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Comparative Study on the Collection of data to Measure the Extent and Impact of Discrimination in a selection of countries

Medis Project (Measurement of Discriminations)

Final Report on England

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Summary

INTRODUCTION

In Part I, we will study the legislative texts and the concepts contained therein. In Part II, we will look at the Independent Authorities and their activities. Part III is a summary of the legal provisions and public policies that require the use of statistics to support the fight against discrimination. Part III will principally include a review of the *indirect discrimination* criteria, as well as a description of the "soft law-type" mechanisms that are based on *ethnic monitoring* . It will also deal with the implications of the Race Relation Act (Amendment) 2000. These three parts will not deal equally with each ground for discrimination. Indeed, the text dealing with "*sexual orientation*" and "*disabilities*" will be more limited than that focusing on the other three grounds ("*race*", "*ethnicity*" and "*religion*"). There are three reasons for this. Firstly, in England, the fight against discrimination on grounds of sexual orientation and "disabilities" relies less on statistics. Also, the reason this report refers less to this form of discrimination is that it is less problematic: the question of measuring discrimination based on sexual orientation and "*disabilities*" has been (and still is) less controversial than discrimination based on "race" or ethnicity. Finally, we chose to study the first three grounds in depth, particularly "race" and ethnicity, for the following reason: to illustrate the singularity of the English context. This context is two-fold. As English anti-discrimination laws influenced the European Directives and programs, it is reasonable to believe that the requirements for implementing these Directives in the fight against discrimination was explored previously in England, particularly with regard to racial and ethnic discrimination. Furthermore, England is the only Member State of the European Union to have statistics on "race". But unlike other Anglo-Saxon nations, such as the United States or Canada, the categorisation structure for measuring discrimination had not yet been constructed. England did not inherit a racial classification system[1], which explains its singular context. Without such an inheritance, England had to design "ethno-racial" questions and categories in order to rapidly counter discriminations. The history of the construction of the "ethnic question" and its appropriate categories proceeds from the implementation of the Race Relation Act 1976 (which influenced the European Directives). For that reason, it seemed particularly appropriate to provide a detailed overview of this process. Part IV, therefore, focuses on this history. In Part IV, we will see the emergence of the "ethnic question" in the 1991 Census, and then in the 2001 Census.

[1] In the United States, the classification system first used as a basis for legal discrimination was subverted to be used thereafter in measuring and countering discrimination. From the first census in 1790 to the most recent in 2000, "race" has always been included in the collected information, even if its content has been modified and subverted.

I - ANTI-DISCRIMINATION LEGISLATION BY GROUND FOR DISCRIMINATION

English anti-discrimination law is particularly well endowed. It has been frequently reviewed and is composed of a corpus of texts relating to all the grounds included in this study (race, ethnicity, religion, sexual orientation, disability). As this law is based on jurisprudence which evolves on a case by case basis, and its enforcement, re-defining and application are in part under the responsibility of Independent Authorities who broaden the requirements and design mechanisms to put them into effect and incite parties to commit themselves, the exclusive consideration of the legal texts will not lead to understanding anti-discrimination policies in England. We will therefore go beyond the legal texts only to look at the Independent Authorities and their activities. These texts, however, due to the concepts they uphold, provide a framework of requirements and constraints necessitating, to varying degrees, a statistical tool to measure and fight discrimination. It is therefore appropriate to study this aspect.

With regard to the efforts committed historically to the implementation of these various policies and because of increased public awareness, the requirements for fighting discrimination transposed from the European Directives[2] and programs do not appear to disturb the British. The current process seems to contradict Adrian Favell's dire prediction of 1998, at least with regard to anti-discrimination legislation and its related mechanisms: *"It is difficult to see how Britain can even begin to bring itself in the line with Europe – as it must over migration flows, denizen's rights, anti-discrimination provisions, and the recognition of human rights norms – without fundamentally upsetting the institutions of multicultural race relations"* (p. 232). It seems more likely that Great Britain is one of the European Union nations which by far is less at a loss with the exacting European Directives. In fact, the requirements of the anti-discrimination Directives and European programs are mostly already in place and more effective particularly with regard to issues relating to statistics and categorial equipment, two subjects which are of primary interest to this study.

[2] These Directives define indirect discrimination as arising "*where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*".

A/ Racial, ethnic and religious discrimination: the Race Relation Act 1976, the Race Relation Act (Amendment) 2000 and the Race Relation Act 1976 (Amendment) Regulations 2003

1) The evolution of English law

In 1976, British law was far ahead of the other European judicial systems in consolidating the 1965 and 1968 RRAs and using the Sex Discrimination Act 1975 which "conceptually and politically opened the door and paved the way" (*Parekh Report*, p. 264, 2000). It distinguishes "direct discrimination" and "indirect discrimination"[3], both of which carry sanctions[4]. As described by Robert C. Lieberman, this two-fold feature makes the said law "*on paper at least, an extremely strong antidiscrimination measure, certainly among the strongest in Europe and stronger in many ways than the American Civil Rights Act in terms of the power it conferred on the state to seek out and punish racial discrimination in employment"* (p. 26, 1999).

Indeed, the *Race Relation Act 1976* provides an anti-discrimination action framework[5] which is exemplary for a number of reasons. Not only did it give rarely seen substance to the law, but it also opened up onto the policy field since it created an Independent Authority responsible for monitoring the application of the law, as well as the promotion of "*good race relations*" and racial equality.

[3] Direct discrimination occurs when a person is treated less favourably than another could or would be in similar circumstances. Indirect discrimination is defined as follows in the 1976 RRA: *"A person discriminates another if he applies to that other a requirement or condition which he applies or would apply equally to a person not of the same racial group as that other but which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of person to whom it is applied; and which is to the detriment of that other because he cannot comply with it"*. This definition is not the same as that included in the European Directives.

[4] At the opening of Parliamentary debate, Roy Jenkins, Home Secretary, described the breadth of the indirect discrimination concept in stating that it not only aims to "*combat discrimination and encourage equal opportunity but also to tackle what has come to be known as racial disadvantage"*. For this reason, the Act, which was put to a vote, defines discrimination in a manner that includes "*not only deliberate and direct discrimination but also unjustifiable indirect discrimination. A particular practice may look fair in a formal sense, or at least neutral in its original intent, but may be discriminatory in its operation* » (quoted from Lieberman, 1999).

[5] With regard to the political context, see in particular Adrian Favell (1998), Robert C. Lieberman (1999), Erik Bleich (2002 & 2003).

It is open to policy as well, since the field of action goes well beyond that of simply punishing conduct prohibited by law and opens the search for Good without any proper judicial specificity because, while the Act defines what is to be considered a discrimination, it does not provide a definition for the constitution of "*good race relations*[6]" nor for equality - these will form the basis for future British anti-discrimination policies.

The conceptual structure of the said law was of significant influence on European legislation; it is here that the "*indirect discrimination*" concept first arose in European countries - somewhat modified in the European Directives. This concept is crucial to understanding the evolution of English anti-discrimination laws and policies, in addition to the routine use of statistics. This is a significant weapon since it allows the law to go beyond observing malicious intent and to be used (and by the parties to a dispute) in order to allow a judge to determine "*adverse impact*" on people belonging to a given racial or ethnic group and which cannot be satisfactorily defended or justified by an accused person. Therefore, with this concept in mind, discrimination law can be better understood through an objective view of disadvantageous "effects" and "consequences" (of actions, practices, procedures and rules governing society) unduly and disproportionately affecting persons belonging to a defined group on one of the prohibited grounds.

Although this framework was reviewed (in 2000), the review related more to an extension of topics and areas covered by the law than to a drastic reformulation of the initial judicial categories. However, the transposition of the European Directives required its reformulation, which met with a number of problems[7]. Upon enactment of the Regulations Act 2003, which transposes the European Directives, the law became very complex. It now incorporated two definitions of indirect discrimination, the original one contained in Act 76 applying on "grounds" of "*colour*" and "*nationality*", and that of the Directives applying on "grounds" of "*race, ethnic or national origin*": because of this, the determination of a discrimination and a judgment's dynamic, changes depending upon the specific ground for the alleged discrimination. We will come back to this point.

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[6] In the words of an American sociologist, English policy structures "*race relations*" in the following manner: "*race politics in terms of 'race relations'"* means "*the ability of racially defined groups to coexist on an equal footing in a multicultural society"* (Lieberman, p.2, 1999). The author indicates that the British forged their policies on the American example, both through education and separation: "*British intellectuals and policymakers have quite explicitly seen their own evolving problems of racial conflict as similar to American ones and sought to emulate American successes and avoid American mistakes in making race policy. As a result, these two countries share an approach to race as a political category that emphasizes both the equal treatment of individuals and the legitimacy of racial groups as social and political units (although these two aims are often in considerable tension with one another)* » (ibid.). One of the issues in which they distance themselves from the American treatment of discrimination is the British legal prohibition of *affirmative action* which goes beyond "*outreach*" policies. With regard to the tensions mentioned by the author, we will see them appear when the *Census* categories are constructed; which construction, according both to statisticians and social science researchers, but for different reasons, is marked by incoherence. In the appendix, see a detailed report of these critiques.

[7] See below.

However, while the definitions of discrimination hardly varied (before their alignment on the European conceptual structure), the Act 2000 significantly changes our study's framework in relation to the use of statistics (its processes and categorisation methods) by the law and by the subjects of judicial standards as well as by the agencies monitoring the application of the law. The *Race Relations (Amendment) Act 2000* therefore considerably broadens the reach of RRA 76 by providing the public authorities and public services with a *positive obligation* (more specifically, "*a general duty*") regarding the racial discrimination question. These bodies must fulfill their functions by paying *due regard* to the need for eliminating illegal racial discrimination and by continuously attempting to *promote* – in this, it is a positive duty - equal opportunity for persons of various racial groups, as well as aiming at the achieving of "good relations" between these persons. The legislation became more precise and moved towards becoming operational in conjunction with the various Public Authorities' activities. It distinguishes and breaks this general obligation down into "*specific duties*". Most of the Public Authorities must publish and implement a "*Race Equality Scheme*" and ensure that the functions and activities that form part of their mission do not lead to disadvantages against persons because of their racial or ethnic affiliation. In practice, this means that the use of statistics (including the collection, archiving, analysis and tabled publication of data relating to race and ethnicity) takes on an unprecedented importance in two respects: the number of areas in question and both through the extension of practical areas and the activities subject to such an assessment. Indeed, almost 43,000 Public Authorities are affected by the new Race Relation Act. They must establish their "*scheme*", set "*targets*", undertake monitoring, assess the impact of activities and publicly report on their "*general*" and "*specific*" duties to the public and the Independent Authority, and they thus use in an unprecedented manner ethnic and racial monitoring and the publication of data describing the race and ethnicity of employees and users. The police, the judicial system, education, prisons, health services and various departments of local and central governments are the subject of a mandate to monitor the make-up of their workforce as well as service delivery to their users. Furthermore, another notable difference in this Act is that monitoring is not only strongly recommended, it is a legal requirement[8]. We will come back to Act 2000 in a subsequent section.

[8] Although no legal monitoring obligation in a strict sense is imposed on private bodies covered by Act 1976 (employers, goods and services providers, etc.).

2) British anti-discrimination laws before the transposition of the European Directives and their partial accounting for cultural and religious pluralism

A further particularity of British anti-discrimination law and policies relates to the fact that multicultural and religious questions have been included in the fight against discrimination through a flexible and supple understanding of what constitutes a "racial group" within the RRA 1976 and can therefore be entitled to legal protection. If a judgment, armed with the indirect discrimination concept, no longer aims at *inactive provisions* (procedures, rules or criteria objectively viewed and judged) but investigates their *activity*, assessing the *effects* or *impact* of their implementation on groups of *individuals* distinguished by their "affiliation" to "groups" entitled to equal "protection", it appears that since *Mandla v. Dowell Lee*[9] (see below), there are two types of *affiliation* and two types of *groups* according to the "*grounds*" prohibited by British law. Indeed, case law distinguishes two types of "groups" and the difference between "racial" discrimination only and "ethnic" discrimination so the prohibition against "*racial*" discrimination or that against discrimination based on *ethnic* or *national origin* do not have the same meaning. "Affiliation" and "group" are meant in a *positive* sense when describing certain *ethnic origins*. That is to say that persons identify themselves as members of these groups. They have feelings of belonging to these groups, which have their own customs and traditions that the members wish to honour and have others respect[10] . Although one can speak of belonging to "groups" distinguished by "race", the two terms (affiliation and race) carry very distinct meanings here. Only a very negative description of a form of existence is conferred upon "race". It must be understood that "race" is included only because it is not satisfactorily taken into account and is subject to inequitable results in the assessment and treatment of persons who could potentially be characterised by their race. "Racial group" must be understood in two ways: *either* the potential for some individuals to be victims of discrimination because they show signs (phenotype, facial features, name, place of residence, etc.) interpreted as characteristics of a "race" on which illicit judgments are based; *or* it relates to a "group" because the reiteration of discriminations and disadvantages has generated inequitable and common socio-economic conditions that must be rectified (notably through "*positive actions*").

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[9] This case illustrates an advance in case law and concerns an anti-discrimination law which includes the multicultural and religious question. In this decision, which ruled in favour of the Sikh complainant, « le concept « d'origine ethnique » est explicitement dissocié de celui de « race », dont la connotation est biologique plutôt que culturelle » (De Schutter, p. 47, 2001).

[10] This does not mean, however that *collective rights* have been granted. It is the *individual* who is targeted, and what is protected is the individual's right to demonstrate or express, should he so desire, an *identity* which would comprise *beliefs* and *constituting practices*, without any breach of his right to enjoy his other rights and equality with other persons. On the matter of "cultural accommodations" required by English law and which do not result from positive discrimination, see De Shutter, 2001.

By broadening the understanding of the prohibition against discrimination via the protection provided to certain ethnico-cultural communities under the RRA 1976, the non-discrimination requirement dons an additional meaning, associated to the first. That is to say that for persons who have been told they will not be victims of unfavourable treatment because others may rely on the visibility of certain features (which would lead to characterising "race" and thus allow for the forming of prejudice or hostilities) to assess their conduct and qualities, they are guaranteed that they can exercise their beliefs and openly demonstrate their ethnic identity without specific disadvantages being brought against them. In the first scenario, not discriminating means making prejudices and undue distinctions inoperable in the assessment and treatment of persons and, in the second, allowing for equal rights to the expression of minority identity (by adjusting employment rules and the work environment, for example). With this understanding, the *equality* promoted and promised by RRA 97 no longer solely relates to indifference towards "race" in the treatment of persons, but also means, in the same anti-discriminatory framework, the requirement for "*accommodation*" of significant minority cultural differences - in other words, a non-indifference towards their cultural and religious practices and customs[11], non-indifference since they must be taken into account in order to develop rules and provisions that are not systemically unfavourable towards them.

However, this broad understanding of the law (and of equality) has not led to the inclusion of every ethnic affiliation[12], as the law has a number of defining criteria who are not equally applied to every type of group. While these criteria have thus allowed for the indirect protection of some major "ethnico-religious" communities, not all communities have had access to the same protection, the proposed criteria testing being to their detriment.

[11] The shift in the meaning of non-discrimination as an "*accommodation*" aiming at the equal treatment of differences was proposed for the first time in 1978 in relation to "*religious needs*" by Lord Scarman, before it was entrenched via *Mandla v. Dowell Lee.* "*In the context of religious discrimination in Britain it is argued that there is a need to accommodate diversity because our society is already structured around basic Christian assumptions and therefore already accommodates the needs of Christians. (...) In a multi-faith multi-cultural society, the needs of individuals with different religious faiths should be met. This was something understood by Lord Scarman in 1978 when, in a case involving a dispute between a Muslim teacher who requested time to attend Friday prayers and the local education authority, he argued that " room has to be found for teachers and pupils of the new religions in the educational system, if discrimination is to be avoided. This calls not for a policy of the blind eye but for one of understandings. The system must be made flexible to accommodate their beliefs and their observances. Otherwise they will suffer discrimination"* (Hepple & Tufyal, p.38, 2001).

[12] In the sense of a positive feeling of belonging, consciously and intentionally tested, to a community with its own distinctive customs which a person wishes to follow and honour.

"Ethnico-religious" communities, more than simply and strictly cultural ones, because, in spite of the judge basing his ruling on a clearly "culturalist"[13] consideration of the constitution of an "ethnic group" in the Mandla v. Dowell Lee (1983) case, apart from "*gypsies*" (Roms or gypsies), every group benefiting from this new protection of their customs did in fact have a clear and undeniable religious base[14]. However, this overture for dealing with religious discrimination is very indirect and is furthermore neither equal or complete, due to the "culturalist" approach taken by the judge in the Mandlas case and the criteria necessary for a group to attain the "*ethnic group*" status and thus be covered by the same law as that which the judge followed, the RRA 1976. While the RRA 1976 "*makes no express reference to religious discrimination, however, ways have been found to provide limited protection under the Act to some religous groups which have the characteristics of an ethnic group. In this way protection has been offered to Sikhs and Jewish people. The recognition of a religious community as an ethnic group provides them with the protection from both direct and indirect discrimination. In the case of Mandla v Dowell Lee the House of Lords accepted that ethnic origin is a wider concept than race and identified several characteristics relevant to identifying an ethnic group. The two essential characteristics are:*

- A long shared history, which the group is conscious of as distinguishing it from other groups; and

- A cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.

Five other characteristics were identified as relevant but not essential:

- Either a common geographical origin, or descent from small numbers of common ancestors;

- A common language, not necessarily peculiar to the group;

- A common religion different from that of neighbouring groups or from the general community around it;

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[13] In the *Mandla v. Dowell Lee* case, the qualification of a group as being an "ethnic group" as set out by Lord Fraser is subject to the following major defining criteria: "*The conditions which appear (…) to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance"* (*Mandla v. Dowell Lee*, 1983, 1 All ER 1062, 1066, 1983, 2 AC 548, 562). Nonetheless, other criteria exist and it is the consideration of those criteria that would prevent this recognition applying to Muslims, see hereafter.

[14] This underlying and persistent religious basis may be explained. For the judge, the implementation of the protection happens through recognising the *obliging* aspect of the member's "ethnic" affiliation, which requires him to support customs or uphold convictions or beliefs. This "obliging" trait relates to something that cannot be cancelled or modified, without causing damage or harm to its integrity, by a person who wishes to honour his affiliation to a given group (for example, wearing a turban, for Sikhs). By recognizing that a given practice or custom obliges the person who sees himself as being a loyal member of an "ethnic" group, the law states that he can not be forced to abandon same in order to meet employer requirements, for example. With regard to RRA 1976 case law, once the practice or custom has been recognised as being crucial to the identity of a group considered to be an "ethnic" group and an obligation for those would wish to maintain their affiliation to the group, it will also impose an obligation on the employer who cannot require the person to conform to other standards if the employer adheres to equal treatment. The reason religion is still so present in the definition of groups granted this protection by the judges is that it is obvious that religion is one of the very few bases on which the intrinsically obliging identity trait is founded and justified. Nothing better than faith and adherence to religious beliefs can offer the required criteria for satisfying this stage in the recognition of the obliging characteristic of a practice or custom within a community.

- Being a minority or being an oppressed or a dominant group within a larger community.

Under these criteria Gypsies have been found to constitute a racial group by virtue of their shared history, geographical origins, distinct customs, language derived from Romany and a common culture.

On the other hand Muslims, Rastafarians and Jehovah's Witnesses have been held not to constitute racial or ethnic groups" (Hepple & Tufyal, 2001). These are therefore additional criteria, meant to add meaning to the first two, which prevented Muslims from having access to protection from discrimination[15]. Despite it all, even those communities who benefited from a protection under RRA 1976 as provided for pursuant to the *Mandla* case and thereafter enshrined, were not completely satisfied with their treatment: the indirect form of the legal protection which was provided did not recognize that religion was worthy of *prima facie* recognition. For example, this is the Sikh case. In spite of this indirect recognition, it seems that they did not trust in the seriousness of the anti-discrimination agencies' commitments towards them. "*People with Indian cultural backgrounds and ties to Sikhism or Hinduism similarly [like Muslim and Jewish peoples] feel that anti-racist organisations have little or nothing to say about their religious affiliations and identities*" (*Parekh Report*, p. 237, 2000). This distrust was justified in that being considered an "ethnic group", which would allow them the protections of RRA 1976, would not be a sign of the recognition of the truly religious character of their distinctive "practices". And while these practices are protected by law, it is not because they relate to observing a *religious command* worthy of respect, but because they have been categorised as having an ethnic *origin* relating to a territory which has historically stable and distinct customs which are commonly shared[16].

In any event, although the advances of Act 1976 did not cover *de facto* and *de jure* all religions, up until the implementation of the European Directives, these groups floated in a "*grey area*" (Favell, p. 119, 1998) which was inhospitable to a few of the more notable religions[17], namely Islam. The

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[15] Others paths have been cleared to achieve this protection, "*a second way of bringing a religious group within the ambit of the RRA has been through the concept of indirect discrimination. Actions taken by an employer causing detriment to Muslims as a class, such as refusal to allow time off work for religious holidays, might be held to constitute indirect racial discrimination against those from an ethnic or national origin that is predominantly Muslim. This does not help Muslims who come from a country where Muslims are in a minority. The limitation of using indirect race discrimination to tackle religious discrimination is highlighted in the decision of the tribunal in Safouane & Bouterfas (1996). In that case two Muslim complainants were dismissed for doing prayers during their breaks. The tribunal held that the acts did not constitute indirect racial discrimination because the applicants belonged to the same North African ethnic Arab minority as the respondents and they had a good record of employing staff from a diversity of backgrounds. Even if a finding of indirect race discrimination is made, the legislation does not at present allow for an award of compensation to be made in cases of indirect race discrimination where there is no intention to discriminate."*
Attempts have also been made to use the Sex discrimination Act 1975 to provide protection against some aspects of religious discrimination. In the case of Sardar v McDonalds (1998) a Muslim female complainant was successful in a claim of indirect sex discrimination after she was dismissed for wearing a scarf to cover her hair." (Op. Cit., pp. 3-5).

[16] That is, for a judge, the criteria by which an "*ethnic group*" is defined.

[17] According to the *Parekh Report*, which remains cautious, this failure to fully recognise religious discrimination can be attributed to the civic culture predominant in organisations charged with fighting discrimination. "*most race equality organisations are broadly secular, not religious. It is perhaps for this reason that they frequently appear insensitive to forms of racism that target aspects of religious identity"* (p. 237).

transposition of the European Directives was therefore welcomed since they broadened the protection of religions by incorporating a larger number of beliefs and faiths in a more direct manner.

The British should have no serious problem with the implementation of anti-discrimination policies that are fully focused on this new ground. In fact, this is the position of the ACAS in its recently published guide on employment dedicated to the question of religious discrimination. Indeed, it tells employers that they can base their implementation of other anti-discrimination policies on past practices and it is therefore realistic to believe that the cost for training and implementing "*good practices*" with regard to religion will be low: "*a lot of the good practices in this booklet will be familiar from existing advice on avoiding sex, race and disability discrimination. The new regulations should pose few difficulties in organisations where people are treated fairly and with consideration"* (ACAS, *Guidance on religion*, 2003). However, a number of people are concerned with the lack of clarity they face regarding anti-discrimination requirements relating to religion and beliefs. This lack of clarity is temporary. It will disappear step by step as case law grows. For the moment, however, the situation is unclear. This is mainly due to the range to be defined in terms of beliefs and religion. The definitional framework for these two grounds are flexible and agencies do not really know where the limits are and therefore which beliefs and religions are covered by law. No comprehensive list has been produced. Some believe that, for the time being, the religions listed by the ACAS[18] in its *Guidance on Religion* are probably covered, but other systems of belief (in the meaning of the relevant Act) should also gain access to this recognition. For the agencies, this failure to provide a list is an obstacle to the implementation of local policies, notably in conceiving a monitoring mechanism.

"*The Regulations define religion or belief as 'any religion, religious belief or similar philosophical belief'. The explanatory notes say that it does not include any philosophical or political belief unless it is similar to a religious belief. The notes also state that courts and tribunals may consider a number of factors in deciding if something is a religion or belief and gives the examples of:*

- *Collective worship*
- *A clear belief system, and*
- *A profound belief affecting way of life or view of the world*

[18] In *Culture and Religion in the Work Place*, a guide published in 2001 by the *Learning and Skills Council*, the following are listed: *"Christians", "Hindu", "Muslims", " Jewish", "Sikhs", "Rastafarian", "Buddhist"* and *"Chinese" ("Taoism", "Confucianism", "Buddhism"* and *"popular religion")* "beliefs and practice". In this guide, "culture" and "religion" are combined – one can note the impact of a multiculturalism that has enabled a discussion on religion – as it is believed that "*religion and culture are inextricably linked since religious belief and practice have a profound impact on lifestyle and cultural events*". It gives a broad description of the manner in which a faith which demands adherence to certain practices is carried out. "*This document illustrates basic information about this host of religious and cultural lifestyles."*

This definition is clearly going to create problems with regard to what exactly it does cover. This has already been the subject of much debate amongst commentators. The ACAS draft guidance provides a list of the most commonly practised religions and gives guidance on their principal obligations. It lists Baha'i, Buddhism, Christianity, Hinduism, Islam, Janism, Judaism, Rastafarianism, Sikhism and Zoroastrians. Commentators have looked at Human Rights and other case law to try and foresee what other religions or beliefs may be covered under this new legislation. Possibilities include Humanism, the Church of Scientology, Veganism, Atheism and Druidism. It is, however, impossible to say with any certainty exactly which religions or beliefs might be covered until case law starts to develop.

This lack of clarity will make it difficult for authorities to draw up policies, guidance etc. However, our suggested approach is to consider the main religions and beliefs (possibly the ACAS list) as covered and to deal with any others on a case by case basis. It may be that claims on the basis of the lesser known religions and beliefs may be few and far between, or that any requests for, for example, time off connected with what an individual claims is their religion or belief can be easily accommodated." (Employers' organisation for Local Government, *Advisory Bulletin, Employment relations, N°476 New discrimination legislation: sexuality/religion or belief November 2003*).

In its current state, no precise indications are given to employers concerning the monitoring of religion. The question is raised in the ACAS guide (and also in the more recent CRE guides), but with no further guidance. However, is seems that monitoring is indeed needed to provide the necessary proof for the launching of "*positive actions*" [19] as well as for meeting the practical requirements of indirect discrimination and the evaluation of action plans. "*There is no requirement to monitor staff's religion, belief or sexuality under the Regulations. Some authorities may already do so. If you do not, you may wish to consider doing so, as a result of these Regulations.*" (Op. cit.).

[19] As noted by the relevant Advisory Bulletin authors, even if it is not necessary to prove the existence of an under-representation of a group in order to implement a "*positive action*" (this is a marked difference between English law and the European Directives which are more distrustful of statistics), unlike racial grounds, it is crucial to base this decision on some statistical data. "*The positive action provisions for sex and race legislation require that positive action is lawful only where it can be shown that there is under representation in a particular occupation. This has not been translated into the new Regulations. It was not felt to be appropriate because of the lack of data on religion, belief and sexuality. (...) Certainly, if you wish to use the positive action provisions, some sort of evidence will be necessary, and it is difficult to imagine what convincing evidence could be used other than that which can only be obtained from monitoring."* (Op. cit.).

3) Issues arising from the Race Relation Act 1976 (Amendment) Regulations 2003

The proposal by the Government in November 2002 to transpose the Directives was somewhat criticized by the CRE, in a response published in December 2002. For the CRE, the first problem relates to the fact that the 2003 regulations do not apply to discriminations based on colour and nationality, two "grounds" covered by the RRA 1976. This is a major stumbling block for the CRE who will come back to this point in June 2003 in a different report: "*We submit that it is illogical to implement the principle of equal treatment by providing for greater protection from discrimination on grounds of race and ethnic or national origin but not colour. The principal trigger for racially discriminatory behaviour is frequently colour: discriminators will seldom know the victim's ethnic or national origin and sometimes not the racial group but 'colour' is a visibly different characteristic"* (*The Race Relations Act 1976 (Amendment) Regulations 2003. A briefing by the CRE*, CRE, 2003). Furthermore, the CRE is concerned that the *Regulations 2003* only relate to certain public services, while the RRA, since the 2000 amendment, applies to all "*public functions, including law enforcement and regulatory functions*". According to the CRE, there is a risk that two definitions may arise from this implementation; two definitions of harassment, two definitions of "g*enuine occupational qualification"*, two different burdens of proof, and "therefore" two types of equality. This will lead to individuals and persons being left without guarantees relating to their respective rights and responsibilities. Furthermore, the CRE was also concerned that differences relating to its application could increase, as well as delays in court proceedings and costs incurred. (See *Which way equality ? The government's proposals for implementing the EU directives*, CRE, December 2002).

Nonetheless, in spite of its reservations, the CRE was obliged to accept the incongruous dual definitions set out by the RRA 76 and the Regulations 2003. Thus the proposal to review the *Statutory Code of Practice on Racial Equality in Employment, Consultation Draft, May 2004* which was submitted for consultation by the CRE ratifies this duality of anti-discrimination law[20]. So as not to lose the benefits of a struggle that was mostly based on colour (but also on nationality, as revealed by certain Census categories. See below.), the CRE maintained this reference. However, this renders the

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[20] *"2.1 The Race Relations Act 1976 (the Act) makes it unlawful to discriminate on racial grounds against job applicants, workers (see the glossary) and office holders. Racial grounds are defined as reasons of race, colour, nationality (including citizenship) or ethnic or national origin. Racial groups (see the glossary and paras 2.4 and 2.5) are groups defined by these attributes. All racial groups are protected from unlawful racial discrimination under the Act.*
2.2 Religion is not included as a ground for discrimination under the Act, but if people affected by alleged religious discrimination are mainly of a particular race, colour, nationality, or ethnic or national origin, the discrimination, although on grounds of religion, might also amount to indirect racial discrimination (see paras 2.12 and 2.13 and 'religious discrimination' in the glossary).
Racial grounds and racial groups
2.3 Important changes to the Act have been made as a result of the Race Relations Act 1976 (Amendment) Regulations, issued to incorporate the EU Race Discrimination Directive into UK legislation. However, the changes will only affect some types of racial discrimination and not others. This is because of a disparity between the grounds of discrimination prohibited in the Race Regulations and the Act. The Race Regulations, and the definitions they have introduced for some concepts, apply only to discrimination on grounds of race or ethnic or national origin. In the case of discrimination on grounds of colour or nationality, the original definitions in the Act will continue to apply. " (Op. cit., 2004).

law more complex since colour and nationality do not refer to the same definition and therefore not to the same means of determining indirect discrimination as the other specifications for "*racial ground*" in the European Directives, a more restricted specification since it only refers to "*race, ethnic origin and national origin*". This means that it will be up to the complainants who wish to have their right to equality upheld to carefully choose the ground on which they believe they were victims of discrimination. Because depending on the chosen ground, the judge's finding of fact with regard to discrimination will follow distinct paths. A path dependent on the case, since each one will lead to a judgment based on a certain definition of indirect discrimination. The complainants must therefore choose the ground which seems more beneficial to their case, but it will also be necessary that the situation they describe to the judge reveals the presence of such a ground.

"*2.12 The Act contains two definitions of indirect discrimination, depending on the grounds of discrimination (see para 2.3).*

a. *grounds of colour or nationality [section 1 (1) (b) of the Act]*

This occurs when an apparently non-discriminatory requirement or condition which applies equally to everyone –

i. can only be met by a considerably smaller proportion of people from a particular racial group; and

ii. puts a person from that group at a disadvantage because he or she cannot meet it; and

iii. the requirement or condition cannot be justified except by reference to race, colour, nationality or ethnic or national origins.

b. *grounds of race or ethnic or national origin [section 1 (1A) of the Act]*

This occurs when a provision, criterion or practice which on the face of it has nothing to do with race:

i. puts or would put people of a particular race or ethnic or national origin at a particular disadvantage when compared with others; and

ii. puts the person bringing the claim at that disadvantage; and

iii. cannot be shown to be a 'proportionate means of achieving a legitimate aim'.

2.13 The concept of 'provision, criterion or practice' is much broader than the concept of 'requirement or condition' and covers the full breadth of formal and informal practices in employment. 'Practice' may be defined as the customary ways in which an intention or policy is actually carried out. It includes attitudes and behaviour that could amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping. To find discrimination, it will be sufficient only to show that a practice is likely to affect the group in question adversely." (Op. Cit., 2004)[21].

[21] This is another area of tension between the Directives and RRA 1976. The two legal texts do not provide the same definition or place to grounds which could lead to an exemption from a prohibition of discrimination on the proscribed grounds. The Directives are indeed les open to potential exemptions than English law. In any event, in both laws, the qualification of a "*Genuine occupational Requirement"* ("*GOR* ") ou "*Genuine occupational qualification"* on which an exemption request is based can always be contested by the person considered to be a victim of it. For details on the difference beween "*genuine occupational requirement*" and "*general occupational qualification*" and the operational methods for both exemption requests, see *Statutory Code of Practice on Racial Equality in Employment, Consultation Draft,* May 2004*, CRE*.

Although it cannot be ascertained for the time being, it is also possible that this context influence the construction of categories for statistical monitoring. Indeed, on what grounds should these categories be defined in the future? The European Directives' failure to refer to colour may run the British amiss, as the Census categories – which are standard and recommended for monitoring both by the ONS and the CRE – massively rely on the specification of "*race*" and "*ethnic origin*" in terms of "*colour*".

B/ Discrimination on the grounds of "disability" and sexual orientation

1) A salient characteristic, the lack of statistical mechanisms to measure and fight discrimination on the grounds of sexual orientation and disability.

a) The new judicial mechanisms supporting the fight against these two types of discrimination

The legislation underlying the fight against discrimination on the ground of sexual orientation and disability is more recent and less endowed than that concerning racial and ethnic discrimination. Similarly, the use of statistics is particularly lesser, or, for the least, for the time being, underdeveloped. There are two reasons for this situation. With regard to discrimination on the ground of sexual orientation, because this ground has been included relatively recently, the means backing this struggle are still being conceived. The question of collecting and processing data relating to sexual orientation has not yet been embraced. With regard to disability anti-discrimination law, the use of statistics in fighting this discrimination is particularly low compared to racial and ethnic discrimination for two reasons. Firstly, like the matter of sexual orientation, this type of struggle is also quite recent. But this low use of statistics is also due in part to the absence of the "*indirect discrimination*" concept in anti-discrimination law as it pertains to "*disabilities*". As we will see, such a concept demands a broad use of statistics and makes almost any institution (private companies, public institutions, unions, associations, etc.) covered by anti-discrimination laws, producers and users of statistics

The fight against discrimination did not include disabled people until well after ethnic and racial minorities were included. It is only in the mid-1990's that public action called for more than State patronage requiring companies to hire handicapped people in order to achieve a representational quota. This system was abandoned in 1995 and was replaced by a re-adjustment of public activities in the fight against discrimination, resulting in the *Disability Discrimination (Employment) Act 1995*. Dealing with three main topics, the Act is implemented gradually and some of its provisions were only implemented in 2004. The "employment" topic (the second part of the Law) came into force at the end of 1996. The poor use of statistics in the fight against discrimination is also due to the interval between the enactment of the Disability Discrimination (Employment) Act and the creation of an Independent Authority charged with monitoring its "*enforcement*". Unlike the Race Relation Act 1976, in terms of the disability ground, it is not solely because of the Law itself, nor immediately, that the Independent

Authority was created. Indeed, the Disability Rights Commission (DRC) was created only in 2000. As this type of Independent Authority is most often the agency charged with translating the legal requirements into practices and logistics, it seems almost normal that no statistical monitoring mechanisms for this ground comparable to that for race and ethnicity are available[22]. Even if the DRC supports the use of statistical monitoring in its codes and "*guidances*", it remains vague on the manner in which they should be designed, the modality for their use and the type of categories that should be required. A good indication of this poor consolidation of the use of statistics in fighting discrimination is illustrated by the relative short passages dedicated to monitoring in the guides and codes published by the DRC.

Here are two examples. In *Employing disabled people : A good practice guide for managers and employers*, pages 23 and 24, under "*Monitoring*", there is only one paragraph:

« *Some employers successfully use a system of monitoring progress in the employment of disabled people.*
Systematic monitoring allows you to

- *keep track of applications from disabled people and the results. This will allow you to measure whether your recruitment policies and practices are successful and if not, then to improve them*
- *ensure that your training programmes in disability awareness for managers and the workforce are kept up to date*
- *monitor the promotion of disabled staff*
- *evaluate the adjustments and investments you have made*
- *plan ahead - for example, in premises redesign or refurbishment, or new technology installation - with the needs of present or potential disabled employees (and customers) in mind*
- *publish results of how you have measured up to your action plan, in your annual report allowing employees, customers and the local community to see the organisation's commitment to the employment of disabled people.*

Examples of monitoring progress

- *having an action plan on how you are going to measure the effectiveness of your policies on the employment of disabled people*
- *by raising awareness of help available, and encouraging staff to seek help if they become disabled, you are more likely to be able to monitor the number of disabled staff you retain in employment, remembering that most disabled people become so during their working life*
- *monitoring the effectiveness of the adjustments which have been made, as a person's impairment may not remain static."*

[22] As we will see in the case of the *Commission for Racial Equality*, it takes some time for an Independent Authority to analyse the breadth and different aspects of its obligations and powers. Furthermore, while the Authority rapidly compiles Codes of Practice, something which requires more than a day, the interval between the publication of the codes and the effective communication of recommended "good practices" is relatively long. It is worth noting that the Code of Practice on Employment and Occupation was published by the DRC in 2004.

The "*code of practice*" flows from this guide and is supposed to elaborate in a more educational and operational form the above excerpt. It hardly provides more guidance, however.
"*2.14. Monitoring of employees is an important way of determining whether anti-discrimination measures taken by an organisation are effective, and ensuring that disability equality is a reality within that organisation. Information must be gathered sensitively, with appropriately worded questions, and confidentiality must be ensured. Knowing the proportion of disabled people at various levels of the organisation, and at various stages in relation to the recruitment process, can help an organisation determine where practices and policies need to be improved. The extent to which formal monitoring can be carried out will depend on the size of the organisation.*

2.15. Monitoring will be more effective if employees (or job applicants) feel comfortable about disclosing information about their disabilities. This is more likely to be the case if the employer explains the purpose of the monitoring and if employees or job applicants believe that the employer genuinely values disabled employees and is using the information gathered to create positive change. Through monitoring of candidates at the recruitment stage an employer becomes aware that, although several disabled people applied for a post, none was short-listed for interview. It uses this information to review the essential requirements for the post.

2.16. Some organisations, especially large ones, choose to monitor by broad type of disability to understand the barriers faced by people with different types of impairment.
A large employer notices through monitoring that the organisation has been successful at retaining most groups of disabled people, but not people with mental health problems. It acts on this information by contacting a specialist organisation for advice about good practice in retaining people with mental health problems." (in the *Code of Practice Employment and Occupation*, pp.16-17, DRC, 2004).
On the other hand, the *Commission for Racial Equality* has published a significant number of guides dedicated to monitoring, with long and detailed chapters which reflect on practical solutions to the monitoring question, always present in the various "*Codes of Practice*" available to parties in a court proceeding. As a comparison, the *Guide for Public Authorities (Non statutory),* published in 2002 by the CRE, strictly dedicated to the "*ethnic monitoring*" question is 89 pages long!

Furthermore, because of a practical objective related to the specificity of the recent awareness of discrimination facing disabled people, the type of monitoring the DRC is requesting will raise significant issues. Issues which, for the time being, the DRC has not clearly perceived. At least, it does not broach them very clearly in its guidelines and codes.

b) The fight against discrimination based on disability, and its monitoring: the absence of the notion of "*indirect discrimination*" and the polarization of actions concerning "*reasonable adjustments*"

As we will see in the next section, monitoring is mainly required by the indirect discrimination concept. It is indeed necessary to have the logistical support enabled by statistical monitoring to assess indirect discrimination. This support is also necessary for the implementation of "*equality plans*" and execution of "*positive actions*"[23]. This is important as the required action is changed in light of the Disability Discrimination Act 1995 not covering indirect discrimination *per se*. It is viewed otherwise, the definition of discrimination being the "*failure to comply with the duty to make reasonable adjustments for a disabled person*" (Hepple & Tufyal, p. 39, 2001). For some jurists, the absence of the indirect discrimination concept has its disadvantages, the main one being the individualisation of treatment imposed by this definition of discrimination.

Thus, some commentators are concerned that the DDA asks too much of the disabled person who not only has to reveal his/her specific vulnerability, but also has to individually prove and substantiate his/her right, since "*the issues in DDA cases revolve initially around whether or not the employer knew that the disabled person needed a reasonable adjustment. This does not arise with indirect discrimination. There the question is whether or not the apparently neutral provision, criterion or practice can be shown to have an adverse impact on a particular group, and if it does, whether the provision is objectively jusitifiable. The reasonable adjustment approach therefore places the onus on the individual to disclose a disability and explain that the arrangements place him or her at a substantial disadvantage. If he or she succeeds in doing this the result will be an individualised solution. The next disabled person will have to go through the same process of disclosure and negotiating reasonableness. The indirect discrimination approach, on the other hand, requires "equality proofing". The onus is on the employer or service provider to consider in advance whether it is objectively justifiable. The indirect discrimination approach is easier for the individual and can have a much more significant impact in terms of promoting participation and access by the disadvantaged group. The absence of a concept of indirect discrimination in the DDA means that until a disabled person interacts with an employer or service provider, there is no incentive to make adjustments."* (Op. Cit.).

However, this is meant to change. The need for persons to request an adjustment in the work place using the law and the individualisation of the action imposed by this resolution method (which works on a case to case basis) have been addressed by the legislator. The legislator is prepared to include a "*positive duty*" in the disability field, similar to that which the "*Public Authorities*" apply to "*race*". Via the *ad hoc* administration by the Commission, the legislator will also attempt to compensate for the absence of the indirect discrimination concept by imposing a less reactive but more active obligation

[23] A positive action is engaged on the basis of statistical data demonstrating an absence of a defined number of people belonging to a given group protected by law from being visible in a given sector.

than that which had previously existed[24]. The transposition of the European Directive thus follows the direction of a significantly more active duty imposed upon the parties, notably "*services providers*", and on this occasion, "*from 1 October 2004 service providers may have to make other 'reasonable adjustments' to their premises so that there are no physical barriers stopping or making it unreasonably difficult for you to use services"* (*2004 and Disabled People*, DRC). The future will thus include their participation in achieving equal access of handicapped persons to provided services and goods. However, it is worth noting that this equal access, which is now sought more actively and continuously, has a very specific meaning: it seeks to ensure that on the premises themselves where goods and services are allocated and distributed, obstacles to disabled persons visiting or being present on the site do not exist either materially or in the architectural layout. Reception (and work) areas, as well as objects, must be designed so as not to be obstacles to persons and to take into account difficulties generated by a variety of disabilities.

Most of the work seems to relate to the environment. An environment which must be reflected upon and assessed in terms of the needs of disabled persons. Bluntly put, it seems obvious that such a duty demands that service providers (and previously, employers) carry out an inspection and categorisation of the environment rather than a categorisation of persons.

[24] In October 2004, the DRC reported on the changes this new approach will bring:
"**Is it ok for service providers to wait until I cannot use their services before making changes?** *No. Their duties are anticipatory and continuing. In other words, service providers should be thinking ahead and continually looking at the way they provide services, their premises and the physical features and considering improvements for disabled people.* " (*2004 and Disabled People*, DRC)

This is misleading, however, as both are intimately linked since the trouble caused to a person by an environment is directly related to the specific nature of his/her disability[25]. Defining the disability and the nature of obstacles in the way of affected persons is therefore equally essential. This is a difficult question as the extension of the "*disability*" concept in recent British legislation is quite significant. The list of disabilities considered, which are understood as "*impairments*" to "*day-to-day*" activities[26], is almost completely open[27], which makes the categorisation task necessary to statistical monitoring quite difficult.

The nature of the monitoring that appears to be required by the disability ground seems quite different to that of other grounds, however. The polarisation of activities on the reasonable adjustment theme, as well as relating to the objective of removing obstacles and to allow the integration and care of disabled persons in various areas, leads to an unusual type of monitoring. Indeed, the DRC believes that such objectives justify monitoring: "[It is] *important to collect information on broad impairment type and to explain that the purpose of this is to ensure that the different barriers faced by people with different experiences of disability are addressed effectively"*. In this case, statistical monitoring is not aimed at collecting facts on adverse impact or disproportionate impacts generated by rules and decisions, both of which are required when the action is considered in the light of the indirect discrimination concept. If one agrees with the DRC, monitoring also does not seem to be concerned

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[25] The DRC illustrates this link by relating objects to persons and vice versa: "**The 2004 duties say that service providers should make reasonable adjustments to physical features but what is a physical feature?** *Here is a long but not exhaustive list: steps, stairways, kerbs, exterior surfaces and paving, parking areas, building entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, public facilities (such as telephones, counters or service desks), lighting and ventilation, lifts and escalators. It is important to realise that these features aren't just buildings or indoor facilities. They include seating in the street or a pub garden, stiles and paths in a country park, or fixed signs in a shop or leisure facility. (...)* **Can service providers just make changes for people with particular disabilities?** *No. Service providers should not focus on stereotypes but should consider the full range of access needs of disabled people and the ways in which their services may be difficult to use. The DRC recommends that service providers have an access audit done. It is important to take into account the needs of a range of disabled people and not rely on stereotypes. As a disabled person you may want to become involved in this through your local access group or organisation. (...)* **How should a service provider deal with a physical feature that is making it difficult for me to use a service?** *Once a service provider has identified the physical features that may make it difficult for you to use their service then the law gives them a choice. They can remove that feature, alter it, find a way of avoiding it or provide the service another way. The DRC strongly recommends that service providers first consider removing the physical feature or altering it. This is often the safest option because it is more likely to make the service accessible, meaning that you receive the services in the same way as other customers. This is called an "inclusive" approach. Where a service provider does decide to avoid a feature or provide the service another way, then the service must not be unreasonably difficult for you to use.* » (Op. Cit.).

[26] Disability is indeed defined in the DDA 1995 as an "*impairment*" affecting a person's ability to execute daily activities in the same fashion as a non-disabled person. "*Disability is defined as: a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. (...) Day-to-day activities are normal activities carried out by most people on a regular basis, and must involve one of the following broad categories: mobility - moving from place to place; manual dexterity - for example, use of the hands; physical co-ordination; continence; the ability to lift, carry or move ordinary objects; speech, hearing or eyesight; memory, or ability to concentrate, learn or understand; being able to recognise physical danger.*" (Definition of disability, DRC, 1996).By using the "*impairment*" (both physical and mental) category, a very broad spectrum is covered, including long-term or progressive medical conditions requiring heavy treatments, either permanent or chronic. Thus, HIV and cancer are covered by the DDA 1995.

[27] However, the legislator explicitly excludes legal protection for the following "*impairments*": "*addiction to or dependency on alcohol, nicotine or any other substance (unless the addiction resulted from the substance being medically prescribed); seasonal allergic rhinitis (e.g. hay fever) except where it aggravates the effect of another condition; a tendency to set fires; a tendency to steal; a tendency to physical or sexual abuse of others; exhibitionism; voyeurism*. " (Definition of disability, DRC, 1996).

with the assessment of the work force composition. Rather, it seems to assess the efforts companies or organisations put forth and it also is deemed to be a support to these bodies in assessing the types of adjustments they must undertake in order to remove the obstacles facing handicapped persons[28] and to achieve equity in service and goods delivery. Monitoring disability is thus significantly modified and only slightly resembles the monitoring undertaken for race and ethnicity. This is clear in the practical recommendations issued by the DRC to employers. For example, when the DRC addresses the question of anonymity, which is usually part of the procedure[29], it leans more towards a collection of non-anonymous information.

"Anonymous and Non-anonymous monitoring

Non-anonymous monitoring enables an organisation to acquire a sophisticated picture of its disabled workforce/membership, in terms of tracking the careers of individuals through recruitment, training, promotion, appraisals and retention etc. It can also indicate whether disabled people are clustered at lower grades or within particular departments.

Anonymous monitoring is likely to lead to a better response rate because people will be less worried about the implications of disclosing personal information. However, it is much less useful and does not allow an organisation to build up a full picture of the progress of disabled people in an organisation.
Overall, the DRC recommends non-anonymous monitoring. However, as this is potentially a more worrying and sensitive form of monitoring in terms of its impact on employees, it would be important to consult staff about the exercise in advance, stressing the benefits and the confidentiality of the process, before any decision was made to go ahead.

Monitoring and Reasonable Adjustments

Non-anonymous monitoring can be combined with an exploration of individuals' needs for 'reasonable adjustments' under the Disability Discrimination Act. The Disability Rights Commission would recommend that any non-anonymous monitoring questionnaire should mention a disabled employee's right to 'reasonable adjustments' and be backed up by systems that ensure any requests for, or queries about, such adjustments are followed up promptly and effectively, in consultation with the disabled person. Anonymous monitoring exercises should also alert people to their rights but obviously cannot be backed up by individual follow-up."

This diversion from the usual anonymity rule intervenes because monitoring, as it is meant herein, is functionally related to the required execution of "*reasonable adjustments*". These adjustments necessarily relate to individualised work stations since they are concrete applications of adjustments to working conditions or the work environment of a given person so that his/her disability does not become a debilitating obstacle. That the anonymity rule appears to be problematic is understood in light of the efforts of companies and organizations, who are bound by legal obligations provided for by

[28] But if this is where monitoring is undertaken, its concern then seems to be the environment rather than persons.
[29] Except when it concerns following the career path of persons within a structure or organization.

the revised Act, imposing a "*duty to make reasonable adjustments*", addressing particular needs relating to the specificity of a person's disability. The preference for suspending anonymity in questioning is also supported by the DRC because it believes that this will increase the opportunities for obtaining answers from disabled persons. These opportunities are based on a presumption that the question implies a recognition of a need and the initiation of an effort to take the disability into account because the question is not anonymous. The DRC therefore suggests that the companies and organizations use the following preface in introducing the questions: "*We are looking at different barriers faced by disabled people in order to make positive changes. Disabled employees are entitled in law to "reasonable adjustments" to address their support needs. Therefore we are interested in any disability or health condition you have. What specific effects on your work might your disability or health condition have that we can help to address?"*.

Looking at this closely and bearing in mind its objectives and practical modalities, one could even wonder if this is truly monitoring. At the least, if it is indeed monitoring, a number of problems could put a serious strain on the operation required by the DRC. Firstly, it seems the confidentiality clause cannot be upheld. It seems logically impossible to guarantee confidentiality, or at least the confinement of disability information, to employees as it is very difficult to imagine that employers could make the necessary adjustments, or even consider them, and uphold the confidentiality requirement after the collection by avoiding matching the information obtained to the individual who has confided the information[30].

Furthermore, what the DRC is calling for may change the usual means of collecting the data necessary to anti-discrimination policies with regard to employer discrimination - by referring to the advice and recommendations of various independent authorities. Indeed, most of these have a tendency to ask all the questions relating to equity monitoring at the same time and argue that the information will be used with the sole intention of "*equal opportunity monitoring*". This introductory argument is what allows them to collect information relating to "sensitive data". This information is subject to a specific collection regime provided for by the Data Protection Act 1998. Unless the Authority supervising DPA 1998 enforcement reviews this case, employers will have to collect disability information at a subsequent time or they will have to accept that this collection is not only for monitoring purposes. In accordance with the DPA, wherever possible, monitoring must respect the system imposing data anonymity and preventing the return of the information collected on the person who provided the information. Undeniably, the information must be returned as it is used for purposes relating to the person who provided the information. The execution of reasonable adjustments is individualized and the employer may only honour his/her duty if the person discloses and describes his/her disability.

[30] The necessity is even greater as the law intends to cover "*progressive*" medical conditions, those that as they evolve see the nature and extent of the "*impairments*" progress.

"*8.23 The Act does not prevent a disabled person keeping a disability confidential from an employer. But keeping a disability confidential is likely to mean that unless the employer could reasonably be expected to know about it anyway, the employer will not be under a duty to make a reasonable adjustment. If a disabled person expects an employer to make a reasonable adjustment, he will need to provide the employer - or someone acting on its behalf - with sufficient information to carry out that adjustment.*

An employee has symptomatic HIV. He prefers not to tell his employer of the condition. However, as the condition progresses, he finds it increasingly difficult to work the required number of hours in a week. Until he tells his employer of his condition - or the employer becomes aware of it (or could reasonably be expected to be aware of it) - the employer does not have to make a reasonable adjustment by changing his working hours to overcome the difficulty. However, once the employer is informed he may then have to make a reasonable adjustment." (DRC, *Code of practice Employment and occupation*, April 2004, p.121)

The "*disclosure of disability*" is even called for before the question of making reasonable adjustments is raised. It occurs as soon as efforts are made not to treat disabled persons more unfavourably. This is explicitly set out in a guide, "*A good practice guide for further and higher education institutions, 2002*", published by the Department for Education and Skills. It explains to agencies the breadth of the *Special Educational Needs and Disability Act 2001*[31], and sets out that "*in order to avoid discriminating against a disabled person or student by treating him or her less favourably because of a disability, responsible bodies will need to know about that person's disability. If the responsible body does not know and could not reasonably have known that a disabled person or student is disabled, then that person has not been treated less favourably for a reason relating to his or her disability. Institutions should note that when "one person" has been told in the institution then the institution could be deemed to know about a person's disability. For example, if a student tells a tutor that she has to see a doctor and take medication on a regular basis and the tutor fails to pass that information on to a responsible person, the institution may not be able to claim that it did not know about the student's disability*."[32]

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[31] The Special Educational Needs and Disability Act 2001 imposes new duties on education institutions for persons of more than sixteen years of age; they have the duty "*not to treat disabled people and students less favourably, without justification, than students without a disability; and to take reasonable steps to enable disabled people and students to have full access to further and higher education*".

[32] The duty to provide reasonable adjustments is a proactive and positive duty within the specific Act and requires acute (because "anticipative") attention on the part of educational institutions' agents. Under the empire of this duty, they are seriously invited to inquire early on about a person's disability, without necessarily obtaining the information through formal testing. "*A responsible body's duty to make reasonable adjustments is an anticipatory duty owed to disabled people and students at large. Responsible bodies should not wait until a disabled person applies to do a course or tries to use a service before thinking about what reasonable adjustments they could make. In practice, this proactive approach means continually anticipating the requirements of disabled people or students and the adjustments that could be made for them (...). In some cases it may be obvious that students have disabilities, for example because they are visible or because you can reasonably infer it from a conversation with the individual or their application. A responsible body does not formally have to be told that a disabled person or student requires a particular adjustment before making such adjustment."*

c) The problem facing categories which are appropriate for this type of monitoring

The DRC's recommended monitoring is thus dissimilar to monitoring in the fight against racial discrimination. Furthermore, it is unlikely that the DRC rapidly design a standard category structure aimed at general use - essential to measure discrimination. Furthermore, on reflecting once again on the DRC recommendations, the implementation of a limited standard category system seems to contradict what it now calls its wishes, that is to say a comprehensive and detailed overview allowing for the discernment of problems which normally are not related to a disability:

"**Monitoring of Specific Impairments**

Whilst certain impairment groups remain particularly under-represented in the workforce (for example, people with visual impairments, mental health difficulties and learning difficulties) it is important to collect information on broad impairment type and to explain that the purpose of this is to ensure that the different barriers faced by people with different experiences of disability are addressed effectively by the organisation. Monitoring by impairment will also help to highlight who is covered by the term 'disabled person' under the Disability Discrimination Act. Many people with hidden impairments or medical conditions do not identify as disabled so it is important to frame a question broadly in order to trigger a response from these people. It is also best to frame a question in a positive way, and back it up by reference to a disabled person's legal rights."

The issue of categorising disability is the most important question facing the different parties to the anti-discrimination struggle. It is worth noting that this question significantly precedes the implementation of monitoring. Firstly, the identification of a disability is subject to proof by certification that does not have an equivalent with other grounds where a person's statements are considered proof (and where the truth of the person's declaration can be proved at minimal costs by the party collecting the information[33]). With regard to disability, expertise is required for the assessment. Medical documents proving the truth of the person's statements and establishing the nature and extent of his/her "*impairments*" can be requested[34]. A broad network of agents (doctors, public servants, etc.) and heterogeneous expertise which concern both the person's past medical history and future expectations is involved.

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[33] Although a trivial example, should the CRE measure "*race*" through the means of self-identification and a white person declare that he/she is "*black*" during the monitoring, there is a good chance that this person not contest a re-codification by the person collecting the information. He/she will simply request that it be noted that the categorization was marked by a third party.

[34] For example, "*mental impairments*": "*13. Mental impairment includes a wide range of impairments relating to mental functioning, including what are often known as learning disabilities (formerly known as "mental handicap"). However, the Act states that it does not include any impairment resulting from or consisting of a mental illness unless that illness is a clinically well-recognised illness (Sch 1, Para 1). 14. A clinically well-recognised illness is a mental illness which is recognised by a respected body of medical opinion. It is very likely that this would include those specifically mentioned in publications such as the World Health Organisation's International Classification of Diseases."* (DRC, *Guidance on matters to be taken into account in determining questions relating to the definition of disability*).

Furthermore, statements are disputable and a few judicial actions relate to the identification and definition of an "*impairment*" covered by law and considered a disability requiring adjustments or making a discrimination unjustifiable. While debates have occurred relating to the extent and understanding of the "*racial group*" concept, as we have seen previously, the debates concerning disability are of a completely distinct nature and a particularly significant complexity. Implementing an *ad hoc* category classification refined for the practical needs of monitoring does not seem realistic for the time being, particularly as the DRC is currently trying to explore the potential for the law considering a broad variety of disabilities[35] . It is noteworthy that the DRC has proposed none. However, with regard to the practical objective the DRC has assigned to monitoring, that of supporting the execution of "reasonable adjustments", it can be considered that large disability categories used by the ONS in its publications regarding the results of broad surveys (of the Census or LFS type) are not relevant (see below). It is the "*impairments*", more than sicknesses or handicaps, as well as the material and social environment in which they are revealed, that should be submitted to a structured categorisation since it is the conflict between these terms that defines the actions to be taken[36].

For the time being, two main methods of categorisation are available, although much is being done in parallel. The first is based on a medical approach and is well equipped and used. The categories available provide well established numbers (more or less accurate) of pathologies and/or handicaps. The central feature of the categorisation is that it differentiates "non-disabled" persons, those who are healthy, with "disabled persons" (the specifications vary depending on the locations and surveys). This categorisation method is subject to serious criticisms and the various parties involved seem to prefer categorisation methods based on a “social” perspective of disability. This method is in use in certain public administrations providing disability statistics to respect the requirements relating to the measuring of equality. While this second method is gaining in strength, it is not really substantiated by statistical equipment.

The *Cabinet Office’s Disability Working Group* has thus suggested that the list of disabilities be reviewed through consultations. The *Civil Service Department* bases its monitoring on this list. This seed of change intends to solve the problems relating to data collection problems which are defined as follows:

“*The main areas for consideration that the group has identified are:*

- *the culture within the Civil Service, which might be perceived as militating against staff who have concerns about declaring themselves as a disabled person;*
- *the under recording of the proportion of disabled civil servants; and*

[35] We have already seen that it has asked the employers for similar acceptance. This is why it has advised them not to limit themselves now to broad disability categories, but to look within the disability field without being influenced by stereotypes that could become barriers to poorly visible and recognisable "*impairments*" (including for those suffering the disability).

[36] It is worth noting that the "*impairment*" question is pivotal to the Act and that the DRC has committed to undertaking a summary categorisation of impairments, as we pointed out in a preceding footnote.

- *the quality and reliability of the data that is recorded, collected and reported on.*

The main issues arising for the group to consider, within Civil Service departments and agencies, are:

- *an examination of the cultural issues and how to achieve cultural change;*
- *what information is recorded on disabled people;*
- *how we can improve the quality of data that is collected on disabled people, including staff in post and applicants in the recruitment process; and*
- *how we can best use this information to promote equality for disabled people within the Civil Service.* "

The main reason behind the request for this modification relates to the acceptability of requests for disability information. An evolution towards categorization based on the "social" understanding of disability is proposed to counter this reticence, however it seems that this evolution is in alignment with the DRC action objectives and the concepts on which all the recent legislative reviews, or review proposals, have been founded, without the proposal authors' concrete suggestions on the form that this categorial architecture could take to comply with the "*social model*"[37]. The second approach is advanced because it would allow for an increase in the rate of responses to the questions as currently applied, also because it is supported by organisations for disabled persons[38] and, in proposing a definition for disability that includes environmental factors, it is more inclusive and involved.

"*There are two main ways of defining 'disability' - known usually as the medical and social models of disability. (...) Under the medical model, disability is defined with reference to what is 'wrong' with a person - how they are thought to differ from the 'norm' accepted by and looked after within society as a whole. (...). Everything that is experienced by the disabled individual is defined in reference to their impairment - 'He can't come to this meeting, because he is in a wheelchair' (...). The onus for their exclusion rests with the disabled person and their impairment and their 'salvation' rests with those who are able to help them overcome the effects of their impairments: doctors, scientists etc. By defining disabled people in relation to their impairment, the medical model seeks to divide disabled people into groups and ignores the common experiences in discrimination that many of them share. Needs are*

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[37] In its *Code of Practices Employment and Occupation* of April 2004, the DRC refers to this in its first pages: "**Understanding the social dimension of disability :** 2*.2. The concept of discrimination in the Act reflects an understanding that functional limitations arising from disabled people's impairments do not inevitably restrict their ability to participate fully in society. Rather than the limitations of an impairment, it is often environmental factors (such as the structure of a building, or an employer's working practices) which unnecessarily lead to these social restrictions. This principle underpins the duty to make reasonable adjustments described in Chapter 5. Understanding this will assist employers and others to avoid discrimination. It is as important to consider which aspects of employment and occupation create difficulties for a disabled person as it is to understand the particular nature of an individual's disability*." (p.7).

[38] However, such an approach does not seem to favour a reduction in the number of categories to be produced. While it may avoid dividing people into groups based on a shared medical condition, it is not certain that this would lead to a reduction in categories. Furthermore, it is difficult to see which categorisation principle should be used here: should the execution be based on a consideration of "*impairments*" or on experienced discrimination? A focus on "*impairments*" and their specificities as required by the DRC, although appropriate, seems to be rather onerous. Also, the attention and treatment focus which the DRC promotes seems to prevent any possibility of equipping a standard categorisation appropriate to statistical monitoring.

met in a way that suggests that disabled people must be compensated for their impaired lives by the provision of 'special' services. (...)

The social model of disability is different - it differentiates between what is an impairment and what is disability:

***Impairment:** this can be defined as a characteristic, feature or attribute within an individual which is long term and may or may not be the result of injury or disease and may:*

a) affect that person's appearance in a way which is not acceptable to society; and or

b) affect the functioning of that person's mind or body; and/or

c) cause pain, fatigue, affect communication and/or reduce consciousness.

***Disability:** this is the disadvantage or restriction on activity and involvement caused by a society which takes little or no account of people who have impairments and their needs, and thus excludes them from mainstream activity.*

Thus 'disability' is (...) about the barriers, physical, social and environmental, that are caused by the way society is organised and the way it views disabled people. (...) The reason he cannot come to this meeting is not because he is a wheelchair user, but rather because the transport system is not accessible to wheelchair users, the built environment is not designed to make it easy to use for wheelchair users, the building itself is not accessible etc."[39]

At the forefront and in parallel to the shift around the monitoring question, other public Authorities express a preference for a "*social model of disability*". Indeed, the *Data Management and Analysis Group* of *The Greater London Authority* lobby for the collection, treatment and analysis of data relating to disability based on this method of defining disability. However, a complete conversion to this method runs up against the standard categories on which disabilities are documented. Although the members of the group in question intend to undertake their analyses under this model[40], the data available will not enable them to conduct the survey as they wish, since the data is "*medically derived*".

"*It is recognised that there are major difficulties relating to the definition of disability and that the concept itself is both complex and controversial. The GLA has adopted the social model of disability but the standard definitions of disability used by official surveys like the LFS tend to focus on medically*

[39] However, such an approach does not seem to favour a reduction in the number of categories to be produced. While it may avoid dividing people into groups based on a shared medical condition, it is not certain that this would lead to a reduction in categories. Furthermore, it is difficult to see which categorisation principle should be used here: should the execution be based on a consideration of "*impairments*" or on experienced discrimination? A focus on "*impairments*" and their specificities as required by the DRC, although appropriate, seems to be rather onerous. Also, the attention and treatment focus which the DRC promotes seems to prevent any possibility of equipping a standard categorisation appropriate to statistical monitoring.

[40] "disabled people's organisations prefer a social approach, which defines disability as "the loss or limitation of opportunities that prevent people who have impairments from taking part in the life of the community on an equal level with others due to physical and social barriers". This approach defines a disabled person as "someone who has an impairment, experiences externally exposed barriers and self-identifies as a disabled person". The term impairment refers to "a physical or mental condition of lacking all or part of a limb or having a limb, or organ or mechanism of the body that is not functioning or not fully functioning"." (p. 5, Greater London Authority, Data Management and Analysis Group, Disabled people and the labour market, An Analysis of Labour Force Survey Data for London 2001/2002).

derived definitions and terminology. These do not fit easily with the social model in that the questions asked aggregate both impairment and long-term health needs" (p. 5, Greater London Authority, Data Management and Analysis Group, *Disabled people and the labour market, An analysis of Labour Force Survey data for London 2001/2002*).

Nevertheless and as we saw previously, the "*social model*" assumption developed here does not lead to the proposal of a group of categories, and even less to the defining of an appropriate question. As we have already seen, the DRC, while supporting this model for understanding disability, has not started to carry out this activity.

Instead of having a proposal for a standard set which includes a question and a set of categories, there is a dispersion, and a number of question and categorisation methods are available. The Labour Force Survey classification is structured according to a "*long term health problem*" concept under which disabilities are distinguished (designating limbs, body parts or human organs – those that are affected and lead to disability – or those that refer to illnesses or psychological states). While results are often set out by distinguishing "*disabled*" from "*non-disabled*", it may occur that certain tables differentiate the distinct disabilities (see *Labour market experiences of people with disabilities*, A. Smith & B. Twomey, Labour Market Division, ONS). These are categorised as follows:

Disabled by type of long term health problem *:*

Musculo skeletal problems :

- *back or neck*
- *legs or feet*
- *arms, hands*

Difficulty in seeing
Difficulty in hearing
Speech impediment
Skin conditions, allergies
Chest, breathing problems
Heart, blood pressure, circulation
Stomach, liver, kidney, digestion
Diabetes
Epilepsy
Mental illness :

- *Depression, bad nerves*
- *Mental illness, phobia, panics*

Learning difficulties
Progressive illnes n.e.c
Other problems, disabilities

The ONS classification is supposed to be congruous with the handicap concept set out by the Disability Discrimination Act 1995, the LFS classification having been partially revised in 1997 to comply with the disability definition on which the DDA 1995 is based. However, it seems it is, at the least, removed from the disability "*social model*" preferred by the DRC and organisations for disabled persons. Indeed, the DRC displays various tables on its web site[41] which show estimates based on the same data as the LFS survey. These are analyzed and presented after the fact by using categories flowing from the Disability Discrimination Act. For example:

Estimates from the most recent Labour Force Survey - (Summer 2002 - Great Britain)
Current Long Term Disabilities Only
Long-term disabled
a) or b)
a) DDA- current disability
b) Work- limiting disability
Not long-term disabled
Note: The LFS disability questions were changed in Spring 1997 to take account of the DDA definition; comparisons with earlier quarters should not be made as they would be misleading.

Footnotes:

1.[1]This category includes those with a disability which has a substantial adverse impact on their day-to-day activities (i.e. DDA) or limits kind or amount of work and those known to have a progressive condition. It may exclude some people with progressive conditions and severe disfigurements who feel that these do not limit their work or have a substantial adverse impact on their day-to-day activities.

This way of distributing and setting tables for disabilities is not standard and there are other categorisation methods. One example, amongst others, is the Higher Education Statistics Agency which distributes disability categories[42] as follows (under the heading "total known to have a handicap"): "*Dyslexia; Blind/Partially sighted; Deaf/Hearing impairment; Wheelchair user/Mobility difficulties; Personal care support; Mental health difficulties; An unseen disability; Multiple disabilities; Other disability; No known disability"*.

However, this will change in the future. The ONS has finally recognised both the expectation of a standardisation and the incoherent structure of its categories with regard to the fight against discrimination as defined by the DDA, and revealed in discussions concerning the 2011 Census. In response to the users of statistics, the ONS admitted that "*the most serious omissions from the 2001 Census were seen to be the questions on income, mode of travel to school (...) disability. The Census should attempt to establish a common approach to standardising the definitions of disability that are currently used in survey by replacing, for example, the question on limiting long-term illness with a definition of disability consistent with the DDA"* (OWG(04)02, *The 2011 Census: user's comments on the proposed design*, ONS, 2004). The Census is the best mechanism on which to align the various uses and propose a solid standard, as it proved to be with regard to ethnic categories (see below).

[41] Some of these cross-reference a person's disability with his/her ethnico-racial origin by using the Census classification.
[42] In a table entitled: **First Year UK Domiciled HE Students by Level of Study, Mode of Study, Gender and Disability 2001/02.**

2) Monitoring sexual orientation

a) Pressure by support groups

The focus on the fight against discrimination on grounds of sexual orientation is also fairly recent. Indeed, it is only since the transposition of the European Directives that this ground has been specifically covered by law via the *Employment Equality (Sexual Orientation) Regulations 2003* (the Act transposing the legislation). This Act only applies to employment, however[43]. To quote the *Stonewall Association* in the *Guidelines for Employers*, which relates to this law, this is welcome. "*For hundreds of thousands of lesbians, gay men and bisexuals, the new laws represent a huge and much welcome advance in fair treatment at work. They are now entitled to protections similar to those already provided for women, disabled and black and ethnic minority staff*" (p. 1). This should not lead to the assumption that nothing had been done, even though the actions were conducted mostly by associations. While Stonewall views the enactment of this Act favourably, it also was born in favourable times, since "*these laws have come at a time when many employers are taking the business case for diversity seriously. (…) Attracting and retaining the very best staff, regardless of background, is a fundamental part of business strategy for British companies that want to remain market leaders, and public sector organisations under pressure to provide world-class public services. Many leading organisations now realise that robust diversity policies contribute substantially to long-term competitiveness. We set out the business case for diversity and look at how effective policies help attract higher skills, motivated employees and loyal customers."* (Op. Cit.). In its booklet published in light of the implementation of this Act, and as it did for its booklet on religion, the ACAS underlines that companies embracing "*diversity*" management will not find difficult meeting the requirements of the new law: "*a lot of the good practices in this booklet will be familiar from existing advice on avoiding sex, race and disability discrimination. The new regulations should pose few difficulties in organisations where people are trated fair and with consideration."* (p. 4, *Sexual orientation and the workplace. A guide for employers and employees*, November 2003).

As the fight against discrimination based on this ground is recent, its monitoring has not yet been fully developed. However, unlike disability, and although there exists no Independent Authority supervising discrimination based on sexual orientation, the associations supporting this cause are more explicit in the need for the use of statistics to locally fight this discrimination[44]. Thus, the Stonewall booklet does not content itself with insisting on the need and benefits of statistical monitoring, but also includes a substantial amount of advice, including examples. The difference between this situation and that of the fight against discrimination based on disability is obvious, as seen in the following excerpt:

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[43] Nevertheless, other public measures are in the process of being implemented in other areas. The most predominant is the implementation of a civil partnership structure for same sex couples recently proposed by the Government. However, one can also refer to the enactment of the *Adoption and Children Act 2002* in the same year, which authorizes child adoption by same sex couples.

[44] There is a difference, however, between the ACAS booklet, which is very unclear on the topic of monitoring, and the *Stonewall* booklet, which is more complete, both in number of pages dedicated to this topic and the explanation of the recommendations.

"*Monitoring and evaluation are central to ensuring any activity is successful. They are the means of checking whether an organisation's diversity policy is being implemented effectively. They provide valuable management data, which can assist the organisation in making the right strategic and operational decisions to ensure they employ and retain a skilled and diverse workforce. (...)*

Monitoring and evaluation can show whether LGB employees: are employed in numbers that reflect the local/national population; apply for promotion at the same rate as all other employees; are recruited or selected for training in proportionate numbers; are being harassed or bullied at work because of their sexuality; are concentrated in certain jobs, sections or department ; think the organisation's procedures and culture are supportive.

However, there are unique challenges in monitoring the sexuality of employees and job applicants sensitively. (...)

Key issues

Under-declaration is a constant problem with monitoring, and inaccurate figures may lead to inappropriate decisions. Many LGB employees and job applicants will not feel safe declaring their sexuality. Because most LGB people are thought not to be out about their sexual orientation to everyone they work with, data on the extent to which individuals are out is as important as that on sexual orientation itself.

London Fire Brigade now includes a question on sexuality and faith in its annual staff census. The preamble to the question states: ' We want to collect this information to find out whether there are any particular minority needs within our workforce but you don't have to complete it if you don't want to.' The question concerning sexuality asks whether employees are out at work as bisexual, lesbian, gay or transgender.

Forms should avoid the suggestion that heterosexuality is the norm and that being lesbian, gay or bisexual is deviant or different from the norm.

People of different generations may use different language to define their sexuality. For example, some older people may define themselves as homosexual rather than gay or lesbian, so it may be helpful to provide alternative wording. Some women may define themselves only as lesbian; other women only as gay.

Creating a safe environment in the workplace will enable more people to be open about their sexual orientation but employers should not force people to disclose this information. Monitoring on sexual orientation should provide an option for people to state that they prefer not to answer a particular question. (...)

Action points

Encourage full participation to ensure accurate monitoring

- *Reassure LGB people it is safe to provide information by explaining in your monitoring forms or questions why you need the information and how it will be stored and kept confidential.*

As part of its commitment to a robust equal opportunities policy the Scottish Parliament has introduced monitoring on sexual orientation and gender identity alongside other personal characteristics. Clear communication explained why such data was needed and how it would be used.

- *Communicate the results of surveys and actions you will take as a result. Employees switch off if they give information but nothing seems to happen.*
- *It could be helpful to know whether someone is 'out' as LGB, as well as simply LGB.*

Decide what you want to monitor

- *You may want to take a snapshot of how many LGB people are currently in the organisation, or perhaps you want specific information on the experiences of those employees; or both.*
- *You might choose to carry out a large-scale, anonymous survey or focus on specific areas such as harassment.*
- *Ideally the data you gather should be good enough to use as a benchmark for improvement*
- *You could start by targeting surveys at specific groups of people – for example, job applicants, employees, customers, or clients complaining of harassment*

The Inland Revenue now includes sexual orientation monitoring as part of its staff survey. This is part of an all-round approach to diversity and equality, including all aspects of organisational life from customer service to recruitment.

Use data from external sources

Surveys carried out in organisations similar to yours might serve as proxy data for your organisation, if you have none available.

Benefits

Organisations that monitor effectively:

- *can measure the success of specific initiatives*
- *send a message that their LGB employees are valued*
- *can identify and communicate improvements in the position of LGB employees." (Stonewall)*

b) A logistical and social environment unfavourable to monitoring

The strong commitment to monitoring is not currently deployed in a fully accepting environment for the time being. Firstly, there are hardly any statistics that could be used as an external counterpart with which comparisons could be made with data resulting from the monitoring of employers who are willing to play the game. Stonewall is not naive, however, and the organisation is fully aware of this unfavourable context. In spite of the lack of statistics, if they encourage employers to be open to monitoring, it is precisely because they intend to incite the ONS to attack the question of measuring sexual orientation more directly and to develop a question with less oblique categories than those on which the number of homosexual couples living in England are based. Indeed, after the 2001 Census, the ONS calculated an estimate of the number of same sex couples living in the same household. The publication of this number caused sharp sarcasm from Stonewall, who publicly expressed caustic remarks via various media. Faced with the estimate published by the ONS stating that 78,522 persons declared they lived with a same sex partner, the president of Stonewall replied that this number "*suggests every homosexual couple in the land is a member of Stonewall and we are in touch with every single one of them. This is patently absurd."*. Ben Summerskill, the president of Stonewall, was reported in an electronic news article as "*blam[ing] confusing questions and a residual fear of admitting to sexuality as the root cause of the low numbers, something he has pledged to help eradicate*" ("*Census claims disputed by gay groups"* in Gay.com UK, 4 February 2004). While the logistical conditions are not yet ready and persons are not yet prepared to fearlessly declare their sexual orientation, Stonewall is attempting to accelerate the process by encouraging employers to conduct monitoring so that the development of this practice may encourage homosexuals to participate and prove to the authorities that there is a need to include a direct question in the Census. "*In the fullness of time people will see the benefit of recording information that is used to develop public services. (...) We would want to encourage them to do so, but we would also want the government to make the forms more transparent by asking the questions more openly"* (Op. cit.)[45].

c) The beginnings of experience

However, Stonewall already has experience with monitoring. It is on that basis that its booklet was published. Because of this experience, the organization expects that the response rate at the beginning will be too poor to lead to pertinent analyses. However, through experiments undertaken by a group of companies ("*Diversity Champions*") with whom it has worked, the association knows that while the initial response rate was poor, it improves with the repetition of monitoring and increased trust on the part of the employees, who believe that the company was seeking information on sexual orientation in order to assess and improve their equal opportunity policies. These experiments also revealed that the response rate increased when data was anonymous. This anonymity, however,

[45] During an interview, Mr. Forester, a Stonewall member charged with the monitoring issue, confirmed that Stonewall encouraged employers to collect and analyse data on their employees and candidates' sexual orientation, although external data, which would allow for comparisons with the general population, did not exist. It is precisely for this reason that the association asked the ONS, with whom it has contact, to include a more direct question on sexual orientation in the next Census.

prevents the monitoring of the promotions and advancement of employees. It also appears that the persons monitored demand significant and convincing guarantees when they provide information that is identifying - that is, when the data is not anonymous[46]. Although the response rate tends to increase in companies making every effort to fight discrimination on the ground of sexual orientation, it still remains weak. Indeed, these companies or organizations report that on average only 5 to 7% of their employees answer the question relating to sexual orientation[47]. Stonewall would like the sexual orientation question to become as routine and un-problematic as the question on ethnic origin and that monitoring also be perceived by employees as proof of an employer's commitment to equitable treatment of LGB persons (lesbian, gay or bisexual).

d) The emergence of a request for information arising from the Census by local authorities

In parallel to the militant commitment to supplant the lack of an Independent Authority responsible specifically for the fight against discrimination on the ground of sexual orientation, many organisations representing local governments and authorities support the demand for statistical methods providing the information necessary to support the policies set out by the legal provisions. The "*local authorities*" are also subject to the Employment Equality (Sexual Orientation) Regulations 2003. Further, in anticipation of the creation of an Independent Authority covering all grounds, these authorities are in a hurry to acquire the resources required to fulfill their legal responsibilities in ensuring equal treatment as employers and service providers as they are fully aware of the lack of statistics on their constituents' sexual orientations. "*New legislation means councils will need to ensure that they are recognising and complying with the rights of homosexual and bisexual employees and residents. (...) Some authorities are already working well with lesbian, gay and bisexual communities, but there is still discrimination out there which we must tackle. Lesbian, gay and bisexual people do not conform to typical stereotypes and are not a visible community of difference. Councils do not even have census figures to know how large the resident population is. They need to reach those people that may really need the support and services they can offer, as well as make a valuable contribution to the work of the council as a whole"*[48].

In a similar vein, although it acknowledges the controversial aspect of sexual orientation monitoring, the DIALOG association requests the progressive introduction of such monitoring, although no legal obligation exists to this effect ("*There is no obligation on employers to monitor in relation to these new equality strands"*) and its reliability may be rather limited at first. "*Unlike the Race Relations*

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[46] Mr. Forester also clarified the Stonewall preference with regard to the collection of anonymous (or non-anonymous) data. The booklet published by Stonewall suggests that it is as important to obtain data concerning the measurement of public awareness of the homosexuality of the persons in question (either because they are "out" in spite of themselves or because they declared their homosexuality of their own free will) as it is to obtain data on sexual orientation *per se*. The only means to achieve this double representation of the situation consists in conducting a two-fold anonymous and non-anonymous monitoring in order to enable comparison. Our interviewee indicated that Stonewall will provide further recommendations in due course.

[47] Mr. Forester provided this information.

[48] Laura Willoughby, Chair of the Local Government Association's Equalities Executive, quoted in "*New guidance issued to councils on engaging lesbian, gay and bisexual communities*", from a Stonewall web site article.

(Amendment) Act 2000, the new Regulations do not require any form of monitoring. The difficulty with both religion and sexuality is that any monitoring data is unlikely to be accurate. People may feel that this information about themselves is a personal matter, or they may fear discrimination and therefore not want to reveal the information. Having said that, in some circumstances monitoring can be useful. Before deciding whether or not to monitor, employers need to be clear about why they might monitor, what will the information tell them, and what will they do with the results, e.g. will targets be set? Monitoring without clear goals will be a waste of resources.

In terms of religion, where there are substantial and diverse religious communities in towns and inner city areas, it will probably be meaningful to monitor job applicants and the workforce as a whole, and set targets to mirror the composition of the local population.

There are many different views on whether lesbians and gay men should be identified in recruitment and selection monitoring. The campaigning organisation Stonewall recognises that monitoring can be useful, but only where the climate is right – people have to feel safe and comfortable before ticking any boxes. Councils that already undertake monitoring on the grounds of sexuality include London Borough of Waltham Forest who monitor in terms of workforce statistics. Manchester City Council and the Greater London Authority are considering where to monitor.

DIALOG does however recommend monitoring through anonymous staff attitude surveys. This will tell the employer if religious groups and lesbian and gay employees feel they are being discriminated against or harassed. It is information that can be used by the employers to improve the working environment. Similarly, information from exit interviews should be collated and analysed to see if there are lessons for the organisation in terms of culture or people management. Some form of monitoring will also signal to tribunals that employers take responsibilities under the Regulations seriously." (DIALOG, Advice note 03/01, *Equality = no exclusions. A guide to the new regulations related to religion, belief and sexuality*, August 2003) .

It seems that data relating to sexual orientation should soon become available in light of these various commitments and the operation of a well equipped anti-discrimination policy regarding other grounds. In this regard, the creation of an Independent Authority overseeing all grounds for discrimination should significantly accelerate the process, as such an authority could not be satisfied with an unequal treatment of the various grounds. All the more so because the mechanisms for fighting discrimination based on sexual orientation, as well as disability and religion, will be aligned with those fighting racial discrimination, which are currently better developed, particularly with regard to statistical monitoring.

II - THE ROLE OF THE INDEPENDENT AUTHORITIES

Independent Authorities play a crucial role in the English anti-discrimination apparatus as it is they who administer the legal requirements and assess current policies. It is in the implementation of legal requirements that statistics play a major role - we gleaned this in the preceding section. Independent Authorities are thus full parties to the elaboration and consolidation of statistical tools supporting and informing the fight against discrimination both locally and nationally.

In order to introduce the activities of these Independent Authorities, we will first look at the Commission for Racial Equality, today the oldest Independent Authority on the topics of this study. The history of its activities seems to be generally applicable, so we will first look at the evolution of the methods supporting its activities. We will then look to the Disability Discrimination Commission and the future single Independent Authority, the *Commission for Equality and Human Rights*, which will be responsible for the work of the three current authorities – the Commission for Racial Equality, Equal Opportunities Commission and Disability Rights Commission - and will take on the responsibility for administering new laws prohibiting discrimination based on age, religion or faith and sexual orientation.

A/ The Commission for Racial Equality: a summary description of its mission and jurisdiction

1) Its powers and mission

In conjunction with the Race Relations Act 1976, the British immediately created an Independent Authority, the Commission for Racial Equality (CRE)[49], whose mission, amongst others, is to supervise the application of the law and recommend improvements. The government combined two poorly established agencies, the *Community Relations Commissio*n and the *Race Relations Board* to create one Independent Authority which was granted on paper ample power by the RRA, particularly powers to investigate which were to be substantial so as to meet the vigorous demands of an Act incorporating the "*indirect discrimination*" concept (we will study its requirements later on). Since then and despite a number of disappointments concerning the true extent of its powers, the CRE has been

[49] By virtue of the 1976 Act, the CRE is composed of a minimum of eight members and a maximum of fifteen. These members are appointed by the *Home Office* for a period of five years. The Home Office also appoints the Commission's president and vice-presidents. There are no legal criteria mandating the choice of members. However, the members usually belong *de facto* to ethnic minorities. The commissioners are required to meet once a month. The commissioners' status is variable, to say the least; some work full-time for the CRE, others part-time; some are volunteers and others are paid. The CRE employs more than 200 persons, other than the commissioners. The Commission has many specialised committees and is present locally, as its activities are relayed by almost 90 committees and significant delegations in certain large cities as well as the nations of the United Kingdom (in particular, London, Birmingham, Leeds, Manchester, Edinburgh in Scotland, and Cardiff in Wales).

confirmed as being the principal administrator of the legal provisions, as well as recommended revisions, so as to achieve greater efficiency or a larger extension – a double extension, first by consolidating the grounds covered by the Act[50], as dictated by advances in case law, but also in demanding that anti-discrimination requirements be imposed in other areas. It is through its efforts[51] that these anti-discrimination requirements will be met by the assembling (at first, experimental) and then generalisation of *ad hoc* mechanisms that will by used by all of the agencies (public and private) concerned with racial and ethnic discrimination. It is worth introducing this Independent Authority before turning to the main features in the CRE three action periods. The CRE has been given the following objectives. It is expected to:

- work towards eliminating discrimination;
- promote equal opportunities and good relations between persons affiliated to all ethnic and "racial" groups.
- monitor the application of the Act 1976 and propose reviews and improvements.

From 1976, these objectives have allowed it to conduct surveys and investigations, negotiate agreements with unions, employer and worker organisations or companies, implement and organise public awareness campaigns. Beyond this, the commission has quasi-legislative abilities as it can enact « *codes of practice*"[52] to eliminate discrimination and promote equal opportunity in areas such as employment, housing, education and, under RRA 2000, Public Authorities. It also has the power to collect data and handle individual complaints. Its access to the courts is not only through the supporting of individual complaints, since some actions in justice can be launched on its initiative alone. Three noteworthy examples with regard to discrimination in the work place and employment:

"**Unlawful advertisements [section 29 of the Act] :** (...) *Only the CRE has the power to bring legal action against the publication of an unlawful advertisement. (...)*

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[50] A. Favell criticised this strategy. "*The dominant strategy of the CRE (…) has always been to use the jurisprudence of the legislation as a means of extending the provisions of the Act. It has thus sought regularly to uphold a series of cases as show-piece judgments in an effort to get the coverage of the Act extended. The legislation has been used successfully to defend not only acts of proven direct and indirect discrimination against Blacks and Asians on ground of their colour, but cultural allowances for Asian women (trousers at Marks and Spencer) and Sikhs (motor helmet and daggers). It has even been used to defend cases against Irish and foreigners all within the framework of a "racial category". (…) One has to ask, however, whether it always necessarily furthers the place and security of a particular group in Britain to have it defended as such under race relations categories. The lines between race, ethnicity, culture and nationality may sometimes be fine ones, but they are all nevertheless distinct categories, and should not be easily conflated*" (1998, p. 214). Here again, he could not have predicted that the recent alignment of European requirements offers promises for the extension and security, with a shift towards the religion or ethnicity of "groups" and conduct, which groups were only protected because of an *ad hoc* composition intended to be "racial" (which, to Favell, is fragile and incoherent).

[51] In one phrase, E. Bleich describes the CRE position as a "*quasigovernmental organisation that takes the lead in dealing with race relations*" (p. 11, 2003). This should not, however, lead to believe that the CRE alone can take initiatives. It more often renews and supports initiatives by various associations or responds to public problems arising elsewhere through recommendations and by establishing practical mechanisms. To take the most recent example, while the CRE participated in the Amendment 2000, this was in response to the Stephen Lawrence affair (1993) and gives effect to some of the recommendations included in the *Stephen Lawrence Inquiry Report* (1999).

[52] We will see how the codes operate and how they are related to the law (practically and through standards).

Instructions to discriminate [section 30 of the Act] *:* 2.23 It is unlawful for a person who has authority over another person, or whose wishes that person customarily follows, to instruct him or her to discriminate unlawfully on racial grounds. Only the CRE can bring legal proceedings. (...)
Pressure to discriminate [section 31 of the Act] *:* 2.24. It is also unlawful to induce, or attempt to induce, a person to discriminate unlawfully on racial grounds. The courts have clarified that inducement may be no more than persuasion and that it does not necessarily entail a benefit or detriment. Only the CRE can bring legal proceedings.**"** *(CRE,* Statutory code of practice on racial equality in employment, Consultation draft*, May 2004)*

To achieve these missions, a broad spectrum of investigative powers are allocated to the CRE. It can therefore require that the accused company, organisation or administration provide all information and documents of interest to the investigation. To that end, it may also request that the judge grant injunctions against holders of proof or hostile witnesses. It can also seize itself and launch its own investigations in order to document and substantiate alleged discriminations, particularly as it is the only body able to appear in court on certain matters, as we have just seen. If the presumptions are proved, it can use conciliation measures and, if unsuccessful, it can formulate "*official non-discrimination notices*". The extent of these powers does not stop here, however, as it can also lend financial and legal assistance to complainants by helping them to lodge and support their "case" in the relevant judicial arena.

Within its mission, the CRE may also draft and formulate revision and amendment proposals for legislative texts such as the Race Relation Act 1976. While a number of proposals have been rejected, the CRE has nevertheless achieved a few notable successes. It has thus fully participated in the development of the new RRA 2000 which covers State services (police, justice, criminal and custodial institutions, public institutions, education, public health, etc.) and public authorities, and includes "*positive duties*" in the promotion of "racial" equality. We will look at the amendment more in detail further on. The CRE's achievements are many[53] as it is a body inventing and experimenting mechanisms and methods which will over time become established and then required by law, and which will also support the private and public sectors. It also played in a role in the introduction of the "*ethnic question*" included in the *Census*, a question that it attempted to include right after its creation but which was only included in the 1991 Census. It is in understanding the CRE activities that one can

[53] From France, J.M. Berlogey, for example, in 1988, counted amongst its successes the following : « *Elle a ainsi obtenu, en 1980, l'abrogation de la section 4 de la Vagrancy Act de 1824 donnant à la police le droit d'arrêter toute personne donnant, dans un lieu public, l'impression qu'elle est sur le point de commettre un délit, disposition naturellement favorable aux abus, et s'apparentant à la reconnaissance d'un délit de sale gueule. Elle a de même, en 1982, fait reconnaître que les procédures d'autorisation de construire et de démolir relevant de la responsabilité des collectivités locales, (« planning permissions ») faisaient partie des domaines couverts par l'interdiction de discrimination. (…) Les dernières suggestions tendent à poser le principe que le Parlement ne peut voter de loi impliquant directement ou indirectement une discrimination, et à rendre obligatoire, au sein des entreprises employant plus de 250 personnes, un « ethnic monitoring », observation continue des pratiques en matière de recrutement, formation, promotion, selon les critères ethniques.*» (Belorgey, 1999).

understand why statistics and the setting of ethnic and/or racial categories (no longer controversial[54]) will become necessary.

The CRE's activities can be divided into three incremental movements inter-related and in a non-contingent order. In a report published in 2001, two researchers characterise the CRE activity periods as follows: from 1977 to 1984, the CRE mains concerns were about law enforcement, its power of law enforcement was "road-tested. Between 1985 and 1993, after a series of failure while confronting the judicial courts with relevant cases, the CRE began to diversify its former strategies : more general investigation were conducted and the CRE extended the work done to promote equality procedures and devices. Then, till 1993, the CRE went further ahead in such a direction and tried to promote and anchor racial and ethnic equality through the means of codes and standards (Clarke & Speeden, p.23, 2001).

Our presentation will look at the main topics in each period and attempt to find the links in the evolution. The first period concerns the testing of the judicial treatment of the question. This is not surprising, it is the acceptance of a strict prohibition of discrimination ("*direct"* and "*indirect*") that initiated all of the progress in English public policies and the CRE needed to test the ability of the law, courts and judges in their treatment of cases it brought forward. It is in fact this strict legal prohibition, supported by a law which it is to apply and thereby rendering it credible as it includes possible sanctions, which made it possible to achieve the progresses set out briefly below. The progresses occurred over almost 30 years. Certain European countries will have to accelerate because, in many ways, the European Directives demand instant and express establishment of similar mechanisms, in spirit if not in form, of those achieved progressively in England.

[54] The establishing and use of these categories are no longer controversial. However, there is considerable debate on their format, number and structure.

2) Three action stages. Using the law and supporting cases, investigating and establishing mechanisms, promoting equality

After a first period of strict judicial application, public action (thereafter proposed as a standard in fighting discrimination) will forge other paths, as we will see. The CRE will explore these alternatives once it becomes aware of the inherent limits to a strictly judicial action. This action can lead to occasional penalties (judgments operate on a "case by case" basis; also, it is expensive to assemble a case and bring it before a court) but has no ability to locally reform faulty procedures and provide durable frameworks for actions in such a fashion that they counter discrimination. It therefore seems that the general movement for English anti-discrimination policies can be described as a slow descent to the locations where this discrimination occurs and is generated. A descent that will assist in reversing the activity's first polarisation (instead of prohibiting discrimination only, it will promote equality) and will see the "negative duties" lead to "positive duties", particularly more exacting in terms of the commitment and implication of the parties and which necessitates the availability of appropriate tools. Thus, one step at a time, anti-discrimination requirements will take root locally (through "*monitoring"* and "*codes of practice"*, leading to "*guidance*" documenting "*good practices*") and support will be provided to the parties so that they can assess the suitability of their actions with regard to the application of the law. Concern and accountability will slowly arise and inform the parties (public and private), who will then act not only under the fear of punishment, but will actively engage and continuously attempt to achieve equality and take diversity into account.

We will see that the path taken by the CRE was made possible by the RRA description (Section 43) of its functions, however, since the Act imposes significant duties on the Commission from the beginning. However, it has only been over time that the Commission designed other forms of intervention and fully assumed its legal jurisdiction, that is to:

- work towards the elimination of racial discrimination
- promote equal opportunity and generally good relations between persons of distinct "racial groups"
- monitor the application of the RRA, work towards its effective application, and propose improving modifications[55].

[55] Here again, the Race Relations Act 1976 granted the CRE powers to fulfill its duties. Thus, in order to fulfill its third mission, the first to have been put into action, the CRE has direct access to the judicial arena and a "*quasi-judicial power* " (CRE, 2001). Also, it can directly attack discrimination by instigating *formal investigations* (Section 49) and enacting non-discrimination notices. Furthermore, it can support individuals when they seek to have their rights upheld in *industrial tribunals* and *county courts* by providing advice and expertise and participation in the compiling of their file (investigation and collection of evidence, establishing proof), even providing their legal representation. It also has the power to enact "*codes of practice*" which must be approved by Parliament. We will look at the form these codes take further on, as well as the manner in which they relate to the law and are taken into account by judges during legal proceedings.

a) The filing of complaints. The impetus to the action and reason for launching a "named person formal investigation" [56]

The Commission for Racial Equality arranged its activities first on the receipt of requests for assistance in filing individual complaints. At first, although the CRE had investigative powers and the ability to initiate court proceedings, it put itself at the service of the plaintiffs. Besides wishing to legitimise its existence and activities, this prioritisation can also be understood as a need to test the practicability of the law and to assess its appropriateness and public awareness thereof. Similarly, this also allowed the Commission to determine its priorities and where to use the powers it had and whose breadth it had not yet fully understood. As the impetus of the action, the collection of individual complaints thus motivated and justified the use by the Commission of the investigative powers conferred upon it by RRA 1976. Thus, as demonstrated in the table below, the first investigations launched by the Commission related to individual complaints.

Table of investigations[57]

	1977-1984		1985-1992		1993-1998	
Type	Individual	General	Individuel	General	Individual	General
Employment	14	0	4	3	1	2
Training	0	0	2	1	0	0
Private housing	2	1	3	1	0	0
Social housing	5	1	0	3	0	0
Education	3	0	3	3	1	0
Social services	1	0	0	0	0	0
Leisure	5	0	1	0	0	0
Other services	0	2	0	1	0	0
	31	4	13	12	2	2
Total	35		25		4	

(Excerpt from Clarke & Speeden, 2001)

[56] The CRE can also engage in a "*general formal investigation*" (see below).
[57] These are only investigations which led to the publication of a report, in other words, investigations deemed sufficiently remarkable by the Commission to be put to the test in public.

b) Investigate to educate and promote awareness

If one is to believe the various annual reports, the CRE members rapidly appropriated their investigation power and used "*formal investigations*" in two ways. The investigation results first led to a preliminary claim to be brought before the courts. The Commission thus first used its investigative powers to *substantiate* a claim and present it to the courts. When a person alleged discrimination, and when the Commission[58] considered the complaint to be substantial, investigations could document and establish the objectivity of potentially illicit practices by collecting and assessing proof and constituting a "case" that could meet the judicial test.

To this end, the CRE established three methods to provide proof, "discover" and establish discrimination. The least complex involves simple hearings of the parties; after the receipt of allegations of discriminatory conduct and if the "file" is based on the description of an act or a series of isolated acts clearly referable to a presumption of "direct discrimination", then hearings involving the defendant (the alleged discriminator) follow (with no further investigation) and witnesses can be received, along with the analysis of pieces of evidence. However, the Commission will also use "testing" procedures and will not hesitate to (belatedly) engage in statistical surveys to investigate large organisations in order to factualise indirect discriminations by proving the *fact* of an effective "*adverse impact*".

The use of investigative powers, other than in the judicial arena, as tools to constitute and bring elements of proof before the courts (the results of which were included in published activity reports), also had a revelatory effect of calling upon the public's attention and raising its awareness. Indeed, while the investigation was first used so as to bring the force of the law to bear on individual cases, it rapidly was used in a more strategic manner. Thus, at the end of 1979, 20 investigations involving employment were launched. Despite everything, the use of the official investigative tool will first be used mainly to establish *direct* discrimination and to deliver well-founded non-discrimination notices[59].

However, the engaged process will soon reach its limits. The first momentum of these investigations did not achieve its objective and the use of this resource died rather rapidly (as illustrated by the table hereunder). Besides a lack of human and financial resources capable of supporting the investigations, the power of these investigations was rapidly put into question in the absence of broad national strategies (and also a lack of fine statistical tools). Furthermore, significant reversals in court finally quashed the desire to follow these types of investigations in key areas. Thus in the first period (1977-1984), out of an average of 120 cases brought before the courts ("*employment tribunals*"), the

[58] While the RRA 76 requires the Commission to examine every request for assistance, the Commission has full authority to agree or not to providing support, and should the occasion arise, to represent the victim (see, *Advice and assistance from the CRE*, p. 12). The requirements seem difficult to meet, as the CRE in 1999 received 1,624 requests for assistance and only represented 183 cases (in 1998, 1,657 requests for 164 cases of assistance, 1,661 for 198 in 1997).

[59] Non-discrimination notices are in fact injunctions against persons who have committed or are committing acts that can be described as "direct discrimination" or "indirect discrimination" to encourage them to cease such acts. "Notices" must be supported by the conclusions of a formal inquiry.

commission registered a success rate of 15%[60]. Drawing from its competencies, the CRE will then turn to using the second type of inquiry, the "*general formal investigation"*. The initiative for these inquiries, as opposed to the preceding ones, is entirely a Commission decision and they are not immediately aimed at being included in a judicial procedure. The CRE intended to access the larger organisations through these inquiries. It created its own opportunity to encourage the organisations subject to the inquiry to reform and revise their practices and procedures which generated inequality in treatment that the investigation made public and flagrant. Thus, from 1984 on, the distribution of "named person" and "general" investigations more or less changed places (see table). The general investigations rapidly increased in number and the launch of an inquiry specifically intended to establish discrimination and incriminate employers seemed more a threat than a reality. The formal "general" surveys granted access to large companies and organisations and also provided a tool to promote "*codes of practices"*[61] and the implementation of "*equal opportunities policies"* (see below). Public awareness of disadvantages or discriminations was supposed to act as an incitement to more effectively convince investigated organisations and companies to immediately mobilise around these issues and deploy specific policies aimed at reducing the apparent inequalities.

While this change in balance between the two types of surveys flows partly from the failure of the cases brought before the courts, it is also appropriate to infer a critique of the simple "judicialisation" of the ethnic and racial discrimination issue. With this critique in mind, the Commission's policy in the fight against discrimination takes a new path. It is an active promotion, rooted in the various assessment tests on which decisions relating to allocations of goods and services are based, of equal treatment and the consideration associated with a simple sanction, discrete and discontinuous, operating in an external arena (the judicial arena) of *an* isolated offence.

However, it is worth noting that a sanction always serves as a threat. This is the position somewhat established by the *RRA 2000*, as it imposes a « *pro-active* », positive duty on the "*Public Authorities*". This change in the public action's focus was needed for two reasons . Firstly, the « g*eneral formal investigations* », as well as social sciences, established the extent and generic character of the disadvantages and differentials in treatment faced by the « *ethnic minorities* ». Secondly, however, these proven inequalities were, despite everything, hard to attribute to a specific and clearly identifiable source. It was therefore difficult to punish them, since the lack of attribution prevented the naming of a guilty party[62] who acted with malice or negligence.

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[60] Many commentators believe the courts' inhospitable treatment is due to the absence of provisions in constitutional law or human rights. "*the British judicial system, which is not predisposed to grant claims based on constitutional rights as are courts in the United States, is a weak vehicle for advancing antidiscrimination claims."* (Lieberman, p. 28, 1999). Also see A. Favell (op. cit.).

[61] The first to receive Parliament's imprimatur in 1983, but published in 1984. We will come back to these codes.

[62] Or when discrimination existed, it was difficult to impute it to agents since they did not comprehend the guilty aspect of their conduct and did nothing to identify and change their systems of rules and provisions (*CRE Annual Report*, 1985, p. 11).

The CRE meeting these difficulties in defining the place, agent or practice carrying a discriminatory effect is a factor in the change of perspectives. Indeed, when the place or the agent of the act escapes from direct investigation because the discrimination does not flow from malicious intent, a simple remedy comprised of a penalty and a sanction does not seem appropriate. Rather, it is more appropriate to conduct a vigilant breakdown in the decision-making and allocation process into examinable steps and segments and to provide the parties with tools allowing them to continuously assess and revise their practices and procedures. These are the roles that *monitoring* will be called upon to fulfill.

c) Achieving equality

The change in strategy is therefore not only based on a lack of "hospitality" in the judicial arena. In fact, the power to conduct formal investigations will be severely restricted by the Courts and, in the beginning, the CRE will experience a number of failures in its court cases. Indeed, the repositioning of the CRE is based on its awareness of the restrictions contained in a strictly judicial action to fight against discrimination. It is in this gaining of awareness regarding these restrictions and in answers thereto that three mechanisms for the anti-discrimination struggle will be consolidated and supported by the CRE: the "*codes of practice*", "*ethnic monitoring*" and the promotion of the "*equality plan*"[63] (or "*scheme*", in the words of RRA 2000), along with "*good practices*", each one of these extending the law and providing it with a new reach.

"*Ethnic monitoring*" allows for local assessments of effects and consequences arising from actions and procedures with regard to a person's "race" and ethnic origin. The "*codes of practices*" (matched with "*Guides*" containing more concrete recommendations as they describe "*good practices*" and provide examples of what not do to) translate the general legal requirements into actions, whilst remaining sensitive to local action constraints which may be appropriated by the participants. The "*plans*", also matched to "*monitoring",* support the promotion and achievement of equality amongst persons in facing hardships.

It is in fact remarkable that the design and progressive implementation of these three mechanisms (almost obligatory today in most spheres of British society) were brought about because of an awareness of the structural restrictions affecting the effectiveness of the law and its inability, *on its own*, to keep the promise of eliminating discriminations. The first relates to the exteriority of the law. The judicial arena, the place where the law is made, is in effect external and excentric to the field of action. To reach the law, there needs to be a "case", *one case only*, as the CRE has been refused (in 1985) the right to globally attack or lodge collective complaints in the name of "groups" or "categories". Furthermore, the law is said on occasion.

[63] We will come back to each of these mechanisms in depth when considering the manner in which they relate to statistics and demand the availability of a categorisation apparatus. We will then describe their operations with more precision.

After a sanction against an illegal act has been pronounced, and the illegality is always pronounced after the fact, after an investigation and after an expensive (and uncertain) procedure against *an* act, the practices or conventions which contained the undesired discriminatory effects can continue as they are not necessarily the subject of inspection and effective review[64]. This 'double' exteriority of the law is particularly problematic when it concerns a fight against a class of offence or errors that (because they are understood based on their *impact*) require constant vigilance and require the parties to commit to significant reflexivity. This exteriority is also problematic because the law is too far removed and does not provide a local framework for actions and tests on the sites themselves. Finally, the third restriction was seen previously. While the laws designates a class of prohibitions or offences, a class which is sanctioned and punished, it suspends the question of implementing "*good practices*"[65] and orders persons to act under the fear of a conviction without having them commit to positive efforts in the review of procedures and practices causing such effects or consequences. At this time, it does not provide a plan to design a reform of the tests and only traces a negative objective of a "Good" to be sought – a Good doubly defined, however, as "*equal opportunity*" or "*good race relations*" in the Race Relation Act 1976.

It is in progressively[66] surpassing these limits that the CRE will add to the English anti-discrimination tools by extending the law through mechanisms that will allow for implementation in the locations where discriminations are borne and to seize these discriminations at their roots, before they can be brought against someone. A broadening (or rather a deepening) which, by adding new tools, will *in fine* contribute to change the polarity of public action and prepare the path to the Amendment 2000. It will then involve not only *sanctioning* offences and departures by occasional proof of patent "*adverse impact*", but also the continuous *promotion* of equality in treatment and consideration of persons by providing parties (public and private) with tools to inspect and assess the congruence of their actions with regard to these requirements and helping them achieve equality.

[64] Although the CRE has the power to send "non-discrimination notices" in order to command a change in illicit practices under the Race Relations Act, it rapidly became apparent that fully backing these "notices" would be costly and extremely complicated.

[65] This defect may be caused by its overly broad generality and the fact that it is organised along principles without specifying the local rules and procedures that would allow for conformity in complex institutions and organisations (Banton, 1994, p. 65).

[66] It is also on the basis of experience and accumulated knowledge drawn from "general" investigation that the CRE will allow itself to change its mode of intervention. Informed by these various investigations, it will then be capable of "*systématiser des procédures permettant d'éviter au mieux les discriminations et d'accéder à une égalité d'opportunité"* (*CRE Annual Report*, 1986).

This "*shift*" in action marks the passage from a goal of strict "*law enforcement*" to a "*promotion*" of equality requested of the various parties[67]. This "*shift*" will culminate in the development of a "*duty to promote equality*" on the part of "*Public Authorities*".

To compensate for these restrictions, the CRE will undertake activities, the objective of which consists in supplying the parties with tools ensuring their position with regard to legal requirements and to more effectively follow equal treatment policies. These activities follow three paths and have gained in significance since 1985[68]. Firstly, the Commission will attempt to submit recruitment, promotions and goods and services allocations to the tests of the exacting requirement inherent in the equality principle. Secondly, in order to eliminate elements that could potentially bear discriminatory consequences, it will commit to an activity of elaborating procedures and standards for actions and conduct[69]. This standardisation is based on the enactment of "*codes of practice*" and "*standards*" which serve as models for scrutinizing and informing practices so as to reduce the likelihood of an "*adverse impact*". These codes and standards are broader than the legal provisions. They take a step towards the parties (taking their constraints into account) for whom they are intended and suggest operational methods sensitive to the environment's harshness and the objectives included in their various spheres of activity. They are transported to the field of action and provide recommendations which tend to eliminate discriminatory "*propensity"* to achieve equality without unduly imposing on people.

[67] This is not that simple, however, since this shift can also be considered a manner in which the parties could effectively and voluntarily systemise the judicial requirements within an action and the procedures surrounding it. The debate concerning the balance to be achieved between voluntary commitment and commitment required by law is constant and has followed the development of English anti-discrimination mechanisms for twenty years. For a recent discussion on the balance to be reached between the "*self-regulation"* policies and "*enforcement"* and "*sanction*" policies, see the *Parekh Report*. Indeed, the authors of this report are not insensitive to the benefits of "self-regulation". Firstly, it generates a "*greater sense of engagement* » within organisations and offers the assurance that "*key concepts and ideas are internalised*". Furthermore, it could incite organisations to go "*beyond non-discrimination*". However, they believe that it is worth remembering that, firstly, the employers' commitment has been encouraged in a heteronymous manner and that it is worth maintaining the pressure, at least through assessments conducted by external agencies who have a power of enforcement, because many fail to abide by even the minimum requirement (p. 269, 2000).

[68] The first code is a code of conduct for the elimination of racial discrimination and promotion of equal employment opportunities published in 1984. It is currently under review and in May 2004, the CRE proposed a consultative process for a new employment code, from which we have already extracted excerpts.

[69] In a comparative study on intermediations in the French and English employment sector, C. Bessy, F. Eymard-Duvernay and E. Marchal (2001) note the greater presence of tools in the English markets (in terms of intermediaries, standardisation of recruitment methods, and a greater consideration for objectivity in the hiring process) which should be related to the legal restrictions imposed in the fight against discrimination. By "tools", they mean "*un marché dans lequel les mises en relation sont à la fois canalisées et encadrées"* et remarquent que "*les opérations de recrutement sont d'avantages encadrées en Grande-Bretagne qu'en France en raison (…) des avancées réalisées en matière de lutte contre la discrimination"*.

By adopting and implementing these codes, the parties will display their concern and voluntary commitment[70] to a local anti-discrimination policy.[71]

However, these codes will also allow them to prevent sanctions, as, should an allegation arise, the respondent could claim the legitimacy of his conduct by proving the effective and local application of the code's recommendations. Thus, although these codes are not, strictly speaking, binding by law, their effect is more restrictive, as a failure to respect them or the absence of local imposition of adequate procedures, is taken into account by the courts when considering allegations against employers (RRA, Article 47, Paragraph 10).

We will see that the various mechanisms established by the CRE require the use of statistics and promote continuous monitoring. Statistics apply to any area concerned with discrimination and continuously support English anti-discrimination policy throughout each stage of its deployment.

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[70] The voluntary character of the implementation of equality is still pertinent to the private sector. However, it is now an *obligation* for the public sector.

[71] The CRE uses motivational tools when it attempts to convince and bring the private sector (and also public) to consider the racial equality issue. In fact, in so doing, it alternatively or jointly solicits:

- Good will (the desire to participate in a just cause);
- Pure and simple caution (attempt to avoid a sanction);
- The employers' best interest – once the "*diversity*" and equality profitability topics are established and the fact that one or the other can be achieved are good management.

The CRE has fully participated in the "managerial"-based establishment of anti-discrimination policy, particularly when it moved towards a "quality" policy. It will launch a vast campaign "*Equality Means Quality*", relying on these types of instruments, which met with relative success since the *Audit Commission* incorporated the *Racial Equality Means Quality* plan into the performance indicator apparatus in 1997. In 200/2001, within the performance indicator apparatus assembled by the two principal audit bodies, 29 related to racial equality. One can also believe that this program launch entrenches and takes to its limits the awareness of the restrictions of legal action based on the effectiveness (or threat) of a sanction. The launch of the Racial Equality Means Quality plan was addressed as follows: : "*The event marked a clear attempt to shift the emphasis of racial equality work from "law enforcement", as the principal means of fighting discrimination, towards a model based on quality management"* (*Measuring it up*, p. 7, CRE, 2000). The application and assessment of the *RRA 2000* requisites borrow a number of processes and tools from this managerial culture, even when it involves public agencies, making equality and public (treated as user-clients) satisfaction measurable objectives incorporated into a plan to improve management, service "quality" and company profitability. This conversion is quite general; one can also see evidence of the strong influence of managerial vocabulary supporting equality in the literature relating to anti-discriminatory public action, regardless of the grounds for discrimination. For example, when the DRC speaks to companies, it takes great care in underlining, "*There are at least 8.6 million disabled people living in the UK* " and that "*that's an awful lot of customers... with an awful lot of money to spend. All of those 8.6 million people and all of their friends and families use services - everything from the local shop, to the library and the theatre. However, many of these services aren't accessible for disabled people, either because of the design of the building or area the services are delivered from or because of the way the service is delivered. All of those 8.6 million disabled people have money in their pockets and they are all taxpayers. It is estimated that disabled people have at least £50 billion a year to spend and, of course, they can only spend their money on goods and services that they can access. Plus their friends and family have money to spend. And when they go shopping, on holiday or out for the evening as a family or a group of friends they will spend that money somewhere where the disabled person can go too. All of this adds up to an awful lot of money which is much more likely to be spent with a service provider whose services are accessible to disabled people.*" (DRC, *Why do it. Why should businesses make improvements for disabled customers?* 2004).

B/ The Disability Right Commission

As we have said, the DRC is much more recent – it was established by an Act succeeding the DDA 95, the Disability Rights Commission Act 1999. Because it is recent, we cannot follow its activity over as long a period of time. However, it is apparent that it follows the CRE structure and a similar path, particularly as it has similar powers. It first charged itself with testing the force of the law by assisting in "cases" and by using jurisprudence to reflect on the elaboration of "*codes of practices*". The DRC published a book on "*case law*" in which it sets out its strategy in a very clear manner. It is worth quoting lengthy excerpts.

"*The Disability Rights Commission (DRC) opened for business just over two years ago. Disabled people and their organisations have been campaigning for decades for civil rights legislation to protect them from discrimination. This led to the Disability Discrimination Act 1995 (DDA) but that Act did not create an organisation to help them enforce their new rights. More campaigning led to the Disability Rights Commission Act 1999, which resulted in the establishment of the DRC. The Commission gives information on the Act to a range of stakeholders, writes statutory Codes of Practice that enable disabled people to enforce their rights and, finally, monitors the Act, telling the Government of the changes that might be needed.*

When the DRC was launched in April 2000, I said that we would use the force of argument and where that failed, the argument of force. That remains our strategy. We work with employers, service providers, local and national government and disabled people to explain the law and help people to follow it. We have a number of services that I describe below but our overriding aim is to remove the curse of discrimination that casts its sinister shadow over and blights the lives of so many disabled people. Our approach has some people questioning whether the DRC is too litigious and others suggesting we should use our legal powers more. This booklet gives a vivid illustration of how we use our powers." (DRC, *50 Key cases from the DRC*, 2002).

As we can see, it does indeed follow a path similar to that of the CRE and it is very likely that the emphasis on "*law enforcement*" will diminish over time. For the time being, the DRC is firm on using its judicial structure as it lends credibility to its power and that of the law, but it is starting to engage in other actions which complement "law enforcement" and attempt to prevent matters from reaching the courts by offering the parties to a dispute procedures to assess and review their practices, thus to move towards equality[72] - without this devaluing the threat of a legal sanction[73]. This firmness is also due to the soon to be created sole Independent Authority. The DRC knows that it will be rapidly engulfed by the CEHR which will soon cover all grounds for discrimination. Before this fusion, it intends to promote the specificity of discrimination against disabled persons. It believes it is all the more pressing to prove the effectiveness of the threat of court action than the CEHR not having "*law enforcement*" powers, as established by the first government drafts[74]. The president of the DRC, Bert Massie, vigorously opposed this lack of power. These two points, the specificities of the disability issue and the need for an "enforcement" threat were the subject of an address by Bert Massie at a conference. "*When a single equality commission was first proposed in January 2000 in the Hepple Report, it called first for a Single Equality Act to equalise the rights of all the strands to the highest standard. While the nature of disability would still require some special provision for disabled people, the failure of the Government to introduce a Single Equality Act is disappointing. It means that many of the gains of the CEHR will not be realised because of the asymmetric structure of the rights of the people it seeks to protect. It also means that a large part of its future campaigning work is pre-ordained. We will have to fight to ensure that the new strands obtain the same rights to goods and services as the three traditional strands enjoy. It is not too late for the Government to address this and give the CEHR a better start. A major concern for disabled people is the whole question of human rights. It seems likely that the CEHR will have powers or perhaps even a duty to promote human rights but it will not have powers to help people enforce their rights.*

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[72] In the preceding part, we saw that it enacted codes of practices aimed at informing the parties on good practices to be implemented, and that it is starting to concentrate on statistical monitoring, a question which is nevertheless less pressing in the fight against discrimination based on disability for the reasons described earlier.

[73] The current DRC president vigorously underlines his mistrust with regard to publicity campaigns: "*disabled people know from long experience that campaigns to change people's attitudes and to win their hearts and minds invariably fail unless people know that behind those campaigns there is the sharp and eager sword of law that somebody is able and willing to use*. " However, he does not fail to point out that the use of this threat by the commission he presides is essentially strategic, as is the case for other commissions: "*The current commissions can hardly be regarded as litigious and when we do use our powers it is strategically. For example, of the eight significant DDA cases reported by the expert lawyer, Michael Rubenstein, in his recent Industrial Law Society lecture, seven were supported by the DRC."* It is interesting to note that he is pleased that the DRC has participated in establishing case law opening and stabilising interpretations of the law which are increasingly broad – this is another point in common with the CRE.

[74] In the "White Paper", the last government proposal drafted in May 2004, entitled *Fairness for all: a new commission for equality and human rights*, the Commission described holds such powers. "*The CEHR will have an enforcement role for anti-discrimination legislation. (...) The CEHR's enforcement powers will be closely modeled on those of the existing Commissions, with modernisation where appropriate (power to support cases; power to conduct investigations; power to issue and enforce non-discrimination notices; power to enter into binding agreements in lieu of enforcement; power to seek an injunction in respect of persistent discrimination). It is intended that these will provide the Commission with a suite of power to allow it to effectively enforce the various pieces of anti-discrimination legislation"* (p. 119-120).

The Government has explained its position with clarity. In the March 2004 edition of Policy Review Magazine, Lord Falconer wrote that the Government wanted a human rights culture rather than a litigation culture. On that basis there was no need for the CEHR to have powers to enable people to enforce their human rights. This makes it more difficult for disabled people to enforce our rights for our dignity to be respected in health and social services. While we can all agree with Lord Falconer that we want a human rights culture, I think we will fail to achieve that without the power to enforce the law. This has been the experience in disability rights legislation. Moreover, there is no reason not to give the CEHR human rights powers. The three existing commissions currently bring fewer than 250 legal cases a year collectively. Most disputes are resolved without access to the courts but only because discriminators know the law can be enforced." (*What can the CEHR offer to disabled people and other groups who experience discrimination?* April 2004).

C/ The Commission for Equality and Human Rights.

The creation of a single commission, grouping the three existing commissions and responsible for discrimination on the ground of age, religion and orientation, has been the subject of controversy[75] (we have just had a glimpse of this) and detours, and its final form has not yet been defined. Because while the government presented to Parliament the White Paper *Fairness for all: a new commission for equality and human rights* in May of 2004, in which it provides details on the Commission's structure

[75] We just had a glimpse of a few DRC criticisms against the first single Commission project. However, the DRC had other grievances. Other than the "law enforcement" power which was not initially anticipated, the main one relates to the fear that the organisational specificity of the DRC would disappear in the new CEHR. Indeed, it is a legal requirement (guaranteed and obligatory) that the DRC allow for 50% of its commissioners to be handicapped persons. However, the first drafts on the future CEHR ignored this legal provision and did not include a similar rule. Bert Massie contested this: "*For most of my life and that of many other disabled people we have been forced to the sidelines and watched non-disabled people making decisions on our behalf. I have no doubt that without exception they meant well. I'm equally convinced that in most cases they were wrong because they failed to understand the life experience of disabled people because they had no personal experience of disability. Most of the major changes in provision for disabled people and in the battle for protection against discrimination only came about when disabled people demanded the right to speak for ourselves. When the Disability Rights Commission was established this principle was enshrined into the Act. At least half of the commissioners of the DRC must be disabled people. In fact, of 15 commissioners 11 are disabled. Nearly 40 percent of the staff of the DRC is disabled. This has a major impact on our work and the approach we take. It is a major reason for the success of the DRC in which disabled people working with non-disabled commissioners and staff, who are an essential part of the equation, create an atmosphere in which we all live, breathe and fight to create a society in which disabled people can participate fully as equal citizens. It is also the reason why we believe that the approaches to the SEB in Lord Lester's Bill, despite its other strong points, and in the government's consultation document are fundamentally flawed. Both would disenfranchise disabled people and turn the clock back 25 years to the days when non-disabled people pontificated about what was good for disabled people."* His voice was heard, as in the governmental White Paper, *Fairness for all: a new commission for equality and human rights* published in May 2004, this request is considered. "*The DRC, uniquely amongst the existing Commissions, has statutory provisions for the appointment of disabled people, or people who have had a disability, to a minimum of 50 % of its Commissioner posts, including either the Chair or deputy Chair. The spirit of these provisions is carried forward in the arrangements for the appointment of at least one disabled person to the CEHR Board, and the establishment of a disability committee to oversee the disability-specific work of the CEHR. The disability committee would also be required to have disabled people, or those who have had a disability, make up at least 50% of its membership"* (p. 129). The government heeds the DRC demand, because it recognises the specific nature of the legislation on disability: "*the government recognises that – partly because disability legislation does not follow the pattern of the other discrimination legislation including, as it does, the recognition that ' reasonable adjustments' are often needed to deliver equal opportunities for disabled people – some specific arrangements and expertise will be required in the new Commission to deliver its remit in this area*" (p. 85).

and mission, things may change since the White Paper has started a debate and some chapters end with a question to the reader.

The future creation of the Commission should likely cause the uniformisation of action methods. While it will evolve within the existing legislation that does not provide the same breadth or weight for each of the grounds, the Commission will likely have to take these asymmetries into account and attempt to progressively balance them. In any case, this is what the government sets out in the White Paper. It even makes this one of the benefits that this Commission can generate: "*a single organisation will also provide an opportunity to pursue a more coherent approach to enforcing discrimination legislation. The CEHR can ensure, for example, that when it takes action to tackle unlawful discrimination in one equality area it also takes the opportunity to ensure improvements in the other area of discrimination"* (p. 18). Despite all of this, the CEHR will nevertheless have to deal with a non-unified legal framework which is more or less exacting depending upon the ground. Here again, the government encourages the commission in advance to achieve a certain balance. "T*he commission will be operating within a framework in which discrimination legislation affords differents levels of protection to different groups. For example, legislation provides protection against discrimination in employment and vocationnal training on grounds of sexual orientation and religion/belief (...), but protection against discrimination on grounds of race, disability or gender applies more widely than just employment and vocationnal training. The CEHR will work within this legislative framework, and be equipped to tailor the way its services are delivered to ensure that it does not disadvantage certain groups in its day-to-day operation"* (p. 126-127). In the long run, the different grounds should receive the same attention and resources and one can reasonably believe that each ground will rapidly be endowed with similar statistical tools[76]. The creation of such a commission will certainly accelerate the inclusion of the grounds for discrimination in the census, grounds which were previously included only very rarely and very indirectly, in the case of sexual orientation, or without true continuity with the legal provisions, in the case of disability. However, for the time being, and in relation to statistics and monitoring, nothing more can be said.

[76] It will only be once the Commission is created that the grounds of sexual orientation and religion will receive the attention of an Independent Authority. As indicated in the White Paper, "*the CEHR will take an enforcement role for the first time, in respect of sexual orientation and religion or belief*", and "*it is the Government's intention that the enforcement framework should be consistent across equality legislation"* (p. 120). However, the "enforcement framework" demands the use of statistics as it is through statistical monitoring that companies and organisations will be implicated and will commit to achieving equality. See Part III of this report.

III - ANTI-DISCRIMINATION PUBLIC POLICY AND LEGAL PROVISIONS REQUIRING THE USE OF STATISTICAL TOOLS

Because of their political application by the various Independent Authorities, the British legal provisions generate a great use of statistics. A use which not only makes available public statistics, but also demands making the statistical equipment available to the parties concerned with judicial standards. This, so that they can continuously assess the degree of conformity of their practices with regard to anti-discrimination requirements, but also so that they can locally implement anti-discrimination policies designed by the various Commissions and report back on their efficiency.

English policy thus gives a central role to "*monitoring*" mechanisms, well beyond the areas of employment and recruitment. As it ensures the application of the law in policies, this mechanism is crucial but remains nevertheless under the authority of the legislation, particularly with regard to the "*indirect discrimination's*" concept requirements, but also the conditions for application that surround the possibility of executing "*positive actions*". We will study these two features, as well as the operations of internal anti-discrimination policies in companies and organisations, the pattern for which was drawn by the CRE in its various codes of practice.

We will start by reporting on the specificity of the "*indirect discrimination"* concept by investigating the constraints imposed on its operation. As we will see, this constitutes the discriminatory act, or at least alleges one, on the basis of a statistical test and inquiry through which an inequality in treatment or condition is revealed. Because the British have taken seriously the requirements that this judicial concept imposes by law on the agents, they have developed mechanisms to locally apply and entrench the law. Thus, the anti-discrimination policies developed by the CRE can be described as a shift towards the concrete field of action where discrimination may occur, the means by which a judgment, or a judge, considers context in order to legality. The law is thus very practically a "model for action" (Jammeaud, 1990). A model for action which is supported by a multitude of mechanisms ensuring a practical translation for the passing of judgments by law and their practical requirements and will be transferred to the public and private parties, after some development (sensitive to the different implementation contexts) in such a fashion that they can locally adjust their conduct and test designs in order to eliminate discrimination and move towards equality. The use of statistical tools has been somewhat tested and required already and has gained in importance since the enactment of RRA 2000 which includes the imposition of a positive duty on the Public Authorities to pursue ethnic and racial equality and requires very stringent monitoring of its actions. For this reason, a section will be dedicated to statistical tools.

In this third section, we will focus on discrimination on the grounds of race or ethnic origin, because it is in these areas that the tools are most developed.

A/ The requirements of the "indirect discrimination" concept

While the specification of the "*indirect discrimination*" concept has changed with the recent revision requested by Europe, its application is directed by statistical reasoning since in both cases – we have seen that there are currently two ways of considering indirect discrimination – it is on the basis of a factual "*adverse impact*" negatively affecting a group that an indirect discriminatory event can be determined.

The RRA 1976 describes this concept as follows:
"*A person discriminates another if he applies to that other a requirement or condition which he applies or would apply equally to person not of the same racial group as that other but which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion ot persons not of that racial group who can comply with it; and which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of person to whom it is applied; and which is to the detriment of that other because he cannot comply with it"*.

Now aligned along the European legal model, it also applies in law:
"*where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary"*.

The "indirect discrimination" concept bases the proof of a discriminatory act on a statistical test, in other words, comparative reasoning, which, having considered the gap separating people on one of the discrimination grounds, analyses their situation when faced with a number of hardships. Such a concept, which requires the investigation of the effects and consequences of an act, procedure or judgment, and not only the determination of discriminatory intent, cannot go without the ability to *prove the fact* which is made possible through statistical reasoning since it allows for an objective view of inequalities arising from an observable event. It is on this basis that "*adverse impact*" can be analysed. Putting this notion to work requires the constituting of ethnic and racial groups as its operationality requires a scrutiny of the *effects* and an objective view of the *consequences* flowing from the provisions, rules and practices which are officially neutral (in other words, which do not expressly distinguish people on the basis of one of the prohibited grounds in order to treat them differently). Prohibiting a certain number of grounds (which are broken down into as many categories) and avoiding giving them effect in decisions and treatments requires the creation of "groups" which will be "protected" as the judge will not consider a discrimination factual unless he can engage in an investigation to determine whether one person is unfavourably treated because he/she belongs to one of these "groups". If the person is unfavourably affected, a consequence of a hardship due to one of the prohibited grounds will be suspected. While this operation may already be required in the simple

"*direct discrimination*" cases where discriminatory intent (because it has not been declared) is not flagrant, it is trully inescapable in cases of "*indirect discriminatio*n". This is because of the definition of indirect discrimination itself which is not perceived as long as an investigation to collect and collate a statistical table on individuals (described by *ad hoc* categories) has not been carried out in order to provide for a comparison establishing whether or not a significant gap has been created between them on the grounds of "race" or their ethnicity.

The factualisation of indirect discrimination as an offence punishable by law is thus very specific. It can only be established through statistical operations which will reveal the fact of a disadvantage by engaging comparative reasoning and ensuring equality amongst persons in and facing an incriminating hardship (in hiring, allocations, etc.) by establishing a balance between persons in order to ascertain whether some have been treated worse than others.

1) The steps in a judgment determining "indirect discrimination"

Before establishing the existence of discrimination, it seems that a judge must be assured of the fact that a significant difference exists which is only brought to attention after comparing various categories of individuals based on affiliation to "racial" or ethnic categories. This differential must also systematically cause a disadvantage to one category, a disadvantage which must be linked to the categories in which the individuals are included in spite of themselves in the case of a "racial" category, or by beliefs if it relates to an ethnicity or religion based on distinct practices which must be honoured. Thus, it could be ascertained that something or someone ("procedure", "provision", "rule", "practice" or "measurement") gave effect to the affiliation category during the test or in the situation faced by the individuals. To find that discrimination occurred, the judge must have an objective overview in the form of an observable fact, a negative differential ("adverse impact") which could be attributed to an operator (agent, "procedure", "rule", "practice", "convention", etc.) and which would allow for effect to be given to a racial category, so as to be supported by it or which generates systematic negative or unfavourable consequences to the person belonging to the said category. The judge's task does not stop there, however, since he must engage in inspecting the legitimacy of the wrongful operator, the finding of a disadvantage not always leading to discrimination, by calling upon the person to justify his/her actions with regard to a variety of endogenous objectives in his/her activity or practice[77].

[77] As we will see, this three-step judgment, through which a discriminatory situation is proved, will have to be apparent in the field of action and appropriated by the parties The "codes of practice" and "guidances" supported by "monitoring" ensure the transposition of the judgment into judicial standards which must apply them where they are applicable in order to answer concerns and, better yet, prevent discrimination from occurring. The law thus becomes an efficient "model for action" in a very practical manner. However, given the very particular nature of the discriminatory "fact" and the complicated nature, for the least, of the judgment, it is reasonable to provide the parties with substantial sets of tools informing them of the regrettable consequences that may flow from the manner in which they act and assess.

2) The reflexivity engaged in investigating the effects caused by the implementation of rules and practices

As long as everything is done to ensure it is effective, such a concept thus has a rather considerable reach since it allows the law to move forward on the basis of a fear only of a disadvantage affecting persons belonging to a "*race"*, ethnic origin or a given religion (since the most recent revision). Its force exists because it is no longer necessary to have a document of a formal type explicitly provided for by a rule or convention (or even verbally by an agent) to engage the law, the legal texts locating indirect discrimination within the existence of a provision (a criteria or a practice) which is "apparently neutral" but likely to cause a disadvantage. Thus, under this type of understanding of discrimination, the uniform and general nature of the rule (or practice) no longer proves equality in that it could not prevent a discriminatory effect or consequence from specifically affecting certain persons. This is a formidable requirement which demands substantial reflexivity on the part of the agents since it means that the general nature of the rule (or convention) which they use for support to stop an assessment could be suspicious because of the general nature itself. This because, in its deployment, it could be blind towards the different states and conditions of persons tested or because a partial and biased representation of these persons has been formed and constituted, representation which does not pay attention to important differences which should not condemn these persons to undue disadvantage.

This understanding of indirect discrimination therefore calls for the application of a reflexive policy which is concerned with assessing the effects and consequences of the rules and practices which govern hiring, allocation or goods and services distribution practices in a variety of areas. Reflexitivity, since the rules and conventions are not only subject to a judgment on their conformity to the non-discrimination requirement when they are "at rest" (in this case, only *the letter* of the procedure, rule or practice is subject to an assessment, a rapid assessment since it stops when no explicit distinction is found and it is established that these apply in a uniform fashion to anyone covered by its provisions). Should the general nature of the rule (or practice) and the uniform nature of its application not be credited with including the ability to ensure equal treatment, this means that it has not indeed been considered while "at rest". On the contrary, what the law requires is an assessment of what happens when it is effectively applied in a complex social environment so as to be able to judge its activity itself, that is, in other words, its propensity to differently affect persons covered by its provisions.

The indirect discrimination concept is thus fashioned to attack and contain the process since, armed with such a concept, it is no longer just discontinued and occasional acts (declaring a racist intention or applying an unjustified distinction) that are subject to sanction. Unless a disadvantage relating to a statistically significant gap or disproportion has been compiled and put before a judge, it can indeed be the processes that will be incriminated, as long as they have been broken down and articulated into as

many identifiable hardships[78], in order to isolate the problematic place or operator (those generating disadvantages) and to call upon the person responsible for the act to answer to their legitimacy.

B/ The virtues of "ethnic monitoring" and its relationship with judicial obligations.

This brief summary of the "*indirect discrimination*" features also allows us to understand why it calls for the use of "*ethnic monitoring"*. This mechanism is in place precisely to conduct continuous assessments of the effects and consequences of hardships in hiring, allocation and distribution so that the law can be exercised by using tools which will allow it to pass judgments[79], but also to allow the parties to know where they stand in relation to compliance with legal requirements as well as to assist them in implementing and assessing the reach of their local anti-discrimination policies. Of course, it is also a test of the consistency of the parties' commitment.

"Monitoring" is thus understood as one of the means by which the environment is prepared for and by the law which, while undoubtedly being a "model for action", demands substantial adjustments in order to effectively act as a pattern (i.e. model) over the actions. A number of tools constructed by the CRE also participate in paving the way to the law and a translation into action of its requirements. Indeed, the CRE takes great interest in the operationalisation of an anti-discriminatory law, as it has slowly grasped the breadth of its requirements and potential (but also some of its restrictions, as we have seen). Because this is its reason for being, it has therefore endeavoured to equip its environment so as to fray a practicable path that may ensure the transposition and understanding of this right as a "model for action" that can be appropriated by those subjected to the judicial standards. It could accomplish this all the more because its Independent Authority status confers upon it a strategic position. Because it stands between the law (both the law and the judicial arena) and the parties, it is up to it to fray a path to the parties, and this in two directions. One of its missions being the monitoring of RRA 1976 "*enforcement"*, it then had to attempt to make available material probative elements which would ensure the "progression" of a substantial prejudice to the excentric and overriding arenas (the courts) where the law is said and justice rendered. But it also had to find a way allowing for the

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[78] This breakdown and articulation of "*missions*" and "*functions*" for assessment purposes is carried out by public authorities and is legally required by the RRA 2000. It is in this operation that the distinction between "*general duty*" and "*specific duties*" takes its full meaning. We will come back to this point.

[79] To this end, employers are obligated to preserve documentary proof of their assessments and decisions in the hiring process. "*All application forms, and documents relating to each stage of the recruitment process, should be kept for twelve months, for reference in case of any complaints about decisions or procedures. Applicants have a right to see them, under the Data Protection Act 1998. In particular, employers should make sure that:*

a. records are kept of all preparation for interviews, for example discussions about the questions, and decisions on marking standards and allocation of time; and

b. notes are taken during each interview on all the questions and answers, and records kept of interviewers' marking, panel discussions, and final decisions.

4.24. Evidence that good practice has been observed throughout the recruitment and selection process will also help avoid litigation, or end it at an early stage. Employers will be in a better position to rely on the defence that they took reasonable steps to prevent discrimination, should the matter reach a tribunal." (CRE, *Statutory code of practice on racial equality in employment, Consultation draft***,** 2004).

"descent" since the (general) requisites of the law need to be anchored in the locations of the acts themselves (companies, institutions, employment, etc.) in such a manner as to enable the parties to model their conduct (and conventions and procedures on which they rely) and efficiently and locally support its new requirements and the obligations it imposes.

So it is upon the base of work carried out by the CRE, in particular, that the law can be seen *in fine* as a true "model for action" under which parties can judge then change their actions and practices if they do not wish to breach the law. However, if the law is perceived as a practicable "model" (i.e. such as a pattern standardizing situations and conforming them to duties) made available locally to parties where they act, this means that the parties must be able to practically follow the judge's reasoning. In brief, that they can ask themselves the questions the judge will not fail to ask if required to pass judgment on a given situation. Since this reasoning has statistical connotations, this then means that statistical tools capable of "*monitoring*" must be available to the parties. Since the law allows the judge to go beyond a distinct and direct discriminatory intention by investigating consequences and looking for significant differences established by statistics, it is then reasonable for the parties to also have the right to a similar inquiry in order to nourish the concerns and vigilance in relation to their acts' compliance with legal obligations imposed by law and translated in practice into a number of recommendations contained in the "*codes of practice*". It is thus because the law is more exacting by consecrating the "*indirect discrimination*" concept that "*ethnic monitoring*" has had to be generalised and made available in every location governed by the various laws on discrimination. "*Monitoring*" is expected to fulfill all of the following functions: vigilance support, mechanism to produce "facts" for a judgment, public sign of a commitment to provide an effort (taken into account by the judge) and accountability tool (in that it allows for reporting).

The call for monitoring is thus conceived as a call for the effectiveness of a struggle that no longer intends to act only by trusting in the discontinuous and occasional sanctions provided by a law that is only effective in courts. A common efficiency requirement which leads to recourse to "*codes of practice"* and "*monitoring"* and the implementation of an "equality plan"[80], efficiency being meant as the law's ability to inform actions and impose as a model the legitimate requirements which seek to achieve a "good" worth being sought (Banton, 1999). Beyond the strong assumption that would have a policy be even more effective because it can be assessed and therefore become reactive, the CRE and M. Banton find other positive facets to monitoring. Thus, for example, it is expected that continuous monitoring will allow for undisclosed problems to be revealed (ibid.). If well understood and used, it would allow for the parties' attention to be focused on the effects that would literally remain unscrutinized without such equipment (ibid.) – as we will see, this feature will be toughened by the RRA 2000. Furthermore, as we have already seen and this is not the least of its features, it may well be here that the presumption of its effectiveness lies. Monitoring, if it causes allegations of implication and respect of the law to be tested, by measuring its consistency, it facilitates the work of a law and

[80] See below.

can be a precious supervisory tool, since it is on the base of monitoring that a discriminatory fact can be found.

"Monitoring" is thus explicitly perceived as a means to grant the parties the ability to continuously supervise the compliance of their acts in the face of legal requirements. This supervisory ability can be used by law via the CRE. In some fashion, monitoring is embedded as an equivalent to "*formal investigations*" in organisations, companies and institutions and makes available in the location of the act itself the tool to imitate the type of reasoning that a judge could follow if required by the CRE or a party who intends to prove a prejudice with regard to his rights. If monitoring facilitates the law's tasks, it is also because such a mechanism provides a set of documentary and testimonial traces on failed acts and decisions – as well as their impact on persons because of their "race" or ethnicity" – which are easily available to third parties charged with judging the legitimacy or illegitimacy of the prejudices and conduct.

Through this means, the agents' implication is also submitted to a consistency test. Indeed, monitoring must allow for the dissuasion of a simple "publicity" use of the "*codes"* and "*Equal Opportunities Policies"* in that it relates control and a *reality test* to simple declarations of intent. Thus, in the middle of the 1990's, the CRA launched a broad survey, "*Large companies and Racial Equality",* to test the consistency of large companies' commitment. While 13% of the surveyed companies had not developed specific policies, 45% declared they had implemented such programs. However, the CRE notes that amongst the companies declaring they implemented such programs, less than a half of them furnish systematic efforts to conduct racial equality policies although they do recognize that racial equality is inherent to a good management policy. Faced with this statement and as it appears that internal racial equality policies are sometimes reduced to being publicity tools, the CRE re-insists on the fact that each company should be able to demonstrate its commitment towards equality and to account for it through monitoring (*CRE Annual Report* 1994, p. 14).

It therefore appears that monitoring also serves as a provider to third party assessors, particularly judges (who, in certain circumstances, can be called upon by the CRE), of proof of a commitment's consistency, if it provides parties with the ability to act and use their efforts in the fight against discrimination, just like the other English mechanisms. This is a reason that the CRE will emphasize in the publication of its first guide focusing on monitoring activities (*Why keep ethnic records ?*, CRE). The sanction possibility is thus always present.

Equally, the CRE underlines that if the preservation of files indicating ethnicity do not result from a legal obligation (in every case), such files are important tools in the task to offer equal treatment as provided by law, as well as it can help employers to protect themselves against accusation of discriminations as those files can provide proofs of the employer's engagement to the fulfilling of equality (ibid.)[81].

Monitoring, just like "*codes of practices"* facilitates and prepares the workings of a law that has consecrated and put its full force behind the concept of indirect discrimination. The establishment of this concept in 1976 caused a quasi inversion of the burden of proof (since the 2003 regulation, the burden of proof has been inversed) and the introduction of a justification obligation in the judicial arena. Indeed, for a prejudice to be considered the source of indirect discrimination, it is not sufficient to provide an unfavourable and "disproportionate" impact on persons with a given ethnic or racial feature – as we have seen, in order to ascertain whether these prejudices conditioning access to goods have an unequal tendency potentially leading to a presumption of discrimination, it is proper to bring these effects to light. To provide evidence of an impact, operating unequally in terms of "race" within any selection tests, presupposes that the ethnic or racial features of the candidates are confined, as well as the racial or ethnic characteristics of those who, having successfully completed the test, were granted access to the goods or services in questions. This is precisely the usefulness of monitoring, to have a continuous comparative assessment of the ethnic composition of a group of candidates in a test and the group of those who passed the test successfully. But for the judge to find discrimination, there must also be nothing in the *nature* of the good or services provided that makes the inequality *legitimate*. Beyond investigating into the factualness of a differential impact or treatment, the judge also investigate the justifiable nature of this differential. The question then asked is as follows: does the nature of the good in question (a job, for example) *require* the presence of a judgment criteria to that effect in order to be best attributed?[82]

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[81] "*Monitoring*" is not a legal obligation for private parties with regard to employment discrimination, for example. The "*Employment Code of Practice"* can therefore only "recommend" its use; " *The code does not impose any legal obligations itself, nor is it an authoritative statement of the law – that can only be provided by the courts and tribunals. If, however, if its recommendations are not observed, this may result in breaches of the law where the act or omission falls within any of the specific prohibitions of the Act. Moreover, its provisions are admissible in evidence in any proceedings under the Race Relations Act before an industrial tribunal and if any provision appears to the tribunal to be relevant to a question arising in the proceedings it must be taken into account in determining that question. If employers take the steps that are set out in the code to prevent their employees from doing acts of unlawful discrimination they may avoid liability for such acts in any legal proceedings brought against them. (…)Responsibility for providing equal opportunity for all job applicants and employees rests primarily with employers. To this end it is recommended that they should adopt, implement and monitor an equal opportunity policy to ensure that there is no unlawful discrimination and that equal opportunity is genuinely available"* (CRE). However, as we can see, this recommendation also includes a legal threat, even if it is indirect, since in the case of an accusation, if the company owner or employer cannot demonstrate all that he did to avoid discriminating – which suggests bringing forth elements proving his implication and concern for equality, elements available through "monitoring" – he exposes himself to severe disappointment. Since the "code of practice" explicitly recommends the use of "monitoring" and the courts take note of the respect, or not, of the code by the accused party (as long as Parliament has ratified it as "*statutory*") in their judgments, it appears that this "recommendation" has more force than a simple piece of advice.

[82] This is a question that can become quite radical and have a very significant critical breadth. For example see (Moore, 1997, p. 60).

The major part of a judge's task then consists in inspecting the justifications brought forth by the accused person for maintaining a condition, criteria or procedure that would generate such a differential in impact. The judge's task is made easier as he/she has available, through monitoring, a mechanism which facilitates the factualisation of test effects, a mechanism which is also applied by the parties to the action[83] and which keeps in memory the various hiring or allocation stages.

The insistence on monitoring virtues is quite central to English policy. To such a degree that a concept will be deemed useful if it is open to monitoring. A good example is that of the discussion by the Parekh Report authors regarding the "*exclusion*" concept and the fact that it can be "monitored" is one of the four advantages it reveals. "*Fourth the concept readily leads to monitoring and statistical analysis. It is indeed the case that certain communities – Asian, Black, Chinese, Irish, for example – are excluded from certain spheres of society? Do they suffer more than others from unemployment, poor health, poor educational qualifications, poor housing? Are they more included and less excluded than they were 10 years ago? How do certain cities or towns compare with each other, in terms of the inclusion and participation of their various communities ? All such questions can be answered with reasonably precise statistics, and the statistics themselves can be used to energise and focus policy"* (p. 79, 2000)[84]. The virtues bestowed upon "*monitoring*" will increase with RRA 2000. So as to avoiding over-charging this report, we will focus on the other monitoring uses in a description of the practical implications of this amendment and we will then come back to the link between this mechanism and action plans.

[83] We will study the intricate relationship between "*monitoring*" and "*equality plans*" in the next section.

[84] It is noteworthy that amongst this concept's disadvantages, the third is the fact "*that the concept of social inclusion apparently does not admit of cultural recognition and respect (…) If the concept of cultural inclusion is not combined with that of social inclusion, the price of inclusion for many individuals will be too high. Black teeenagers will not wish to be included in the education system if such inclusion inherently requires them to « act white », that is, to deny their sense of themselves as black people, with distinctive personnal and community of experiences and perception of history. (…) Religious believers will not wish to be included in public administration and services if there is no recognition of, or even accommodation for, their religious identities and observance."* (p. 83, 2000). Nevertheless, it appears that the English are starting to "*monitor*" these issues, specifically through "*satisfaction*" surveys and "*consultations*" with religious and cultural communities.

C/ "Racial equality plans" and statistics

Statistics are also an element in equality policies applied by companies and organisations. Once again, we will focus on the ground of "race". Since statistics are involved, it is worthwhile giving a brief description of "*equal opportunity policies"* and particularly the fact that they are an invitation prescribed by "*codes of practice*" published by the CRE to address different the different sectors of activity required by anti-discrimination laws to implement anti-discrimination action plans. These organisations must base their anti-discrimination action on a plan, as well as a method informing and locally conducting the policies. This action must be governed by and focused on "*targets"* which are statistically based. This "targeting" is essential in many ways, since it will bear the burden of the appropriateness and realistic nature of the plan which a given employer may propose to follow.

We therefore need to take a look at the plan. In order to understand the stakes involved in this functional articulation between statistics and "*equal opportunity policies"*[85], the restrictions, requirements and beneficial features of this type of action plan must be specified. Furthermore, this will assist in understanding the achievement of the RRA 2000 requirements which calls for the expansion of the use of this type of plan subjected to continuous monitoring.

1) The plan format development

If the plan format is enhanced it is because it provides not only support for assessing success and judging "progress" and the evolution of "performances" with regard to the equality question, but also because it is equally suitable to a breakdown in the process of allocation (of goods, services, positions, etc.) and decision making in as many sectors and areas as are potentially the subject of continuous examination and revision. This two-fold dimension for the implementation of the policy is illustrated in an exemplary fashion by the CRE recommendations with regard to the implementation of an "*equal opportunity policy*".

"The following is a ten point plan to help employers promote equality of opportunity in their organisations. These are guidance points only and employers should seek further details about each of the areas:

1. Develop an equal opportunities policy, covering recruitment, promotion and training.
2. Set an action plan, with targets, so that you and your staff have a clear idea of what can be achieved and by when.

[85] The presence of this functional articulation provides one of the substantive justifications for including the "*ethnic question*" in the Census. See Part IV of the report.

3. Provide training for all people, including managers, throughout your organisation, to ensure they understand the importance of equal opportunities. Provide additional training for staff who recruit, select and train your employees.
4. Assess the present position to establish your starting point, and monitor progress in achieving your objectives.
5. Review recruitment, selection, promotion and training procedures regularly, to ensure that you are delivering on your policy.
6. Draw up clear and justifiable job criteria, which are demonstrably objective and job-related.
7. Offer pre-employment training, where appropriate, to prepare potential job applicants for selection tests and interviews; you should also consider positive action training to help ethnic minority employees to apply for jobs in areas where they are underrepresented.
8. Consider your organisation's image: do you encourage applications from underrepresented groups and feature women, ethnic minority staff and people with disabilities in recruitment literature, or could you be seen as an employer who is indifferent to these groups?
9. Consider flexible working, career breaks, providing childcare facilities, and so on, to help women in particular meet domestic responsibilities and pursue their occupations; and consider providing special equipment and assistance to help people with disabilities.
10. Develop links with local community groups, organisations and schools, in order to reach a wider pool of potential applicants. (Commission for Racial Equality, *Equal Opportunities policies*). »

While this planning includes vigilance, traces a standard path to success and provides indicators to assess the company's action, it also is a powerful standardisation tool. Indeed, it is expected that it will inform all employee conduct. Thus, one of the prerequisites is increasing employee awareness. The use of this type of plan also supports the breakdown, which makes visible, or understandable, followable and thus revisable, "processes" that are often opaque. This is congruous with the force behind the indirect discrimination concept and it is its requirements that lead to more effective vigilance. Indeed, since the law sanctions discriminations based not only on intent, but also puts an emphasis on effects and consequences, it is reasonable to circumscribe and break down the chain of operations and tests (for hiring, recruitment, promotions, etc.) in order to verify which (where, why, and how) lead to undesirable disadvantages (Banton, 1994).

The plan thus supports the vigilance required by law since such scrutiny and breakdown should emphasize amongst the parties, and anchor it in the amended mechanisms, the search for equality in treatment throughout the chain of tests and by which a good or a service will be allocated. Thus, the employment code[86], which is the program basis for "equal opportunity policies" in employment, takes

[86] The very first was published in 1984. This form of action is therefore not new.

the allocation/hiring process and calls upon agents to practice constant and continuous vigilance in any situation capable of producing an illegitimate difference or causing a potentially unequal treatment. Attention is first called upon the "recruitment sources". The sources include in particular the advertisement's means and form[87] and the channels or networks through which recruitment transit (CRE, *Employment code of practice*).

The plan is also a mechanism for displaying the commitment of those who adopt it. Publicity that makes them accountable because of its effectiveness, but also declares a specific attention towards "minorities". Thus, in order to encourage applications the CRE invites employers to mention their engagements towards equality[88].

2) "Targeting"

The application of a local anti-discrimination policy is thus related to the construction of an ethnic monitoring mechanism which assumes that statistical categories on ethnicity or race are available. It is at this point that the use of "*targets"* appears. Indeed, if an employer (for example) subscribes to an equal opportunity policy, he must devise an action plan. Firstly, he must set "*targets*" to be achieved and, prior to that, set out his position with regard to a projected equal opportunity state. In the case of an employer, this position is founded on a numerical assessment of the "*ethnic"* composition of his "*staff"* with regard to its total composition, and within this same report, also the available workforce in the local market place – which, as we will see, will require the availability of precise data which the census can provide – this is the "*starting point"* in engaging an action plan aimed at equality.

The first step in an internal equal opportunity policy consists then in assessing the current state, positioning the company or organisation within the Race Relations Act prerequisites – thus understood, the law not only imposes prohibitions but also provides an objective to be achieved – and measuring the gap to be reduced in order to achieve compliance. It then appears that the instigation of such a policy immediately reveals a need for measurements and thus requires the availability of a categorisation mechanism based on ethnicity and race – first locally, then nationally. Once a commitment has been made to apply an equal opportunity policy, after the initial declaration of the current state which is the starting point for the effort to be undertaken, the inaugural measurement must also allow for the design of the desired state to be achieved. While it does not recognise the use

[87] Particular care is taken with the form and nature of the publication. One example is the effort taken in the writing of an advertisement for *Positive action in action* (Moore, 1997) aiming at maximizing the targeting to "ethnic minorities" to obtain their applications. In the case investigated in R. Moore's book, this occurred notably in working on the representations put forth by the organisation and the available position, the representations preventing any interest on the part of "minority" individuals. Similarly, the locations for the posters and the media were chosen for their ability to meet the attention of people from under-represented groups within the surveyed organisation.

[88] Such comments introduced *de facto* the conversion of these programs into "quality" policies which started to be used as indicating quality from the user's point of view.

of “quotas” as provided by law, the CRE gives itself “*targets”*. The difference is notable, as “quotas” are imperative and “*targeting”* indicative.

This difference is significant and distinguishes the British policy from the American “*affirmative action”* policy, since race or ethnicity are not considered decisive criteria on which “candidates” can be differentiated in order to achieve a numerical representative quota. The CRE took great care in underlining this in one of its “*codes of practice”* « *that a target is a system of measurement and should not be confused with a predetermined quota, which is unlawful under the Race Relations Act. A quota is a fixed number or percentage which is imposed for a particular area, and there is an obligation to achieve it. A target on the other hand is not an absolute minimum or maximum, as it may be over or underachieved. (...) Achievement of a target does not lead to the exclusion of any particular applicant. A target is the criterion for measuring performance as reflected in the ethnic record keeping and monitoring system.*»[89]. The “*target”* thus provides an indication of the progress related to eliminating discrimination and the degree of achievement of the equal opportunity goal. The care taken in their construction and establishment is essential, as it is on the basis of these “*targets”*, “ *a yardstick for measuring success or failure ”* (CRE), that action will be guided. Setting “*targets*” is negotiated and flows from the extrapolation of an ideal situation where the equal opportunity requirement would be statistically achieved – this is where the Census data come in, as we will see below. « *In order to assess whether different ethnic groups are being treated equally, a measurement needs to be agreed of the proportions that could be expected (for example, among successful applicants for housing) if equal opportunity was being achieved. (…)This measurement of target, will be the yardstick by which the data are analysed to check whether ethnic minorities have received a fair share of the properties and services available.*» (CRE, 1991).

Thus, targeting and monitoring support the assessment of a policy in progress. Indeed, a measuring tool is required only at this starting point – the specification of the initial state and the setting of “*targets”*. As it involves following an action plan, the achievement of which is gradual and in accordance with “target”[90] indicators which keep the momentum, it is reasonable to continuously assess its progress. Simply put: monitoring[91].

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[89] *Race relations code of practice in rented housing*, CRE, 1991. We took the meaning of this comment outside of the employment sector in order to demonstrate the diversity of areas covered by British law and policies. In the last code regarding employment, a draft of which was published in May 2004, the CRE established even more strongly the difference in affirmative action and thus the difference between “targets” and “quotas”. “*Racial equality targets are* **not** *quotas. Quotas exclude people from jobs simply on the basis of their racial group. Quotas are unfair and unlawful. Restricting recruitment to people from particular racial groups – for example, to improve their representation in the workforce – is positive discrimination, and is unlawful. All selection for employment must be – and be seen to be – on the basis of merit alone.*
3.52. Racial equality targets for recruitment, promotion and training should be based on external and internal benchmarks, that is, the ethnic and racial composition of the area from which an organisation recruits for particular jobs, and the ethnic and racial composition of its workforce.”

[90] These objectives can be reviewed as progress is achieved or difficulties arise.

[91] The verb “to monitor”, which leads to “monitoring” is translated by “évaluer”, “contrôler”, “surveiller” and “conduire” in French.

These policies are thus related to "*targets*" which provide points to be achieved. These "targets" provide public objectives. They serve as targets along a positive set of stages to achieve equal opportunity, but they also serve as indicators on which the action's progress can be assessed. Such indicators are based on the definition of an ideal situation (situation in which equal opportunity would be achieved statistically) in relation to the current situation of the employer in terms of the workforce composition. The defining of an ideal situation, the counterpart to of the initial situation which provides the basis for action – the "*starting point*", see above – requires data that must be available to the employer: precise data relating to the working population composition, distinguished by race or ethnic groups at the local employment level, data that the Census can provide (see Part IV).

D/ Positive Actions. The need for statistical proof and the distance taken with regard to the American Affirmative Action

Legally, the introduction of a "positive action" also requires the use of statistics, at least for "race" and ethnic origin, as this statistical proof requirement is not formally required for sexual orientation and religion. The Regulations 2003[92] regarding sexual orientation and religion differ "*significantly from the Sex Discrimination Act 1975 and the Race Relations Act 1976, in that the employer does not have to demonstrate proportional under-representation before introducing positive action measures. In this way, the Regulations reflect the difficulty of gathering reliable statistics in relation to religion and especially sexuality. It does not prevent employers from monitoring and using statistical data in relation to positive action measures, but it is not a necessity. In local authorities with substantially diverse religious communities, (as recorded in the 2001 Census) monitoring of job applicants and monitoring the impact of human resource procedures or practices is advisable*" (DIALOG, Advice note 03/01, *Equality = no exclusions. A guide to the new regulations related to religion, belief and sexuality*, August 2003).

[92]"The condition under which positive action can take place is specified as being: Where it 'reasonably appears' that such action will prevent or compensate for disadvantages linked to sexuality, religion or belief suffered by persons of that sexuality, religion or belief doing that work or likely to take up that work."

The introduction of a positive action is therefore rigorously structured. For the legislator and the Independent Authority, the rigorous structure of this procedure aims at preventing itself from slipping towards the American affirmative action in avoiding going beyond a simple "outreach" measure. The action to be undertaken is designed to be an "*encouragement*" and "*training*" through which it will prepare persons of a group whose under-representation[93] within an organisation or company or during a recruitement process has been demonstrated, by providing them with preparation and training potentially giving them with the ability required by the test and necessary to the positions to be filled. "*The sole aim of positive action training, as permitted under the Race Relations Act, is to educate and teach, in order to equip people from a particular racial group with the skills they need to apply successfully in open competition with others for jobs where they are under-represented or absent. Traineeships that lead automatically to permanent employment would be unlawful. 3.57. Encouragement means making it easier for people from a racial group under-represented in particular work to take advantage of job opportunities when they come up, if they wish to do so, for example by directing recruitment initiatives at particular schools and colleges. It does not mean dissuading others from applying, or giving the impression that a particular racial group will be treated more favourably during the selection process."* (CRE, *Statutory code of practice on racial equality in employment, Consultation draft,* 2004).

Indeed, before launching this type of measure, the company or organistion must not only establish under-representation – which calls upon monitoring – of a group whose participation it intends to *encourage*, but it must take care that this training and/or preparation not lead to the systematic and automatic provision of employment or a position. For a positive action to remain legal, it must not consist in the *reservation* of a position or employment for persons who will participate – similarly, it must not dissuade members of a group that is not a subject of this action[94].

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[93] « **Positive action** [sections 37 and 38 of the Act]
2.26. The term 'positive action' refers to a wide range of measures employers may lawfully take to **train** *or* **encourage** *people from a particular racial group that is under-represented in particular work (see also paras 3.55 – 3.63).*" (CRE, *Statutory code of practice on racial equality in employment, Consultation draft,* 2004). The detail of the conditions imposed are the following : "*2.28. Accordingly, in a small number of specified circumstances, the Act allows employers and others to take positive action in favour of people from a particular racial group, by providing training that will make them eligible for particular work, and by encouraging them to apply for it, if certain conditions are met. These conditions are that:*

a. *no one from the particular racial group has been doing that work in Great Britain during the previous twelve months; or*
b. *the proportion of people from that racial group doing that work in Great Britain was small, compared with its proportion in the population of Great Britain.*

2.29. When these conditions are met, training or encouragement can be provided exclusively for the racial group in question.
2.30. If these conditions are not met for Great Britain as a whole, but only for a particular geographical area, training or encouragement can be provided for people from the racial group in question who appear likely to take up that work in that area. Neither the training nor the encouragement can be provided exclusively for the group." (Op. cit.).

[94] See the last quotation from the code.

Preferential treatment must therefore cease immediately before the actual recruitment or allocation test as only the candidates' respective merit[95] should be considered. "*2.32. Anyone making use of the positive action provisions of the Act should be especially careful that the training or encouragement provided does not automatically lead to recruitment. A traineeship that automatically leads to a contract of permanent employment after a specified period would amount to unlawful positive discrimination, particularly if the traineeship was awarded on the basis of the positive action exception in the Act and there was no open competition for it. Employers should also make sure that when they encourage a particular racial group to apply for work, they do not give preferential treatment in the recruitment and selection process to candidates from that group. It is vital that all candidates should be assessed and selected for employment solely on the basis of merit.* "[96] (CRE, *Statutory code of practice on racial equality in employment, Consultation draft,* 2004).

E/ "Monitoring" extension: the RRA 2000.

The Race Relations Act (Amendment) 2000 significantly increases the number of production and archival sites for statistics on "*race*" and ethnicity. Similarly, it extends the use of "*monitoring*" by requesting that a major portion of the *Public Authorities* apply "*racial equality schemes*" which are as close to effective action as possible and well beyond the previous "*equality plans*". The reflexivity requirement in the action conduct, as well as in the conception of rules and procedures through which practices are accomplished, is used to its greatest extent within the imperative vision of this Act. Designed to face "*institutional racism*" (concept born in the *Stephen Lawrence Report*), this Act consecrates the consequentialist concept of the law by providing a positive and proactive obligation, "*a positive duty*" aimed at Public Authorities. From this moment, they no longer must just avoid discriminating, but they are charged with continuously following and promoting equality in the execution of their various missions while paying effective and constant attention, *a due regard,* to the consequences and effects of their practices on persons (in relation to their "race" and ethnicity)[97].

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[95] "*Positive action is often confused with positive discrimination, which means treating a person favourably on the basis of their racial group in selecting them for a job, possibly regardless of merit. This is unlawful in Britain. Affirmative action, a term in use in the USA and Northern Ireland, is a form of positive discrimination which involves the use of minimum quotas. It is unlawful in England, Scotland and Wales. The overriding principle of selection for recruitment in Britain is that it must be based on* **merit**." (CRE, *Statutory code of practice on racial equality in employment, Consultation draft,* 2004).

[96] The most recent CRE employment guide provides the following example as an illustration :

***"*Example 11: Positive action**

A local authority included a statement in an advertisement for gardening apprentices encouraging young people from 'black and ethnic minorities' to apply, and referring to section 38 of the Act. Three white people applied for the jobs and were told they were open only to people from ethnic minorities. The tribunal upheld their claims that they were unlawfully discriminated against on racial grounds. The case hinged on three points:

- *'black and ethnic minorities' are not 'a particular racial group' under the Act;*
- *'encouragement' does not extend to providing job opportunities for any section of the community;*
- *ethnic minorities comprised 9% of gardeners in the council, compared with 38% in the borough; however, only 58% of the council's entire workforce came from the borough, and there was no evidence of where the remaining 42% were recruited from, and what proportion of that population was from ethnic minorities.*" (CRE, *Statutory code of practice on racial equality in employment, Consultation draft,* 2004).

[97] "The general duty's aim is to make race equality a central part of the way you work, by putting it at the centre of policy-making, service delivery, regulation and enforcement, and employment practice" (p. 3, CRE, May 2002).

This Act imposes on public agents a significant and new cognitive and organisational burden as they are required not only to participate in a continuous survey but also to publish its results and to gradually review their practices on the basis of the problems revealed through the survey. Furthermore, this survey is not only retrospective, as it also must be conducted before any review proposal regarding prior work methods or the application of new policies (in service delivery, work organisation, public reception, etc.) in order to determine how this proposal could generate disadvantages between groups or ignore the specific needs of some of them[98]. This survey is conducted through "*monitoring*" (but also through "*consultations*") which should play the following roles:

- attract the public agents' attention to the unseen disproportions or disadvantages and encourage their vigilance with regard to the consequences of their conduct ("*assessing impact*");
- allow them to set "targets" throughout the action plan they wish to implement ("*racial equality scheme*") and assess their progress;
- analyse "minority" satisfaction and document their specific "needs" ("*monitoring service delivery*");
- be accountable to the public, and to the law, and subject their commitment to promoting equality to a reality check.

To follow more practically the role of statistics in its practical deployment, one may look to the new requirements of this Act which are refined in the "*Statutory Code of practice on the duty to promote racial equality"* as well as the "*guide for public authorities"*.

[98] This type of survey is based on "*consultations"* with the various communities but also on a map of their features (based on statistics or publicly available if these features are cultural or religious and relate to the expression of an identity). This specific duty is included in the "*code of practice on the duty to promote racial equality"* under "*arrangements for assessing, and consulting on, the likely impact of proposed policies"*. Point 4.17 of the code provides that "*Public authorities are expected to set out their arrangements for : a. assessing the likely impact their proposed policies will have, including their arrangements for collecting data; b. consulting groups that may be affected by the policies"*. Point 4.19 then goes on to provide a substantiated list of survey mechanisms that can be used: "*assessing the likely impact of a proposed policy should help to identify whether that policy might have a different impact on some racial groups, and whether it will contribute to good race relations. The assessment may involve using: a. information that is already available; b. research findings; c. population data, including census findings; d. comparisons with similar policies in other authorities; e. survey results; f. ethnic data collected at different stages of a process (for example, when people apply for a service); g. one-off data-gathering exercises; or h. specially commissioned research"* (p. 24). Thereafter, "*consultations"* are explored.

1) From a "general duty" to "specific duties": the "ethnic monitoring" duty

While the Act imposes a general duty, it is refined and takes a step towards becoming operational by imposing specific duties , "*in the areas of policy-making, service delivery, and employment"* (CRE, May 2002), as set out by the Home Secretary in the form of an "*Order*". These "*specific duties*" remain within the spectrum of the general duty and are only set out to guide operations. As the CRE points out in its "*guide*", "*the duties' aim is to improve performance of general duty. They are not ends in themselves, but the basic steps you must take to meet the general duty*" (Op. Cit., p. 3). These specific duties are important to this report because it is in their execution that "*monitoring"* becomes imperative. Indeed, this is not a choice offered to public agents (as it may be in the case of private parties). Inherent in the agents' duty to design and publish a "*racial equality scheme*", it is a legal requirement as set out in point 4.24 of the "*statutory*" "*code of practice"* relating to the application of Act 2000[99].

In concrete terms, the public authorities listed in Appendix 2 of the code must, and this is a legal obligation, publish a "*race equality scheme*", which includes, as we have just seen, the "*monitoring"* and purely statistical surveys whose results are distributed according to the persons' ethnic and/or "racial" affiliation. Similarly, seen as a specific duty imposed on the public authorities as employers (the list of which is included in Appendix 3 of the code), they are immediately required (and this is not

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[99] This point makes explicit the expectations weighing on "*monitoring*". *"Public authorities must set out in their racial equality scheme their arrangements for monitoring their policies for any adverse impact on race equality (see 4.6). 4.25 Knowing that a policy is working is vital to achieving the aims of the general duty. Keeping track of how policy is working, and whether it is having an adverse impact or harming race equality, depends largely on having an efficient, up-to-date, and relevant monitoring system. 4.26 Under this duty, public authorities should set out their arrangements to monitor all the policies that are relevant to the general duty to promote race equality. These could include a wide range of policies, such as service delivery, as well as regulatory and enforcement functions, such as licensing or "stop and search". 4.27 Monitoring allows public authorities to test: a. how racial groups are affected by their policies (for example, how often and why people use a service, how often they experience enforcement or legal action, how often they make complaints and why, and whether they face disadvantage or find that their needs are not met); b. whether people from all groups are equally satisfied with the way they are treated; c. whether services are provided effectively to all communities; and d. whether services are suitable and designed to meet different needs (for example, whether they recognise language difficulties, individual cultural needs, or long-standing patterns of discrimination or exclusion). 4.28 Arrangements that the authority makes, or changes, to meet the duty should be relevant to the size of the authority, the nature of the policy and its possible effect on the public, particularly on different racial groups. Authorities can use a range of methods to monitor and analyse the effects of their policies on different racial groups, including: a. statistical analysis of ethnic monitoring data : b. satisfaction surveys (analysed by the racial groups to which the people surveyed belong); c. random or targeted surveys; and d. meetings, focus groups, and citizen's juries. 4.29 A public authority's arrangements might explain what it would do if its monitoring showed that one of its policies was having an adverse impact on race equality, and that it would prevent the authority from meeting its general duty » (Op. cit., pp. 26-27).* The following point also deserves mention since it demonstrates in a remarkable fashion how the "code of practice" and the policies it demands very explicitly and practically invite agents the subject of this law to think as would a judge in assessing a situation and basing his reflection on the reasoning through which a "discrimination" can be determined: *"4.30 The authority should ask the following questions. a. If one of our policies is leading to unlawful racial discrimination, can we find another way to meet our aims? b. If one of our policies is adversely affecting people from certain racial groups, can we justify the policy because of its overall objectives? If we adapt the policy, could that compensate for any adverse effects? c. If the policy is harming good race relations, what should we do? d. Will changes to the policy be significant, and will we need to consult about them?" (Op. cit., p.27).* This abundance of recommendations and tools, particularly statistical, aim to structure the environment so that agents can comply with the requirements and conditions of the laws set out by the Act.

a simple "recommendation") to "*monitor"*[100] their staff, applications for employment, promotions and training granted, in the form of a "racial group" report concerning the persons involved. Furthermore, amongst the relevant public authorities, those who employ more than 150 persons must also conduct "*monitoring"*, still depending on "*racial groups*", relating to the number of persons who "*receive training; benefit or suffer from performance appraisals; are involved in grievances; are subjected to disciplinary action; and end their service with [the] authority (for whatever reason)*" (*A guide for public authority*, CRE, May 2002, p. 4)[101]. With regard to the number of areas provided for by the Act, there is an unprecedented increase in the ethnic statistical data to be gathered. This is for an impressive diversity of areas, since the practical assessment requirements of "adverse impact" go deep into a multiform public action and subjects it to a very fine breakdown and analysis. At the end of this task which supports the public action plan by preparing it for continuous and reactive assessment, the data related to "race" and/or ethnicity which are thus available extend well beyond the usually relevant areas (such as employment or housing, for example).

2) Planning and breaking down public action in the execution of a "racial equality scheme"

The public authorities' duties are broad and stated without further indications, so appear impossible to follow. Their required status could even lead to confusion since their objective is a "*long term initiative*" (as stated by the Home Office in its web site's FAQ section). *"It requires bodies to be proactive (actively to promote race equality), rather than requiring them to avoid doing something (unlawfully discriminating on racial grounds). (…) The duty to promote race equality moved the battle against racism in a new direction. The general duty is a positive one, requiring public authorities to seek to avoid unlawful discrimination before it occurs"*. While the objective is broad and since it is intended that the practical modalities for respecting this obligation will singularly vary depending on the type of public authority bound by the objective, the legislator proposes a means to channel the public agents' concerns by providing a practicable procedure and is assisted by the CRE on this point. It is through planning public action that these concerns can be channeled. A plan fulfills two functions. Firstly, it is an evolving guide overseeing the various steps and to be used as a pattern through which the public actions and objectives can be broken down and distributed to each public authority.

[100] This is an important change that the CRE emphasises in its guide. *"The original 1976 Act outlawed racial discrimination in employment, but it did not make ethnic monitoring compulsory. The employment duty changes this. For the first time, public authorities must monitor their employment processes by racial group and publish the results each year"* (p. 63).
[101] The public authorities subject to a specific employment duty must state the results of their various "*monitoring*" activities every year.

Secondly, it is a mechanism which breaks down the general duty into as many specific duties translatable into measurable objectives to be achieved. The plan's role as a channel to address public agents' concerns is patent in the CRE guide. Indeed, they are inscribed in writing, since the guide invites the public agents to appropriate the proposed plan and follow the steps so as to calm their anxieties resulting from this new responsibility. It also assists the public agents in designing their "*racial equality scheme"*[102].

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[102] For this reason, we will quote it in its entirety.
"**What do you need to do ?**
Policy and service delivery
To satisfy yourself that you are meeting all three parts of the general duty, we suggest you follow the four stages described below. ***1. Identify your functions and decide which of them are relevant to race equality****.*
You can do this by making a list of all your statutory powers and duties or, if you prefer, a list of all the functions covered by your authority, and related policies. You will find that functions that involve, or affect, the public, as well as functions that you carry out as an employer, are most likely to be relevant to race equality. You should ask which functions could result in unlawful racial discrimination, unequal opportunities or poor race relations. ***2. Prioritise these functions****.*
The priority you give to each function will depend on how relevant it is to promoting race equality. (…) The best way to approach this is by collecting ethnic data about people affected by each relevant function, or the policies you have introduced to carry it out. This would involve the following steps.
Identify by racial group those who use, or might use, the services or facilities you provide, and ask whether any of them have particular needs or priorities.
Consider whether the function or policy affects (or could affect) relations between people from different racial groups.
List your functions in order of their importance, or likely importance, for promoting race equality.
3. Assess all relevant functions and policies for their effects on race equality*.*
Starting with the most important functions for promoting race equality, draw up a statement of your aims and objectives for each function, and for the policies you have developped to carry it out.
Make a list of the groups who are meant to benefit from each function (…) together with any information you already have about their racial group.
Check whether the policies you have adopted to carry out a function affect all racial groups equally. Look for any significant differences between the information available on the different racial groups in the population you serve and the information you hold on the people seved by each function and its various policies. For example, changes in police patrol timetables might suit most people in a district, but leave a particularly vulnerable racial group feeling unprotected.
Ask whether the policies you use to carry out a function, or people's view on those policies, affect relations between people from different racial groups. (…)
Set up ethnic monitoring systems (…) so that you can carry out regular checks on the effects your policies, and any changes you make to them, have on different racial groups.
4. Consider and make changes to your policies, if necessary, to meet the general duty*.*
If your assessment shows that a policy is having an adverse impact on some racial groups (…), you should ask if this could amount to unlawful racial discrimination (…). If it could, you should consider and make changes to the policy as soon as possible.
If you find differences in impact between racial groups, but no immediate evidence of unlawful racial discrimination, you should ask if the policy is acting as a barrier to opportunities for some racial groups, or if it is harming relations between different racial groups.
Ask if you can avoid any adverse impact. If not, can you justify it in terms of the policy's wider aims If not, you should consider other policies that could be just as effective, but without having an adverse impact on some racial groups, and without risking damage to race relations.
If you can justify the policy, you should ask whether you could limit its adverse impact on some racial groups (…)
Make sure you prepare well for any changes you are planning to make to your policies or procedures. For example, you could do this by informing and consulting everyone who might be affected by them, and by taking account of their concerns (…)." (pp. 7-9).

It is following these tasks – which involve breaking down the action, isolating the areas and activities ("*functions"* and "*policies"*[103]) which, because they deal with the public, are liable to treat the public differentially in relation to "race" and ethnicity – which are the for the most part[104], the responsibility of the agents (who are considered the most qualified to break down their missions by order of pertinence and with their public in mind), that it is expected that each public authority set out a public and detailed "*racial equality scheme".* This has three features:

- a promise to the public[105] (to commit to improving the quality of services rendered, to attempt to equitably meet each person's needs, etc.), as well as to the agency responsible for supervising the effective implementation of the duty (in other words, the CRE).
- a programming plan for programs aimed at the future (and thereby including "targets" and timelines[106]), and lastly;
- a basis for the assessment of the public authority's situation with regard to the duty (since it can be controlled by audit agencies, the CRE and the courts) – knowing that it is intended that should the plan be effectively followed, it will be protected and the risk of being bothered by the law reduced, "*if you put all your plans into practice, you can be confident that you are working within*

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[103] It is expected that the public authorities list the "*functions"* and "*policies*" that seem more appropriate with regard to the general duty in their "*racial equality scheme*". Both terms are defined in the "code of practice on the duty to promote racial equality" glossary. In general, the term "*function*" covers the set of powers and duties granted or available to the public authority. The concept includes both internal and external functions and even includes delivered services (including negative goods and services such as penalties and sanctions). It is obvious that these change over time for a given authority, which is the reason it is recommended that the plan be frequently reviewed – "*you should consider reviewing your race equality scheme every year. This would allow you to consider any new functions or policies introduced during the year."* (CRE, *Guide for public authorities*, p. 27). The term "*policies*" does not only include written public procedures but also covers informal "practices" which do not require an explanation and are not based on explicit conventions. "*Ideally, your policies should be clearly and plainly written. However, in reality, some policies are built into everyday procedures and customs. As a result, not all policy has been open to inspection and review. You should take « policies » to mean the full range of formal and informal decisions you make in carrying your duties, and all the ways in which you use your powers – or decide not to. You should therefore include in any assessment of a policy an examination of long-standing "custom and practic"" and management decisions, as well as your formal written policy. It is important to remember that, in this context, service delivery means the full range of external functions, including regulation and enforcement"* (CRE, Guide for public authorities, pp. 24-25).

[104] Not all, however, since, as we have seen, a breakdown required by law relates to the employment sector. Similarly, for other matters such as police action, a review of police activity is required – it sets to the side and examines, for example, the "*stop and search*" (the equivalent of random identity checks), via "*monitoring*".

[105] For these reasons, the emphasis is on the need for publication, which is a duty, and accessibility. "*The race equality scheme is a public document that explains how you plan to meet the general duty. However, to meet the duty, you must put the scheme into practice. You will have to answer to the public for delivering the programme you set out in your scheme*" (CRE, *Guide for public authorities*, p. 17). The duty also covers the publication of "*monitoring*" and "*consultation*" results. The reasons behind this duty are numerous, to say the least, as indicated in the CRE guide. *"Under the duty, you must publish the results of the assessments, consultations and monitoring you carry out to meet the duty and make these available. (…) This part of the duty is about accountability. It aims to make sure that your monitoring, assessment, and consultation activities, and their results, are clear and plain to the public. (…) If you are to win and keep public confidence, you need not only to promote race equality, but to be seen doing so. By publishing the results of your activities, you will show that you are carrying out the specific duties of: monitoring; and assessing and consulting on the effects of your policies. Publishing your results will also show your commitment to promoting race equality. Your staff will be better informed about your policies and more aware of the standards of good practice. Also public confidence in your authority will increase, particularly among the ethnic minority communities you serve"* (CRE, *Guide for public authorities*, p. 52).

[106] "*your scheme should say how you plan to meet the general duty and specific duties. (…) A race equality scheme is effectively a strategy and a timetabled and realistic action plan. It should summarise your approach to race equality, and your corporate aims. It should also say how you plan to carry out the individual parts of the specific duty – in other words, your arrangements for assessing, consulting, monitoring, informing, publishing and training."* (CRE, Guide for public authorities, p. 14).

the law and contributing to good race relations in your community" (CRE, *Guide for public authorities*, p. 12).

Its implementation, writing and follow-up thus needs the implementation of "*ethnic monitoring*" at every stage. Its efficiency must be subjected to continuous testing and the results for each "*specific duty*" must be published, because it relates to the public and its representatives (one of which is the CRE). It is on the basis of this information, or the absence thereof, that the CRE can intervene. Indeed, the Act confers upon " *the power to enforce the specific duties"*. To this end, it has a legal instrument (made available since 1976 to supervise the application of the RRA), the "*compliance notice*", which it can use if it believes that a public authority is not satisfactorily fulfilling its duty. This instrument operates as an injunction to respect the relevant duty within a specific timeframe. If it appears that the accused authority does not adequately respond to this injunction, the CRE can call upon a court to renew it. And should no action follow, the authority in question could be the subject of legal proceedings. The entire mechanism is thus based *in fine* on the CRE's ability (the CRE is assisted in this by the different bodies responsible for auditing the public authorities) to supervise all of the public institutions and to have access to the publication of reliable and clear data. Here again, "*monitoring*" is required. And this is where problems arise.

3) Assessment of feedback from effected monitorings and the "equal opportunity schemes'" effectiveness

If everything depends on monitoring quality, including the effectiveness of "racial equality schemes", it is important to understand how the CRE intends to look at the work undertaken by the public authorities. Given the number of areas provided for by the RRA (Amendment) 2000, this is not a minor problem. The problem was already apparent in the assessment of actions implemented by private sector companies and organisations since the CRE has never been able to systematically review these in order to determine the degree to which monitoring practices and the availability of racial equality plans were effective. Private sector organisations are not duty bound to monitor – except in the following case: should a public authority engage a private company to carry out one of its public missions or functions, it should be assured that the company monitors (but only on the function delegated to it). Even if it is believed that a number of private organisations engage in monitoring, it remains that there is no systematic count and thus no precise numbers in terms of the number of companies who monitor. Some information is available from associations such as the Race for Opportunity Association which states that 83% of their member companies reported in a survey that they do indeed monitor their workforce (which does not mean that they also monitor recruitment and other areas such as promotions, training, careers, disciplinary procedures, etc.). Of course, the member companies of the said organisation are far from being representative. To this day, the only data produced by the CRE were obtained through a questionnaire survey conducted in 1995 with regard to large companies. 40% of the companies declared that they monitored their workforce and 30%, the candidate hiring process. The reservations raised earlier also apply here. That is that the

surveyed companies (through questionnaires only) are not representative of the private sector, and also the survey is almost ten years old and significant innovations have seen the light since that time. It is likely that the Workplace Employment Relations Survey will provide some information since it will be conducted in 2004 (but the results will not be available until 2006) and should include questions relating to monitoring.

The issue regarding the assessment of the "*duty to promote equality*" borne by the public authorities is thus raised and the absence of any systematic treatment of the particular case of private companies does not allow us to understand how the CRE intends to proceed. Because even if this is a duty, it is difficult to understand how the CRE intends to proceed with the assessment of public organisations' efforts. The issue of assessing the effectiveness and reality of "*race equality schemes*" as well as the achievement of "*positive duty*" is therefore crucial. To date, the CRE has not explained how it intends to effectively manage its supervisory role.

F/ Monitoring and data protection: the boundaries surrounding the collection of sensitive data.

The operationalisation of measuring discrimination based on prohibited grounds is systematically linked with the legislative protection of the collection and treatment of personal data. All the more because discrimination grounds are formally related to a list of personal data considered "sensitive data" – a qualification which, in most European legislations, significantly toughens the legal requirements surrounding data collection and treatment. "*Sensitive data*" are indeed the subject of a right to a distinct regime of treatment. English law relating to personal data protection is not an exception. All the grounds covered by anti-discrimination legislation can be qualified as relating to "*sensitive data*". However, this does not prevent monitoring occurring as English law provides numerous exemptions to the prohibition of collecting and treating sensitive data in Schedule 3 of the relevant Act (*the Data Protection Act 1998*) relating to the conditions for treating sensitive data. Most of these exemptions are very intentionally available in order to allow for monitoring. These exemptions are then explained more explicitly in the guides and Codes of Practices aimed at parties to a dispute and published by the *Information Commissioner*, the Independent Authority in charge of supervising the application of the Data Protection Act 1998.

The law states the following: "*The processing is necessary for the purpose of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment"*.

The *Employment Practices Data protection code* states that "*this condition can have quite wide application in the context of employment records. Employer's rights and obligations may be conferred or imposed by statute or common law, which in this context means decisions in relevant legal cases. For example they will include obligations to: (...) not discriminate on the grounds of race, sex or disability; consider reasonable adjustments to the workplace to accomodate workers with disabilities (...)"*. In this Code's *Supplementary Guidance* (published separately), it is written that by virtue of the first provision "*an employer may be able to collect sensitive data in the course of monitoring workers if the monitoring is necessary to enable it to meet its legal obligations, for example to ensure the safety of workers, or to prevent unlawful discrimination. The collection and use of sensitive personal information must however be "necessary" for exercising or performing a right or obligation that is conferred or imposed by the law*"[107].

[107] It provides broad meaning to the term "necessary" as it gives the following example immediately afterwards: *"This condition would, for example, be satisfied if there is evidence that a worker is using the employer's e-mail system to subject another worker to racial harassment, and there is no reasonable alternative to monitoring the worker's e-mail if the employer is to ensure it meets its obligation not to discriminate on the grounds of race".*

Should this first exemption be insufficient, other conditions render monitoring lawful. In particular: "*the processing –*
(a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective proceedings)
(b) is necessary for the purpose of obtaining legal advice
(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights".
Another part of the Code (*Part 1*: *Recruitment and selection*) provides an example of the application of this exemption, including a comment on its breadth of application "*including prospective proceedings"*: "*the application of this condition in the context of recruitment and selection is quite limited but it might for example be relied on to enable a prospective employer to process sensitive personal data to defend him or herself were an applicant to make a claim of unlawful discrimination*".

Other than the first provision, however, the law also provides two others which are extremely efficient in allowing monitoring and the policies it supports. The first makes lawful the treatment of sensitive data which are necessarily found in monitoring racial discrimination (within the meaning of the RRA 76 and 2000). It states that the collection is permitted if "*the processing -*
(a) is of sensitive personal data consisting of information as to racial or ethnic origin
(b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained".
The other grounds and sensitive data, that is, religion and disability, receive similar attention and a similar provision which provides that "*processing of sensitive personal data consisting of information as to religious belief (or other beliefs of similar nature) or physical or mental health or condition where –*
(a) the processing is necessary for identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons with a view to enabling such equality to be promoted and maintained; and
(b) it does not support measures or decisions relating to a data subject otherwise than the data subject's explicit consent; and
(c) it does not cause nor is likely to cause substantial damage or distress to the data subject or any other person".

In the relevant code, the Information Commissioner does not seem to distinguish between the provision stating "race" and "ethnic origin" and the one stating "religion" and "physical or mental health or condition". He/she puts the two provisions together and, economically, reports such in the following manner: "*the processing (a) is of information in categories relating to racial or ethnic origin, religious beliefs or other beliefs of a similar nature, physical or mental health or condition, (b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity of treatment, (c) contains safeguards for the data subject"*. More laconically, he/she states that "*this*

condition will be relevant to equal opportunities monitoring related to racial origin, religion and disability".

It is also worth noting that the Information Commissioner is not firm on the question of anonymity - both because he keeps "*reasonable adjustment*" requirements in mind, which assume that the information is returned to the person who provided it (this was raised in the section dealing with disability), and because he takes into account the constraints imposed on certain types of monitoring, specifically when involving career paths and the assessment of equity in promotions or disciplinary procedures. In the same Code, it is also stated that "*effective equal opportunities monitoring may mean employers have to keep records about workers' backgrounds and their work history in a form that identifies them. For example, if your organisation wants to track how many people with disabilities are being promoted and to what grades, it is difficult to see how this can be done without keeping records in a form that identifies them. Where tracking of individuals is involved it will not always be possible to use only anonymised information*".

Similarly, consent is not always strictly required. Admittedly, as the law generally requires, the Commissioner determines that *"employers are more likely to need the consent of workers if they are processing sensitive data rather than non-sensitive data"*, and in this case, "*the consent must be ' explicit'"*. In spite of this, he/she takes care to add that "*even then, sensitive data can be processed without the explicit consent in a number of circumstances, for example, where the processing is necessary to enable the employer to comply with any legal obligation. Data about the racial or ethnic origin of workers may therefore be held in order to comply with the law relating to racial discrimination"* (Information Commissioner, Codes of Practice. The Employment Practice Data Protection Code. Part 1 : Recruitment and selection, March 2002).

However, this should not imply that the employer can does as he/she wishes in terms of monitoring. A fair number of protections are available and the codes aimed at monitoring are very precise (particularly those of the CRE). Nevertheless, we will stop here as it was only intended that we establish that the data protection law does not serve as a barrier to monitoring for the good and simple reason that, since and in its writing, the requirements and restrictions of the anti-discrimination battle have been adequately considered.

IV - THE CENSUS AND THE "ETHNIC QUESTION"

A/ The construction of an "ethnic question" for the Census

1) The two-fold procedure involved in adopting a question: "consultation users" and acceptability tests

The design and inclusion of a new question in the census is the subject of two sets of procedures. These procedures became formal after the 1981 Census and required that the questions adopted in the Census forms be restricted to those asking for a simple answer which is "*acceptable*" to the public and not considered as violating "privacy", as well as being essential in the planning of public and private activities (Thompson, 1995). The identification of "topics" and "issues" which require the availability of Census statistics, as well as the arbitration between them, is carried out through "consultations" in which a significant number of institutions and organisations participate: "*the obvious candidates were included, such as central governments departments, local and health authorities, the academic community and commercial users*" (Op.cit., p. 205). "*Obvious candidates*", as the design and content of the British census is polarised by the taking into account of the "*census users"* needs and opinions[108]. Amongst the other invitees were organisations who have specific expertise, represent the public or are responsible for the application of certain policies and are also statistics users – "*in addition, we consulted a wide range of others organizations, including the Royal Statistical Society The Royal Town Planning Institute, The Market Research Society, The Trades Union Congress, the Confederation of British Industry, The British Medical Association, the Countryside Commission, The National Council for One-Parent Families, the Welsh Language Board and the Commission for Racial Equality*" (Ibid.). While some questions are automatically included in the Census, it is because they cover "*core topics*" (Op. Cit., p.206), for others a so-called "*inquisitorial*" approach is used. "*Inquisitorial*" because, in order to get past the first "*consultation*" stage, it is required that question proposals be structured to meet a number of requirements. Users must have probative elements capable of providing support to the introduction of a new question or new categories. Public statistics organisms invite the users to justify their needs. The justifications must meet three criteria. When the OPCS inquires as to what type of information is needed by the main users, it also intends to ascertain how the users will be called upon to use them and how the availability of this information will benefit their activities. To make things even more difficult, the users are then asked to describe the costs related to this information not being available. Finally, they must demonstrate why this information cannot be obtained in a forum other than the Census[109]. When an agreement is reached on the need

[108] This polarisation of the users' requirements and opinions will be strongly contested in the preparation of the 2001 Census, in particular in relation to the "*ethnic question*", in Scotland, during the process of devolution and writing of the questionnaire.

[109] The criteria were strictly formalised for the 2001 Census. "*All topics proposed for inclusion in the 2001 Census meet the following criteria: there is a clearly demonstrated need; user's requirement cannot be adequately met by information from other sources; a question can be devised which will produce data that is sufficiently accurate to meet user's requirements; and the topic is acceptable to the public and will not have an adverse effect on overall response*" (Moss, p. 29, 1999).

to obtain an information, the refining of questions and choice of categorial items which will enable such may pave the way to the creation of specific think tanks composed of various participants.

The procedures do not stop here, as the questions, their form and the categories they create are then submitted to a battery of tests ("*field trials*"[110]) aimed at ascertaining the degree of the public "*acceptability*" (i.e. by the respondents) as well as the degree of "*reliability*" (i.e. the relevance and quality) of the information gathered. From one test to the next, revisions are carried out on the question design and a fragile arbitration often has to occur in order to respond to certain limitations: the increased reliability and productivity of a question can influence its acceptability or not. The acceptability (or not) can also be unequal for certain groups of society, etc. At the end of this two-fold process which lasts almost ten years, the government proposes a set of questions a few years before the census is carried out in a special "White Paper" which leads to a final test (that of the complete form proposed) and once again enters into consultations and negotiations.

[110] The procedure followed during these "*field trials*" consists in a small scale experimental simulation of the methods used during the census. An investigator provides each sample "*household"* with a form. A few days later, the investigator contacts the test participants to collect the form and check that it has been filled. Unlike a true Census, participation is voluntary, except that in 1979 and 1989, these "*field trials*" on "*ethnic questions*" were carried out jointly with the "*census test*" and this procedure was not publicised. A further difference with the Census is that the investigator is required not to help the respondents with their answers in any fashion. However, when he was to collect the form, he had to ask the respondent a few questions in order to verify the information obtained, to inquire as to the reasons for omissions, to establish whether the respondent had difficulties or objections to communicate with regard to its contents. The OPCS investigators receive training to undertake this task efficiently and have experience in the conduct of interview-based surveys. They are full-time employees and members of the OPCS Social Survey Division Field Force. The samples used in "field trials" differ in size and composition depending on each test's objectives. In order to obtain the samples required per objective in each "*field trial*", from 1975 to 1989, the OPCS focused on zones containing a "sufficient" number of persons belonging to the relevant "groups". Generally speaking, the said zones were selected on the basis of previous (1971 and 1981) census data by using information on the country of birth and the country of birth of the parents as provided by them. For certain "field trials" and in order to refine the targeting, "households" belong to relevant ethnic groups were selected on the basis of the household head's surname (by using electoral lists). The acceptability tests and analyses break the results down by "group". Thus, the presentation of the analyses carried out specify the members of the "*households"* as being "*Whites*" or "*Asians"*, for example. The caracterisation of respondents carried forward into the tables which break the results down is not simply based on the Census data used to define samples, it is also confirmed and ratified by the "*field trial*" investigators. For the test managers, the major problem with this form of sampling by country of birth on the basis of the 71 and 81 Census data flows from the fact that each group's samples are confined to zones where the density of "minorities" is significant and presents specific social and demographic features.

2) The identification of a need for "ethnic" data.

a) From the immigration issue to the discrimination issue

While the need to construct an "ethnic" question and relevant categories is contemporaneous with the enactment of the Race Relations Act 1976[111] and the creation of the CRE, the recognition and practical treatment of same and finally the agreement to a standard structure by the statistics organisms have, however, been progressive. Even though the statisticians considered this need for "ethnic" data early on, it took a good number of years to consider a question, find a suitable design and meet with the confidence of the public who was going to be the subject of this new categorisation exercise. Unlike the United States or even Canada, England was not prepared for this means of characterising persons and representing the difference they make to the political community. Unlike those two nations, England did not inherit an available categorial structure to which new elements were added over time. It had to start from the beginning, without such an inheritance.

In 1978, the government insisted on the need for this type of data and requested the formulation of a question specifically aimed at this need for the 1981 Census. The identification of this need for "*authoritative and reliable information about the main ethnic minorities"* (HM Government, 1978) is linked to the requirements and objectives of the battle against discrimination under the RRA 1976 which requires the agents who supervise its application to have the ability to factualise differentials affecting "*ethnic minorities*" in order to react consequently. It is as such that the Government justifies this need: "*In order to help in carrying out their responsibilities under the Race Relations Act, and in developing effective social policies, the government and local authorities need to know how the family structure, housing, education, employment and unemployment of the ethnic minorities compare with the conditions in the population as a whole"* (HM Government, 1978).

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[111] As noted by Ludi Simpson, the sudden reversal of public statistics organisms with regard to this issue cannot be explained by the public powers' insistence on having information for and concerning the policy they launched. This is indeed a reversal, as in 1966, with regard to the 1971 Census, John Boreham considered it impossible to include a question in the Census relating to race or ethnicity. "*It is extremely difficult to define "coloured" precisely at all; and it is impossible to define it precisely in a way that will work in a census. We did not (and will not) attempt it, but used the unequivocal and objective concept of birthplace instead. This leaves you with the awkward "white indians" and "black englishman" but there is no practicable way of identifying them in a census"* (quoted from Simpson, 2002).
As we can see, it is "*colour"* that is to be identified. For those who are concerned with the recent *NCWP* immigration, as well as for those engaged in the battle against discrimination, it is obvious that the populations included in these two debates (as threats or victims) identically dread a racialised and generalised characterisation. "*Interest in the numbers of racial groups gained strength in the 1960s and 1970s as immigration became a strong political issue. At the same time, black populations made their organised contribution in many city areas, and racism was resisted strongly by black organisations, stimulated by political traditions new to Britain including the Black Power movements of the Caribbean and the USA. Already all the policies discussed above were evident to some extent, but only immigration made it onto the government statistical agenda. Immigration policy and anti-racists alike focused on the Black population as a whole, and this was not to change until multi-cultural policies came to the fore in the 1980s"* (Simpson, 2002).

This does not mean that OPCS members were not previously concerned with resolving this data collection and "*ethnic minorities*" measurement problem. Indeed, it was in 1975 that the OCPS starting reflecting on the construction of a question potentially producing information on these groups. However, these reflections were not, at first or not only, focused on the issue of discrimination or disadvantages. It was first within the framework of statistical participation in the immigration issue[112] regarding New Commonwealth populations that the statisticians work commenced. However, via the "groups" involved, which were already defined and distinguished in the statistical treatment of this political question of immigration, the shift to becoming problematic in terms of discrimination incurred – since it is the future of these same "groups", but differently described, that is in play in both public issues. The presence of ethnic and racial minorities within this reflection was thus ensured and the *New Common Wealth* groups were already within the accounting and representation designed by statistics – even if it was under a different status than that of a victim in the battle against discrimination.

Indeed, the 1971 census, in order to capture the doubly problematic populations (first in terms of immigration management and secondly – in a second timeframe – the disadvantages they face) broadened to include a question on the country of birth of the parents of the persons enumerated. At that time, the solution seemed to suffice to count the population the subject of the two political concerns[113]. However, the OPCS statisticians soon worried about their ability to produce more "reliable" information, that is that could honour their standards of deontological excellence by including a solid accounting support and relevant information to statistics users[114].

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[112] With regard to the politicisation of this issue and the balance in toughening migratory laws by the reinforcement of anti-discrimination laws, see (Favell, 1998).

[113] "*This was the basis of government projections of the 'New Commonwealth and Pakistan' population: those born in or with parents born in the New Commonwealth or Pakistan, which was not a member of the Commonwealth in 1971 or 1981. The census data gave numbers and age structures in each part of the country, that corresponded very well with Britain's black population. The government's aim was simply a demographic profile of the black population, just as the political debate about the statistics continued to focus on whether the immigrant population had been exaggerated or under-counted, and informed the politics of black immigration*" (Op. Cit.).

[114] During a meeting at the *Royal Statistical Society* on November 17, 1982 for the presentation of a report entitled "*Sources of Statistics on Ethnic Minorities*", the author started his speech by stating the nature of OPCS mission and responsibilities and by asking himself whether the available sources would allow for their adequate fulfillment. Although the excerpt below is far earlier, it is of interest as it demonstrates the statisticians' continued commitment to answering this need for data in spite of the government in place at the time of the meeting being somewhat hostile to an ethnic question in the census – as it demonstrated by adjourning the inclusion of this question in the 1981 Census. "*My part today, therefore, is merely to introduce a paper which lays before us the sources of statistics that are available to my Department (that is, the Office of Population Censuses and Surveys) (…) The sources provide some of the basic material from which to construct estimates of the demographic characteristics of the population of ethnic minorities living in this country. Perhaps, first I could read the two sentences that open this particular paper. The first states:*
'the Registrar-General is responsible for reporting to Parliament and the public generally on the number and conditions of the population, including the various groups which go to make up the population.'
I hope that is a statement which may be taken (…) as explaining the locus of my Office in this particular subject. (…) Our locus in this subject stems from our responsibilities, as we see them, under the various Acts that require the Registrar-General, first, to conduct Censuses and, secondly, to collect registration information about births and deaths in the population and to compile estimates. The second sentence states :
'Public policy and public discussion of the position of different racial and ethnic minority groups in British society need to be informed by relevant and reliable data.'
The purpose of the paper is to try to establish how far we can supply data which is regarded as relevant for public discussion and public policy, and also try to establish its reliability".

The beginning of the reflecting on the construction of a question allowing for "*direct information*" to be obtained, as well as on the establishing of a categorial *ad hoc* structure, rapidly saw on the horizon the introduction of a new question, a "*direct question*", into the census. The statisticians consider the census to be a tool of excellence, one that allows for the refining of information obtained, unprecedented access to a sample by covering the entire population and going beyond a suspicion relating to unsatisfactory "*estimates*" included by default. Thus, starting in 1975, the OPCS has attempted to reflect on the implementation of a mechanism taking into account "*ethnic minorities*" via a less indirect path than that taken by the 1971 Census[115]. The OPCS carried out a research program focused both on proving the degree of receptivity of the public with regard to this questioning and formulating an acceptable and relevant version. A first series of tests ("*field trials*") was carried out between 1975 and 1977, after which K. Sillitoe, slightly ahead of the government, recommended a question.

1) ☐ White
2) ☐ West Indian
3) ☐ African
4) ☐ Indian
5) ☐ Pakistani
6) ☐ Bangladeshi
7) ☐ Arab
8) ☐ Turkish
9) ☐ Chinese
10) ☐ Any other race or ethnic group, or if of mixed racial or ethnic descent
(please describe below)

[115] Until that time, the gathering of information on the birth of the persons, then their parents, provided a generally satisfactory "*proxy"* quite adequate in meeting researchers and "*policy-makers'"* expectations. Over time, it appeared that this strategy was increasingly uncertain. If one believes Peter Rattcliffe, since the 1970's, a consensus appeared and it was commonly agreed that existing statistics would no be longer adequate to estimate *"the size of communities of minority ethnic origin*" (Rattcliffe, 2004). This inadequacy led some of the involved parties to support the demand for a "*more direct*" measurement of "*ethnic groups*" (Op. Cit.), a demand which gained legitimacy since the more rigorous implementation of the Race Relations Act 1976 did not lack in strong and decisive reasons, other than those regarding concerns with the migratory policy, for a public demand for statistical monitoring of the conditions and position of the "*ethnic minorities*". In 1982, after the use of a "proxy" was excessive and used to the limit in the 1981 Census, the statisticians no longer doubted that it was impossible to continue ignoring the need for a more "direct" measurement of ethno-racial groups. This is what M. Bulmer expressed with acuity at the Royal Statistical Society meeting we previously mentioned: "*the proxy question seems to me to be on its way out. It has had a long run – we have gone from country of birth, to country of birth crossed with parent's country of birth, and now country of birth of the head of the household. (…) But country of birth is increasingly problematical, as far as birth registration is concerned. By the late 1980s, clearly even country of birth of household will be unsatisfactory as a measure"*.

The construction of this first question is based in part on the "public problem" relating to immigration. Its conformity relies on the background of a first intuitive grasp of the populations to be statistically distinguished and documented, that is the new immigrants from the New Common Wealth or of non-European descent, and starts off with the visibility of their difference both in relation to immigrants who were historically related to Great Britain and a majority population. "*When in the 1950s there began an influx of people from other continents – mainly from the West Indies, East Africa and Asia – there was nothing historically unique about this event**, except for the important fact that, unlike most of their predecessors, these later immigrants were clearly distinguishable from the indigenous population by the colour of their skin"***[116] (Sillitoe & White, p. 141, 1992). This background is important. It can be said that it will govern the tasks of the statisticians engaged in the search for an "*ethnic question*", since it is through it that they will assess the relevance of the various categorial mechanisms that will be tested. Thus, while the statisticians start with this difference within the "*indigenous*"[117] population, difference which exposes them to disadvantages, they also take into account the origins of these "*minorities*", the situation of which they are attempting to document, as well as their socio-demographic features. The fact that, for a long time, statisticians will distinguish the populations they seek to describe on the basis of geographical regions from which they originate, provides a good indicator of their sensitivity to the persons' origins in the designing of categories[118]. It is worth noting that at that time this sensitivity owes more to the existence of the NCWP immigration issue than to the multiculturalist topics available to promote "*diversity*" and politically broaden "*ethnic identities*" – these will only be operational and publicly available in the 1980's[119].

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[116] From the beginning, Sillitoe assisted in the construction of the "*ethnic question*".

[117] A population which is not a subject of concern and is seen homogenously under the "*white*" category. It is worth noting that the indifference towards breaking down the "*white*" category is not only caused by the introduction of the racial discrimination problematic in the statisticians' agenda, but also to the prior "immigration" issue. It is not relevant to make an advanced differentiation of the "*white*" population because it is intuitively seen as being the "native" population, a population which sees immigrants arrive. The categorisation asymmetry arises from the racial discrimination asymmetry as much as that pertaining to the immigration issue (where some see others arrive and worry about their settlement). This double asymmetry will be questioned by some researchers and activists after the 1991 Census.

[118] Sillitoe and White make a common criticism of this approach in terms of origin sub-divisions. Indeed, they know that this sensitivity towards the origin, on which the distinguishing of "groups" is be based, is not necessarily congruous with a policy dedicated to the fight against "racial" discrimination. The battle against discrimination does not really care about these distinctions, because the undue distinctions are the most basic ones. "*This approach may be criticized by those who would argue that, althought the distinction that we have drawn between racial and ethnic characteristics may be valid, it is irrelevant if one is primarily concerned with monitoring effects of discriminatory practices resulting from the conscious or unconscious bias commonly displayed by whites towards people of non-european origin, for which it is sufficient to classify people simply as (say) "white", "black" or "asian", or even just as "white" or " non-white". However, although this may be true up to a point, it is also true that there are socio-economic, demographic and other differences between ethnic minorities which also have to be taken into account for some purposes."* (Op. cit., pp. 143-144).

[119] Certain researchers use the *Scarman Report* (1985) as the marker for this distribution of multiculturalist topics (Favell, 1998; Simpson, 2002). In fact, as we will see, the 1991 and 2001 Census questions and categories were massively criticised because they did not grasp ethnic plurality and caused a split between "*white*" and "*non-white*". The convergence of these critiques and their being embraced by the public provides a good indicator of this multiculturalist anchoring within the political community, as the Census will be criticised for not "representing" (if it does not mean the same as "reflecting") this community feature, a state seen as doubly realistic (it is a "fact" that is waiting to be presented) and morally, politically, just (it is desirable to take this into account and be conscious of it; this situation is not morally problematic because the existence of diversity itself is a source of riches).

However, there are also two other main reasons supporting the anchoring of this multiplicity of categorial items on origin. Firstly, it involves tasks seeking to guarantee the acceptability of the categorisation by the persons involved. The persons must indeed answer questions, and if the statisticians expect them to relate to a certain type of category, they know that the acceptability of the questions and the relevance of the answers depend on the ability to identify themselves in the pre-formed categorial items. For such a question to work, it must compose categories that take into account differences between types of "groups" but also, at the same time, offer persons believed to be members of these "groups" understandable semantic clues that would lead to the manner (which is dependent upon the "group") in which they represent and identify themselves. The statisticians will attempt to work in such a manner that the racised persons exposed to racial discrimination relate to the proper categories, those that document "*ascribed identities*", but to achieve this, they must construct items that leave room for the manner in which they self-identify[120]. Most tests conducted on the categories between 1975 and 1989 sought to solve this equation and arbitrate the restrictions while attempting to construct a classification with some semblance of systematic and coherent logic[121]. In 1982, an OPCS member summed up the "*general principles*" deduced from the preceding test campaigns as follows:

"*(i) The term "white" is essential to describe people of European descent. If filter expressions are used such as "European", "British" or "English" it leads some British born members of the ethnic minorities to place themselves in the wrong category, so far as our objectives are concerned.*

(ii) It is preferable to distinguish members of ethnic minorities born overseas from those born in the United Kingdom (really following on form the first point).

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[120] As stated by Sillitoe & White, "*to be effective an ethnic classification has to be expressed both intelligibly and acceptably to all sections of the population ; it has also to furnish the information in the form in which it is needed.*" (Op. cit., p.143). The form of this information is required by a "main purpose", which requires the accounting of a certain type of difference: "*to satisfy the main purpose for which the data are wanted in this country it is necessary to distinguish reliably all people who belong to groups which are susceptible to discrimination because of their ethnicity*" (Ibid.). The *tests* must answer the acceptability question and the intelligibility of the question and categories for each of the "groups" exposed to discrimination: "*the only way to find out how the classification needs to be expressed to make it as intelligible and acceptable as possible is to test a variety of alternative designs on samples of all main ethnic groups*" (Ibid.). Before launching tests, they have a number of ideas. They believe that "*to render it understandable and acceptable, an ethnic group classification has to be expressed in terms which the groups themselves recognize and regard as meaningful: not surprisingly, this necessitates a more extended and redefined classification than is afforded by the ethnocentric and simplistic language of racism*" (pp. 143-144). The tension between the objective served by the classification (the documenting of *racial* discrimination) and its acceptability is at a maximum, and most of the work will consist in finding solutions allowing this objective to be achieved without raising too many objections on the part of the respondents. The statisticians must therefore engage in a compromise, which is disappointing by necessity and terribly unfair as it raises criticisms. The tests conducted between 1975 and 1989 will only confirm this by demonstrating that the weight of the contradictory restrictions only leads to a compromise sacrificing systematic logic and conceptual consistency to the benefit of the requirement: "*such tests have demonstrated that the various aims are not always compatible and that the final design has had to be a compromise between conflicting objectives*" (Ibid.)

[121] At a meeting of the *Royal Statistical Society*, M. Bulmer provided a *political* reason for the minimal logical coherence requirement that a categorial classification of "*race and ethnic group*" question must meet: "*It seems to me that the logic of work in this area is moving much more towards a self-assessment question. However, it seems clear that there is need for much more work on a self-assessment question in terms of race and ethnicity. I agree with the last speaker in pointing to the logical inconsistencies in a question which posits a category of white, and then another set of categories in terms of national origin. These do not match up; they are logically unsatisfactory from that point of view, and also they provide ammunition for those who are politically opposed to asking such a question".*

(iii) It is impractical to distinguish members of European ethnic minorities who were born in the U.K., except on the basis of religion – and that would not be a very popular move.

(iv) The term "black" ought not to be used to describe Asians, because it causes offence to many Asians who regard it as applicable only to Afro-Caribbeans and Africans.

(v) The term "race" needs to be used preferably in conjunction with "ethnic", in the heading or wording of an ethnic origin question, to describe its purpose. This is because the term "ethnic" althought correct, causes confusion when used alone and it is not very widely understood.

(vi) People from the Indian Subcontinent dislike being described collectively. They prefer to be distinguished according to their individual countries of origin; an acceptable alternative is to classify them according to their religion. In fact we thought that the ideal question would have a religion sub-part from those from the indian Subcontinent (…). This is basically the present state of development regarding the ethnic origin question as used in The National Dwelling and Housing Survey, and slightly modified for the 1981 LFS. We think the next development is to study the acceptability of a question which actually uses the phrase " black" or "black British". We believe that some sections of the population would prefer that. "[122].

As we can see, the coherence of the classification runs up against the various requirements and "preferences" of the "groups" that must be present – these "preferences" are difficult to compose and weigh on the coherence of the entire categorial structure. Furthermore, they are instable because they evolve over time[123].

Another robust reason supports the construction of categories on "ethnico-national" origins and doubly underlines origin or ancestry. Indeed, it means that statisticians must attempt to *avoid* the risk of their participation in a *racialisation* of the political community. This risk is even greater in that the statisticians could furnish ammunitions to a portion of the public which has not been convinced by the

[122] F. E. Whitehead, OPCS, speech at a *Royal Statistical Society* meeting.

[123] Thus, while in 1982 it appeared to statisticians that the use of the term "*race*" is essential to the understanding of the question – this affirmation is controversial, because, at the end of the 1970's, the government was opposed to mentioning the terms "*black"* and "*white"* in obligatory surveys – in the 1990's this is the motor behind a rejection, on the contrary. The evolution of the general acceptability of the question on "race" and ethnicity, specifically between the 1979 Census test and that of 1989, is without doubt for the statisticians and researchers. Nevertheless, they cannot entirely explain it: "*There is no obvious explanation for why the 1989 question did not give rise to the same level of objections from black as other questions tested (…). It may be that the effort which had gone into consultation about the question and explaining the reasons for the census test itself to the public had borne fruit and that the general level of concern about a question on ethnic group had been much reduced. It may also be attribuable to the fact that in recent years ethnic monitoring has become much more widespread. (…) Familiarity with answering questions about ethnic group in other contexts (…) will make it seem more natural and less objectionnable to do it in a census*" (Sillitoe & White, p. 162, 1992). For others, this change is caused by the evolution in anti-discrimination policies brought about by "multiculturalism" rather than an habituation to the question. As soon as multicultural policies were put in place and provided with resources specifically aimed at "black" populations (and directly related to their employment and needs), these same populations (or those who intend to represent them) saw an advantage in them that reduced their reservation and previous objections. "*Now there was an advantage to measuring ethnic group, especially to those organisations and individuals who advanced within the schemes."* (Simpson, 2002) – see also (Long, 2002).

discreditation of racist theories and assumptions[124]. Before the anti-discrimination policies tended towards a multicultural direction,[125], the choice of the "ethnic group" concept to name "groups" which statistics must attempt to document was mainly negative. This essentially means that it is wise to avoid the use of semantics and the notional network of the term "race" in order to avoid the accusation of accrediting racist theories[126]. By avoiding semantics concerning "race" and "racial groups" and by promoting the concept of ethnicity, the statisticians hope to start a positive dynamic of performativity through statistical schemes[127].

b) The first question put to trial by the tests and the government

The first question Sillitoe recommends both for the Census and the large scale OPCS surveys (such as the Labour Force Survey[128]) has ten "tick-boxes". The first category is "White", followed by eight pre-formed items and one open item. Each box has a number of corresponding descriptors that vary between "race" (i.e. colour) and indicators of origin and background, from national origins to larger ones referring to vast geographic areas intend to cover specific "groups". In other words, "West Indian" is meant to referred to black persons from the Carribean. This first question's goal is clear. It intends to show the difference between the "majority" (i.e. "*white*") and the minorities (i.e. "*unwhite*"), without, however, gathering the "unwhite"[129] population under the same category, as the instruction on interpreting the question specifically sets out to the respondent on the left side of the classification where the following text appears: "*Race or ethnic group/descent. Please tick the appropriate box to show the race to which the person belongs. For someone who was born in the United Kingdom, but whose race is not "white" tick one of the boxes number 2 to 10 to show from which group the person is*

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[124] "*Although largely disproved by modern genetics, such beliefs are still found among the general public. It is partly for this reason that many social scientists now prefer to use the term "ethnicity", rather than race. (…)".* Thus, by following the lead of social sciences, they attempt to make a difference between "race" and ethnicity and do not fail to fear that the distinction is not yet well established. Although they foresee the need to publicise the insistence on the difference they put between "race" and "ethnicity", in order to avoid unhappy consequences and to change the way of addressing racised persons, as the term "ethnic", in spite of everything, integrates a physical difference characteristic (which *must* be included since the data are produced to substantiate the battle against racial discrimination) the burden facing statisticians is restrictive and perilous. "*The expression ethnicity derives from the Greek word Ethnos which roughly means a nation or tribe. These days, when we speak of an ethnic group we mean a socially distinct community of people who share a common history and culture and often religion and language as well. It is these ethnic attributes which truly and properly characterize the various groups. However, as was observed earlier, a further factor which contributes to making ethnic groups socially distinct is that they often, although not always, have physical characteristics such as skin colour which render them easily distinguishable from the rest of the population. When this is so, ethnic differences are easily confused with so-called racial differences*" (Op. cit., p.143).

[125] New direction which, by make place and giving equal rights to identities and distinct "ethnico-religious" customs when compared to the WASP majority will fully confer specific consistency on the concepts of "*ethnic group*" and "*ethnic identities*".

[126] "*Incorporating race and colour distinctions into an ethnic group classification carries the risk that it may appear to be giving a spurious authenticity to the discredited beliefs about the non-physical differences between racial types alluded to earlier. This is why it is necessary to emphasize the fundamental difference between the concepts of race and ethnicity, and why in the question designs we have tried always to use the term ethnic wherever it was appropriate, in the hope that gradually it will become better known and more widely employed*." (Op. cit., p. 143).

[127] See the end of the preceding quotation.

[128] It is important to note that this question will be used in the OPCS surveys, particularly the Labour Force Survey (amongst others).

[129] Without using "racial" categories to define them, for the reasons stated earlier.

descended. If the person's race or ethnic group is not one of those listed or if the person is descended from more than one, tick box 10 and describe in full, in the space provided".

The tests accompanying the design of this first draft question underlined certain specific reticence's, such as those by the "*West Indians*" who objected to the proposed classification more strongly than any other group. "*Whereas other ethnic minorities were usually satisfied for their UK-Born members to be described as "Indian", "Chinese", etc., many West Indians felt that it was inappropriate to describe people who had been born in Britain in terms of their forebears' geographical origins."* (Sillitoe &White, p. 145, 1992). This resistance also referred to questions on race or ethnicity and continued throughout the three tests. The reasons put forth related both to an objection of principle and at a significant doubt of the government's purpose in asking these types of questions.

In order to accommodate the "preferences" (Op. cit) of the "West Indian" respondents and to make the question "acceptable", one of the solutions chosen by the OPCS members was to propose an additional category specifically for the Afro-Caribbeans born in Great Britain, the "*Black British"*. Surprisingly, this proposal referred to the term "black" used in censuses in the USA and some Caribbean countries, the idea being that this reticent "population" would be more accustomed to this form of identification[130]. This solution was also proposed as it seemed obviously compatible with the use of the term "white", term which was chosen to designate persons of European descent, and was therefore a logical counterpoint. The OPCS did not have the time to test the operation of these new categories since the government, insulted by the emphasis on race or colour distinctions (Office of Population Censuses and Surveys, 1980), rejected this solution. To justify its position, the government made a significant distinction between *voluntary* and *obligatory* surveys. The government thought that while the term "*white"* - and its counterpart "*black"*, which was to be introduced – could be acceptable in the first case[131], in the census which is obligatory, it demands that the OPCS earnestly avoid the use of explicitly "racial" terms. The OPCS therefore had to find an alternative classification system. And in doing such, exclusively using the term "*ethnic"* and carefully avoiding the words "*black*" and "*white".* On the basis of this new list of requirements, the OPCS established three new versions which were put to test in 1978. None of these met the acceptability standards and were not apt to be included in a questionnaire the results of which needed to be "reliable".

[130] The objection's legitimacy does not seem to have crossed the mind of the question's designers. They only treat this reticence as a different form of "preference". However, this is more than a simple "preference" because what is at risk is the legitimate ambition to be recognized as full-fledged members of a political community. The constant reminding of origin marks them as outsiders and prevents them from achieving this goal. However, the solution proposed by the statisticians allows this ambition to be attained, since the "Black British" category refers to an affiliation.

[131] It is not only the distinction between "*voluntary"* and "*compulsory"* that is really in question; the issue more likely relates to the scale of the collection implied by the census procedure (in this case, the sample is the entire population). While the Government insisted on the first distinction, there is no doubt it is because it seemed (or was brought to its attention) that such categories were already used in Labour Force Surveys, causing less problems since the sample was smaller.

The statisticians agreed to try to design a modified version of the previous question for a future test to be carried out in 1979. However, to prevent the failure of a direct "*ethnic*" question, they also constructed a question on the country of birth of the parents (along the Census 1971 model). These two versions were put to test in 1979 (Version A and Version B). Version A, entitled "***parent's country of birth***", is intended to collect the following information:

"Write the country of birth of	
a) the person's father	a) Father born in (country) ……
b) the person's mother	b) Mother born in (country) ……
This question should be answered even if the person's father or mother is no longer alive (if country not known, write « NOT KNOWN "). Give the name by which the country is known today.	

Version B, for its part, is entitled "**racial or ethnic group"**. The open category is "*English, Welsh, Scottish or Irish*" (tick-box 1) to avoid using "*white"* category and therefore follow the Government's wishes. This is extended (tick-box 2) to "*other European"*, followed by a series of categories intended to capture and represent "minorities" (understood both as resulting from recent immigration and as being "*un-white"*). This question has 10 "*tick-boxes"*, one of which is open to providing explanation. Amongst the nine pre-formed "tick-boxes", two carry more than one term. The first, as we have seen, lists identities intended to replace the term "white", likewise for the second. But the third also sees the "*West Indian*" qualifyer as being related to "Guyanese", this gathering referring to a same geographical region (the Caribbean).

At the left-hand side of the categorial structure, a text serves as a guideline to channel the respondents' interpretations and provides the following instructions: "***Racial or ethnic group****:*

Please tick the appropriate box to show the racial group to which the person belongs. If the person was born in the United Kingdom of West Indian, African, Asian, Arab, Chinese or « Other european » descent, please tick one of the boxes numbered 2 to 10 to show the group from which the person is descended. "

1) ☐ English, Welsh, Scottish or Irish
2) ☐ Other european
3) ☐ West Indian or Guyanese
4) ☐ African
5) ☐ Indian
6) ☐ Pakistani
7) ☐ Bangladeshi
8) ☐ Arab
9) ☐ Chinese
10) ☐ Any other racial or ethnic group,
or if of mixed racial or ethnic descent
(please described below).
[Version B]

The "*field trial*" of this two-fold question occurred in Haringey (London Borough of Haringey). This test was quite different from the previous ones as it was conducted at the same time as a broader test, which consisted in an experimental simulation of the complete census procedure. The joint use of these two tests was decided because it allowed the OPCS agents to publicly test the receivability of the ethnic question in the most probative experimental environment. Indeed, these conditions were as close as possible to the real conditions in which the Census is conducted, specifically with regard to the high level of publicity surrounding it.

For the OPCS investigators, the test results were not satisfactory as they believe they were significantly affected by a militant campaign undertaken by local associations[132]. The OPCS investigators found themselves faced with a poor and worrying acceptability performance with regard to the "ethnic" question[133], without being able to clearly and unequivocally blame the poor results of the two tests on this militant activity. On the basis of these tests and after consultations with a variety of minority associations and organisations, the government decided not only not to include a question

[132] They encouraged persons to abstain from answering any question on ethnicity, place of birth, country of birth of parents or parents' nationality. This strong recommendation to abstain exposed the suggested presence of a hidden agenda intending to use the information collected to change the laws regarding citizenship (to the detriment of ethnic minorities recently immigrated to Great Britain). These militant associations suspected that while the Thatcher government was interested in documenting the various groups, this had little to do with the equality issue, but tended more towards their fear of aggressive policies (potentially leading to the repatriation of the most recent newcomers).

[133] Only 14% of "*West Indians*" and 34% of "*Asians*" contacted correctly answered Version B, and only 19% and 48% provided complete answers to Version A of the questionnaire. Also, a great number of respondents objected to the principle itself of asking a question relating to an ethnic group. Thus, 32% of "*West Indian"* respondents and 32% of « *Asians* » respondents considered that introducing an ethnic question was a bad thing (the proportion of those opposed to question A relating to the country of the parent's birth was even larger and reached 37%). Furthermore, it was not only the ethnic question's test results which left to be desired. The Census test results were also well below its predecessor's performance: only 54% of "*households*" returned the forms, as compared to 70% previously. This also weighed heavily on the withdrawal of the "*ethnic*" question from the statistical agenda.

on the country of birth of the parents, which had been used in 1971, but to adjourn its replacement by a direct question relating to the person's race or ethnicity[134].

3) The return to the issue and designing of new questions

To circumvent the failure in including the « ethnic » question in the 1981 Census, the OPCS statisticians inferred information on the population's ethnic classification through "*country of birth of the head of each household"* (Sillitoe & White, p. 148, 1992). While this last-minute solution prevented public statistics from being significantly lacking, the statisticians were not satisfied, because "*data produced were even less reliable than the data that have been provided from the question on parents' birthplace used in 1971"* (Op. cit.), and this question had not then met the statisticians expectations. While, in 1971, the OPCS "*was able to rely on parent's birthplace data from the census to distinguish the population from ethnic minority groups because at that time the minorities were virtually all first-generation immigrants, or the children of immigrants, even then, parent's birthplaces were not always a reliable indicator of ethnicity*" (Op. cit. p. 142).

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[134] The fact of whether or not to include this question in the Census led to very vocal debates. The debate rapidly created two camps and gave place to a rather curious political clivage (Rattcliffe, 2004). The "anti" camp formed a heterogeneous front and included M. Thatcher, a good number of "black" activists, many members of the radical Left, but also researchers, including statisticians. Thus, the *Radical Statistics* group, as a member of the British Society for *Social Responsibility in Science*, signed a document addressed to the public (particularly, the minorities) aimed at alerting the public to the risks inherent in the formulation of such a question in the Census. The means to achieving awareness are radical, and, in order that the public well understand the nature of the risk, the document uses the most provoking fiction: "*It said that in the atmosphere of fear on immigration, repatriation and racist policing, with little evidence of commitment to prosecute racists, there was little purpose for the question. To help its readers empathise with the situation that blacks in Britain faced with a census question on race, it hypothesised a public debate on euthanasia at 65 and asked whether elderly people would be right to worry if there was a new census question on age (BSSRS, 1981)"* (Simpson, Op. Cit.). On the other hand, the pro-question "camp" gathered around the CRE which demanded tools allowing it to analyse the impact of the RRA, and was joined by a good number of social science researchers. Despite the CRE's insistence, the question will be abandoned because its maintenance, in light of the strong opposition it created, risked putting the Census conduct at risk by undermining the public's confidence and compromising the data "quality". For P. Rattcliffe, the decision to withdraw the inclusion of the "ethnic question" came from M. Thatcher who was fiercely opposed to the principle of the question itself, more than the Haringey test failure. She was also accused of having personally decided not to include the question in the Census (2004) in spite of the unresolved debate and the her ignoring OPCS and CRE. The Haringey affair and the withdrawal of the 1981 Census question left a significant mark on the Statisticians. During the 1982 debate at the Royal Statistical Society (a few excerpts of which we have quoted), almost all of the researchers present referred back to this episode. Stepping back, some blamed the Haringey failure on the government itself by stating that its aggressive policy on immigration and absence of a policy fighting discrimination did not allow for a trustful atmosphere and a cooperative context vis à vis the ethnic minorities. For example: " *The political objections are much more important and much more difficult to overcome and they impinge upon the technical ones. The first political objection that has been raised by ethnic minority leaders themselves (…) is that to include a question in the Census as an official measurement would give undue recognition to the importance of race in society (…). The other political objection, and probably the strongest one, is the threat felt by ethnic minorities about a Census question. (…) The objection appeared at the time of the Haringey test Census, and the promise of anonymity did not seem to satisfy the objectors. I do not think that it was simply an individual fear ; I think it was a group fear. Given the operation of race policies in this country, and the level of race discrimination, that fear was legitimate – but perhaps it was attached to the wrong target.* » (Professor R. Jowell; Social and Community planning Research). "*There was too much confusion at that time with nationality, and with linking the question to other questions on date of entry into the UK"* (Dr M. Johnson; SSRC Research Unit on Ethnic relations, University of Aston) "*The black population has little reason to have confidence in Government agencies because of the attack on their status in this country, and the very slow progress that has been made towards eliminating discrimination and disadvantage"* (Mr D. J. Drew; member of the Radical Statistics group)

To compensate for the lack of data accuracy and reliability, the statisticians also used data resulting from the adoption of an ethnic question contained in the Labour Force Survey (question inspired by Sillitoe's proposal after the 75-77 tests). It was thus possible on this basis to obtain information on groups at a national level as well as to assess the degree of relevance of the 1981 Census data. Despite this, the LFS (survey on a random sample) margin of error seems too significant and the estimations of the regional distribution of groups cannot be reliable as they are based on risky extrapolations.

Racial discrimination and disadvantage.
The answers to these questions will help Government, local authorities, employers and other organisations to identify racial discrimination and disadvantage, to develop more effective policies against them, and to monitor the progress of these policies.

a) Are you white ?	Yes/no
b) Are you black ?	Yes/no
If you are black, are you	☐British
	☐West indian
	☐African
Tick as many boxes as apply	☐Other
c) Are you of Asian origin ?	Yes/no
If yes are you	☐British
	☐Indian
	☐Pakistani
	☐Bangladeshi
	☐West Indian
	☐Chinese
	☐Vietnamese
Tick as many boxes as apply	☐Other
d) Other groups	
Are you	☐Mixed race
	☐Arab
	☐Greek Cypriot
	☐Turkish Cypriot
Tick one box	☐None of these

The machine is back in motion when the *House of Commons Home Affairs Sub-Committee on Race Relations and Immigration,* in a report made public on May 5, 1983, publicly apologises for the government's decision not to introduce the ethnic question in the 1981 Census. This report focused on the need for information on ethnic minorities and also states that the principal beneficiaries of monitoring "*ethnic groups*" are the minorities themselves, in light of the bad memories of the failed Haringey test. It encouraged the OPCS to launch another series of tests in order to formulate a question on race and ethnicity to potentially be introduced in the 1991 Census.

This report describes a path for designing the question, a narrow path as it clearly lists the almost unachievable requirements that the OPCS statisticians must observe. Thus, while it recommends that the question format "*should not compel people to define themselves solely by their own or their ancestor's immigrant origin*", it sets out the complicated framework in which the statisticians must work when constructing an *ad hoc* question: indeed, the statisticians are called upon to propose a question and categories that "*should enable people to identify themselves in a way acceptable to them whilst at the same time meeting the needs of users who need to measure disadvantage and discrimination"*. To facilitate achieving the objectives set out in the second part of this proposal, the report authors do not hesitate in setting aside previous avoidances and turning their backs on the government by stating that it may be absolutely necessary to use the terms "white" and "black" to construct an effective classification. To give substance to its proposals, the committee submitted a proposed question to the OPCS (see box before). This is clearly informed by anti-discrimination requirements and it says as much to the public, as indicated by the legend and title themselves.

The government answered this report favourably (in 1984) and allowed tests to be conducted to ascertain whether a reliable and acceptable question could be constructed in such a manner as to be included in the 1991 Census (with the reservation that the government in place so desire). The OPCS thus undertakes the task by using the first stage of the first test series (which concluded in 1977) and the recommendations included in the committee report. A new design is tested in October 1985.

Its legend is summary and does not refer to anti-discrimination policies. The term "*race*" is present: "*Race or Ethnic Origin*". The text explaining the filling out of the form is two-fold, with ancestry (origin) and affiliation: "*If the person is descended from more than one group, please tick the one to which the person considers he or she belongs, or tick box 12 and describe the person's ancestry in the space provided*". There are 12 "*tick-boxes*" which cover a large variety of "groups" (concurrently "racial", "ethnic" and "national" [see box below]).

1 ☐ White
2 ☐ Black British
(ie born in England, Wales, Scotland or Northern Ireland,
of African or Afro-Caribbean descent)
3 ☐ British Asian
(ie born in England, Wales, Scotland or Northern Ireland,
of Asian descent)
4 ☐ West Indian or Guyanese
5 ☐ Indian
6 ☐ Pakistani
7 ☐ Bangladeshi
8 ☐ African
9 ☐ Chinese
10 ☐ Arab
11 ☐ Turkish or Turkish Cypriot
12 ☐ Any other race or ethnic group or if of mixed descent
Please describe below

In designing this question, the OPCS followed the Committee's recommendation by including a question on religion. This question was specifically aimed at persons from South Asia (two versions were tested, one with the question on religion and one without). Thus, an additional instruction is set out for them: "*If of Indian, Pakistani, Bangladeshi or Sri Lankan origin or descent, please also tick one of these boxes"*. At the bottom of the form, after the 12 boxes and beside the instructions, is the subsidiary question with five tick-boxes.

Religion

Muslim	Hindu	Sikh	Other	None
☐	☐	☐	☐	☐
1	2	3	4	5

The sixth test reveals a few things to the OPCS. Firstly, it seems that reserving the "British Asian" category for persons born in Great Britain only was not accepted. Many persons born overseas in Commonwealth countries consider that they should be able to describe themselves as "*British*". A similar asymmetry problem will cause the subsidiary question on religion to disappear, which question will no longer be included in forms tested after 1985. Indeed, it appeared difficult to the OPCS to defend a question which, by only addressing one segment of the population, seemed to set it apart and make it distinct. Furthermore, the inclusion of such a question would have required an amendment to the Census Act.

While the question on religion is dropped, the OPCS still has to struggle with extending the breakdown of the term “British”. While it appears that it cannot be reserved, its extension and distribution over each category raises a practical problem for the statisticians which could impede their obtaining the information they wish to gather. This issue is raised by Sillitoe and White: “*The problem with giving all members of the ethnic minorities the option of describing themselves as British was that many people born overseas would undoubtedly prefer to classify themselves in this way, rather than in a more explicit way, whereas some who had been born in Britain would almost certainly still choose to describe themselves as Indian or Chinese etc. Thus, the ethnic data produced by a design of this type would be of a very limited value and in practice produce a classification of the whole population based largely in each person’s race or skin color only. This would be a particular disadvantage in relation to Asians, as people of (say) Chinese descent would then be indistinguishable from those of Indian or Pakistani descent, etc., who were likely to have different socioeconomics and demographic characteristics.*” (p. 151).

1 ☐ British
White
2 ☐ Other white
(please describe below)
… … … … … … … … …
3 ☐ British
4 ☐ West Indian
Black
5 ☐ African
6 ☐ Other Black
(please describe below)
… … … … … … … … …
7 ☐ British
8 ☐ Indian
9 ☐ Pakistani - Asian
10 ☐ Bangladeshi
11 ☐ Chinese
12 ☐ Other Asian
(please describe below)
… … … … … … … … …
Any other race or ethnic group 13 ☐ Please describe below … … … … … … … … …
[questionnaire VIIA]

As agreed with the CRE, the OPCS reserves a "*field trial*" to explore this issue. A test is dedicated to finding a suitable formulation that could reach a balance between the benefits and costs generated by offering the respondents the possibility to include themselves in the "*British"* category. "*After consultation with the Commission for Racial Equality it was decided, therefore that the next field trial would concentrate on demonstrating the degree to which the general acceptability of an ethnicity question was enhanced by allowing everyone to classify themselves as British, if they so wished, against the cost of such a design, in terms of the reduced usefulness of the data that it would furnish"* (p. 151). To this end, the OPCS produced two forms which were tested in January 1986, the VIIA and the VIIB. To the left-hand side of the VIIA form (see box below), the question title is "*Race or Ethnic Group*" and the instructions are "*Please tick the appropriate box.* « *If the person is descended from more than one group, please tick the one to which the person considers he or she belongs, or tick box 13 and describe the person's ancestry in the space provided*".

1 ☐ White

2 ☐ Black

Please also tick one of the boxes below, to show ethnic origin

5 ☐ Afro-Caribbean

6 ☐ African

7 ☐ Other Black

(please describe below)

……

……

3 ☐ Asian

Please also tick one of the boxes below, to show ethnic origin

8 ☐ Indian

9 ☐ Pakistani

10 ☐ Bangladeshi

11 ☐ Chinese

12 ☐ Other Asian

(please describe below)

……

……

4 ☐ Any other race or ethnic group

(please describe below)

……

[VIIB questionnaire]

As a counterpoint to VIIA, the VIIB questionnaire does not mention the *"British"* category for any "group". The categories are also set up in four sections and it is always the "*Asian"* section which is subdivided most narrowly. The respondents fill out this form in two steps. Firstly, the respondents choose one of the four general categorial headings (the first three show the distinction between the "racial" descriptors). Secondly, they are asked to specify an origin and/or affiliation. It is worth noting that the "*white*" descriptor does not lead to a second step; the form is completed as soon as the "*box*" is ticked. At the left-hand side of the category table, this time, the instructions are as follows: "*Please tick the appropriate box or boxes. If the person is descended from more than one group, please tick the one to which the person considers he or she belongs, or tick box 4 and describe the person's ancestry in the space provided"*.

The results of this seventh test will cause the OPCS agents to abandon the use of the "*British*" category and this type of descriptor. On the basis of this test, while these categories seem to allow for a response regarding affiliation or an expression of attachment to the British community, both being asked, the statisticians believe that they prevent the obtaining of expected information. The two-step process for filling out the VII questionnaire seemed to confuse the respondents – in the minds of the statisticians, this "confusion" is confirmed by the poor answer rate registered for this test – and too many of them (in terms of the OPCS expectations) used the "*British*" option, without providing the statisticians with any information on their origin. "*Design VIIA furnished much less informative data about the ethnic grouping of people born in Britain of immigrant descent, three-quarters of whom were shown simply as Black British, Asian British or white British"* (p. 151). However, the VIIA design seemed more acceptable for one "group" of respondents, the "*West Indians"*, those whose reticence expressed during the Haringey test precipitated the end of the first series of trials. Despite this, although the OPCS preferred the VIIA design, it abandoned the hyphened categories (Black-British, Asian-British, etc.) because they caused "*confusion*" (Sillitoe & White, p. 152). So as not to be exposed to a demand for a hyphenated descriptor, the statisticians then attempted to construct a categorial structure which, by de-emphasising "*black*" origins, is intended to circumscribe and prevent the emergence of such a demand. It is first to circumscribe this demand – whose extension can cause issues with the majority of respondents, while certain "*black"* populations (from the Caribbean) prefer it – and not to broaden the "*black*" group, that the VIIIC questionnaire tested in October 1986 gathers under one single "*black*" tick-box "*African*" and "*West Indian*" identifiers[135]. The VIIIC narrows the number of "*tick-boxes*" to nine. The question title is still "**race or ethnic group**" and the instructions similar to its predecessors: "*Please tick the appropriate box. If the person is descended from more than one group please tick the one to which the person considers he or she belongs, or tick box 9 and describe the person's ancestry in the space provided"*.

[135] This term appearing again, the term "Afro-Caribbean" having been rejected by 10% of the Caribbean respondents.

1 ☐ White

2 ☐ Black, West Indian or African

3 ☐ Indian

4 ☐ Pakistani

5 ☐ Bangladeshi

6 ☐ East African Asian[136]

7 ☐ Chinese

8 ☐ Arab

9 ☐ Any other race or ethnic group

(please describe below)

……

……

[VIIIC questionnaire]

The results of this new version's test seemed satisfactory to the OCPS agents – "*the ethnicity question (…) tested this time were notably more effective than any of their predecessors"* (Sillitoe & White, p. 154) - despite some respondents' hostility, "*1 in 10 of the West Indians"* (Op. cit.), to the fact of the question itself and the semantics of certain categories. Thus, the trick aimed at circumscribing the "*British*" descriptor (adjacent to the categories specifying "ethnic" groups) did not fulfill its role and this same "group" once again demanded the availability of a "*Black British*" category and demonstrated its objection to "*tick-box*" two as it deemed it referred to an outside qualification.

In 1988, after this "*field trial*" on the basis of the design it tested and in agreement with the CRE, the Government proposed a question in a "*White Paper*".

1 ☐ White

2 ☐ Black

3 ☐ Indian

4 ☐ Pakistani

5 ☐ Bangladeshi

6 ☐ Chinese

7 ☐ Any other ethnic group

(please describe below)

……

……

[Questionnaire White Paper]

This proposal modified the VIIIC in four ways. Firstly, the reference to "race" disappears from the question's legend. It is no longer a question of "***race or ethnic group",*** but only "***ethnic group***"[137]. The specification in the "*black"*» category including indications on geographical origins is not maintained, only the term "*black"* is set out below "*white"* and serves as a perfectly logical counterpoint. This deletion is caused by the test experience, which demonstrated that the "*description of persons of West Indian or African descent as black without further geographical qualifications would tend to make the question more acceptable to the relevant ethnic group"* (Sillitoe & White, p. 154). Furthermore, the two items from the VIIIC disappear, one because it was difficult to understand ("*East African Asian"*), the other ("*Arab"* and previously, "*Vietnamese"*, "*Turkish"*, "*Turkish Cypriot"* and "*Greek Cypriot"* because its introduction was not considered a "*strong case"*.

[136] This strange categorial entry, which appears for the first (and last) time was aimed at describing "*people whose family histories had brought them to Britain from the Indian subcontinent via East Africa*" (Sillitoe & White, p.154).

[137] The instructions are: "*Please tick the appropriate box. If the person is descended from more than one group, please tick the one to which the person considers he or she belongs, or tick box 7 and describe the person's ancestry in the space provided*".

In its report, the government not only proposes its version for the question, it also requests that an "*ethnic question*" be included in the form to be tested during the "*Census test*" of April 1989. The results of this test will be the basis for deciding whether or not to include the "ethnic question" in the 1991 Census. The question to be included in the test was not yet decided. It will not necessarily be the one proposed by the Government, as it is expected that the publication of the "*White Paper*" will lead to discussions and requests. On this occasion, the same stumbling block appears, that of the qualification to be brought to the "*black*" category. Many civic and community associations representing the "*black*" population requested a question that could distinguish the diversity in origins. These were effective as the question included in the Census test incorporated three "*black*" items, each with its own "*tick-box*": "*Black-Caribbean"*, "*Black-African"* and "*Black-Other"*. As the "*census test"* is conclusive[138], this question will be the one included in the 1991 Census forms (see this report's section on the 1991 Census).

B/ Reasons and expectations behind the 1991 question

As we will see more accurately after this study of the changes surrounding the "ethnic question" and categories, a functional chain links anti-discrimination law, "*codes of practices*", "*ethnic monitoring*" and "*racial equality schemes*". It also is now worthwhile noting that the inclusion of an "*ethnic*" question in the Census also participates in this articulated chain and its efficiency. This fact is shared by researchers, statisticians and "policy-makers" to such a degree that those who were against the 1991 question do not really criticise the questioning itself. Some researchers attacked the question precisely because they thought it designed a categorisation modality overly anchored in the pragmatic and logistical requirements of the struggle against *racial* discrimination. We will come back to these criticisms. While we can speak about a link between the introduction of an "ethnic question" and English anti-discrimination policies; it is also worthy to examine their nature and demonstrate how the Census and "racial equality policies" are inter-related[139].

[138] "*the question on ethnic group was rarely given as a reason for not taking part in the census test and only a relatively small proportion of those who did not take part refused on principle for that or any other reason. (…) As in all previous tests of a question on ethnic group, a proportion of informants voiced objections to the question, when prompted, but this had not necessarily prevented them from taking part in the census test or in answering the question*" (Op. cit., pp. 157-158).

[139] As we will later see, other types of policies are based on or require "ethnic" data from the census. Some authors believe that the incoherence of the categorial structure is caused by the disparate requirements of these policies.

1) The background in the recognition of disadvantages caused by racial discrimination

The first link is a justification as it is the proof of a background, massively shared, that of the reality of discrimination and racial and ethnic inequalities that determine the call for and the introduction of this type of questioning (Ni Bhrolchain[140], 1990 ; Bulmer, p. 35, 1996). It was certainly a "reality" documented elsewhere and factualised through many surveys and investigations, but it was waiting for a general and homogenous [141] capture and lacked local data[142]. From there, the foremost objective for the statisticians engaged in formulating the first question and in establishing a categorial structure seems to be as follows: it was nothing more or less than to distinguish people belonging to groups facing discriminations on the ground of their ethnicity (Silitoe & White, 1992, p. 143).

2) Supporting anti-discriminatory public action.

Then, the introduction of an "*ethnic*" heading in the 1991 Census was massively justified as being a tool required by implemented public policies. Some researchers who were involved in designing the question wanted to include a comment on this requirement in the public forms[143], particularly to increase the acceptance of the question and to clarify the political objective (Ni Bhrolchain, op. cit., p. 564).

This same statistician generally describes the need for such tools so as to document the level of discriminations and inequity, to implement public actions against discriminations and assess their functionning, and also because minorities are politically and socially distincts and then they face specific needs (ibid. p. 545).

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[140] M. Ni Bhrolchain is a demographer and statistician and participated in the construction of the ethnicity question in the 1991 census as a member of the *Information Development and Liaison Group Census Sub-Group* and the *Group on Ethnic Question Publicity*.

[141] The statisticians also expected that the introduction of this question would result positively in the standardisation of the questioning and a more effective publication of the information that was otherwise available. In 1982, a Home Office statistician linked the absence of accounting for the different data on discrimination to a lack of standardisation as follows: "*We wondered why so little was known about ethnic minority statistics. Possibly this is because many of the data are not collected and published in a uniform matter."* (Mr C. G. Lewis - Home Office, Statistical Dept).

[142] This lack of local information is the basis on which the statisticians and "policy-makers" requested the introduction of this question into the Census: "*there was no source, however, of local information, and there could not be until a suitable question was added to the census*" (Sillitoe & White, p. 142, 1992). Data was necessary for the local level, as it was a relevant level for actions and distribution: "*apart from the use of the information for planning services generally, local authorities in England and Wales can apply for a government grant for certain types of special provision for members of ethnic minority groups (under section 11 of the Local Government Act 1966) subject to a proven case on the basis of local evidence. Such payments currently exceed 100 million £ per year. Other bodies, such as employers and the race equality councils, will use the information on the number and distribution of ethnic minority groups in the population to monitor progress on combating inequality*" (Op. cit., p. 142).

[143] For the type of legend on the questions recommended in 1983 by the Home Affair Sub-Committee, see above.

The goal is thus to benefit from the power inherent in the census by using its ability to substantiate disadvantages and the extensive counting offered by public statistics. While this dual power is not considered sufficient, it appears at least to be necessary for the following reasons: ethnic datas support the design, the debatting, the implementation and the assessment of anti-discrimination policies (ibid., p. 551). The introduction of the "*ethnic question*" is therefore required to support public action and feed the mechanisms made available (particularly) by the CRE.

The desire for quantification is principally organised around a requirement for efficiency and support for an anti-discrimination policy which is not judged on its principles, but on its results – and which, above all, is already well supported. It is also remarkable that the practicality of the "ethnic" question is always affirmed. Indeed, it is obvious to each of the researchers[144], statisticians or public players that these are indeed practical requirements and not simply a "scientific" curiosity which guides the introduction of such categories, if only because a census is a heavy and costly event which is not implemented to satisfy the scientific community only (Coleman & Salt, 1996, p. 9).

Beyond this similar feature (the efficiency requirement), the public action mechanisms and the "*ethnic*" question included in the census are inter-related in many respects. Firstly, public action in general, and specifically as it is articulated nationally and locally (beyond its diverse specifications), must answer to a number of restrictions and requirements [145] which need statistical and accounting support.

a) Public action accounting restrictions

In his list of most crucial justifications for the introduction of this question, M. Ni Bhrolchain specifically focuses on the statistics' role in transactions between government agencies and administrations and local authorities. Indeed, it is on their basis that arbitrations take place and the distribution of rare resources is decided. Furthermore, besides the use of numbers resulting from the census data in arbitration and resource allocation, data are also necessary for policies (in terms of interventions) for the public diversely spread across the territory and defined by ethnic affiliations, and who have specific needs. Also, the use of numbers to establish and publish the size and number of ethnic communities can counter the resistance (which is conferred by the objectivity of an extensive count) of public players who might fail to take their significance into account. Ludi Simpson, despite the strong criticisms she expresses concerning public statistics, formulates this type of justification. Once the current categories have been exhausted, for reasons we will see, and while she attempts to think of a "*radical*" use (read "*anti-racist"*) of statistics, she ends up with a similar position – although, as a good left-wing activist, she focuses on the *a priori* lack of Authority will.

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[144] As we will see, some complain about this (Ballard, 1997 & 1998 ; Simpson, 2000).

[145] As A. Desrosières reminds us, public actions depend on the restrictions and pragmatic conditions of a higher level than lesser actions, and most often « *impliquent des mesures (au sens de décisions) administratives et politiques, dont la discussion et la justification peuvent prendre appui sur des mesures (au sens de quantifications) des fins à atteindre et des moyens qui y sont consacrés* » (p. 138, 1992).

"*Thus, it seems that race and ethnicity categories are useful to monitor and to expose oppression and its results. However, they are not so essential to plans to eradicate the causes of inequality. Statistics are not needed to implement policies to remove institutional racism, if the power and the will are there. But evidence of racism and its results helps to neutralise resistance to that power"* (2001.).

b) Refining the "targeting" required by the CRE: the requirements of the "equal opportunity policies" action plan

More precisely, the *Census* is technically and functionally related to one of the well-known anti-discrimination policies – the "*equal opportunity policies*". As we saw in the previous section, these "*equal opportunity*" policies are organised around "*targets*" which set benchmarks to be achieved. These "*targets*" provide public objectives. They are literally equal to targets appearing and graded over a positive horizon of equal opportunities, but are also benchmarks for assessing the progress of an action. Such targets/benchmarks are based on the definition of an ideal situation (situation in which equal opportunity would be achieved statistically) as compared to the current situation of the employer in terms of his workforce composition. The defining of an ideal situation, the buttress of the initial situation which provides the basis for action – the "*starting point*" – requires data that must be available to the employer: fine data relating to the composition of the working population and distinguished by race or ethnic groups at the local workforce level (Coombes, 1996, p. 116).

The standardisation of "*racial equality plans*" through "*target*s" thus presumes, beyond information on the ethnic or racial composition and distribution of the organisation or company's staff adopting an action plan, the availability of data on the proportion of ethnic and racial minorities present in the relevant local workforce[146], to serve as a counterpoint (Coombes, 1996, p. 116-117).

Mike Coombes effectively captures the functional relationship between the census data and "*targeting*" and one can explicitly see that it is indeed the recent state of the anti-discrimination policy as established by the CRE which requires the introduction of the "*ethnic question*" in order to align it along categorial standards and to increase precision and comparability; as much for standardising "*racial equality plans*" as for factualising in a probative manner significant statistical disproportions. (ibid., p. 117). He also notes that while the CRE delivers advices concerning ethnic monitoring, experience suggests the main hardship is about the identification of datas about the relevant labour market for each employerThe effort must thus be made in terms of public statistics, the only accredited one which is capable of providing fine, exhaustive and extensive data at the local level. All the more so because the size of the relevant labour market has a huge impact on the target's fixation that must be given to employers aiming at an equality action plan (ibid., p. 118).

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[146] The relevant employment market varies depending on the nature of the position to be filled and the qualifications required. This is repeated by the CRE in the draft of its most recent employment code of practice. Indeed, because "*the aim is not to ensure that every job reflects the overall proportion of all racial groups in Great Britain"*, it appears that "*local labour markets vary considerably and, depending on their recruitment needs, employers may find that national and regional data, which have different representation profiles for different racial groups, provide more useful benchmarks. For example, applications for the post of senior accountant are more likely to come from a wider geographical area than applications for a clerical post*".

It is on the basis of this technico-logistical relationship between the census "ethnic question" and "pro-active" policies in the fight against discrimination in the workplace that M. Ni Bhrolchain disqualifies the position of a portion of those who oppose the introduction of this question in the 1991 Census[147].

c) The census as a resource provider participating in ethnic minority "empowerment"

As we have briefly seen, it then appears that most of the justifications and expectations relating to the use of the "*ethnic question"* relate to requirements inherent in public action and racial and ethnic anti-discrimination policies which now have a voluntary feature and are armed to attack indirect discrimination. The moment when racial equalities have been factualised, so as to expose them and sensitise the public and its players, is in some sense overtaken when the "*ethnic question*" of 1991 is emphasised. The reality of "*racial disadvantages*" is no longer in doubt, and rather than revealing its magnitude, the Census must provide refined resources to be used in the action and ensure its justice and efficiency.

Nevertheless, it is worth noting that the application of the "*ethnic question*" is also understood by zealous defenders to be a resource increasing the power of victims of discrimination - this increase in power, "empowerment", which would function in a less mediate fashion. The Census thus appears to be a proper political mechanism more than technical machinery providing the data necessary to implementing policies. The introduction of such a question is therefore expected to increase statistical visibility. A statistical visibility which, far from being perceived as a stigma, is seen here as the basis, condition or path to achieving visibility and proper political ability (Ni Bhrolchain, 1990). This visibility is not just meant in the sense of gaining representation or illustration in a statistical environment which, by translating in its own terms the national space and entities therein, would allow for the political existence of groups by recognising them and simply by the fact of including them in the count ("being counted" equals "accounted for" and "counted amongst")[148] – according to K. Prewitt's renowned formula which states that "*being measured is to be politically noticed, and to be noticed is to have a claim on the nation's resources... political visibility follow[s] on the heel of statistical visibility"* (1987, p. 270).

This path leading to visibility and a political taking into account (which would flow from the new statistical visibility provided by the Census) occurs more by fact than because the availability of numbered data on race (and/or ethnicity) allows for voices to be heard – minority voices – and to give power to claims which the voices did not have previously. Should their voices not be heard, their interests not be seen and included in the negotiations with the public authorities, their needs not

[147] This is valid for the employment issue as well as for the use and delivery of services, and specifically public services, which are also the subject of monitoring to assess the performance in the meeting of, and the satisfaction of, ethnic minority needs.

[148] The 2001 Census will provide much room to this recognition schema. Furthermore, it will significantly influence the question design and categorial structure. And the public, seeming to have taken the ONS slogan to the letter ("*Count me in!")* will not fail to be heard by requesting the power to include a diversity of identifications in the Census.

considered, certain researchers believe that it is because they do not benefit from (public) statistical support and the decisive argumentative power that "*Great Numbers*" (Desrosières, 1993) can confer.

From this would flow a specific type of inequality and disadvantage affecting the relationship between persons and the "*public good*" constituted by statistics (Prewitt, 2001). Statistics are central resources to effectively support voices during debates (Keifiz, 1987) – even right from the beginning, since their engagement often participates in the construction of "*public problems*"[149] (Desrosières, 1992, 1993) – attracting the State's and the public's attention, used in negotiations with the authorities, substantiating decisions in arbitrations, etc. No one is prepared to be denied access to such resources[150] and this in itself constitutes patent discrimination and disadvantage.

d) Increasing public agents' and public authorities' "accountability"

Lastly, a final element of justification deserves attention. It is with this that the author ends his list and it is important to raise this at this time because a similar argument will support extending monitoring to "*public authorities*". As with the preceding one, it exceeds the prerequisites and requirements of public action or at least the strictly logistical dimension of this action, and supports a proper political requirement. Furthermore, it also allows an alternative apprehension of the profusion of monitoring mechanisms and anticipates the duties imposed by the Race Relations (Amendment) Act 2000. The general use of monitoring by and in public action is understood as a method allowing for an increase in its effectiveness. However, this is not the only virtue that the English see in this mechanism. Indeed, monitoring can support the call for the accountability of public agents. By making the objectivity of the impact of engaged actions publicly available, the public can ask the public agents to be accountable. This therefore makes the public agents accountable for their acts before a public which includes minorities. Because statistics allow situations to be reported, which situations, without statistics, would never be scrutinised and even less objectively, the public can engage the authorities in giving accounts on this basis. Briefly put, "*monitoring*" would then be a method of ensuring public agents' accountability. Furthermore, in its own way, "*monitoring*" participates in the constitution and maintenance of a democratic public arena, a space in which the public can require accounts and verify the keeping of promises made to it because it has the means to investigate the consequences of the authorities' actions (Prewitt, 1987 & 2001).

[149] For R. Ballard, equally, the lack of statistics reduces the chances to introduce a new issue in public debates (Ballard, 1997, p. 182).
[150] Resources that can also be directly engaged in commercial activities .

3) The wording of the 1991 question and its sets of categories

11 **Ethnic group**

Please tick the appropriate box.

If the person is descended from more than one ethnic or racial group, please tick the group to which the person considers he/shebelongs, or tick the « any other ethnic group » box and describe the person's ancestry in the space provided.

White 0
Black-Caribbean 1
Black-African 2
Black other
Please describe

Indian 3
Pakistani 4
Bangladeshi 5
Chinese 6
Any other ethnic group
Please describe

The profusion of justifications supporting the request for "ethnic group" information does not lead to a complicated question. Equally, further to the history of the question design which we saw in brief, the categories proposed were not numerous, despite the theory that they were to document minority and/or ethnic community diversity. It is a simple question, with a small legend and no explanation of the reasons supporting it, along with a limited number of categories which were included in the census forms. With regard to the multiple expectations brought forth by the various public justifications supporting the introduction of this question, the limited reach of the questioning and the low quantity of proposed categories, as well as the underlying conceptual structure, did not fail to reveal a surprising gap which will be the primary cause of criticisms[151].

[151] Thus, R. Ballard, one of those who will be the most critical – see hereafter – aims his dissatisfaction precisely at this gap: "*the ethnic question (...) was a curiously limited exercise. Far from seeking to explore the scale of ethnic diversity in Britain (...) it was almost exclusively concerned with identifying members of Britain's visible minorities"* (1996).

Upon completion of their task, the persons responsible for designing the question did not fail to anticipate these criticisms which they defend on the basis of inherent practical restrictions and the imprimatur of the CRE[152].

a) Answering the "ethnic question": self-identification ...

Practically speaking, it is the person to whom the form is addressed who must answer for him or herself. In this minimal sense, the question calls upon self-identification in that the questionnaire is not filled in by a third party (i.e. an investigator). This does not mean, however, that one can say without caution that it is an identity presumed to be in the first person who must declare himself/herself in the answer[153]. However, in light of the category sets proposed (and if one forgets their history), there is no doubt that they were constructed in order to substantiate the fight against racial discrimination and provide the necessary support. Indeed, the variations are articulated for the most part around colour and physical appearance, an appearance that is somewhat territorialised as it is related to vast geographic areas[154] (although not for "*white*"), in other words, that which can be effective in racial discrimination actions and judgments. The only "groups" present are those whose consistency and outline are only designed through the disadvantages and discrimination certain persons preferentially face because of their origin or appearance.

b) … which is paradoxical

While it is wise from a methodological point of view to distinguish between self-identification and hetero-identification in statistics, one could almost say that neither of these methods are really appropriate to describe the type of response expected by the "ethnic question", as the persons need to identify themselves by taking into account the manner in which they are classified by third parties for the time it takes them to answer the question. They need to occasionally appropriate in the first person the third person categorisations which were informed by the practical prerequisites imposed by the fight against racial discrimination as it was – and still is – conducted. If these categories are truly aimed at generating statistics for anti-discrimination policies, it now seems that to criticise them because they do not provide space for a person's feeling of belonging and only collect with difficulty an identity statement in the first person (in terms acceptable to the respondent) is to not understand the

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[152] "*The question which was included in the 1991 Census is a compromise between obtaining the type and detail of information that users require and devising a question which members of the public understand and will answer. It is likely (…) to attract criticism from those who think that it does not go sufficiently far, as well as from those who will continue to be wary of the purpose of such a question. In response to such criticisms the census offices can point out that the question was developed from empirical criteria and in close consultation with bodies such as the CRE (…) and organizations representing ethnic groups. In short: it works, it provides valuable information and it is acceptable to the public*" (Sillitoe & White, pp. 162-163, 1992).

[153] It is even on this point that the "ethnic question" will be strongly criticised and numerous commentators will believe that the declaration is not in any way related to a "*self-identification"* and even less to ethnic identity. For many commentators, it cannot indeed be an identity as the proposed categories cannot really provide for a feeling of belonging – despite the note "*tick the group the person considers he/she belongs"* - and they do not easily refer to the manner in which these persons identify each other within a same group.

[154] For the reasons previously discussed.

reason they were included and their objective[155]. This demand, which flows from anti-discrimination policy requirements (a demand not explicitly expressed and difficult to formulate) – and which requests an answer that has little to do with an identity declaration – is difficult to comprehend and its access can be costly, even for an enumerated person who is conscious of the motives which led to the introduction of the "*ethnic question*" into the Census. In this regard, in 1999, Brian Klug gave witness in *Connection* (the CRE magazine) in connection to his strong reaction when faced with the 1991 Census question. In many respects, this is an exemplary illustration of the unsolvable restrictions imposed on the "*ethnic question*" design and construction of categories. As well, this testimony is a good indicator of the manner in which emotionally solicited persons, confused by this request for information (regardless of whether they understand the political expectations governing the introduction of this item), cannot help themselves from seeing this question as inappropriate or inappropriable[156].

"*I can clearly remember my reaction when I came across the Ethnic group question for the first time in 1991. I found most of the question on the Census form quite straightforward - factual questions about name, marital status, address, and so on - until I reached question 11. The question offered nine choices of "ethnic group", and the instruction was to "tick the appropriate box". At that moment I felt that the appropriate response was to tick none of the boxes, since it seemed an inappropriate question to ask. Actually, my initial reaction was stronger than that. I found it disturbing to see the categories baldly stated - in black and white- as though they were fixed in the nature of things. And I wondered : "Where do I fit in ?" As a Jew of European extraction, there was something faintly familiar, and vaguely sinister, about this sensation. Furthermore, it wasn't clear what was meant by the "appropriate box". The other instruction in question 11 said "if the person is descended from more than one ethnic or racial group, please tick the group to which the person considers he/she belongs..." I took the word "considers" to mean that the appropriate box was the one in which I placed myself, not the one in which others might put me. So in my case the question boiled down to this : did I consider myself, ethnically or racially, to be "white" ? Obviously not – given the Jewish experience in Europe, the history of ostracism and expulsion, of life in the Pale of Settlement and death beyond the pale, death for not being Aryan, not being white. So I didn't tick the box marked "white"; I ticked the "any other ethnic group" box and wrote, in the space provided, "Jewish". It might be objected that in giving this answer I was missing the point of the question. The purpose of the question (someone might say) was not to open windows into people's souls - to know, for the sake of knowing, how people feel about their own identities - but to generate statistics that enable government, local authorities, and other public bodies, to deliver services and good effectively and equitably.*

[155] Nevertheless, as we will see, such criticisms will be numerous and will weigh upon the Census 2001 category conformation. It no longer is a question of disqualifying them as they are logical and the reasons behind them well-founded - only to a certain degree, however, since these constructed categories aimed at informing the fight against racial discrimination cannot be criticised for being built on a racial basis, since that is just simply unavoidable.

[156] Unless what they wish to include is present and anything that disturbs them morally disappears.

What the question was really asking (the objection continues) was whether a person is a member of one of the ethnic minority groups which, because they look or behave differently from the norm, are liable to be discriminated against. But if that is what the question was really asking, why didn't it actually ask it, or something along those lines ? Moreover, the categories were confused and even invidious. Consider the category "white". You don't have to be Jewish to shrink from ticking this box. Even if you were blond and blue-eyed and descended from Vikings you might reject the notion that you belong to an "ethnic or racial group" called "white" - as if you were tied by a bond of race or ethnicity to other "whites". (...) While there are a number of shortcomings with the ethnic group question, the crucial problem as I see it is this. On the one hand, the question seeks to obtain information that we as a society need if we are to allocate social ressources equitably and combat racial discrimination. On the other hand, the way the way the question was formulated in the last census tends to institutionalise the very evil it is meant to oppose. (...) I do not know the best way to ask what the ethnic group question is trying to ask. But come 2001, if I am faced with having to select from the menu that the white paper proposes, I shall once again refrain from ticking the box marked "white". I shall have to opt for "Chinese or other". "

These insurmountable reactions, but which the question designers attempted to attenuate, combined with the public policy requirements calling for the data, lead to hybrid categories (mixing “race” and ethnicity) and this paradoxical identification structure which the Census needs to inform, however[157].

Despite all of this, the question “worked” well. Indeed, it will lead to a relatively impressive acceptability rate. In addition to the fact that it was asked without explanation in the form, the reasons for this survey gave a good indication of the power of the educational work carried out between 1981 and 1991, but also most likely to the routine nature, via the progressive generalisation of “*ethnic monitoring*”, of this questioning method. Indeed, despite the absence of explanation on how the “ethnic group” term should be understood, the question was considered “*acceptable”*[158] to the population, since 98.6% of the respondents filled in one or more of the “boxes” and only 1.4% took advantage of the “*write-in option”* (“*please describe”*) (Ballard, 1999).
We will now turn to the 2001 Census in order to observe and understand the numerous differences that arose.

[157] A paradoxical identification structure despite the changes to the 2001 question which seems, as Peter Rattcliffe will indicate, difficult to overcome as it requires composing two contradictory restrictions.
[158] “*Acceptability*” has a specific and limited meaning for statisticians and demographers. A question is acceptable when it has not been rejected by respondents and has been answered by a statistically sufficient number of investigated persons. The acceptability rate is measured and, as we have seen, preliminary tests attempt to test the acceptability of various versions of a same question in order to ascertain which provides the best result.

As we will see, these are a part of numerous processes and various dynamics, and the categories that will be selected, despite their large number, will not suffice to stop criticisms and disappointments, mainly because the public will take a significant part in the ONS agenda and will benefit from the critical arguments put forth previously[159].

C/ The 2001 question: its formulation and public intervention.

Significant modifications affected the question and the collection of information on race and ethnicity to such a degree that some commentators believed they saw a decisive change marking the beginning of a new way of understanding the role and appropriation of the "*ethnic question*" by the public. This is the case of Johanna Southworth, who sees these changes as a welcomed tendency throughout Anglo-Saxon census: "*Certain questions on the Census, namely the race question in America and the ethnic question in Britain, are no longer viewed as some outside body asking "what are you?", but instead are taken at a more personal level to be enquiring "who am I?" The census is becoming a means of expressing an identity and having that identity officially recognised. This is exemplified by two campaigns that have gained force over the past decade. The first is the campaign in America to have a multiracial identification, and the second is the campaign by particular faith communities to have a question on religion asked in addition to ethnicity in England and Wales"* (Southworth, 2001). While her description is too decisive and affirmative, it also has elements of truth. Indeed, the public participated quite largely in the construction and selection of categories process, both through organised consultations under the ONS, but also and mainly through collective mobilisation and protests. Similarly, even if one cannot really and fully say that the Census shifts from the "*who are you?*" question to the more welcoming "*who am I?*", there are still indications that reveal this inclination – without, however, this passage being, or being able to be, complete, because if this shift occurs too rapidly, it may cause significant problems in the fight against discrimination.

[159] As an example of the availability of topical criticisms put forth by researchers and activists after the 91 Census, see below an excerpt of a letter written by Philip Muinde (Vice Chair President of the Grampian Race Equality Council, a Scottish organisation particularly virulent in its criticism of the 2001 Census) to Jim Wallace (Scotland's Deputy First Minister and Minister for Justice), which is exemplary: "*Our research on the census and especially the genesis of the ethnicity question has only gone to reinforce the gravity of our concerns that Africans and others have expressed. It is, for example, quite clear that at no point did any African communities in the UK wish to have their ethnicity expressed in any terms other than their primary identities (i.e. ethno-geographic terms) just as was and is the case with Asians and other immigrants from the Commonwealth and elsewhere. It is also clear that the homogenisation of Africans and the Caribbeans and the subsuming of both their ethnicities under colour/Black was something which was imposed on Africans - against their expressed wishes. (see Ballard, pp. 13-14; cf. Silitoe and White, pp. 152, 154, 163). One of our problems with the Census is therefore with those who not only see `ethnicity as nothing more than surrogate for colour', but who have also somehow succeeded in persuading our Parliament(s) that `race, ethnicity and deprivation was synonymous' (Ballard, pp. 32-33). The result is the institutionalisation and politicisation of a bi-polar (`White' v `Black') social paradigm, whose popularity and currency has no doubt been helped by its explicit and uncritical use by some of these guardians of race relations - on the basis that this framework and its racially coded descriptors was somehow essential in the implementation of the RRA! Indeed, as already suggested, these guardians seem to be so wedded to this paradigm that warnings, in their own publication, about the framework's historic incidious and racist connotations, were apparently ignored."*

1) Programmed and requested categories

The introduction of new categories was proposed by the Government in its *White Paper* of May 1999[160]. This proposal is based on a number of "*consultations*" as well as the work of numerous committees and working groups composed of a number of Census users, including the public – through various community representatives, as well as technicians (be they researchers, "*policy-makers"*, statisticians, etc.). The question proposals of the 1991 White Paper are said to "*reflect the needs of central and local government, the health service, academics, the business sector and professional organisations identified during a period of extensive user consultation*" (Moss, p. 28, 1999). Most of them are conducted under the responsibility of the "*Advisory Groups"*, "*the Census Advisory Groups are the main mechanism through which the Census Offices consult users of Census date"* (Op. cit., p. 31) and cover eight areas[161]. The work provided on these various occasions takes place over long periods of time, since the first "*consultations*" were launched in 1995, and will continue without interruption. It is during these consultations that question proposals are put forth. To pass the consultation test – through a variety of tests (see hereafter) – and to end up in the Census, each proposal is usually required to meet the following public criteria: similarly to the preceding Census, approval resulting from a consultation and the parties' agreement do not suffice. The newly proposed questions and items are submitted to tests and research to determine public acceptability[162] once they have been presented in the consultative arena. Two versions of the "*ethnic question*" were tested in 1997, one using the term "*ethnic group*" as a heading over items and the other using the term "*ancestral origin"*[163]. Despite these stages in question and category selection and validation, steps

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[160] The English, Welsh and Scottish censuses are covered by the Census Act 1920. This Act requires the lodging of a "*Census Order*" before the Parliament sets a census date and validates the questions to be asked, etc. Every ten years, therefore, the Parliament debates the census, and for the 2001 Census, the debate also took place in the Scottish Parliament. Before issuing the Census Order, which must be approved by Parliament – who thus has a view and power over the proposed questions and categories – the government published a document, which we call a White Paper herein, setting out the changes to the census with minimal justification.

[161] That is: "*central government departments, local authorities, health authorities, the academic community, the private sector, other business areas in National Statistics, Scotland, Northern Ireland*" (Boag, 2001).

[162] A certain number of requests set out by the ONS under the "*cultural topics*" heading reached the consultation stage. "*An increasing requirement for more sophisticated measures of cultural identity has been reflected in submissions for the inclusion of a number of cultural topics for the 2001 Census*" (Moss, p. 31, 1999). The result was a request for questions on the country of birth, a strong demand for information on "*proficiency in English*" (rejected in the "*tests"*) and also "*nationality*" and the length of residency, as well as a request for an extension of the question on national languages ("*Welsh, Irish and Scottish Gaelic")* to cover all of Great Britain. All three were rejected because of a lack of support on the part of the participants. Finally, a question on "taught languages" is rejected as well because it did not receive the support of local authority representatives (Op. cit.)

[163] "*The qualitative follow-up survey highlighted specific problems with the term "ancestral origin" and the position of the mixed category, which was moved in subsequent testing to ensure that respondents did not overlook the category. The term "ethnic group" was broadly understood by respondents, and encompassing a wide range of attributes including brithplace of parents and race."* (Op. cit., p. 32). At the same time these versions were tested, an introductory heading is added to channel this question's interpretations. "*In subsequent small-scale tests an additional instruction referring to "cultural background, interpreted as relating to the respondent's way of life in terms of cultural attributes such as religion, language, dress, place of birth and ancestry, helped clarify the question for respondents*" (Op. cit., p.32).
The technicians considered this "*helped clarify the question for respondents*", which is somewhat understood as the symptom of confusion by social science researchers who will continue to emphasize the gap between the "*cultural background*" concept and the racial feature of the available categories.

which are doubly open to public's[164] view (but in a strict and proceduralised framework), the public is called upon again to participate because the *White Paper* proposals are not yet definitively established[165].

"*A question on* **ethnic group** *was included in a census for the first time in Great-Britain in 1991. There had been widespread support for such a question, and the information has enabled national and local government and health authorities to allocate resources and plan programmes taking account of the special needs of ethnic minority groups. In particular, response to the question provided baseline figures against which the Government can monitor possible racial disadvantage within minority groups. The question worked well and was one of the main successes of the 1991 Census, and, indeed, the classification of ethnic groups used in the Census is now widely regarded as a* de facto *standard. The Government proposes to include the topic again in the 2001 Census, this time throughout the UK, though different forms of the questions are proposed in England and Wales, in Scotland and in Northern Ireland to reflect differences in local needs for information. The question proposed for England and Wales has been extensively researched and tested since the 1991 Census, both to meet users' requirements for additional information about people of mixed origin and sub-groups within the "White" population, particularly the "Irish", and to be as acceptable as possible to respondents. The new response categories are such as to provide optimum comparability with information from the 1991 Census question while, at the same time, attempting to improve response to the question among those communities who would prefer to describe themselves as "black British" or "Asian British".* " (*White Paper*, p. 15, 1999).

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[164] In fact, it will be the "*users*" of the Census data more than the "public" who will be called upon to participate in the different consultations as well as the "*advisory groups*". Furthermore, as stated by Jennifer Boag, "*much of the discussion at the meetings of the Advisory Groups is technical and detailed. This undoubtedly limits the number of people outside the Census Offices who become closely involved in the Census Consultations. Relatively few people have the skills, time, or indeed inclination, to spend on close scrutiny of the vast numbers of papers which have been produced over the last ten years*" (2001). It is noteworthy that she does not complain about this restriction. The public debatability of the Census categories is seen rather as a problem and related to damage caused by political pressures affecting well thought-out technical decisions – "*following the debates which have taken place (…) this is perhaps an appropriate time to consider whether the Census as it currently exists, and its planning, should be reviewed from the point of view of politicians in the process. Political pressures largely brought about the late changes that were made to the Census content during 2000"* (Op. cit.). The changes to which they refer are those achieved in Scotland and Wales – both will not follow government proposals (resulting from the work and advice of "*advisory groups*") and the "*ethnic*" question will be reviewed.

[165] The Government takes care in noting that while it publishes the program document two years before the Census is effectively carried out, it is because it "*believes that there should be time for public discussion of proposals that affect every person in the country"* (p. 1, 1999). Maybe more than the government desired, the public will take advantage of this occasion to vigorously protest and will invite itself, with no qualms outside of the procedural arena, to participate in the selection and formulation of the categories (as we will see hereafter). While the tone of the criticisms surprised many, it was also because the introduction of the "ethnic question" was routine for the Government, as observed by its minimal efforts in terms of the justification and education regarding the proposals. Furthermore, the Government based itself on the "success" of the preceding census of 1991 – a success because it was well accepted and the available categories became standardisation references – and on the results of the test and consultations first conducted. It was thus in an economical way, that is to say without motivational tools, that the Government re-introduced this question and the changes set out in the *White Paper*.

At this time, other than the question on religion (introduced in another chapter of the White Paper), numerous changes are foreseen: a section is reserved for "*people of mixed origin*" and the specification of sub-groups to break down the "*white*" category. The construction of this section is set as follows:

Ethnic Group question to be asked in England and Wales

What is your ethnic group ?

◆Choose one section from (a) to (e) then tick the appropriate box to indicate your cultural background

(a) White

❋ British

❋ Irish

❋ Any other White background

please write in below

……

Excerpt from the *White Paper*, March 1999.

While the items available will not change in the Census form[166], further to multiple protests, in *Ethnic group statistics : a guide for the collection and classification of ethnicity data*, an ONS document which must ensure the inclusion of the Census categories and procedures as well as their standardisation, the ONS will need to propose a second "*method"*[167] (in which the categories differ from those of the Census) giving place to national identities ("*Welsh"*, "*Scottish"* and "*English"*, in addition to "*Irish"* and "*British"*), thus continuing to break down the "*white*" category. While this post-census review collecting national identities indeed illustrates the role played by the public outside the procedural area (consultations, working groups, tests, etc.) in establishing and constructing new categories (Long, 2002), this should not make one forget that during the most technical and structured procedures, many persons pushed for the introduction of questions to collect information on new "groups" or, in the least, provide new representations of these groups. Thus, Peter Rattcliffe, who participated in the ONS *Working Party on the Ethnic Group Question,* reports that the members of this party had to face "*lobbying*" on the part of numerous groups who requested a separate category (a specific "*tick box*" for this category) and that one of the important questions was to ascertain how many requests should and could be accommodated (Rattcliffe, 2004).

[166] A form is attached as an Appendix.

[167] By marking a "preference" as a result of the protests, for the second, despite the fact that this will not lead to suitable comparisons …

a) A few reasons behind the increase in categories

Besides the pressure caused by various entities, the changes effected are not foreign to the intense commentaries and critical reactions caused by the 1991 Census. Indeed, it appears that the question and categories' revisions practically (yet partially) answer some of the critiques arising between 1991 and 2001. Similarly, they also are due to the shift in anti-discrimination actions and policies (increasingly sensitive to multiculturalist arguments for a valorisation and recognition of "diversity"[168]) and do not seem indifferent to the legislative and judicial renovations to come (RRA 2000 and the transposition of the European Directives) – even though elements leading to this conclusion are not available, one can believe that the introduction of a question on religion is not completely disconnected from the anticipation of the new European anti-discrimination requirements[169]. However, these revisions are also related to the public's appropriation of the schema and the functioning of anti-discrimination policies – policies which are used more efficiently, more readily and which provide resources or an attention through which "groups" are recognised and their existence is institutionally signed and ratified, particularly through statistics. The example of the emergence of comments from the Jewish community in its regard are not insignificant[170]. Similarly, it is pursuant to claims from organisations and groups representing "*visible minorities*" – and criticisms from the academic community that supported them – that Sections C) and D) of the "*Census form*" aimed at specifying "*black*" and "*Asian*" leave room for the recognition of "*Britishness*" by introducing the section in the following fashion: "*Black or Black British"* and "*Asian or Asian British"*[171].

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[168] The *Parekh Report* (2002) emphasises the good resulting from "diversity" (which should not be minimalised by the search for equality) and provides a good indicator of this sensitivity's influence. The Scottish controversy over the "*ethnic question*" categories proposed in the White Paper is an even better indicator of the depth of this perspective – see below.

[169] Thus, in its guide and with regard to monitoring, the CRE indicates to "public authorities": "*on the question of monitoring religion or belief for employment, you will be aware that, in 2003, the government will introduce legislation to give effect to the EU employment directive. This will make discrimination in the workplace unlawful on a range of grounds, including religion or belief. Monitoring religion or belief may emerge as part of this wider agenda. The issues surrounding this have not yet been fully explored or debated, but if you decide to collect information about religion or belief, you should first consult the ONS (…) which drew up the question on religion for the 2001 Census*" (CRE, July 2002).

[170] This emergence illustrates more than anything else this appropriation and increased confidence because it indicates the lesser intensity of defiance with regard to the tools used by these policies. In 1999 Barry Kosmin requested a representation that would adhere to a community's right, which he intends to represent in two ways, first as an "ethnic group" and then through a question on religion. If one believes R. Ballard, during the construction of the 1991 Census question, the representatives of this community, based on the unfortunate history haunting their collective memory, avoided notice and making a claim for this situation to be taken into account: "*many of the invisible minorities had grave reservations about the wisdom of raising their heads above the parapet. Jewish memories of the Holocaust were still vivid, and hence they were very conscious that permitting the state to identify them in public had recently been the first step towards genocide"* (1997).

[171] These demands were heard this time and two small semantic revisions no longer appear problematic since they do not affect the ability to compare them with previous data and do not affect the answers' "quality": "*new response categories provide optimum comparability with information from the 1991 Census, while at the same time meeting the needs of those whose prefer to describe themselves as "Black British" or "Asian British"* » (Moss, p. 32, 1999). This clarification will not appease the critics although it was the subject of significant work in the 1980's. The impropriety of categories deemed racialist will again be critiqued (see hereafter) by members of the "*black*" minorities.

The introduction of a "*mixed*" section – Section B) – "*was justified from the multiculturalist camp as reflecting new cultural identities"* (Simpson, 2001)[172]. Finally, the mention of "*Irish"* and "*British"* that will initiate the breakdown of the immense "*white"* category by opening the way to a request for the presence of other "*national identities*" meets expectations that are not necessarily congruous[173]. It is only incidentally that some based their protest on the fact that the "*Irish"*[174] category also referred to a "*national identity*" and thus claimed the need for a representation of all "*national identities*" within the United Kingdom on the basis of an easily formulated equality requirement – that is, "*Irish*" and "*British*", as well as "*Scottish*", firstly, then "*Welsh*" and "*English*". These claims found support within a portion of the population which increasingly considered the "*ethnic question"* to be an occasion for and an invitation to declare an identity and thus sees the Census as a tool to achieve recognition. These claims caused a wave of intense mobilisation before and during the finalisation of the 2001 Census forms[175], particularly in Scotland and Wales. It is after these mobilisations that the ONS will provide a two-step collection method in its guide in which the question of national identity[176] precedes that of ethnicity.

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[172] A request that was visibly heard, according to L. Simpson, "*as a seriously negative impact on the effectiveness of employment discrimination statistics, by reducing the number in the discriminated population (eg. "Black") without demanding that the employing organisations re-survey their workforce to exclude "Mixed" from the "Black" employees and applicants*" (Op. cit.).

[173] Firstly, it demonstrates a shift in anti-discrimination policy, concerning the "*Irish"* item, towards taking less visible minorities into account – less visibility which does not mean lesser in size and even less in its exposure to discrimination. It is indeed because numerous elements demonstrated the presence of disadvantages and even specific racism (*Parekh Report*, 2000) against persons of Irish descent, mixed with religious considerations hostile towards their Catholicism (real or presumed), that the category was introduced. The introduction of the "Irish" category was supported by the CRE.

[174] An assumption reinforced by the inclusion in the form of this category immediately after the "*British*" category which was introduced precisely to attenuate the racialist character of the "*white"* label and to remove its homogeneity by adding an ethnico-national specification allowing it to gather and recognise the expression of a feeling of belonging. This "*British"* category, so as not to expose the question to criticism regarding the monopolisation of a national identity by "*Whites"* and in order to establish the recognition of the "*British identification of many minority ethnic group members (previously "white" implied British)*" (Walls, 2001) will, as we have seen, be distributed over other "groups" under the categorial titles of "*Black or Black British*" and "*Asian or Asian British*". In March 1999, the *White Paper* did not, however, intend to extend "*Black British*" and "*Asian British*" to Scotland – the "*ethnic question*" was to remain unchanged, except for the new mention of a "*mixed ethnic group*" proposed without any other specification. It is pursuant to numerous criticisms reaching even the *Equal Opportunity Committee* of the Scottish Parliament and relayed by the Parliamentarians, that these changes will be effected.

[175] The dissatisfaction does not seem to have been general. L. Simpson conducted an ethnography of the census agents charged in fact with distributing the form, and while they indicate the presence of numerous problems, for those she followed "*neither religion nor ethnic group raised problems noted by field staff* " (2001).

[176] Six options are available: "*English"*, "S*cottish"*, "*Welsh"*, "*Irish"*, "*British"* and "*Other"*. The ONS recommendations show traces of the debates which relate to the possibility of enhancing a perceived identity in the first person and thus potentially composite, as the guide allows persons to tick "*as many or as few [tick box] as apply"*. Some experts fear that the fact the "*Irish*" category is aligned with the "*national identities*" under the "*ethnic groups*" question makes the specific situation of this population unclear and the disadvantages and discriminations it faces invisible.

b) The introduction of a question on religion

The 1999 White Paper also projected including a question on religion. This addition would be a heavy legal burden as it required an amendment to the Census Act 1920[177].

"*A question on religion is being proposed for inclusion in the 2001 Census in England, Wales and Northern Ireland. The topic is new to the Census in England and Wales, and responses to the question would help provide information which would supplement the output from the ethnicity question by identifying ethnic minority sub-groups, particularly those originating from the Indian sub-continent, in terms of their religion."* (White Paper, p. 17, 1999).

It is with relative economy that the question is included. It is within the "ethnic question" and, it is in order to increase the precision of the information but also the manner in which persons identify themselves – "*in terms of their religion"* – that this question is determined. Similarly to the renewal of the "ethnic" question, the introduction of this new question is not extended to Scotland, at this stage of the process, as there seems to be no need for it:

"*Consultation with users[178] in Scotland indicated that there was a far less strong business case for information to be collected on religion there in the 2001 Census. This is consistent with the requirement for less detailed information on ethnic group than is being collected in England and Wales. Consequently it is not proposed to include question in Scotland*" (Op. ci., p. 18).

It is noteworthy that the question on religion is understood as supplying a supplement to the "*ethnic question*". Noteworthy, because, despite the European Directives, it clearly demonstrates that the specification of the "groups" and categories receive privileged attention as the groups could be victims of discrimination and retain the mark of British case law – for which religion was apprehended and covered indirectly by the RRA. The "*ethnic groups*" thus remain in the forefront, the question on religion being seen as a means to refine and break down the groups[179]. This is particularly evident in the ONS justifications, but it is also patent when one notes that the Christian religion is not subject to a being broken down[180].

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[177] This amendment passed the House of Lords which took advantage of the occasion to make answering this question voluntary, a derogation of the common law which covers the Census – it is indeed an obligation to answer the Census questions. A question on religion already existed in Northern Ireland.

[178] We will see how the weight accorded to potential "users" of the Census information and data, who will thus have the power to select and establish the nature and format of questions to be asked to the detriment of those who may be included in the categorisations, leads to great indignation in Scotland.

[179] This manner of refining the "ethnico-racial" categorisation through religion was tried in the 1980's, as we have seen.

[180] P. Rattcliffe (2004) will say that, visibly, the interest is lesser for the religion of a group deemed a "majority" ("*Christian*" relates to "*White*" and is at the head of the list).

In relation to this question, the ONS indeed states in its "*guide for the collection and classification of ethnicity data"*, that "*the concept of ethnic group and religion overlap to some extent, particularly for groups such as Sikhs and Muslims. Therefore it is strongly recommended that, wherever possible, a question on religion as well as ethnic group should be included as part of data collection. (…) One of the important questions is whether the experience of Muslims for example, are more similar to each other irrespective of ethnic group, or whether ethnic group is the more important factor"* (ONS, p. 14, 2003).

2) The role of a very critical public

To illustrate some of the criticisms against the categories and questions decided by the ONS and validated by the White Paper, it is worth visiting the Scottish then Welsh cases. The criticisms were undeniably effective as the Government had not foreseen adding a question on religion nor revising the "*ethnic question"* (except for the additional introduction of the "*mixed ethnic group"* category), although one was included in Scotland[181]. The Census thus appears as a truly political object concerning "minorities", minorities who claimed the right to participate in the construction of categories through which they will be presented and represented. Some positions communicated by local organisations (of the Race Equality Council type) will rattle the entire categorial mechanism on which the measurement of discrimination, and thus the fight against discrimination, is founded. This "rattling" is interesting as it reveals the substance of the mechanism and brings to light the increasing gap between statistics users and those who are the subject of the use. Beyond "minorities" only, it is also the whole public who will protest by claiming that the Census operates as a central mechanism in recognising "diversity" and the gathering of identities expressed in less formatted and excessive terms. However, it is not only because the Census' categorial mechanism is not hospitable to identities that it was attacked, but also because it leaves certain minorities to the side. It is also for this reason that the Census categorial structure was criticised. This is attested by some of the strong reasons put forth in Scotland to support a double revision of the proposed categories. We will rapidly[182] turn to the how and why the Scottish believed the question of religion and the mention of the "*Irish*" category were

[181] The realisation of these changes before and outside of the technical procedures (consultations and tests) did not fail to irritate some technicians as they illustrated most exemplarily their relative loss in mastering the mechanism and the shift in its understanding. For example, Jennifer Boag, for whom "*the changes made to the 2001 Census were made due to pressure brought by politicians who had been lobbied by interest groups. This resulted in the government making changes to the content of the Census questionnaires at a relatively late stage. This was after all the consultations with users had taken place. (…) The position in Scotland on religion and ethnicity causes most concern over political interference in the Census. Following the publication of the White Paper, a number of groups began campaigning for the inclusion of a question on religion in Scotland and for an ethnicity question more like the one proposed for England and Wales. They lobbied the Equal Opportunities Committee of the Scottish Parliament. The Committee was persuaded by their arguments to propose an amendment to the Census Order when it was debated in February 2000 to include not only a question on current religion, but also a question on religion of upbringing, similar to the questions in Northern Ireland. (…) These concessions were obviously made for political reasons when the Ministers realised that they were likely to be defeated on the Census Order if they did not concede to the representations of the Equal Opportunities Committee. (…) Many of those who had been involved in the Census consultations from the beginning were unhappy that politicians were able to make late changes to the Census. This undoubtedly brings into question the time and effort which went into Census planning both in the Census office and Elsewhere*" (2001).

[182] Patricia Walls (2001) reviewed this question.

needed in spite of the advice flowing from the White Paper[183] and consultations. Although the introduction of *a* question on religion was not foreseen, Scotland will finally adopt *two* questions on religion in order to document and make evident, in particular, discrimination against persons of Irish descent and Catholic beliefs (real or presumed)[184]. The debates surrounding this question opposed two points of view which do not perceive the Census and its requirements in the same fashion. The opposition to the inclusion of a question on religion, as well as to the revision of the "*ethnic question*", mainly came from the executive branch (the General Register Office, as well as the Scottish government) for whom they was no need to proceed with changes since the need for this data had not been established by the users. Likewise, they raised the financial and methodological cost of a revision and feared that this would affect the carrying out of the Census, and argued that the disadvantages faced by the Irish minority were over-estimated. The inclusion of this question, as well as the revised classification of "*ethnic groups*" were supported by the Scottish members of Parliament, members of the Equal Opportunity Council, association leaders representing various communities, the CRE, a contingent of researchers working on the Irish community, the press and a portion of the public.

The arguments put forth by these various entities were not always aligned and we will only look at some of them, specifically those relating to the dual and racialised structure of the current categories and which intend to attenuate or start subverting the structure through these two revisions. Thus, many supported these two revisions to "break" the "*white"* category, to rattle those who "*remain entrenched in the post war racialisation of ethnicity"* and to achieve the recognition, through the exemplary Irish case, that *""whiteness "is no guarantee of social, material (and for the purpose of the specific argument here) health[185] advantage* " (Walls, 2001). The "Irish" question in many ways provided a suitable opportunity for those who intended to contest and rattle the conceptual basis for the Census categories. Firstly, it enabled contesting the predominance of an alignment between colour ("visible minorities") and ethnicity, the first supposedly drawing on the second's specification, by demonstrating how the maintenance of this form of understanding would hide the Irish minority situation and prevent a political intervention since the categories do not reserve any room for it.

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[183] It is worth noting that the CRE publicly criticised the decision not to include religion in the Scottish Census. The CRE opinions regarding discrimination against the "*Irish*" population, well-founded opinions, were not taken into account during the major Scottish census "*data user*" consultations.

[184] Against every expectation, it is where information on religion was not required that the most detailed version of the question is born: "*in Scotland, two religion questions were introduced which focused on current belonging and upbringing, and differed from the England/Wales question by disaggregating Christians of Church of Scotland, Roman Catholic and Other Christians faiths. The Scottish religion questions were an amalgam of the questions of England/Wales and Northern Ireland. Like Northern Ireland they asked about upbringing and disaggregated Christians, and like England and Wales they named non-Christian religious categories which did not happen in Northern Ireland. The Scottish questions were therefore the most detailed of religious questions. This was particularly remarkable given that in the White Paper of March 1999, Scotland did not propose to include a religion question at all"* (Walls, 2001).

[185] It is on the basis of numerous surveys documenting the inequalities faced by the Irish minority in the health care sector that will arise the need for a double revision of the Census form in Scotland.

Others supported the inclusion of the "*Irish"* category because they had a more substantial agenda in mind[186].

The Scottish example thus demonstrates that the desire for a breakdown of the "*white"* category did not simply result from a desire to recognise "*national identity"*, the agenda of most participants in the re-elaboration of the Scottish Census question not heading in this direction. Their agenda emphasised a concern regarding discrimination against populations for which the "*white*" category held no "*shelter*" (see above) but was a denial[187]. The changes to the Scottish Census form improved their ability to shed light on a problem concerning the manner in which anti-discrimination policy framed the ethnicity concept and ignored religion on the scale of British society: "*the nature of the debate in Scotland presents an interesting example of wider British tensions connected to ethnicity and religion: "whiteness" has not been an "ethnicity" but has been a means to submerge ethnicities of British, Scottish, Irish and others, and religion, whilst an important aspect of ethnic identity for many, has needed to be excluded because (…) it may be little more than a short-hand for Irish ethnicity (…) and remote from religious practice per se."* (Op. cit.). The challenge to come, the one intending to politicise those who efficiently mobilised on this occasion, relates to discrimination problems against "*white*" ethnicity and "*national identities*"[188] ; and it is not insignificant that this politicisation emerged first in Scotland, then in Wales, on the occasion of the first "*devolution*" of the Census organisation by the Government of Central London.

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[186] More than simply requesting the recognition of a minority until then invisible, it was also to initiate a more general re-working that they took this position: "*Irish inclusion in the Census, albeit within an increasingly scrutinised "white" ethnicity (…), may be the beginning of a political and research agenda which is beginning to reflect more accurately how different minorities fare in British society, long after they were assumed to have assimilated"* (Op. cit.). It is because this double entry regarding religion also operated in favour of a regarding of ethnicity that it was welcome – "*a question on religious upbringing (as in Northern Ireland) rather than just current religion (as in England/Wales)"* (Op. Cit.) Indeed, according to the same participant in the debates, this two-fold questioning "*gave official credibility to the fact that it is not religious belief per se, but rather* ethnic *belonging, based on a religious marker, which denotes Irish-descended "Catholic" minority group status in Scotland"* (Op. Cit.).

[187] The dual equation - "*ethnic groups*" means "*un-white groups*" and "*ethnic*" equals "*skin colour*" – leads to a framework "*leading to a denial at all levels that the situation of the Irish in Britain could possibly differ from that of the indigenous British population. When research findings (…) clearly contradicted this, there seemed no discourse within which it was permissible to address the needs of Britain's largest ethnic and migrant group. This situation has persisted ever since, resulting in official and academic Irish submersion under the umbrella of "white" homogeneous British identity (…)*." (Op. cit.).

[188] The author makes no mystery of the "battle" to be engaged which will most likely arise during the next Census: "*the challenge to enact policy change based on researching "white" ethnicities and religion has yet to be confronted"* (Op.cit.).

a) "Racist" categories?

In Scotland, the attack on Census categories took a radical turn. Many threw themselves into the battles of post-discussions and attempted to reveal the "racist" character of the current categories. The criticisms were severe, reminders of an unfortunate past in international history which haunt memories, and tried to support tools for an anti-discrimination policy (which broadly uses these categories and has influenced their design) and the horizon it looks to. The objective was to demonstrate that the vice being fought is continuously progressing, even institutionally ratified in the categorial equipment available by and for the fight against discrimination. This critique is far from being new. But it is here endowed with an inference that it did not have previously since it does not intend to favour "*color-blindness*".

On the contrary, it is inclusive of a recognition and representation dynamic for ethnic diversity. The criticism against the Census categories, and thus anti-discrimination policy in general, is not the underlining of differences, but that this is inadequately handled and leads to a tainted recognition, tainted because excessive and in terms that do not meet the ambitions of those that are potentially the subject of these categorisations and who seek fair recognition. As we will see, this argumentation also emphasises the gap between the "*user"* requirements for statistical data and those of the public (the "minorities") who are the subject of statistical collection and thus the available categorisations – a gap that needs to be reduced without, however, making impossible the factualisation of inequalities and disadvantages faced by certain "groups" and which is an invitation to the creation of a means to satisfy both these conditions.

It is on this occasion of the debates initiated by the Scottish Census and in answer to the consultation open to civil society organisations' views, that the *Grampian Race Equality Council* addresses this wave of criticisms to the Scottish executive in an exchange of correspondence with one of its members.

The first letter skillfully opens with a number of criticisms not referred to explicitly but attributed to certain communities concerned mainly with the Census categories, then provides a few recommendations tending towards a regulated operationalisation[189].

[189] "*Questions on Ethnicity in the 2001 Census of Population, Scotland : Some Comments*
What others said
1. That the categories "White", "Asian", "Black" and "Mixed" are precisely those of Apartheid (except for the use of the explicit "Asian" in place of the euphemistic "coloured").
2. That the order suggested of "White", "Mixed", etc. actually echoes the Apartheid hierarchy.
3. That the categories are a curious mixture of colour and geography. How is this justified?
4. That "Asian" is subdivided on the grounds of geographical origin, but inconsistently, since "Chinese" is a separate category. So "Asian" is incorrectly used as a euphemistic synonym for "Indian Subcontinent".
5. That the subdivision of Asian results from findings in previous test censuses in which Pakistanis and Bangladeshis refused to assent to "Indian Subcontinent". If it is recognised in that case that the census categories must be ones to which respondents are required to assent, surely the same should be applied to "black" and "white".
6. That the fact that "White" is not subdivided strongly suggests that the Registrars are not interested in ethnic origin at all - except of the so-called ethnic minorities - or more likely and bluntly, visible immigrant communities. The Poles and Irish (e.g.) are just as much ethnic minorities. The question is quite blatantly discriminatory. (By the way, in the English census "Irish" is opposed to "British" - which do they expect a Unionist to tick?)
7. That by locking Africans in a "colour box" the GRO is unwittingly reinforcing stereotypical attitudes and assumptions about Africa, Africans and people with African roots - like the "Caribbeans" and "African Americans" (note that the latter have moved away from reference to colour!) In the long run this focus on colour rather than nationality/culture would do nothing either to promote equality based on a common humanity or to prevent their discrimination and marginalisation in the new Scotland.
My Own Comments
8. The question that immediately comes to mind is, "For what purpose is the data being collected?" (…) The lack of focus and clarity in the questions on religion and ethnicity leads one to suspect that (…) not enough time has been allowed for consultation across Scotland, especially among ALL those potentially affected by the outcomes of the census, or we have here a census framework which the GRO has taken wholesale from Northern Ireland and seemingly consulted with all other "communities" except Africans who are likely to be impacted by the outcomes of this census for years to come. (…) Was it, as some suspect, assumed that, as always, Africans would be happy to accept whatever decision regarding their identity was/would be made - by others - on their behalf?
9. There is a confusion between the terms "ethnic group" and "cultural background". (…) But the confusion is deeper than this. Are the questions intended to allow individuals to express how they perceive themselves and would like to be known? Or are the questions intended to force people into narrow `racial' categories defined by the government - no doubt with advice from `experts'? (…)
11. The use of the terms "white" and "black" in this case is, at best, questionable and, at worst, offensive (USA and SA?). In a civilised society, what relevance does colour have to one's ethnic or cultural identity and background? Indeed, in view of what we've witnessed not only in Bosnia and Kosovo (in Europe!) but also in Rwanda (in Africa) should we in the NEW SCOTLAND be using the term 'ethnic' as freely as we are? Are we right to refer to resident or naturalised immigrants in Scotland as 'ethnic' minorities (and even worse, `black and ethnic minorities'!) or should we use more inclusive, flexible and non emotive terms such as 'minorities' or `immigrants.'(…) However, if by census or any other means, any individual or group or community in Scotland is categorised or forced to categorise him/herself as `white', `black', or `mixed' we may not only risk infringing their human rights but also undermine the integrity of Scotland's renowned legal, political and social foundations.
12. Accordingly, if it is considered essential to ask people about `origins', we recommend that all references to colour, whether `pure' or `mixed', be removed from this section, and clear options given which would enable people to identify themselves by means of reference to continental or national origins. Thus, for example, Option 1 could allow people to identify themselves from a list of continents or sub-continents or nations in Latin America, North America, Asia, Africa, Europe, etc - and this in a way that would be as broad or as narrow as necessary. Again, this would enable the respondents to affirm their preferred primary identities (e.g. African or Ethiopian etc; Asian or Indian etc), including multiple identities (e.g. African Scottish, Asian-Scottish etc). (…).
Philip Muinde, Vice Chair Grampian Race Equality Council
17 March 2000"

In another exchange, continuing with the charge within a forum that took place several months later (May 2000), the same organisation purported supporting an "*African perspective*" and, in its own name, compared the Census category descriptions to those of apartheid[190]. It upholds a "right" against such categories, the right of persons requested by the Census to identify themselves in their own terms. However, concrete content is nevertheless provided to a suitable form of identification, the counterweight to a poor reflection of society based on the effect of racial descriptors (on the basis of skin colour)[191]. The argumentative strategy consists in shedding light on the gap between the action horizon and the tools available, tools which need to be put in place for at least the next ten years. Finally, in response to the public opinion expressed by Jim Wallace – who, when faced with the various attacks arising from previous consultations, emphasises that the White Paper categories were selected because they met the Census data "*user*" requirements – the organisation includes his perspective and rejects the predominance of user needs and views over those of the persons being captured by the categories[192]. This tension will also be worked upon and considered by the researchers (see below). It also will appear to some of them that it will not be ignored since it causes criticism at every Census, and seems difficult to solve.

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[190] *"The central concern here revolves around the use of the apartheid categories as headings for the tick boxes. This concern has not been assuaged by GRO's decoding of the `white' category since in our view the comparable category of "African" is neither `black' nor `white' but "Asian" which comprises a wide range of ethnic groups. The other concern revolves around putting Africans and Caribbeans under one category solely on the basis of colour despite their different national and cultural contexts. One would have thought that if headings were to be used at all they would have to be appropriate, consistent and acceptable to all concerned".*

[191] "*If Africans are going to be forced into a "colour box" and thus denied the right to identify themselves on the basis of their national/cultural backgrounds - that is, on the basis of who they are rather than what they are - then we run the real risk of unwittingly reinforcing racist attitudes and perpetuating historic stereotypes, stigma and discrimination towards Africans and people of African backgrounds. Accordingly, those like REAF who are concerned with equality have the obligation as a matter of urgency to advise both the GRO and the Scottish Parliament that these categories are inappropriate and should therefore be dropped, or substituted by more appropriate categories. Failure to do this will mean that the present proposed `apartheid' categories will stick (i.e. will be institutionalised) for the next ten years - a prospect that does not bear thinking about*". This type of position had an impact and influence, which leads one to believe that the next Census will likely be more welcoming to these types of considerations. Thus, with respect to the traces left in ethnic monitoring, in *A guide for public authorities (2002)*, in order to illustrate Section "*2. Your ethnic question must be widely acceptable",* the CRE mentions the same type of critical resistance: *"Similarly, some Black African and Black Caribbean groups are beginning to express concern about being labeled "Black"*." (p. 83).

[192] "*Of course there is now a need for an alternative classification but we do not believe that "solving a problem for one group may create a problem for other groups". How could ending the confusion of colour, culture, nationality and geography "create problems"?! If respondents were allowed to choose their own descriptors - and to use more than one if appropriate - there would be no such concern. Likewise, we find the idea that we must convince a range of users that the presentation of Census results in a different way would still meet their needs...' quite disturbing. How could it be that a national Census can be used in such a way as to make the supposed "needs" of the users paramount over our needs/human rights? Should the Census be primarily concerned with how people think and how they see themselves or with what users think, and how they see people?".*

b) The mobilisation of the Welsh, the Muslims and the Sikhs: effects and reactions generated by the list

The revisions that the Scots will bring to the Census pave the way for a chain of events *in fine* consolidating new categories. In their advance, the Scots will include two additional "*tick boxes*" before the "*Irish"* item; one for "*Scottish"*, the other for "*Other British"*[193]. When this list becomes public, the Welsh reaction will lead to the question of "*national identities"*. In seeing this representation of national identity as a specification of "*white*" – specification which is distributed in other chapters of the Scottish Census[194] – the Welsh, inspired by the similarity of their national status, mobilised so as to have included in the Census form a separate "*tick box*" for the word "*Welsh*". Similarly, other "groups" had previously mobilised to include new categories, specifically the Sikhs and Muslims. Before studying these three mobilisations, we need to study the two-fold practical operation of the Census, from which these reactions derive: the listing and devolution of "*tick boxes"* relating to a qualified category.

Such reactions are not foreign indeed to the "inclusion in the list" required by the Census and necessary to its conduct – separation and listing of pre-formed categories which prepare the carrying out of the collection and tabulation. This operation does not fail in arousing various critical reactions. Indeed, this operation leads to the comparison of different groups and identities and allows one to rapidly see which groups are included and under what descriptions, and thereby to raise a concern with regard to equality in treatment (in this case, representation). Likewise, it is because of the practical features of the list that the Census appears as a mechanism which, more than just counting, is a medium for the accounting for, and thus public and political recognition.

Once the list is established, it invites persons who read it to ask themselves why some items are present and not others. It supports a comparative survey which concerns equal treatment and consideration. All the more because persons can reasonably believe that having a separate "*tick box*" means, *in fine*, that they benefit from particular attention and specific recognition since the Census categories influence the creation of the monitoring mechanisms and orient the development (and resources) of public policies (Long, 2001). It is thus inevitable that the Census form lead to reactions and that the list be subjected to intense inspection. Furthermore, because a list is necessarily "organised", particularly as its subsequent computation must be regulated, it is almost obvious that this organisation be the subject of surveys (particularly in the event of a question on "*ethnic groups*" and required by "*race relation policies*") and that it instigates reactions concerned with a hierarchisation of "groups". The order in which the items are presented was the first component contested in Scotland in that it led to an "*apartheid*" classification and gave preference to the "*white*" category which figured at

[193] And after "*Irish*" comes "*any other white background*", inspired by the new standard.

[194] That is, "*Asian, Asian Scottish, or Asian British", as well as "Black, Black Scottish, or Black British".* Furthermore, the heading "mixed" does not include a pre-formed specification. It only states "*Mixed, Any mixed background, please write in"*. The English and Welsh Census breaks this "*mixed*" section down as follows: "*White and Black Caribbean, White and Black African, White and Asian, Any other Mixed Background"*. However, "Chinese" (which is at the end of the list beside "*other ethnic group*") has no specification.

the top of the list[195]. Since it represents a gain in recognition and the assurance of public attention, this list carries many stakes and it is often the list that causes controversies, such as the one arising in Wales[196]. However, while the Welsh mobilisation indicates a shift in the understanding of the Census (as described by J. Southworth, "*the perception of the Census has been changing slowly, and now for many who complete the form the ethnic and religious questions are more closely linked to identify, asking "Who am I?*"), it is, however, disconnected from the issues surrounding measuring discrimination and the categorial construction of the "groups" concerned with this operation and the subject of specific legal attention. The mobilisation and campaigns undertaken by associations representing and supporting the interests of Sikh and Muslim communities are closer to these issues. Numerous authors indicate that the arrival of the religious issue was caused by the mobilisation of these groups – for example, "*the emergence of the religious question was largely due to pressure from Muslim organisations, which argued that defining themselves by ethnic group was meaningless and out-of-date"* (Southworth, 2001).

Nevertheless, the situation was not the same for Sikhs and Muslims and the support they could bring to substantiate this demand was not the same. Indeed, the Sikhs had a strong argument which the Muslim community lacked, the right provided by law: which law, for a long time, had already granted security to these persons claiming an affiliation to this community by accounting for them as a "*racial group*". Thus constituted and recognized by law, which throughout its case law covers new "groups"[197], they benefit from the assurance of a protection under RRA 1976 and RRA 2000. The question they asked, based on the inter-relations between law, anti-discrimination policy and statistics, in a certain sense was the following: "Does this recognition under the law give the right to a "*tick box"*?"

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[195] The ONS is restricted in the order it gives to the items and categories, but this order is not political. It is related to the manner (which has been tested) in which respondents read the list and focus their attention:

[196] The Welsh mobilisation was fed by the press and numerous militant campaigns. Although it did not lead to a review of the Census forms – the timeframe was too short since the mobilisation was delayed (once the Scots managed to achieve the introduction of a "Scottish" "tick box", the Welsh complained they didn't have the same opportunity) and the financial costs too high – the mobilisation had an impact. Responding to the threat of a boycott by many people, the ONS had to promise to separately gather and count persons who wrote "*Welsh"* in the census form (418,000 persons ticked "*Welsh"* in response to the form's identification requirements, that is not less than 14% of the Welsh population). Furthermore, it seems that this mobilisation, as well as the Scottish review, caused the ONS to experiment a set of categories aimed at making room for "*national identity"* in its "*guide for the collection and classification of ethnicity data*" recommendations. Likewise, in its guide on the standardisation of monitoring procedures, the CRE will set out an "*alternative expanded question for England and Wales*" beside the reproduction of the 2001 Census question for England and Wales, which uses the national categories ("*British*", divided into *"English*", "*Scottish*", "*Welsh*" and "*Other*" set out in the same way – in graphical terms – as "*British*" and "*Irish*").

[197] "The Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000, (the Act) makes it unlawful to discriminate – directly or indirectly – against someone on racial grounds. Under the Act, "*racial grounds" means reasons of race, colour, nationality (including citizenship), or ethnic or national origins. Racial groups are defined accordingly. For example, Black Caribbeans, Gypsies, Indians, White Irish, Pakistanis, Bangladeshis, Irish Travelers, Jews and Sikhs are among the groups that have been recognised as racial groups under the Act*" (CRE, p. 87, 2002).

This judicial recognition was thus a motor for the Sikhs requesting a "*tick box*". However, they did not intend to be publicly represented as a "*racial group"* in the Census form, but as a religious community, as it is through religious commands they are distinguished. This relationship with the law, which is both a support to, and the cause of, a gap, is not without interest. A support, first because through case law since the *Mandla* case, the law has counted them as a recognised "group" protected by the RRA. At the same time, however, a gap, since it is as a "*racial group"* that they are constituted by law, and it is on the basis of their faith that the Sikhs intend to be included in the Census, that is as a group defined by its religion. This double requirement for a specification based on religion and a distinct treatment for this group by policy and law does not seem exorbitant to some legal minds. Two jurists[198] argue in favour of a distinct consideration of the religion issue – their argument relates to the law, but can also relate to statistics. Indeed, they are against a slight amendment to the RRA 1976, a seemingly attractive amendment because it is inexpensive and could consist in a systematic adding of an "*additional ground*" by inserting the word "*religious"* after the word "*racial*" each time it appears in the Act's text.

The reason for their opposition is interesting, as it turns around the modalities on which a religion and a faith are carried out: *"religious groups are not usually understood by members of those groups simply as extensions of racial groups. Legislation has an important symbolic function, and the equation of race and religion might send out the wrong signal in a multi-faith society*" (Hepple & Tufyal, p. 20, 2001). Furthermore, they express another reservation: "*a simple amendment of the kind proposed risks restrictive interpretation by the courts which might regard "religion" as belonging to the same genus or category as "race" and "religious group" to the same genus as "racial group". This would exclude from protection members of some religions or religious groups which have no obvious connection with a racial or ethnic group"* (Ibid.). A reservation which brings to mind the "*Muslim*" situation.

The "*Muslim*" case has a few similarities with the "*Sikh*" case, although in its regard, the case law is somewhat less solid since the RRA covers them more indirectly than the Sikhs. The demands for a "tick box" on the part of Muslim community representatives, although they meant this as a recognition based on a multicultural representation of a political community, sought to redress the gaps in their judicial security (quite fragile) and address the absence of political considerations, defects which an existence recognised and stabilised by the Census could update and revise. Thus, for these groups, it was not a question of evolving from the law to statistics, like the Muslims, but from statistics to the law and public policy, by anticipating the protection by law in the face of religious discrimination which is a secret to no one (by using a well-entrenched multiculturalist topic).

[198] In a report lodged with the Home Office and dealing with the implications of the transposition of the prohibition against religious discrimination.

This author's position is exemplary in this regard: "*Britain prides itself on being a "multicultural society". Yet the state recognizes and accommodates only certain identities. Some do not register at all on the barometer of inclusion. So, one is either Black Caribbean, Black African, Black Other, Indian, Pakistani, Bangladeshi, Chinese, Other Asian or White - the categories that currently appear on the census form. But if you describe yourself as a Muslim, you dot not really exist as a legal entity, even though it's possible to find Muslims in each and every one of those Categories. (...) The denial of religious identity to Muslims has led to state-sanctioned discrimination against them. For example, Mulsim community project, such as the Muslim Women's Help-line, are not recognized as legitimate "ethnic" organizations and therefore cannot get council or government funding. The "Muslim News" does not qualify as an "ethnic paper" and is thus denied adverstising from local authorities, government agencies and the CRE which sustains newspaper such as the "Asian Times", "Caribbean Times" and the "Voice"* » (Sardar, p.24, 2000).

Various players attempted to use the challenge appearing in the different areas in which the categories were constructed and recognised in order to represent "groups" and "identities". This is not surprising, since this is what statistics and public policy continuously do when they clear a path (not a linear one) for a way in which the law, through jurisprudence, informs and names protected "groups" to the way they themselves publicly present and categorise these "groups" – in other words, various players attempt to invite themselves in order to influence the translation. This path is not without problems as it is in no way linear. Firstly, because the frontal categorisation is "racially" based and raises an increasing amount of problems. It is not insignificant, despite the fact that it provides more secure information on "race"[199], that the 1991

Census question was finally called the "ethnic question"[200]. Also non linear because public statistics are subject to restrictions of another nature and do not try to multiply "groups" and categories to count them and attempt to make available a classification system with a minimal appearance of systematicity[201]. However, these various shifts and translations do not fail to give a persistent impression that the Census' categorial structure lacks coherence as it is composed of heterogeneous restrictions and expectations. The scientific community's critiques are aimed at this incoherence. The social science researchers also agree on the presence of this incoherence. However, when they question the causes of this incoherence, disagreements arise. While they are ready to refute the ONS' rather defensive arguments and highlight the crippling contradictions weighing on the categorial structure created by this entity, not all critics focus on the same points (see the Appendix).

[199] Because it was conceived for this purpose, the CRE agenda prevailed and it intended being able to meet the RRA 1976 requirements and to report on the policies flowing therefrom.
[200] Likewise, for acceptability and public intelligibility reasons (although a multiculturalist concern is also included) with regard to the questioning, the 2001 Census form introduces and structures it as relating to "*cultural background*": "**What is your ethnic group?** *Choose ONE section from A to E, then tick the appropriate box to indicate your cultural background*".
[201] Which it visibly does not achieve, as witnessed by a number of critics disappointed with its lack of logic.

V - APPENDIX : "ETHNIC QUESTION" CRITIQUES FROM 1991 AND 2001

A/ The 1991 Census "Ethnic Question" critiques

While the need for constructing this question has only been weakly contested, as we have seen, its formulation, the nature of the categories allowing for answers, and even the reasons supporting and informing the format, have not escaped criticism. These critiques are important and should be documented as they have partially caused the changes affecting the 2001 question. Like those justifying the "*ethnic question*" and defending the proposed categories, particular power is given to the census and public statistics by sociologists and statisticians who were particularly critical during the debate. It is this same power that they intend to put to the service of policy-making as well as within the hands of ethnic minorities. For English researchers, the construction of an "*ethnic question*" also participates in creating a resource allowing an "*empowerment*" policy for "*ethnic and racial minorities*". However, it is in considering this power itself, which confers a very special responsibility on those constructing the categories, that certain researchers were critical. This is the case of Roger Ballard, for example, an anthropologist for whom the census has an huge impact (1997, p. 182). For this author, one of the consequences of the introduction of this question is the formidable "alignment" power it produces on the methods of representing society, understanding the identity of the persons comprised in this society and the "debatability" of the issues it faces (Desrosières, 1992). This "power of alignment" is no cause for concern when it is believed that the category format (the manner in which it captures, identifies and understand its referent) and the conceptual and political background on which it is based are fair and appropriate[202]. However, like R. Ballard, when the conceptual vision inherent in the "ethnic question" is viewed as problematic, this power of "alignment" should be feared (p. 184, 1997).

[202] This is the case of M. Ni Brolchain. Thus, the researcher expects benefits from this alignment with the categorial standard constituted by the Census, as he is persuaded of the conformity of the chosen categories. It is with impatience that he expects the "ethnic question" to rapidly become a standard for public categorisation methods used elsewhere – this introduction should also motivate and legitimise the collection and routine practice as reticence would have disappeared.

1) A partial and biased capture of "differences"?

This researcher is not satisfied with the type of "differences" these categories attempt to "capture" since they only have relevance with regard to a policy, *one policy and one policy only*, a policy which informs an asymmetric and biased capture of "differences" and infers the racialisation of identities. It is thus not the fact of the question itself that feeds his reticence; the introduction of this question also has virtues[203]. However, he believes that the question was fashioned only, expressly and excessively in light of the restrictions and requirements imposed by public policies concerning the fight against *racial* discrimination. The political back drop, very attached to this concern, confers a racialising colour and tone on these categories that is very criticable. R. Ballard criticises the public administration and statisticians, in light of another potential policy – a policy sensitive to the multiculturalism issue –, because they have conduct the design of the categories with the "*racial disadvantage*" issue in mind (1998). Such a questioning, subjecting "*ethnicities"* to *" race"*, would not give room to the ample diversity of "ethnic" affiliations which do not all flow from an experience of "*deprivation"*[204] and *"racial disadvantage"*, nor to their symmetrical and shared character. Likewise, a question designed in that fashion would make the "*un-white*" "affiliation communities" too homogenous and identified inappropriately because it includes, certainly in order to fight it, a more "racial" than "ethnic" characteristic, in other words a third person characterisation which leaves little room to the expression of a feeling of belonging in the first person felt by all British subjects.

However, while Ballard is concerned with the shift towards the racialising character inherent in ethnicity which fail to recognize that every group – *"white"* or *"un-white"* – is intrinsically ethnic (Ballard, 1997, p. 194), he in no way questions the reality of ethnicity – this being, for him, a real fact that cannot be ignored and which should be recognised because the world is made this way. Rather, he is indignant at the asymmetric and racialising capture which leads to an unfortunate duality. Thus, the 1991 *Census* leads to an unfortunate vision of the "*common sense"* by determining a difference between a "*white"* population, "a-ethnic" by definition, and other segments of the population who see themselves as ethnic – ethnicity then being understood as a burden, a charge[205]. It is not entrenching

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[203] "*The decision to make a formal note of the ethnic affiliation of every citizen was a quite unprecedented development, since it not only entailed a formal acknowledgement that Britain is - and is likely to remain - a plural society, but also that ethnic diversity is an issue which can and should routinely be taken into account in the formulation of public policy*" (1999).

[204] In a 2004 article, he will put into question the fact of the magnitude of this "*racial disadvantage"* itself and will estimate that the data, properly compiled and made available by the *Census* results, do not lead to considering that discrimination is as widespread as his colleagues would have believe. The criticism of what he, and others, call the "*deprivationist*" perspective is not new but a point of past critical divergence that he has aimed at the CRE since its creation and will not cease to affirm. In a 1977 article (written with Geoffrey Driver and published in *New Society*), the criticism of the CRE was already armed, as well as the counterweight to the "*ethnic approach*": "*the minorities are not simply black and brown-skinned individuals living in a white society; they possess, in each case, a distinctive community and cultural life as an integral part of their being. These different lifestyles have now become as much a focus of so-called racial tension and conflict as their colour"*. For him, this "deprivationist" view is an obstacle to considering the agency abilities of minority persons – "*an analysis which limits itself solely to an exploration of deprivation will inexorably suggest that the victims of exclusionism lack the capacity to take charge of their own destiny"* (1992) – and prevents the accounting for and recognition of "*the positive vitality of ethnic-minority institutions"* (Ibid.).

[205] See hereafter.

and making ethnicity visible that is problematic but the asymmetry which leads to an implicit presumption of the "racialising characteristic" of ethnicity. In other words, a means of recognising and publicly fashioning ethnicity in a categorial format providing the motor for the creation of an *"illusion*" of a WASP "*Englishness*" which is united and hegemonic (since no place is reserved to affiliations such as "Scottish", "Welsh", etc.) (Ballard, 1997).

2) The criticism of the asymmetric duality and the desire for a complete table relating each individual to ethnic affiliation and identity

R. Ballard does not condemn in any way public and categorial accounting of "ethnicity" nor is he insulted by a survey on origins. What he condemns is an inadequate taking into account, because of the "*white"/"un-white"* duality which benefits the first term and which is neither integral – in that it lacks the capturing and representation of the plurality of ethnic affiliations and cultural communities currently existent in Great Britain – nor integrating - since it leads to a dual representation of society where only some members are described in "ethnic" terms, the others remaining solely and entirely "English". As he sees it, and he is far from being alone, the categories made available by the "*ethnic question"* are racial categories, far from relating to one of the numerous meanings of the term "*ethnic"* - as he will later indicate, this issue would better be described in many regards as a "*Race question*", and this is true for the 2001 Census (Ballard, 2004).

Such a criticism is not a condemnation without appeal of the categorial capturing of ethnic or "race" origins. Since the end of the 1970's, the criticism has evolved and the categorisation itself does not cause reticence. With regard to the statistical categorisation question, this argumentation rather effectively sheds light on the tension between an anti-discrimination policy and a policy recognising ethnic affiliations and cultural communities; two political parallels which, since the mid-1980's, have concerned Britain and weigh on the coherence of the categorial apparatus of public statistics. Indeed, each of these policies require a specific categorial apparatus and it appears to be a fact, since this is what was sought and presumed by those conceiving it, that the construction of the "e*thnic question"* in the 1991 Census was mainly organised according to the logistical prerequisites of the equal opportunity and *racial* discrimination struggles – even if the elements of the second policy were also included in the construction phase, but only partially (and in a biased manner) - and this is what the anthropologist, R. Ballard, regrets. While he is against the "*ethnic question*" format because it is *in fine* a representation of society that leads to asymmetric racialisation, we should note, however, that the question construction did flow from the absence of "*theoretical cogitation*", to use his words (p. 184, 1997). This way of asking the question was destined to provide a type of categorial characterisation congruous with public policies implemented in Great Britain. To actively aim at equality opportunity presupposes the logical and logistical categorisation of the barriers to its achievement, because no one discriminates against a race or visible "ethnicity" by using prohibited reasons in their judgment and

in their actions. Thus, M. Bulmer[206] makes no mystery of the fact that the 1991 question aimed at identifying visible minorities. The issue related more to "*race"* than to "ethnicity" - "*the Census question is concerned with "race" rather than "ethnicity""* (Bulmer, p. 35).

Numerous voices, along with R. Ballard's, provided the same type of criticism. In anticipation of the 2001 Census, they requested the possibility of including affiliations and origins crushed by the "*white*" category (but also by the "*black"* or "*Asian"* categories). This is Barry Kosmin's position, an intellectual and representative of the Jewish community, who published recommendations to this effect in a Judaic study review in anticipation of the future *Census*[207]. These opinions certainly flow in part from a reaction to the representation drawn by the 1991 Census results computation – that is a reaction to the dual "colourisation" and "racialisation" of British society. These opinions appear thus to be based also on a multiculturalist policy encouraging the accounting of cultural (or ethnic) affiliations fashioned into "identities" and whose diversity is considered an advantage. Having thus gone over and equipped the racial discrimination question, most players seem to engage in a second type of policy, one aimed at equal recognition and equal public representation of affiliations or cultural communities. One can thus understand the reaction to the absence of a categorial inclusion, being interpreted as a denial of recognition of community and ethnic affiliations or political identities. The 1991 Census is guilty of this rejection[208].

3) A breakdown to equalise or enrichment to "reflect" diversity and welcome identities?

The two critical requirements referring to the 1991 Census' categorial structure must be differentiated. In a certain manner, these will be heard when the 2001 Census questions and categories are re-formatted. While the result to which they are aimed is formally the same – in this case, the increase in "groups" included in the Census – the critical motor behind them is quite distinct. On the one hand, there is a breakdown requirement, specifically of the "*white*" category, which is heard. On the other hand, there is the requirement for a multiplicity of categorial items in order to establish diversity and open the Census up to the expression of identity or ethnic affiliation. It is worth distinguishing this request for a breakdown from that which seeks to establish diversity, although following these two

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[206] One of the authors of the four volumes focusing on the analysis of the data from the '"*Ethnic question"* (*Ethnicity in the 1991 Census*, Volume I-IV, 1996, Office for National Statistics, HMSO, London).

[207] Believing that the census is a tool that may support a multiculral society and deliberative democracy (1999), he pleads for the inclusion of a question on religion and, with reference to the ethnic question, for the breakdown of the "*white*" category into a variety of origins and ethnic affiliations – specifically requesting the inclusion of "*English"*, "*Scottish"*, "*Welsh*", "*Irish*" and "*Jewish*" ("Ethnic and religious questions in the 2001 UK Census of Population; policy recommendations", *JPR*, 1999).

[208] It seems rather difficult to formulate a question (as well as its related items) that could take a number of conflicting expectations into account: to meet the manner in which people self-identify – according to R. Ballard, "minorities" are far from being able to recognise themselves in the 1991 Census items – to give substance to public policies; to deal with the lack of recognition and inclusion of ethnic and community affiliations; to factualise discrimination; to avoid the duality inherent in asymmetric racialisation, etc. As two OPCS statisticians point out, even within the first two expectations a significant tension occurs (Dale & Holdsworth, 1996, p. 177). This tension will be found in the 2001 Census, and it will gain in intensity as it intended to take these two issues into account.

movements pre-supposes an increase in "*tick boxes*" available on the census form. These two expectations, however, can be included in the same critique. For example, this is the case with R. Ballard, whose criticisms supported the call for both, as they are caused by two reactions. The first reaction relates to the unequal attribution of ethnicity, which leads to the harmful idea that ethnicity only relates to persons of foreign origin and is only distributed to them (Ballard, 1997, p. 194). Harmful, because it is equivalent to implicitly confiscating "*Britishness*" to the benefit of "*white*" and making ethnicity a burden unequally shared. A burden precisely because this unequal sharing separates those who are thus identified and makes the "*white*" category a "*shelter*": "*from this perspective the Label White can best be understood as a carefully constructed umbrella under which everyone who does not consider themselves to belong to any of the other labeled categories can, and indeed should, take shelter."* (1999). The demand for a breakdown of the "*white*" category and its distinction from "*British*" translates an equality requirement within a political community affiliation. To achieve this equality and decrease the disadvantage facing those ethnically identified (identification which, as such, pushes aside the achievement and recognition of their full affiliation in society), this criticism invites the "*whites*" to be also the subject of such an identification[209] – notably in such a fashion that they could no longer believe that they, and not the others, were the only true English. In this case, the breakdown is requested in the name of achieving equal affiliation which has been prevented by the gap between "*whites"* and "*un-ethnic"* and others who have been ethnicised. This intends to accomplish two things : firstly, to lighten the "ethnic" burden (by distributing it over anyone, including persons gathered under the "*white"* heading) and to prevent the implicit or explicit monopolisation of "*Englishness"* (or "*Britishness"*) by those who, exempted from the "*ethnic"* identification, are conveniently gathered under the label "*white"*[210].

However, this demand for the breakdown of the "*white"* category can also be caused by the concern relating to discrimination against minorities on grounds other than colour of skin. These minorities remain invisible as long as only one identification possibility, "*white*", appears without a further specificity: "*many smaller minority groups, such as the Arabs, the Yemenis, and the Greek and Turkish Cypriots, let alone members of Britain's many invisible minority communities, such as the Jews, the Irish Catholics and the Poles have been disappeared from statistical sight. As a results they are rarely, if ever, referred to in discussion of ethnic plurality*" (Ballard, 1999). This argument perhaps more than any other will bear weight in the re-working of categories for the 2001 Census, and thus the

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[209] "*The Ethnic question (…) was almost exclusively concerned with identifying members of Britain's visible minorities. (…) Ethnicity was therefore assumed to be synonymous with physical visibility.*
This assumption had many consequences. Not only did it further obscure the distinctive character of the less visible minorities, but it also entrenched an even more serious deficiency: the possibility that Britain's indigenous majority might also be in some way ethnic" (Ballard, 1996).

[210] "*Whilst the question provided a range of non-European groups with an opportunity to identify themselves in ethno-national terms, it encouraged virtually everyone else (and especially members of the indigenous majority) to identify themselves racially as White; and even when respondents sought to offer a less racist form of self-definition (although remarkably few did so), they were invariably reclassified as white during the coding process* " (1999). While the "white" category can be used as a "protection" (an "umbrella", R. Ballard would say), it is because "*the unstated assumption remains that Britishness and whiteness go together, like roast beef and Yorkshire pudding*" (p.25, 2000), according to the *Parekh Report.*

most significant minority in terms of numbers[211], the "*Irish"* community, which was absent in the 1991 Census, will appear.

Nevertheless, as we said, the requirement to reformat the categories is based on the theory that it is worth bringing them closer to the respondents' view in order to allow the Census to take into account the diversity of English society through a substantial enrichment of the items. This demand, aligned with a presumed multiculturalist view and seeking to give rights and place to the requested identities, also induces a multiplication of items and requires a radical restructuring of a representation of the society which is racialised and dual as per the Census categories and results.

B/ The criticisms regarding the 2001 Census question a consensus on the insurmountable contradictions.

While the researchers agree on the incoherence inherent in the categorial structure, they disagree on the reasons for this "incoherence". Nevertheless, the researchers agree to contest that which the ONS advances, that is to say that "ethnic groups" as they are included in the Census and ethnic monitoring, give place and rights to self-definition and the expression of a feeling of belonging via a first person declaration. In its code of practice, *Ethnic groups statistics* (2003), the ONS, despite its critics, maintains that the question it asks is indeed based on self-definition.[212] For the researchers, however, although it is true that it is the respondent who is called upon to answer and not a third party, this does not allow for the consideration that it is nevertheless a "*self-definition*", nor that it is fair to say that the formed categories, in spite of their revisions, allow for taking into account a feeling of belonging and the public expression of an identity. This protest follows various paths. The most basic points out that the fact that categories are pre-formed opposes this assertion, because the ability of persons to express themselves is immediately restricted by well established propositions[213].

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[211] "*There are around 3 million Irish people in Britain today – by far the largest migrant community. All too often they are neglected in considerations of race and cultural diversity in modern Britain. It is essential however, that all such considerations should take their perceptions and situations into account* "(Ibid., p. 31, 2000).

[212] "*Is a person's ethnic group self-defined? Yes. Membership of an ethnic group is something that is subjectively meaningful to the person concerned, and this is the principal basis for ethnic categorisation in the United Kingdom. So, in ethnic group questions, we are unable to base ethnic identification upon objective, quantifiable information as we would, say, for age or gender. And this means that we should rather ask people which group they see themselves as belonging to*".

[213] If self-definition exists, it is in its weakest form: a choice between a number of available items. "*The lack of notes [There are no explanatory notes. It is assumed that each person in Britain will agree sufficiently what is intended by "cultural background"] emphasises the government's view that the "ethnic group which each person chooses as his or her own is intrinsically the ethnic group of self-identity, rather than being ascribed by anyone else" (…). But since the categories are predefined it is not self-identity at all except in the trivial sense of self-completion of the form. The question elicits the individual's response to an official set of categories, the official cognitive system which compels respondents to allocate themselves to a particular group whether they like it or not*" (Simpson, 2001).

Within the same perspective, R. Ballard (2004) re-affirms his criticism, which is virulent despite the ONS revisions to the Census categories between 1991 and 2001. While it appears that room has been allocated to an expression of ethnicity, it is secondary lexicographically and politically. R. Ballard indeed considers that the 2001 question is "*a two stage question*", but one in which the first continues to prevail: as a first step, the person is asked to select their "*biological heritage"* (colour and physiognomy – "*White"*, "*Mixed"*, "*Black"*, "*Asian"*, etc.), and then, once that is completed, to relate to a series of ethno-national, previously encoded identifications. This second characteristic relates to the maintenance of a concept based on a racialised view of ethnicity that cannot be publicly revealed and which, by changing margins, becomes entrenched and gives place to some incoherence and notable contradictions. For the author, the random and imbalanced composition of the two "*heritage*" meanings (one that is prevailing is biological and focusing on colour, and a cultural and sociological version related to the consistent and distinct features of an ethnic culture) increases the contradictions and does not prevent the 2001 "*ethnic question*" from remaining undoubtedly more "*racial*" than "*ethnic*": according to the author, in 2001 as in 1991, the Census continued to include a racist definition failing to assume that others aspects of their heritage may have a signification and a value (p. 19, 2004). While he worries about the fact that this clumsy composition between two acceptances of the "heritage" concept could cause certain problems in comparing and stabilising that of which it is question, his point is essentially purely political as this imbalance in the favour of colour would lead to three unfortunate consequences. Focusing on the issue of a reaction to colour as a significant factor which should be taken into account in designing the categories leads to two problems. Firstly, this ends up ignoring that the content of the "*heritage"* that the minorities have brought has a greater impact on their adaptation strategies than "colour". Further, this undermines the fact that exclusion based on linguistic, cultural and most of all religious grounds has a longer history in Britain than strictly racial discrimination. Finally, by relying more strongly on the issue of public recognition (in which statistics could participate) as a basis for the forming and securing of a non-deformed self-evaluation, Ballard goes so far as to consider that the undermining of a cultural acceptance of the "*heritage"* notion in constructing Census categories is equivalent to an insult and lack of consideration: this being equivalent to not considering that members of "*visible minorities"* are, for the most part, very conscious of the distinct characteristics of their cultural "*heritage"* which they intend to support and maintain, and it is thus insulting to ignore their normative commitment to do so.

While R. Ballard relates on the incoherence in the Census' categorial structure to the predominance of a racial concept (a concept which is necessarily and logically asymmetric) of ethnicity, other authors believe that this incoherence, which they also criticise, is caused more by the profusion of anticipated policies by which and for which the Census categories were designed. This is the case, for example, of L. Simpson (2001) who indicates four areas of political problematics which require so-called ethnic categories without any understanding of their constitution and the nature of the differences they are supposed to capture and represent.

L. Simpson's contribution is first the fact that she reminds us that the ethnic and/or racial categories and statistics are of interest not only to the legislation and policies involved in the fight against racial discrimination – which can be deluding because it is for this purpose that their construction was needed and their inclusion in the statistical apparatus publicly discussed – since they also concern, and we will use her terms, policies regarding the "*diversity and the protection of cultural space*"[214], as well as "*immigration policy"* and finally and more recently, policies relating to "*community cohesion*"[215]. The requirements and expectations (implicit or explicit) of each of these bear differing weight upon the category conformity, their use in a coherent classification and in statistics. The first difference relates to temporality. Although the categorisation and collection of data on "race" will continue over time, when the issue is that of substantiating a policy aiming at eliminating racial discrimination, the categories to be constructed to support such a policy are intrinsically transitory and occasional. "*For any policy that demands change, the observed behavior is intended not to be observed in the future. Successful anti-discriminatory policies may need race and ethnic group to be established themselves, but demand change so that they need not be collected in the future*" (Op. cit.).

Likewise, with regard to the extension of categories, such a policy does not aim to be a general and symmetrical shelter. It is only concerned with gathering information on minority "groups" the most exposed to discrimination and disadvantages because of a racial and racialising attribution exercised by the white "majority". Under this dual relationship between temporality and extension, the situation varies singularly when it refers to the second type of policy, because in the case of "*government policies for "multicultural Britain" needed to categorise people into separate cultural identities in order to understand and accommodates differences. (…) Under this government policy, statistics are permanently needed. Government resources are specified to ensure that each culture can express itself and be appreciated within regulatory limits, including extended support for faith schools*" (Op. cit.). Categorisation, not content with being permanently required, is also, in this case, subjected to a requirement of symmetry and extension since it is worthwhile counting entire ethnico-cultural "groups" (substantial groups as they contain intentionally supported properties honoured by its members) in order to distribute resources and ensure they have equal space and representation. As in the first case, it is no longer only important to gather information on "groups" subject to racial discrimination, this information being obtained through asymmetrical categorisation, since, with regard to its objectives, it could be satisfied with leaving the "white majority" in the shadows. As stated by the author, "*Multicultural policy expects that we all have a cultural background"*, which makes a distinction

[214] This author distinguishes the anti-discrimination issue from the multicultural issue, which is neither well-founded nor really justified. Indeed, the distinction is caused by the bias of an anti-racist activist who considers that the only issue of relevance or importance is the social and economic disadvantages caused by racial discrimination. Her criticism is therefore opposed to that which R. Ballard has put forth for many years, but one can say that both can be misleading, since British legislation and policies relate these two objects ("*racial disadvantage*" and "*cultural and religious accommodation*") to the issue of the struggle against discrimination which has been fought on both fronts for some time now (Stavo-Debauge, 2004). Despite it all, there is truly a difference between the two objects in relation to the conformity of categories required by the struggle and the entrenchment of the differences which are in question in each case (idem).

[215] The Government has recently required local authorities to monitor "*community cohesion*". This concerns the integration of different persons in a given place and the prevention of auto-segregation. For more critiques of this policy, see the *Runnymede Trust* documents.

with the two other policies, "*a different priority from the focus on discriminated social groups, or the immigration focus on culturally non-European immigrants"* (Op. cit.).

The author also attempts to demonstrate that, depending on the background behind the public policies challenged by the players in understanding the question, there will be different reactions in terms of statistics and the manner in which they relate to the categories available[216]. Thus, it appears to him that to whomever aligns his view of statistics along considerations of multicultural policies, what is important is increasing the size of the groups in question in order to increase the ability of some to be heard and upheld: "*Organisations that grab resources on the basis of measured community size would be only too pleased to welcome you into their category"* (Op. cit.). On the contrary for those who are concerned with immigration policy,[217] as he seems to harness certain fears "*in this context it is reasonable to fear the use of personal records that include race or ethnic group directly for discriminatory purposes by a future government"* (Op. cit.).

It is because these various policies are not easily composed and required categories of one kind while causing various reactions that it seems to the author that the question related to "*ethnic groups"* in the 2001 Census could not appear coherent and systematic[218].

While R. Ballard and L. Simpson emphasise the categorisation operation as the source of incoherencies, these result from the framework in which policy problematics informing the design of categories weigh upon their organisation in the classification. Other authors point elsewhere to the root of these logical and conceptual defects. For some, it is also the restrictions linked to the acceptability and intelligibility of the categorisation by the surveyed populations which prevent the possibility of a harmonious, logically satisfactory design. For example, this is P. Rattcliffe's position. However, it is worth noting that he does not neglect the fact that there are many practical horizons (he sees two practical objectives) which guide the operation of the categorisation conducted by the "ethnic question". Such a question's design largely and as a priority meets the need for defining minority interests, these minorities being victims of large-scale discrimination in many areas (it means to address the disadvantages and inequalities made flagrant by a factualisation legitimised by statistics), but is also answers, more weakly, the "policy-makers'" request as they want to ensure that the services they manage locally meet the needs and ambitions of their users (users whose "ethnic" plurality is without doubt).

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[216] This is only conjecture on his part.

[217] It is worth noting that the author relates the asymmetry in the intra-categorial specifications to the continued weight, intentional or invisible, of immigration policies: "*the focus on detailed differences among categories other than White continues the idea of a foreign population, from immigration politics. It is reinforced when the academic [Peter Aspinall] who convened discussions leading up to the 2001 Census classification writes about "people from ethnic groups"(…). Which people are not from an ethnic group?"* (Op. cit.).

[218] And this in spite of significant efforts on the part of statisticians and social science researchers: "*with three decades of research into question wording, with sociological and governmental studies into ethnicity and race over forty years, one would hope for some clarity of categorisation. But given the mixture of contradictory policies informing government's need for the statistics, there is evident confusion in the ethnic group question for the 2001 census question"* (Op. cit.).

The composition of these two demands raises problems. Mutually contradictory, they touch upon the incoherence of the category construction. Whether applying to one or the other objective, two essentially different questions need to be asked of the persons aimed at by the Census. And although the first objective is predominant, with no protests from statisticians, the question asked is strategically undermined because its categorial translating seems shocking and, as such, quite impracticable. When the object consists in focusing on excluding and discriminatory forces (dominant argument), it is the data related to "*ascribed identity*" which are required: it is then important to document and identify the manner in which people are unduly perceived and characterised by indelicate third parties (in this case, "*white*"), a perception and characterisation which lead to discrimination when put into effect in judgments and decisions. However, for statisticians, it goes without saying (and there is a very strong consensus on this, as it has not been questioned) that persons could not be asked to answer Census agents by specifying such a hetero-identity: this would imply that they relate to themselves through a stigmatising hetero-attribution that they suffer in their dealings with isolated third parties and that they identify themselves in these terms, terms which are essentially and intrinsically negative. The essence of the statisticians' tasks thus consists in finding a practical solution to this acceptability issue. An issue which increases the tension undermining the satisfactory composition of the two practical objectives that the Census "*ethnic question"* must meet and satisfy. The priority given to racial discrimination and disadvantage issues is euphemised firstly by the public legend in the Census question under the generic heading of the "*ethnic question*" because it seeks the information of the type of difference that is difficult to ask (the "*ascribed identity*") – a legend which seems to require, and in fact requires, persons to identify the "ethnic" group to which they belong – and not their "racial" group. If one follows this, it appears that the question's goal is presented to the respondents as a revelation of "*self-identity*" which is suitable in terms of the agenda for those whose objective it is to document the specific needs of some groups in order to adequately meet them. Thus, although this second objective is considered largely as less of a priority, as it can be easily met in practice, in terms of the question, it raises less reticence because it requests the introduction of "*self-identity*" and leaves its print on the formulation of the question posed and touches upon available categories without, however, eliminating their racialising tone. It is because the statisticians involved in the question design must look in two different directions, which is not obvious to the respondents, that the 1991 and 2001 Census questions seem to be logically inconsistent. They therefore need to find a question format which would allow them not just to ask persons a type of identity ("*ascribed*") which is not easily stated in the first person (hence the use of "*ethnic*" instead of "*racial*" and the ONS insistence on these categories being "*self-defined*") but which also, over time, can allow for a reliable imputation with regard to the second type of questioning.

P. Rattcliffe's argument also indicates that the criticised incoherence is strongly related to the impossible prerequisites imposed on the statisticians. It also sheds light on a two-level challenge, that of effective expectations, left in the background but informing the design, and that of public expectations with regard to those aimed at by the question and to whom the question must be made acceptable and practicable, although the requirement is contestable as it leads to categories through

which discrimination is exercised. Thus, while the category conformity was, from the start, a priority, conceptually and practically ordained to the capture of ascribed identities, in other words "*racially based"* (so as to be useful in the fight against discrimination), the manner in which they are now presented to the public demonstrates, both in the question formulation and the rather forced manner the categories are described, a shift towards "*self-identity"* becoming "*ethnic"*[219], and announced as relating to the determination of a "*cultural background"*[220] – nevertheless important. Because of these shifts which are justified by delving into "multiculturalist" topics (all the more because these are within the British anti-discrimination framework itself), but which are also brought to life by a concern with making the question acceptable, it is feared that the "*ethnic question's*" ability to provide "*ascribed identities*" required to fight discrimination could significantly decrease. Thus the conflict relating to data collection on ethnicity could slightly weigh unfavourably in the fight against discrimination, even though it is central to the justification apparatus related to the "*ethnic question"*[221].

[219] For P. Rattcliffe, it is obvious that the 1991 question did not relate to ethnicity in the sense that a social science researcher could recognise, or at least legitimise, such. It was an explicitly "racialised" measurement, undeniably more relevant to the CRE agenda than that of the public agents interested in the implication of a "multicultural" society. Despite all of the revisions, the 2001 question remains under the command of the same objectives and embraces the same restrictions. The modifications do not allow for the dissipation of the impression that the question is dominated by a racialisation more than by an understanding of the ethnic diversity fact. The focus is in effect maintained on "*NCWP groups*", both for comparison reasons, but mostly because it is commonly accepted that these groups are the ones facing the greatest disadvantage, although that is not explicitly expressed.

[220] The CRE, in *Ethnic Monitoring, a guide for public authorities*, uses the expression "*ethnic background*" and states its preference for "*self-classification*". "*There are two sources of information about someone's ethnic background. The first is the individual himself or herself. This is known as "self-classification". The second is information supplied by another person, based on their judgment of the individual's ethnic background. This is known as "'other classification'. (…) You should always use self-classification, wherever possible*" (p.14).

[221] A few facts underlie this unconscious undermining. For example, although the ONS guide on ethnic data collection refers to monitoring duties imposed upon public agents by the Race Relations (Amendment) Act 2000 and refers to it as "a*s one of the key Acts to have in mind",* it nevertheless appears that the guide is conceived more to satisfy a measurement of ethnicity itself than for the use of ethnic data in monitoring aimed at establishing discrimination or disadvantages. Thus, the multi-faceted construction of "ethnicities" to which this guide leads, while it seems informative and reliable for someone interested in the sociology of ethnic groups and communities, could appear overly complex for a practical task of factualising discriminations.

BIBLIOGRAPHY

ACAS, *Religion or Belief in the work place. A guide for employers and employees*, November, 2003

ACAS, *Sexual orientation and the workplace. A guide for employers and employees*, November 2003

BALLARD, Roger, « negotiating race and ethnicity : exploring the implications of the 1991 Census », *Patterns of Prejudice*, Volume 30 N°3, 1996

BALLARD, Roger, « The construction of a conceptual vision : « ethnic groups » and the 1991 UK Census » in *Ethnic and racial studies*, Volume 20 Number 1 January 1997

BALLARD, Roger, « Asking Ethnic Questions : some hows, whys and wherefores » in *Patterns of Prejudices*, 1998

BALLARD, Roger, « Making sense of pluralisme : Race, ethnicity and Public policy » à paraître, 2004

BANTON, Michael, *Discrimination*, Buckingham, Open University Press, 1994

BANTON, Michael, « Ethnic monitoring in Britain », in *Diskriminering i arbetslivet : normativa och deskriptiv*, Stockholm, 1999

BANTON, Michael, « Ethnic monitoring in International Law : The work of CERD », in *Ethnic monitoring and data protection. The european context*, Krizsan, A. (éd.), Budapest, Central European University Press, 2001

BELORGEY, Jean-Michel, Rapport à Madame la ministre de l'emploi et de la solidarité, 1999

BESSY, Christian & DE LARQUIER, Guillemette, « L'organisation du recrutement : entre monopole public et marché », in *Des marchés du travail équitables ? Une approche comparative France Royaume-Uni*, BESSY, Christian, EYMARD-DUVERNAY, François, DE LARQUIER, Guillemette & MARCHAL, Emmanuelle (éd.), Bruxelles, P.I.E. Peter Lang, 2001

BLEICH, Erik, « Continuity has a path to change : institutionnal innovation in the 1976 British Race Relations Act », paper presented to the British Study Group the Center for European Studies, Harvard University, March 15, 2002

BLEICH, Erik, *Race politics in Britain and France. Ideas and policy-making since the 1960s*, Cambridge, Cambridge university press, 2003

BULMER, Martin, « The Ethnic Question in the 1991 Census Population » in COLEMAN, david & SALT, John (éd.) *General demographic characteristics of the ethnic minority population*, Vol. 1, Londres, OPCS, 1996

CLARKE, John & SPEEDEN, Stuart, *Then and now : a change for the better ?*, London, CRE, 2001

COLEMAN, David & SALT, John, « The ethnic group question in the 1991 Census : a new landmark in British social statistics » in *Ethnicity in the 1991 Census* volume one, COLEMAN, David & SALT, John (éd.), Londres, OPCS, 1996

COOMBES, Mike, « Monitoring equal employment opportunity » in *Ethnicity in the 1991 Census*, Londres, OPCS, 1996

CRE, *Annual Report*, London, CRE, 1985

CRE, *Annual Report*, London, CRE, 1986

CRE, *Race relations code of practice in rented housing*, London, CRE, 1991

CRE, *Why keep ethnic records ?*, London, CRE, 2001

CRE, *Job advertisements and the Race Relations Act. A guide to section 5 for advertisers and publishers*, London, CRE, 1994

CRE, *Annual* Report, London, CRE, 1994

CRE, *Measuring it up*, *London*, CRE, 2000

CRE, *Equal opportunities policies*, London, CRE, 2001

CRE, *Code of practice on the duty to promote race equality. Statutory*, London, CRE, May 2002

CRE, *The duty to promote equality. A guide for public authorities (non-statutory)*, London, CRE, May 2002

CRE, *Ethnic monitoring. A guide for public authorities (non-statutory)*, London, CRE, July 2002

CRE, *Towards Equality and diversity. Implementing the employment and race directives. Response from the CRE*, London, CRE, 2002

CRE, *Which way equality ? The government's proposals for implementing the EU directives*, London, CRE, December 2002

CRE, *The Race Relations Act 1976 (amendment) Regulations 2003. A briefing by the CRE*, CRE, June 2003

CRE, *Towards Racial Equality. An evaluation of the public duty to promote race equality and good race relations in Englands and Wales (2002)*, CRE, July 2003

CRE, *Statutory Code of Practice on Racial Equality in Employment, Consultation Draft*, CRE, May 2004

DALE, Angela & HOLDSWORTH, Clare, « Issues in the analysis of ethnicity in the 1991 British Census : evidence from microdata » in *Ethnic and racial studies*, volume 20, N°1, 1997

DE SCHUTTER, Olivier, *Discriminations et marché du travail. Liberté et égalité dans les rapports d'emploi*, Bruxelles, P.I.E. – Peter lang, 2001

DESROSIÈRES, Alain, « Discuter l'indiscutable » *in Pouvoir et légitimité, figures de l'espace public*, *Raisons pratiques* N°3, COTTEREAU, Alain & LADRIERE, Paul (éd.), Paris, EHESS, 1992

DESROSIÈRES, Alain, *La politique des grands nombres. Histoire de la raison statistique*. Paris : Éditions La Découverte, 1993.

DEPARTEMENT FOR EDUCATION AND SKILLS, *A good practice guide for further and higher education institutions*, 2002

DIALOG, *Equality = no exclusions. A guide to the new regulations related to religion, belief and sexuality*, Advice note 03/01,August 2003

DRC, *Guidance on matters to be taken into account in determining questions relating to the definition of disability*

DRC, *Definition of Disability*, DRC, 1996

DRC, *50 Key cases from the DRC*, DRC, 2002

DRC, *Employing disabled people : A good practice guide for managers and employers*, DRC, 2004

DRC, *Code of practice on Employment and Occupation*, DRC, April 2004

DRC, *2004 and Disabled people*, DRC, 2004

DRC, *Why do it. Why should businesses make improvements for disabled customers?* 2004

DTI, *Fairness for all : a new commission for equality and human rights*, WHITE PAPER, TSO (The Stationnary Office), May 2004

ETHNIC MINORITIES AND THE LABOUR MARKET, Final Report, Strategy Unit, Cabinet Office, March 2003

EMPLOYERS' ORGANISATION FOR LOCAL GOVERNMENT, *Advisory Bulletin, Employment relations, N°476 New discrimination legislation : sexuality/religion or belief,* November 2003

FAULKNER, David, « Civil renewal, diversity and social capital in a multi-ethnic Britain », Perrspectives papers, The Runnymede Trust, 2004

FAVELL, Adrian, *Philosophies of integration. Immigration and the idea of citizenship in France and Britain*, MacMillan Press, 1998

GREATER LONDON AUTHORITY, Data Management and Analysis Group, *Disabled people and the labour market, An analysis of Labour Force Survey data for London 2001/2002*, 2003

HILLYARD, Paddy, « New Labour and ethnic monitoring in policing » in *Rad Stat* N°70, 1999

HEPPLE, Bob & TUFYAL, Choudhury, *Tackling religious discrimination : practical implications for policy-makers and legislation*, Home Office Research study 221, London, Home Office Research, Development and Statistics Directorate, February 2001

HOME OFFICE, *Race equality in public services*, London, Home Office, November 2002

INFORMATION COMMISSIONER, *Code of Practices. The employement practices Data protection code(III part)*, 2002

INFORMATION COMMISSIONER, *The employement practices Data protection code*, *Supplementary guidance*, 2002

INFORMATION COMMISSIONER, *Data protection Act 1998. Legal Guidance*, 2001

JEAMMAUD, Antoine, « La règle de droit comme modèle » in *Recueil Dalloz Sirey*, *Chronique XXXIV*, Paris, Dalloz, 1990

KOSMIN, Barry, « Ethnic and religious questions in the 2001 UK Census of population policy recommendations » in *JPR* N°2, 1999

LEARNING AND SKILLS COUNCIL, *Culture and religion in the work place*, 2001

LIEBERMAN, Robert C., « Constructing Race Policy in theUnited States and Great Britain: History and Politics in the Development ofEmployment Discrimination Policy », working paper, Russell Sage Foundation, 1 August 1999

LONG, Karen, « Standing up to be counted : interest group strategies and Ethnic classification in the United Kingdom and United States Censuses », Paper prepared for the annual meetings of the International Studies Association, New Orleans, March 2002

MARCHAL, Emmanuelle & RENARD-BODINIER, Clotilde, « L'équipement des relations sur les marchés du travail : comparaison des méthodes de recrutement » in *Des marchés du travail équitables ? Une approche comparative France Royaume-Uni*, BESSY, Christian, EYMARD-

DUVERNAY, François, DE LARQUIER, Guillemette & MARCHAL, Emmanuelle (éd.), Bruxelles, P.I.E. Peter Lang, 2001

MASSIE, Bert, « What can the CEHR offer to disabled people and other groups who experience discrimination ? », DRC, April 2004

MODEL, Suzanne & LIN, Lang, « The cost of not being christian : Hindus, Sikhs and Muslims in Britain and Canada », Paper presented at the conference on *Host Societies and The Reception of Immigrants*, Havard University, May 12, 2001

MONITORING THE EU ACESSION PROCESS : MINORITY PROTECTION, *The situation of Muslims in the UK*, Rapport, Open society institute 2002

MOORE, Robert, *Positive action in action. Equal opportunities and declining opportunities on Merseyside*, Aldershot, Ashgate Publishing Limited, 1997

MOSS, Celia, « Selection of topics and questions for the 2001 Census », in *Population Trends* N°97, 1999

NATIONAL STATISTICS, Cen*sus 2001 Review and Evaluation, Data Needs : Evaluation Report*, February 2002

NI BHROLCHAIN, Maire, « The ethnicity question for the 1991 Census : background and issues » in *Ethnic and racial studies*, volume 13, N°4, 1990

ONS, *Ethnic group statistics. A guide for the collection and classification of ethnicity data*, 2003

ONS, OWG(04)02, *The 2011 Census : user's comments on the proposed design*, ONS, 2004

PEACH, Ceri, « Les groupes ethniques au recensement britannique de 1991 in *REMI*, 15 –1, 1999

PREWITT, Kenneth, « Public Statistics and Democratic Politics » In: Alonso W, Starr P. (eds.) *The Politics of Numbers*, New York: Russell Sage Foundation, 1987

PREWITT, Kenneth, « How should a statistical agency meets his political responsabilities ? » in *Rad Stat*, N°78, 2001

RATTCLIFFE, Peter, « « Ethnic group » and the population Census in Great Britain : Mission impossible ? » à paraître, 2004

ROYAL STATISTICAL SOCIETY, « Sources of statistics on Ethnic minorities », Journal of The Royal Statistical Society. Series A (General), Vol. 146, N°2, 1983

SILLITOE, K. & WHITE, P.H., « Ethnic group and the British Census : the search for a Question », Journal of the Royal Statistical Society. Series A (Statistics in Society), Vol. 155, N°1, 1992

SIMPSON, Ludi, « Census fiedwork : the bedrock for a decade of social analysis » in *Rad Stat* n° 78, 2001

SIMPSON, Ludi, « « Race » statistics : their's and our's » in *Rad Stat* N°79-80, 2002

SIMPSON, Ludi, *Statistics of racial Segregation : measures, evidence and policy*, Occasional Paper N°24, Centre for Census and Survey Research, University of Manchester, 2003

SMITH, Allan & TWOMEY, Bertrand, *Labour market experiences of people with disabilities*, Labour market division, ONS

SMITH, Allan, *The new ethnicity classification in the Labour Force Survey*, Technical Report, ONS

SOUTHWORTH, Joanna R., « Count me in ? » in *Rad Stat* N°78, 2001

STONEWALL, *Guidelines for Employers*, 2003

STATHAM, Paul, « Political mobililsation by minorities in Britain : a negative feedback of "race relations" ? », *Journal of Ethnic and Migrations Studies*, 25 (4), 1999

STAVO-DEBAUGE, Joan, « Les vices d'une inconséquences conduisant à l'impuissance de la politique française de lutte contre les discriminations. Partie 1 : « Tu ne catégoriseras point ! » » in *Carnets de Bord*, N°6, 2003

STAVO-DEBAUGE, Joan, « Les vices d'une inconséquences conduisant à l'impuissance de la politique française de lutte contre les discriminations. Partie 2 : « Apprêter un chemin au droit, confectionner des catégories pour l'action publique » » in *Carnets de Bord*, N°7, 2004

THE RUNNYMEDE TRUST, *The future of multiethnic Britain (The Parekh Report)*, London, Profile Books, 2000

THE RUNNYMEDE TRUST, *Developing community cohesion. Understanding the issues, delivering solutions*, Proceedings of the Runnymede Conference, October 2002

THOMPSON, Eric J., « The 1991 Census of Population in England and Wales », in Journal of the Royal Statistical Society. Series A (Statistic in Society), Vol. 158, N°2, 1995

WALLS, Patricia, « Religion, ethnicity and nation in the Census: some thoughts on theinclusion of Irish ethnicity and Catholic religion » in *Rad Stat* N° 78, 2001