

Race Equality Schemes reviewed

Introduction

It is now more than two years since the Race Relations Act 1976 (Statutory Duties) Order 2001 came into force and 31 May 2004 will mark the second anniversary of the deadline for each public authority listed in the Order to complete and publish its Race Equality Scheme (RES). Two surveys of RES's have been conducted in the period following the deadline, our own published in *Croners Workplace Equality and Diversity News* in March 2003, and the Schneider-Ross survey commissioned by the CRE in July 2003. Disappointingly, both studies found widespread failures to comply with the terms of the legislation.

In this article we summarise the findings of our survey, compare them with those of Schneider-Ross, suggest reasons for the largescale non-compliance, and ask what this means for the future – bearing in mind that the production of an RES which complies with the 2001 Order can only ever be the beginning of eliminating discrimination and ensuring equality.

The legal requirements

With effect from 2 April 2001, s.1 of the Race Relations (Amendment) Act 2000 (RRAA) inserted into the Race Relations Act 1976 s.19B, rendering all public authorities liable for race discrimination (and susceptible to claims alleging the same in the County or Sheriff Court). The requirement to produce an RES is borne out of the 'positive' side of the RRAA, which at s.2 (1), inserted a new s.71 into the RRA, and imposed a general duty on a large number of listed public authorities. This duty requires those authorities to have due regard to the need to eliminate unlawful racial discrimination; promote equality of opportunity and good relations between persons of different racial groups.

In order to ensure better performance by those authorities of their general duty, under the new s.71 (2) the Secretary of State has power to impose specific duties on them. This was done by the 2001 Order.

Specific duties: policy and service delivery

The aim of an RES is to make a public authority set out how it is going to go about taking steps to ensure it can comply with the general duty. Under the terms of the 2001 Order, an RES must cover:

- the functions, policies and proposed policies of the public authority which are relevant to the performance of the general duty, a list which should be reviewed at least every three years beginning 31 May 2002;
- arrangements for assessing and consulting on the likely impact of proposed policies on the promotion of race equality;
- arrangements for monitoring policies for any adverse impact on the promotion of race equality;
- arrangements for publishing the results of those assessments, consultation and monitoring;
- arrangements for ensuring public access to information and services provided by the public authority;
- arrangements for training staff in connection with the general duty; and
- arrangements for meeting the authority's employment duty if it applies (see below).

Specific duties: employment

The specific duty on employment applies to most of the public authorities to which the general duty applies. These public authorities should have had arrangements in place by 31 May 2002 to monitor their workforce by ethnicity and should have put these arrangements into practice as soon as reasonably practicable.

The duty is to monitor, by reference to the racial groups to which they belong, the numbers of employees and applicants for employment, training and promotion. Where the public authority has 150 or more full time staff, it must in addition monitor, by reference to the racial groups to which they belong, the numbers of employees who receive training; benefit or suffer detriment as a result of its performance assessment procedures; are involved in grievance procedures; are the

subject of disciplinary procedures; or cease employment.

The public authority is obliged to publish the results of this monitoring annually.

Our survey

The survey looked at 100 randomly selected RES's across 10 different sectors including local and central Government, health, transport, criminal justice and media. We gave each RES a score out of 100 based on the following three criteria:

- did the RES comply with the minimum requirements of the legislation? (maximum score 20 points)
- what was the *quality* of the compliance? (maximum score 60 points)
- did the RES deserve any bonus points for, clarity, brevity, or some other feature showing initiative? (maximum score 20 points).

An RES must be published and it is therefore a public document. In conducting our survey we approached public authorities as would any member of the public. We did not ask the public authorities to respond to a questionnaire, nor did we contact those tasked with writing the RES and monitoring its implementation. Instead, our survey used reasonable endeavours to obtain an authority's RES using telephone and internet enquiries.

Our immediate finding was that RES's were completely unavailable to the public in 14% of cases. The reasons for this are likely to range from a total failure to comply with the legislation to a failure to publish the RES in an accessible location and educate staff dealing with public enquiries. In one case, the authority was very reluctant to hand over a copy of its RES, treating it like valuable intellectual property that others might want to copy, which is hardly in the spirit of the legislation. 8% of those RES's that were available were still marked 'draft.'

Perhaps the most surprising finding though was the large percentage of RES's that failed to comply with the minimum requirements of the legislation (96%). Doing what the legislation says should be the easy part. Doing it well is what requires the effort.

The vast majority (91%) of RES's that failed to comply with the minimum requirements of the legislation did so because they failed to identify the functions, policies and proposed policies that the authority had assessed as relevant to the performance of the general duty. This is, in our view, the most important

step in the process and, without it, any action plan is likely to lack focus and direction.

Many RES's merely stated that the authority **would** take steps to identify relevant functions, policies and proposed policies. The legislation however, required authorities to have **completed** this assessment so that the results could be included in the RES before the 31 May 2002 deadline.

Ideally, i.e. in addition to the minimum requirements of the legislation listed above, an RES should address what the authority has done to:

- identify and list each of its functions (i.e. the full range of its duties and powers);
- prepare a statement of the aims of each function;
- assess whether race equality is relevant to each function. This may involve identifying those functions that involve or affect the public, and eliminating those that are purely technical in nature (the CRE Code of Practice on the Duty to Promote Race Equality, identifies traffic control and weather forecasting as being possible examples of the latter);
- consider what information is available as to how different racial groups are affected by the function as employees or users of services;
- consider whether the way in which a function is carried out has a negative impact on race equality, and, if so, consider what steps could be taken to avoid that; and
- consider giving priority to those functions where race equality is most relevant.
- this process should be repeated for policies and for proposed policies with the result of each analysis reported in the RES.

Even where some attempt had been made to address the issue of functions, policies and proposed policies, our survey found very little evidence that authorities had approached functions, policies and proposed policies as three separate things. Some authorities chose to deal with these issues on the basis of 'core functions,' a process conducted at such a high level as to be meaningless. One authority in the health sector stated that it had '212 functions' without any obvious source for this figure or analysis of how those functions were relevant to the general duty.

Our survey found a similar lack of detail in relation to the various arrangements for monitoring, training and public access to information. Many RES's merely stated that 'arrangements would be put in place' without saying

what they were, or whether they had been. Action plans were also noticeably missing from many RES's, or were too vague to provide any real direction.

An RES should also be accessible in the sense of clarity, and practically accessible to a wide range of racial groups. It is likely to be of interest to members of the public for whom English is not a first language. The survey therefore gave bonus points to RES's that were clear and concise (more than 50 pages lost 2 points), and available in languages other than English, which was relatively rare.

The Schneider-Ross survey

This survey combined a quantitative and qualitative approach. The first element was a questionnaire based survey of 3,338 public authorities and educational institutions, including 1,105 schools and a shortened questionnaire for a sample of 102 parish councils. Overall the response rate was 47% i.e. 1,568 returned questionnaires. Schneider-Ross's experience suggests that the response rate was 'relatively high for this type of survey.' On the negative side, the response rate for schools was only 20%. The authors also recognise the limitations of a questionnaire based survey, stating that 'it is possible, given the statutory nature of the public duty, that those that feel they have made most progress are more likely to have responded' and 'in their answers to the questionnaire, respondents may have been over optimistic in their [self] assessment of progress.' It is also worth noting that respondents did not always complete the entire questionnaire.

The second element of the survey was an analysis of a random sample of 143 RES's and policies, assessed against the recommendations of the CRE Code and guidance (a similar approach to our survey). The overall assessment was graded into four categories: 'needs developing,' 'partly developed,' 'mainly developed' and 'fully developed,' with each category colour coded to produce an easy to read 'traffic-light-style' table. The survey looked at RES's and, also, race equality policies produced by educational bodies under Article 3 of the 2001 Order (a sector that we did not cover in our survey). The main statistical findings drawn from the tables produced by the authors were:

- local government: 24% need developing; 36% partly developed; 28% mainly developed and 12% fully developed;
- health sector: 35% need developing; 30% partly developed; 30% mainly developed and 5% fully developed;
- central government: 14% need developing; 43% partly developed; 43% mainly developed and 0% fully developed;
- inspectorates: 0% need developing; 60% partly developed; 40% mainly developed and 0% fully developed;
- criminal justice and policing: 27% need developing; 40% partly developed; 20% mainly developed and 13% fully developed;
- schools: 60% need developing; 10% partly developed; 20% mainly developed and 10% fully developed;
- further education colleges: 50% need developing; 9% partly developed; 36% mainly developed and 5% fully developed;
- higher education: 17% need developing; 33% partly developed; 33% mainly developed and 17% fully developed;
- overall: 28% need developing; 33% partly developed; 31% mainly developed and 8% fully developed.

Therefore while our survey found that 96% of the RES's reviewed failed to comply with the 2001 Order, the Schneider-Ross survey avoided that stark statistic, concentrating instead on a more encouraging message, but basically came to a similar conclusion.

The survey contains the following metaphor that aptly illustrates the concept of 'mainstreaming':

it is about institutional change – getting the concept of inclusion into the bloodstream of an organisation so that it reaches every part of the body – and therefore everything it does.

Interestingly, the survey revealed that this is most likely to occur i.e. RES's were most likely to be fully linked to wider corporate plans and strategies, when lead responsibility for the RES was at CEO or board/governing body level rather than with an HR or equality specialist.

Possible explanations for failure

Our survey found that RES's varied considerably. The best scoring RES was given 91% and the worst scored 19%, with non-compliance obviously scoring 0%. This range of quality and approach is not surprising as authorities had little in the way of precedents from which to work and little time for sharing experiences. As time moves on these excuses carry considerably less weight.

Another possible explanation is that those drafting the

RES's did not pay enough attention to the legislation itself relying instead on summaries and guidance. Whilst some of this material is very helpful, such as the Code of Practice and guidance produced by the CRE, it is possible to miss the basic legal requirements without reference to the legislation. This may suggest that lawyers were not generally included in the teams preparing RES's.

The Schneider-Ross survey commented that another factor in non-compliance '... may be the design of the statutory instrument that does not clearly link the employment duty specifically to the requirements for RES's.' We agree. Article 2(1) of the 2001 Order states that an RES is a scheme showing how the authority 'intends to fulfil its duties under section 71(1) of the Race Relations Act and this Order.' The reference to 'and this Order' captures the employment duty i.e. the RES must include details of the arrangements the authority has put in place to comply with the employment duty. Unhelpfully, the particular matters to be included in an RES, listed in Article 2(2), make no mention of the employment duty and the CRE Code states at paragraph 4.7 that '... authorities may find it useful to include the arrangements they make to meet their employment duties in their RES's,' confusing the requirements of the legislation with good practice guidance. For these reasons we specifically removed the employment duty from the minimum requirements test in the first part of our survey, including it instead in the final bonus point section.

Another contributory factor is likely to be the CRE's delay in finalising the Code of Practice and guidance. It is probably true that the timeframe was too ambitious. The legislation came into force on 3 December 2001 and required the production of RES's by 31 May 2002. The CRE set about drafting a Code and four specific guidance documents (dealing with education, schools, monitoring and a general guide for public authorities), and then consulted on the drafts. In fact, the Code was not finalised until immediately before the 31 May deadline, giving any public authority that had waited for the final version, almost no time to prepare its RES. Once again, as time moves on, this excuse carries considerably less weight.

The questionnaire element of the Schneider-Ross survey specifically asked authorities to state what, if any, barriers they had encountered in implementing the duty. Overall, 'resource allocation' and 'moving it into the

mainstream' were the most frequently cited obstacles with 59% and 58% authorities quoting these reasons respectively. 'Establishing leadership' was the least cited reason with 19%.

The future

Many of the authorities responding to the Schneider-Ross questionnaire said they would welcome further advice and guidance on specific elements of the public duty. However, the 2001 Order is itself intended to guide authorities in their implementation of the general duty in the 2000 Act: the CRE Code of Practice provides guidance on the Order; and the four CRE Guidance documents provide more specific assistance on the Code. It seems to us that it is not only guidance that is needed but a concrete example, with the CRE producing a model RES in co-operation with a chosen authority. Of course this would need to be prefaced with a heavy caveat, as a precedent is only the starting point and needs to be adapted to suit the particular circumstances. However, a well-written model scheme could help to crystallise what are currently broad principles into tangible actions, particularly in the process of analysing functions, policies and proposed policies for relevance to the general duty.

The Schneider-Ross survey recommends, amongst other things, that the CRE conduct a specific review of the 'public duty' (i.e. the general and specific duties) in 2004 and commission an independent review in 2005. More importantly for persistently failing authorities, the authors state that 'whilst, in general, we believe that a key role for the CRE is to advise and promote – and this is clearly appropriate for these early stages of the public duty – where public authorities and institutions continue to remain in non-compliance of their statutory obligations, the CRE will need to focus on its enforcement role.' The CRE, after all, was specifically given the power under the 2000 Act (by ss.71D and 71E inserted into the 1976 Act) to take enforcement action against those authorities who fail to comply with the specific duties (by issuing a compliance notice, and if necessary applying to the County or Sheriff Court for an order mandating compliance).

Moreover the obligations in relation to RES's are growing. The Race Relations Act 1976 (Statutory Duties) Order 2003 came into force on 31 December 2003 and extends the list of authorities to which the

specific duty to produce an RES applies. The deadline for compliance for those authorities is 31 May 2004.

An important question for the future is whether general and specific duties will be brought in for other equality 'strands' (gender, disability, sexual orientation, religion and belief and eventually age). There is no logical reason why race discrimination should be seen as more worthy of a public duty than these other 'strands.' Indeed, some legislation already creates such a broad obligation; for example, section 404 of the Greater London Authority Act 1999 imposes upon the Greater London Authority, the Metropolitan Police Authority and the London Fire and Emergency Planning Authority a duty, when exercising their functions, to have regard to the need to:

- promote equality of opportunity for all persons irrespective of their race, sex, disability, age, sexual orientation or religion;
- to eliminate unlawful discrimination; and
- to promote good relations between persons of different racial groups, religious beliefs and sexual orientation.

One element of RES's that gives us some cause for

concern is the concept of including 'outcomes.' Some authorities, for example, have stated a clear vision for the ethnic breakdown of their workforces. Authorities must be careful that in stating such outcomes and creating action plans to achieve them, they do not cross the clear line between permissible positive action and direct race discrimination.

Finally, we understand that the Audit Commission is due to report on the implementation of the Race Relations (Amendment) Act 2000 generally, which should include RES's. However, it is worth noting that the Audit Commission RES was included in our survey and the Commission was not one of the 4% of authorities assessed as having managed full compliance with the terms of the 2001 Order!

Richard Kenyon

Partner, Field Fisher Waterhouse

Richard.Kenyon@ffw.com

Henrietta Hill

Doughty Street Chambers

www.doughtystreet.co.uk

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