditional discrimination is much more prevalent than reverse discrimination;
- in EEOC cases there were more sex-related reverse discriminations than race-related reverse discrimination cases, but that in appeal court cases the opposite was true;
- the issues of promotion and firing were expected to be more prevalent than issues of hiring and quotas. This was partly confirmed in EEOC cases and fully confirmed in appeal court cases. Data showed clearly that only a minority of allegations of reverse discrimination involve affirmative action as such;
- traditional discrimination cases were more credible than reverse discrimination cases. In both data sets women complainants were more successful than men. However, the race related findings were more mixed, showing that in the EEOC cases blacks were *less* successful than whites and inconclusive results in appeal court cases.

On the basis of this evidence Pincus argues that: 'All in all, these findings should take some of the wind out of the sails of the conservative, anti-affirmative action movement. The data show that affirmative action does not have a large, negative impact on white males, as a group. However much they talk about reverse discrimination being a major problem, there is little support for this position in the

empirical data.' (Pincus, 2003: 120) He (also) argues that reverse discrimination is a socially constructed concept used by conservatives and liberal critics to attack affirmative action, and at its worst the discourse of reverse discrimination is a form of contemporary prejudice especially against blacks.

Previous studies of federal court cases (Burstein, 1991; Burstein and Monaghan, 1986) examined federal appeal court decisions between 1963 and 1985. These found only 4.9 per cent of decisions involving whites charging race discrimination or males charging sex discrimination. These studies also found that allegations by whites and males were more likely to involve sex discrimination (40 per cent) than race discrimination (36.5 per cent). There were other interesting findings from these studies:

- there were only 23 per cent of cases involving the issue of 'goals or quotas favouring minorities or women';
- although, 34 per cent of discrimination cases brought by whites and men were decided in their favour, 58 per cent of traditional discrimination cases were decided in favour of minorities or women, suggesting that allegations of reverse discrimination had less legal credibility;
- that only 19 per cent of appeals involved issues of hiring and 26 per cent promotions. The most common complaints at 29 per cent, related to 'discipline, discharge, demotion and layoffs'. This challenges the popular notion that reverse discrimination cases involve not being hired or promoted.

However, case study evidence (Lynch, 1989) based on interviews with 32 men who claimed to have been victimised showed that almost 60 per cent complained of race discrimination. More than a third complained of either sex discrimination only, or of a combination of race and sex discrimination. None of the respondents actually complained about discrimination in hiring, with most referring to problems with promotions, reassignments, discipline or being fired. Whilst this particular case study material has limitations, not least in the ability to generalise from the small sample size, it does give an indication coupled with other research of some of the trends in the area of alleged reverse discrimination.

One interesting finding of particular relevance to a discussion of backlash is that federal contractors appear to experience less of a reaction than non-contractors. Kalev *et al.* suggest that it may be 'that regulatory oversight of federal contractors gives strength to the business case for diversity management' (2005). Another possibility may be that the regulations create a **defence** against any (internal) backlash because they are mandated (Holzer, interview). As no **defence** exists in relation to voluntary activity, it may be that employees feel empowered to vent to concerns, which would otherwise remain suppressed.

### 7.4.2 Tension between groups

In addition to the popular concern with reverse discrimination, there is also concern amongst minority groups and equality professionals about intersectionality, and multi-racial classification and the collection of statistics.

There is a continuing debate about whether affirmative action policy is relevant in the context of a purported growth in black middle class. In the employment context, Kee argues that the emergence of a black middle class indicates less need for affirmative action, as **redress for past discrimination**, but if retention is taken into account there is greater need for affirmative action. He also suggests that, when defining disadvantage, we need to think beyond race and religion.

Although, Arnold Kee did not sense any profound tensions between ethnic groups, he did refer to anecdotes of tensions at different times between blacks and Latinos, blacks and Koreans due to the presence of Korean stores in black neighbourhoods, and there have been stories of tensions between Italians and blacks, he had not heard of these in recent years. Interestingly, he thought that after 9/11 there was a 'dip in the aggregate' of tensions as everyone attempted to centre around their American identity, though that appears to have 'waned' recently.

While for some minorities 9/11 may have marked a (temporary) new found emphasis on an American unity, for people perceived to be Muslims (mainly people from the Middle East, South Asia but also African-Americans with non-Christian names) it has meant an unprecedented level of suspicion, surveillance and discrimination both inside and outside workplaces. This was highlighted by Christopher Metzler, who also suggested that the ongoing war in Iraq has heightened those tensions.

Regarding tensions in the workplace between different ethnic and religious groups, Edwin Bowman pointed out that post 9/11 there clearly have been more discussions about 'ethnic profiling' and the implications for employment. But religion itself is covered by the legislation and so is not a permissible basis of discrimination. There is undoubtedly a 'heightened sensitivity' to these issues, but these things need to be balanced by measures that cover 'anti-hate crimes'. Recent developments have given rise to negative attitudes towards persons perceived to be Muslim and this may impact upon the way others behave toward them. Whilst there are questions about 'whether policies can manage attitudes as opposed to behaviours, there needs to be an open and honest dialogue about these issues' and in each case this will be 'organisational specific – one size does not fit all'. He argued that there is a need for 'synergy', that a dynamic needs to develop which engages people in the workplace on these matters – most probably described as 'respect for the individual'.

The problems associated with other 'designated' groups were marked in Canada by the different experiences of women and visible minorities as highlighted by Keith Jeffers, a consultant with a background in the Canadian Public Service. He pointed out that there was an AAP for women, which started in the 70s in the Ontario Public Service that preceded Employment Equity. There was a 'total difference' in terms of



reaction to Affirmative Action for women to that for other designated groups that included visible or racial minorities. It was argued and anticipated that there would be an easy or logical progression from Affirmative Action from women to Employment Equity for visible minorities since the goals were similar. But his experience is there was a different reaction to gender discrimination as opposed to racial discrimination. Black activists saw Affirmative Action for Women simply as white women attempting to share power with their white male counterparts. White men and white women shared the same values and in spite of their power differentials were united in maintaining the existing structures based on race and white privilege.

Women and racial minorities were only two of the designated groups under the Employment Equity program of the provincial government. The others were persons with disabilities, Aboriginal or First Nations Peoples and Francophones. All of these groups experienced different degrees of disadvantage in the workforce and Employment Equity was developed as a 'solution' to reduce the tensions caused by the exclusion of these groups. Expectations were raised, and were high. The 'solution did not deliver' and this raised the level of frustration and dissatisfaction with the policy and exacerbated the tension particularly between the (white) women and racial minorities. The Women's Program was successful and its beneficiaries were primarily if not exclusively white women. It was cynically labelled as for 'white women only'. It was 'a standing joke that there were women, and then there were racial minority women'. It was argued that because of the effectiveness of the women's programme that had been established some ten/15 years earlier, white women were now in the supervisory and management positions, making decisions about the selection of others. Human Resources personnel are seen as the gatekeepers, and at least in the Public Service at that time, he suggests 75 per cent – 85 per cent of this group were primarily women. Instead of being collaborators, 'as one oppressed person to another, and joining hands and walking into the sunset...people saw the white woman as part of the problem, not as part of the solution.' The issue was no longer gender, but race, and 'the agents of this racism or this retention of power or supremacy, the agents were white men, or white men and white women'.

In the US, Shirley Wilcher suggested that the issue of the collection of statistics and programmes targeted at specific groups is (further) complicated by the use of multiracial classifications because 'it would become problematic if more and more people are added to that list'. For policies that are geared towards specific groups become more difficult to manage. Holzer holds similar views in relation to his time at the OFFCP. He never encountered any opposition to the affirmative action policy within the OFCCP, as it is mostly staffed by career civil servants, with the only political appointee being the head of the OFCCP, the Deputy Assistant Secretary of ESA. He did not think there were serious tensions between different ethnic and religious groups at OFCCP, but nonetheless controversy surrounded the issue of multi-racial classifications. The Census Bureau has been evolving towards a new set of rules to enable people to have multi-racial categories, but the OFCCP didn't always like this because it waters down what they do. It makes their role much more complicated.

Recognition of multi-racial categories, logically implies that racial boundaries are very pliable – making it unclear what it really means to be an African American or an Hispanic American – that creates difficulties in terms of the implementation of affirmative action policy. There was also some tension around consideration of extending protection to other groups, such as the disabled.

Several commentators note the growing trend for ethnic groups to lobby to be included in state or federal level affirmative action programs (Reskin, interview). Harper and Reskin (2005) argue that the growing number of protected groups has contributed to charges of over-inclusiveness and an awareness that African Americans who were the original targets of affirmative action continue to lag behind. This quest for inclusion as an 'official minority' with a right to protection under the legislation has given rise to tensions between different groups and against affirmative action itself (see also Malamud 2001; Leiter and Leiter 2002) Skrenty 2002).

Melissa Williams also notes that there has been some resentment against targeted groups, 'but in the Canadian context people are reluctant to express it...it's muttered under the breath, but seldom gets voiced.' (Williams, interview) This is due to 'a culture of tolerance, of acceptance of difference...Canadians pride themselves on not being racist, not being bigoted, being open minded, and being very welcoming of new immigrants, and to some extent that self-image is warranted, but of course it is not as warranted as people would like to believe. That ethos of inclusiveness, (and) antiracism runs pretty deep.' (Williams, interview) She suggests that Canadians like to consider themselves anti-racist and distinguish themselves from the Americans, because the US is seen as a racially divided society. She thinks this is justifiable, as Canada is not a racially divided society to nearly the same degree and is a country of immigration, however 'there are some big blind spots...especially with respect to Aboriginal people...especially with respect to blacks... Other cultural groups get stigmatised at different moments, in different ways, Asians, Chinese...during the SARS scare, Muslims in general...but...because of historic biculturalism and bilingualism there is a habit of accommodating those who are different from oneself.' (Williams, interview)

Kamal Dib endorsed this point, accepting the existence of overt and violent types of racism, but suggesting that it was difficult to imagine it occurring in places like Toronto or Vancouver, which have high immigrant and visible minority populations. He also suggested that it is unlikely that, 'there are ghettos of foreign people or immigrants or coloured people who will somehow jump and burn cars, that's unimaginable in Canada.' He argues that the country is 'ahead of situations' that face many of the other industrialised countries (Dib, interview).

### **7.4.3 Public relations**

A third area of risk relates to the failure of government to communicate with the public effectively regarding the rationale and nature of the policies proposed, and to promote the policies robustly.

Melissa Williams suggests that policy makers need to find the 'right political rhetoric of equality...to present such policies within a framework of an over-arching democratic culture, an over-arching democratic society, in which ones life chances ought not to be determined by the circumstances of ones birth. Those are the principles that citizens of western liberal democratic societies, generally embrace.' (Williams, interview) Affirmative action policy is, therefore, much easier to present through this lens, as opposed to one based on group privilege. A language is needed that holds the reverse discrimination rhetoric at bay.

In the US context Shirley Wilcher notes: 'Federal government involves a clear top-down process, emanating from a single policy. However, political change clearly undermines the progress of that policy, because it is such a controversial subject. She says it took seven years to build an enforcement programme and it will take another eight years when a Democrat is elected. Political change creates inconsistency and prohibits progress because the views of the different administrations are so extreme and different. One day the agency can do something, the next day they can't. Because of the rhetoric that surrounds affirmative action the PR is important what ever you do.' (Wilcher, interview) Arnold Kee also argues that attention needs to be paid to how the debate is being brought down in the public arena, 'the court of public opinion', and that before discussions becomes too public, there need to be people who understand the issue and are able to respond to the negative criticisms. In the US it was taken for granted that the context of **redress** arising out of the Civil Rights Movement, would be enough to sustain the programmes through the years, and as that became historically further away it became more difficult (Kee, interview).

Similarly, in the Canadian context, Galabuzi suggests that: 'The lack of success and sustainability of the programme in Ontario was the inability to communicate effectively what the programme was about...the key elements...what the benefits were.' This was critical. Whatever support there was for the programme, was 'grossly undermined by the absence of an aggressive communications strategy...half measures really do undermine the effectiveness of the programme...because when you implement half measures, essentially you are setting up the programme to fail, and in the end you have a self-fulfilling prophecy.' (Galabuzi, interview) Jain agrees that the success of positive action '...depends on how you present it, it's a very controversial area, it depends on how you educate people, how you tell them what it is.' He notes that the provincial Conservative government got elected in the early 1990s claiming the Employment Equity system amounted to quotas. Kay Blair also argued that the problem with racism at the workplace is attributable to the absence of leadership and a law 'without teeth'. She argues therefore that the most effective policies are those that understand and work to address this framework. The different federal and provincial provisions in Canada have led to 'fragmentation' and a 'pseudo affirmative action policy'. She believes enforcement work is necessary and that there needs to be greater commitment from government towards fighting hate crime (Blair, interview).

This suggests that political will is central to the effective implementation of affirmative action policies. As Hodges-Aeberhard and Raskin suggest: '... (a) specific factor that impacts on the success of affirmative action in any given enterprise is commitment.' (1997: 26) By inference, organisational commitment is dependent upon the enforcement requirements or expectations of regulations such as contract compliance orders. This in turn is reliant upon a political will (in part) to integrate the mechanisms by which governments and employers interact contractually to be dependent upon the demonstrable achievement of an equitable workforce. If government does not make the attainment of workplace equity a mandatory requirement then employers will be less likely to embark upon affirmative action programmes of their own volition.

The efficacy of affirmative action programmes depends upon a consensus amongst national stakeholders, and these stakeholders need to be involved in the planning, implementation, monitoring and evaluation of the measures. Furthermore, these stakeholders should have an understanding of the parameters of the programmes and workers organisations need to overcome latent fears of reverse discrimination, including concerns about negative affects on seniority and other acquired rights.

Amongst our interviewees there is general agreement in both the US and Canada that affirmative action and employment equity have increased opportunity and improved the position of ethnic minorities. There was general agreement that affirmative action appointments do not lead to lower performance at the individual level because targeted groups feel they have to work twice as hard to prove themselves. Moreover, there is no evidence to point to any wider adverse effect on organisational performance as a result of such appointments.

While most of our interviewees agreed that outcomes are the key indicator of success in affirmative action policy, they also emphasised the need for formalising recruitment. However, at least one raised questions about the efficacy of this in terms of changing representation of targeted groups. Most referred to a quantitative shift in organisational distribution patterns, though some also referred to the need for a qualitative approach at the organisational level to measuring success. One argued the case for **deliberation** suggesting a more sophisticated form of measuring success. Generally, interviewees suggest that metrics need to take account of both recruitment and retention.

## 8 Conclusions and implications for policy

Each of our case studies offers specific lessons for Britain. In this report we looked at the Netherlands, Northern Ireland, the USA and Canada for examples of good practice in relation to positive action policies:

### 8.1 The Netherlands

The developments in the Netherlands suggest that neither the introduction of voluntary agreements nor race equality laws necessarily guarantee results: political will is also needed. Employment equity measures need to be backed up by enforcement mechanisms if employers are to comply. They also need to be bureaucracy-light if employers are to embrace the scheme with any degree of enthusiasm. Too much red-tape risks alienating employers. It also suggests that attention needs to be paid to 'supply-side' issues, ensuring that ethnic minority job skills levels are addressed. This in turn suggests that race equality policies that target the labour market without due regard to education and skills training are less likely to be successful. Education and skills training need to be addressed. Finally, the experience of the Netherlands suggests that the small-scale direct approach adopted for the covenants can be highly effective in addressing high levels of ethnic minority unemployment. In particular, schemes that facilitate co-ordination between employers with vacancies and labour exchanges with access to ethnic minority jobseekers can increase ethnic minority employment rates.

### 8.2 Northern Ireland

The developments in Northern Ireland suggest that the introduction of proactive equality instruments accompanied by the political will to bring about social change can have a significant impact on employment equity. Whilst the available research does not establish a direct causal link between the introduction of the Fair Employment Act and greater employment equity in Northern Ireland, it is not

unreasonable to conclude that to a greater or lesser degree, it was the combination of wider attempts to end the conflict, and to actively tackle discrimination in the workplace that have resulted in significant social change. The case of Northern Ireland and positive action on religious equality in employment may also be particularly pertinent for Britain at a time when many Muslims, Sikhs and others complain of religious discrimination, when the most disadvantaged groups in the labour market are Muslims, and when discussion about Muslims and integration is dominating the agendas of the Commission for Racial Equality and others.

### 8.3 The United States

Overall, the lessons of the US seem to be policies that seem to simply prefer a candidate on the grounds of race, especially if by objective measures that candidate is less qualified, will not carry popular support – even amongst blacks and minorities – for long, and will be subject to successful legal challenges. Hence *Bakke* outlawed quotas and *Gratz v Bollinger* disallowed mechanical or automatic ways of favouring a black candidate, but *Grutter v Bollinger* allow race to be one amongst other factors which may be taken into account in college recruitment or college admissions. In the US now there seems to be an understanding that the continuation of affirmative action programmes requires a continual review in relation to effectiveness, business efficiency and fairness. Another lesson seems to be that one of the most effective instruments for promoting positive action in employment is contract compliance by the Government as a purchaser of goods and services. Whilst the Government is usually able to impose higher standards of equality (and other kinds of) policies on the grounds that it is taxpayers money that is being spent and so civic equality must be respected, governments hesitate to impose equivalent duties upon private sector employers so as to not seem overly intrusive or alienate the engines of the economy. This is exactly the situation in Britain where positive action is sometimes perceived by some employers as a government wielding a big stick. Contract compliance, however, is not just a stick, but also a carrot. For businesses get a direct benefit, namely government contracts. Moreover, the taxpayer has a right to see equality where his/her money is spent applies as equally to government spending as to the Government as an employer. A third lesson from the US may be that affirmative action as regards the better quality jobs is unlikely to be successful without an adequate supply of suitably qualified and trained individuals, in particular graduates and professionals such as doctors and lawyers. Hence, universities, law and medical schools have been at the eye of the storm in the affirmative action political and legal turbulence, especially as there has been and continues to be a shortage of black graduates and trained professionals (the same applies to Hispanics but not Asians). In Britain, there is not a parallel shortage if we take ethnic minorities as a whole. On the other hand, most ethnic minority groups are under-represented in the most prestigious universities, and some groups much more than others (e.g., black men).

## 8.4 Canada

Overall, it appears that, as in the US, contract compliance appears to one of the most effective positive action tools in Canada. Nonetheless, the Canadian experiences of positive action policies suggest Canada's positive action policies have not generally been as successful as one might have expected. This may be due to the large continuous flow of migration, which results in high levels of people with, on average, limited Canadian linguistic facility, work skills, appropriate qualifications (as overseas qualifications frequently count for less), cultural and appropriate interpersonal skills. This may mean that even if from one year to the next some progress in equity is made, it will be masked by the new entrants into the pool, especially if, as there is reason to believe, recent immigrants have lower levels of human capital than their peers of ten or twenty years earlier. Nevertheless, studies that control for the immigration effect and the racialised effect show that racial discrimination continues to be a feature of the Canadian labour markets. In this context, it may be significant the Employment Equity Act and the Federal Government Contract Compliance programmes only apply at the federal level, leaving 87 per cent of the Canadian workforce exclusively under the remit of the provincial jurisdiction. The lesson, then, appears to be that even a country that is generally regarded as open and positive about immigration and minorities has a need for ongoing positive action policies.

## 8.5 General summary

Cheung and Heath conclude their cross-national comparative research into ethnic penalties with the following statement: 'We did not intend this study to lead to specific policy recommendations. But one implication of our broadly pessimistic conclusion is that policy interventions will be needed to bring the reality of our liberal western democracies closer to their professed ideals of equality of opportunity.' (Cheung and Heath, forthcoming). They suggest that this could take the form of the affirmative action legislation that has perhaps reduced ethno-religious disadvantage in Northern Ireland. On the basis of our research, we would affirm their sense that affirmative action policies are needed. We would suggest that they might indeed take the form of the Northern Irish legislation discussed in the report. We would further suggest that these affirmative action policies might usefully take the form of the contract compliance policies adopted in the US and in Canada at a federal level, and the covenants adopted in the Netherlands.

- **Political will.** The introduction of proactive equality instruments accompanied by the political will to bring about social change can have an observable impact on employment equity. But political will is needed to implement positive action policies effectively.
- **Liberal democratic rationale.** The rationale for the policies should appeal to an over-arching liberal democratic culture and respect for diversity and should be able to win broad support both amongst the targeted groups and their co-citizens rather than to specific arguments based on group privilege.

- **Economic rationale.** The rationale for these policies should also embrace the business case for employment equity.
- **Public relations.** This rationale needs to be clearly articulated in a coherent communications strategy.
- **Statistical data.** Detailed statistical data is needed to pinpoint which group require positive action and to evaluate the impact of programmes that incorporate targets or timetables for such groups in quantitative terms.
- **Contract compliance.** The experience from the USA and, to a lesser extent, Canada suggests that contract compliance is an effective positive action policy, changing key employers' practices with minimum pain and resistance and resulting in improved employment and retention rates amongst large corporations.
- **Covenants.** The experience of the Netherlands suggests that the small-scale direct approach adopted for the covenants that facilitate co-ordination between employers with vacancies and labour exchanges with access to ethnic minority job seekers can increase ethnic minority employment rates.
- **Enforcement mechanisms.** In addition to being clearly and coherently explained and defended, positive action policies need to be backed up by robust enforcement mechanisms if employers are to comply. These should entail mandatory goal-setting and vigorous enforcement, including sanctions, by government.
- **Availability index.** The experience from the USA suggests that the creation of availability indices is an important mechanism for establishing who is qualified and potentially available for work.
- **Overseer.** The experiences of the USA and Canada suggest that the creation of an institution responsible for overseeing contract compliance programmes is crucial for the effective implementation of the policy.
- **Resources.** The implementation of a contract compliance programme needs to be well resourced.
- **Bureaucracy-light.** The policies also need to be bureaucracy-light if employers are to embrace the scheme with any degree of enthusiasm. Too much red-tape risks alienating employers. However, the production of statistical data and regular programme reviews are needed.
- **Review.** Positive action programmes should be regularly reviewed in relation to effectiveness, business efficiency and fairness.
- **Supply-side.** Ethnic minority education and job skills levels need to be addressed.
- **Religion.** Positive action programmes should consider both religious and ethnic minority equality measures.



The evidence from this research has shown that there can be clear benefits from a programme of positive action. Existing policy approaches have been limited in redressing persisting ethnic penalties. In our view, a government committed to eradicating social exclusion can legitimately and confidently engage with an advanced programme of positive action, which includes contract compliance. The implementation of such a policy would send the right signal both to the intended beneficiaries and to those organisations and individuals that continue to deny ethnic groups and visible minorities their full part in the economic and social life of the country. As it is over four decades since the first Race Relations Act, and given that ethnic inequality continues to be a part of the social fabric of our country, the time is now right for such steps.



# Appendix

## List of interviewees

Interviews were held in November 2005 in Washington and Toronto with relevant individuals in the United States (US) and Canadian public and private sector, in (federal and provincial) government bodies, and with US and Canadian academics working on ethnic minority positive action policies. Details of those interviewed are as follows:

### **Carol Agocs**

Carol Agocs is Professor Emeritus at the University of West Ontario. She has research interests in discrimination in employment, equality policy and implementation, and has written numerous books and articles on race inequality. Her publications include: Carol Agócs, editor, *Workplace Equality: International Perspectives on Legislation, Policy and Practice*, The Hague: Kluwer Law International, 2002.

### **Kay Blair**

Kay Blair is Director of Micro-skills a community based training and employment organisation that facilitates opportunities for minority communities. Micro-Skills is an anti-racist, not for profit organisation that works to assist women, youth and individuals at risk: it is driven by issues of under-representation, racial discrimination and the needs of the client groups. Policy is developed within the organisation by Kay Blair, the Executive Committee and the Board of Directors.

### **Edwin Bowman**

Edwin Bowman is Diversity Manager for Skadden, Arps, Slate, Meagher & Horn one of the largest law firms in the world. Previously, he worked as Vice President, Manager Diversity Development for Merrill Lynch U.S. Private Client. Prior to joining Merrill Lynch in February, 2000, Bowman was a Senior Consultant and Director EEO Consulting Services at Organization Resources Counselors, Inc. (ORC) an international management consulting firm with headquarters in New York, NY. His responsibilities centered on project management of EEO, Affirmative Action, and Diversity projects

across industry sectors with a focus on Fortune 500 companies. Bowman was also a consultant to the Federal Glass Ceiling Commission that developed published recommendations and guidelines to the White House for driving workforce diversity throughout both the public and private sector. He has held numerous human resources positions, including Director EEO for Dow Chemical USA (Midland, MI), and is a member of the Society for Human Resource Management.

### **DCI Consulting**

DCI Consulting is a human resources risk management consulting firm. It offers consultancy and develops software products, which are sold to companies to help them to identify potential risk in liability and EEO losses. They work with a broad range of companies to help them meet their Contract Compliance obligations as they relates to the relevant executive order and Office of Federal Contract Compliance Programs (OFCCP) regulations. They engage in data analysis and production of statistics. They also run training courses, proactive analysis including mock audits, and they assist companies undergoing actual OFCCP audit. The work of DCI has been informally praised by OFCCP compliance officers and samples of their work are often used by the OFCCP during technical assistance.

### **Kamal Dib**

Kamal Dib is Senior Economist with the labour branch of the department of Human Resources & Skills Development, Canada. He is the Manager responsible for the Policy & Programme Development, and his focus is the work place as opposed the labour market. His work centres on the Employment Equity Act and the Canada Labour Court, and attempts to achieve increases in the representation of designated groups. 'The philosophy here is that we're not giving anybody special privilege, however, we are recognising that people have skills and for racist or discriminatory reasons, they are not being able to fulfil them or to contribute what they can to the Canadian society.' This includes legislative and regulatory business, and supporting programme delivery. The Legislative Employment Equity Programme, and the Federal Contractors Programme are also part of their brief.

### **Frank Dobbin**

Professor Dobbin is Chair of the Organisations, Occupations and Work section of the American Sociological Association, and has conducted various studies on affirmative action, diversity management and training His research on *Affirmative Action at Work: Corporate Compliance Activities and Workforce Composition*, attempted to evaluate the effects of employment practices on workforce composition and the effectiveness of activity designed to meet anti-discrimination law and make workforces more diverse. Professor Dobbin's research into affirmative action is based upon large data sets of employers and details their respective employment practices.

### **Grace-Edward Galabuzi**

Grace-Edward Galabuzi is an Assistant Professor at the Politics and Public Administration department of the Ryerson University, Toronto, Canada. His work involves looking at the integration of racialised minorities into the labour market. He therefore has an interest in the structural barriers to their access to employment. His background in employment equity goes back to before he began his academic career. In the late 1980s, he worked with various community organisations in campaigns for employment equity. He became the Provincial Co-ordinator for the Alliance for Employment Equity, the primary coalition in Ontario in 1988. This coalition involved different organisations from the Aboriginal community, disabled peoples, racial minorities and women's groups. These were the key target groups for employment equity policy in Canada. He is a community activist turned academic, who also has experience in the Public Service. He is the author of *Canada's Creeping Economic Apartheid and Social Exclusion*.

### **Harry Holzer**

Professor Holzer is based at the Public Policy Institute of Georgetown University Washington, DC. In addition to being an interviewee for this project, Professor Holzer also acted as our US consultant, reading and commenting on drafts of the report. His research has primarily been engaged with urban poverty and social policy issues, and includes emphasis on the low wage labour market and particularly the problems of minority workers in urban areas. He has engaged in work on employer skills needs and hiring practices and also the employment problems of less-educated young men. He has extensively researched the effects of affirmative action on women and ethnic minorities. Professor Holzer has been instrumental in producing a number of studies that have sought to evaluate the outcomes of affirmative action policies.

### **Jerry Humes**

Jerry Humes is Director of Human Resources at Pelmorex, which is a parent company of The Weather Network which works in the media, providing 24 hour weather stations, weather networks, weather information to various commercial clients, and information through the website. She has worked in Employment Equity since she started, nine and a half years ago, and is responsible for filing the company annual reports to the government department, Human Resources & Skills Development, Canada (HRSDC). Pelmorex is considered by HRSDC to have a track record on Employment Equity and be an example of good practice.

### **Harish Jain**

Professor Harish Jain is recognized for his work with visible minorities and immigrants and has been inducted as a member of the Order of Canada. He is professor emeritus at the DeGroote School of Business at McMaster University. In addition to being an interviewee for this project, Professor Jain also acted as our Canadian consultant, reading and commenting on drafts of the report. His research and

professional interests include diversity management, employment equity, affirmative action, human rights in employment, and multiculturalism. He is lead author of several books and monographs and has published more than 60 articles in academic and professional journals. He has also worked with federal and provincial government departments and agencies such as Labour Canada, HRSDC, the Canadian Human Rights Tribunal and the Canadian, Quebec, and Nova Scotia Human Rights Commissions. In April 2005, he was appointed a commissioner of the Canadian Human Rights Commission. Professor Jain has held the Donald Gordon Chair at the University of Cape Town, Graduate School of Business. In South Africa, he assisted in the development of employment equity legislation, brought in by former President Mandela's government and has been a policy advisor and consultant to the South African Department of Labour, assisting with the transition to de-segregation in all sectors of society.

### **Keith Jeffers**

Keith Jeffers is a Consultant work for Employment Matters, in the area of Diversity, Equity & Human Resources Management. He has a background as a Senior Manager in the Ontario Public Service where he served for over eight years in the Central Agency with responsibility for the government of Ontario Employment Equity Programme. He was the architect of the policies and programmes of Employment Equity, and had special responsibility for the development of the Employment Systems Review Guide & Process & Methodology. He has experience and understanding of policy development, implementation and monitoring. He has also served as Assistant Deputy Minister in the British Columbia Public Service and was also in a Senior Executive position in the British Columbia Public Service Central Agency, where he had responsibility for the Equity & Diversity Programme. This had an impact on about 14,000 employees in the public sector.

### **Arnold Kee**

Arnold Kee is Director of Programmes at the Institute for Higher Education Policy, in Washington DC. This is a non-government organisation and his role is to provide additional management and organisation for a range of programmes that the institute engages with, and to monitor affirmative action. The mission of the institute is to provide policy guidance on education law, which will increase access and equity in higher education in the US. He previously worked at the American Association of Community Policy Network for ten years. As the coordinator for minority services at the American Association of Community Colleges, he was involved in monitoring developments in affirmative action in higher education, and was responsible for making legal and policy developments known to members using various means. I organized forums at our national conventions, written articles in our newspaper, and briefed a Commission of Community College Presidents.

**Rosemary Kilkenny**

Rosemary Kilkenny is Special Advisor to the President of Georgetown University in Washington DC. Her role at the University is to advise the President and serve as his legal adviser on Affirmative Action matters in education, employment and business development. She is a trained attorney admitted to the bar, with a Bachelors of Arts Degree, two Masters Degrees and the JD – Juris Doctorate from Georgetown University Law School.

**Christopher Metzler**

Christopher Metzler is based at the Cornell University School of Industrial and Labour Relations, where he is Director of the Diversity Management and EEO Studies Programmes. He runs a number of courses including the Diversity Management Certificate and the nation's first Certified Diversity Professional Programme which provides professionals working in the field with credentials. The centre is described as the Nation's leading authority on Diversity and EEO professional education.

**Ravi Pendakur**

Ravi Pendakur is Assistant Director of the Research Group within the Knowledge and Research Directorate. This is part of the Strategic Directions Branch of Social Development, Canada. He was previously Senior Researcher at the Department of Canadian Heritage. His recent publications include: Aizlewood, A. and R. Pendakur. 2005. Ethnicity and social capital in Canada. *Canadian Ethnic Studies* vol. 37.

**James Pierce**

James Pierce is Acting Director of the Division of Policy, Planning & Program Development at The OFCCP, which is part of the U.S. Department of Labour's Employment Standards Administration. OFCCP is responsible for ensuring that employers doing business with the Federal government comply with the laws and regulations requiring non-discrimination. He is a civil servant, with detailed knowledge of the policies and procedures involved in affirmative action.

**Barbara Reskin**

Professor Reskin is now based at the University of Washington (Seattle) and was previously at Harvard University and has written six books, including *The Realities of Affirmative Action* and numerous articles and chapters on gender and race inequality in the workplace, sex segregation, discrimination and affirmative action. She is a past president of the American Sociological Association, and has served on the Board of Overseers of the General Social Survey and on several National Academy of Sciences/National Research Council Committees.

**Melissa Williams**

Melissa Williams is Professor of Political Science at the University of Toronto. She teaches contemporary democratic theory focusing on democratic justice and democratic equality and reconciling this with aspects of social diversity, including group structured inequality ethnic and 'racial' differences, cultural groups, and gender. She became interested in issues around affirmative action through work that she did on political representation. She was a contributor to Appelt, E. and Jarosch (2000) *M. Combating Racial Discrimination – Affirmative Action as a Model for Europe*, Oxford: Berg.

**Shirley Wilcher**

Shirley Wilcher is a leading authority on equal opportunity and diversity policy. She is President of Wilcher Global LLC Diversity Consulting, a firm that specializes in diversity management, affirmative action, contract compliance and government relations. In April 2004, the American Association for Affirmative Action (AAAA) granted her the 'Rosa Parks' Award for her efforts to advance the cause of equal opportunity through affirmative action. In May 2005, she became the Interim Executive Director for AAAA. She serves as an expert witness in major Title VII employment discrimination cases and provides affirmative action program consultation for federal contractors. She was executive director of Americans for a Fair Chance, a consortium of six civil rights legal organizations formed to serve as an educational resource on affirmative action, and also completed a seven-year term as Deputy Assistant Secretary for the OFCCP, in the Employment Standards Administration of the U.S. Department of Labor. In July 2000, Ms. Wilcher received the NAACP's prestigious Benjamin L. Hooks 'Keeper of the Flame Award'. She has more than 20 years of experience, including service as civil rights counsel with the Education and Labor Committee, US House of Representatives; as Director for State Relations and General Counsel with the National Association of Independent Colleges and Universities, and as a staff attorney with the National Women's Law Center.



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