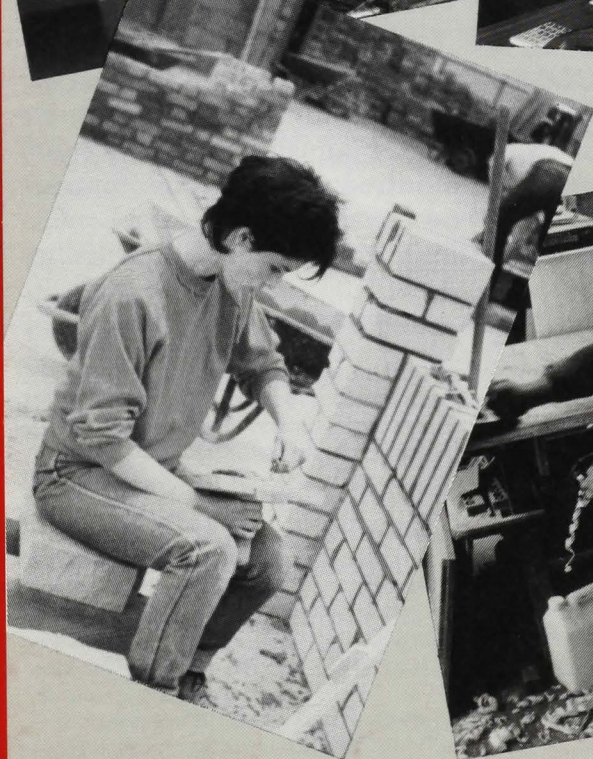


Fabian Society No. 517

New Roads To Equality:

**Contract Compliance
For The UK?**



John Carr

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I. Introduction

British governments have repeatedly condemned employment discrimination. They have funded the Commission for Racial Equality (CRE), the Equal Opportunities Commission (EOC) and a range of inner-city and other programmes aimed at eliminating employment discrimination and promoting equality of opportunity. Yet simultaneously those same governments, together with the rest of the public sector, have been spending vastly greater sums of money on or with companies or organisations that are perpetuating, possibly exacerbating, the very same problems these initiatives are meant to be tackling.

There is considerable evidence to show that progress towards eliminating discrimination from the employment markets in the United Kingdom has been unconscionably slow. The existing framework of law and law enforcement have been failing. New initiatives are needed across the board.

The rate of unemployment among young blacks remains twice as high as for young whites. The Policy Studies Institute (PSI) estimates that still at least one-third of employers discriminate against black applicants at the point of recruitment (C Brown & P Gay, *Racial Discrimination: 17 years after the Act*, PSI, 1985).

Women's earnings as a proportion of men's remain at around 73-4 per cent, slightly lower than their 1975 high point of 75.5 per cent. Sexual segregation remains a dominant characteristic of the UK labour force: 75 per cent of all clerks are women. Women comprise 40 per cent of all semi-skilled and unskilled manual workers but only 13 per cent of "foremen and inspectors".

In respect of disabled people a recent study conservatively estimated that "an able-bodied job applicant was 1.6 times more likely to receive a positive response from an employer than a disabled

applicant with identical qualifications" (E Fry, *An Equal Chance for Disabled People: a study of discrimination in employment*, Spastics Society, 1986). Court cases for failing to meet the 3 per cent quota established under the Disabled Persons (Employment) Act 1944 are unheard of. The quota is honoured more in the breach than in the observance.

The government, local authorities and other public sector organisations need to do more to ensure that they act as 'model employers', providing equal opportunities for ethnic minorities, women and disabled people. But with 80 per cent of UK employees working in the private sector, removing discrimination in employment requires new ways of influencing behaviour within that sector. A major new way of doing this is through public sector purchasing.

Public sector purchasing

Public sector purchasing from the private sector takes place on an enormous scale in the UK. In 1985 central and local government spent £34,644 million and the public corporations some £36,710 million on purchasing goods and services. At a combined total

of £71,354 million, this represented roughly 23 per cent of GNP. It seems likely that approximately one-third of this expenditure would have been spent on goods and services supplied by other organisations in the public sector. But that still leaves about £56 billion spent directly with the private sector: in 1985 that £56 billion represented 22 per cent of total private sector output. In relation to construction in 1985, 30 per cent of all new orders for construction work came from the public sector. This amounted to £4.6 billion.

Public sector expenditure is not spread uniformly across all sectors of the economy, nor do all parts of the public sector spend at similar rates. Within central government alone over 23 departments or agencies are engaged in various buying activities. They range from the massive Ministry of Defence down to the Department of Employment which spent £3 million on goods and services in 1983.

The UK's ethnic minorities, women and people with disabilities pay rates and taxes which go towards funding this huge volume of purchases from the private sector. Ethnic minorities, women and people with disabilities are beginning to demand that those rates and taxes are not then, effectively, used against them. Increasingly they are saying there should be no profits or subsidies for discriminators from the public purse.

Worse still, the public sector may be penalising the more law-abiding companies that are making a real effort to provide equal opportunities and obey the law. Maverick outfits, less interested in meeting their legal or other commitments, could be gaining a marginal cost or price advantage over their more fastidious or socially responsible rivals.

Contract compliance

In the United States of America the

authorities had to resolve a similar paradox. Providing equal employment opportunities was made a condition with which firms had to comply if they wanted to remain eligible to tender for Federal contracts. This policy, known as contract compliance, is now gaining ground in the UK.

With contract compliance the public sector insists that the firms from which it buys goods or services meet certain minimum employment standards. Rather than leaving it to other agencies to ensure that those standards are honoured, the purchasing body itself, or an agency acting directly on its behalf, seeks to ensure that they are met or that they will be met within a reasonable time. If the purchasing body cannot satisfy itself, at least on this latter point, then the firm forfeits the right to tender for public sector contracts.

Contract compliance is founded on the belief that giving equal opportunities this kind of commercial edge will produce significant positive changes relatively quickly, or at least more quickly than if matters were left to the conventional or traditional means of enforcing anti-discrimination laws. The evidence bears out that belief.

Recent large-scale research confirms that since the early 1970s the US policy has achieved significant success for ethnic minorities and women. For people with disabilities similar research has not been completed but the support for contract compliance from disability groups is very widespread. They believe it is working for them.

This pamphlet looks at how contract compliance works in the USA and at the experience of using this approach in UK local government. And it shows how a national policy of contract compliance could begin to tackle the problems of discrimination in employment throughout society.

2. Lessons from America

Contract compliance was first established in the USA in June 1941. It sprang out of a struggle by black American workers for an equal right to work in the anti-fascist war effort.

Although the USA did not enter World War II until December 1941, the Americans were busy stockpiling weapons either for their own use when eventually, as Roosevelt expected, they would become an official combatant, or to supply to Britain and the anti-Axis forces.

To supervise the USA's war effort President Roosevelt established an Office of Production Management (OPM). The OPM calculated in 1941 that America was short of four million workers in the defence industries. At the same time the Council for Democracy could allege in an open letter to Roosevelt that "evidence is uniform of the deliberate exclusion of skilled Negro workers from industries clamouring for (their) skills" (as reported in the *Washington Post*, 12 June 1941). The aircraft industry was the worst offender with, apparently, not a single black person employed in a skilled position anywhere within it.

A March on Washington was organised for 1 July 1941, to protest about and draw attention to the continued discrimination against blacks in the defence industries. Organised by A. Philip Randolph, President of the Sleeping Car Porters Union (an all-black organisation) and Walter White, Secretary of the National Association for the Advancement of Colored People, 100,000 blacks were expected to participate. The USA would have been very visibly shown to be a divided nation, even at a time of dire national crisis. Worse still there were real fears that Washington DC's own police force (largely drawn from the South) might behave brutally towards the marchers

thus, again very publicly, underlining aspects of American society which would have done little to bolster her egalitarian, anti-fascist, democratic image in the wider world.

On 25 June Roosevelt signed Executive Order 8802 prohibiting discrimination on the basis of race, colour, creed or national origin by all defence contractors, as well as in direct Federal employment, and on all Federally-funded vocational and training programmes. In signing the Executive Order Roosevelt said: "the democratic way of life within the Nation can be defended successfully only with the help and support of all groups within its borders" (as reported in the *Washington Post*, 26 June 1941). With the signing of the Executive Order the March on Washington was called off. The government had finally been pushed on to a road that would eventually produce very substantial benefits for blacks and other disadvantaged groups.

In practice the new policy had little immediate impact. A report published in 1964 concluded: "the twenty years (1941-61) of intermittent activity by Presidential committees ... had little effect on traditional patterns of Negro employment. It is evident that the non-discrimination clause in government contracts was virtually unenforced by the contracting agencies during the years preceding 1961" (P Norgen & S Hill, *Towards Fair Employment Practices*, Columbia University Press, 1964).

Voluntary efforts to improve compliance (eg "Plans for Progress"), had been the principal means of seeking to gain adherence to the spirit of the 1941

declaration. But following the tumultuous events in many of America's key cities in the late 1950s and early 1960s, the civil rights movement, under the leadership of people like Martin Luther King Jr., began pressing for major reforms across a range of headings. In 1961 President Kennedy began the break with the contract compliance policy's inglorious history by promulgating a new Executive Order, 10925. In this Order the phrase "affirmative action" first appeared. It was left to President Lyndon Johnson to complete the work. The "Great Society" strategy was launched. The possibility of real change finally have into view.

One of the key pieces of legislation of the Johnson era was the Civil Rights Act 1964. Title VII of that Act set out the general anti-discrimination provisions of American law. Title VII became operative the following year. Under it the Equal Employment Opportunities Commission (EEOC) was established to supervise the implementation and enforcement of the general anti-discrimination laws. Also in 1965 a new Executive Order, 11246, was signed. This established the Office of Federal Contract Compliance Programmes (OFCCP) to improve performance under the 1941 policy and complement Title VII. 1968 saw the first company being debarred from further Federal contracts.

USA today

The Americans use the phrase "affirmative action" to describe the generality of all programmes, policies or activities aimed at eliminating discrimination and promoting equal opportunity. However it has at least two other important and more precise meanings: it refers to those actions which are required under Executive Order 11246 ie the contract compliance programme administered by the OFCCP, now a single agency within the Department of Labor. But it might also describe any action ordered by a Court under the general anti-discrimination law. Sec-

tion 706 (g) of Title VII states: "... the court may enjoin the respondent from engaging in ... unlawful employment practices and order such affirmative action as may be appropriate ...".

Every employer of more than 100 people, whether or not they benefit from any Federal contracts, has to complete and return annually a form known as an "EEO-1". The EEO-1 is a relatively simple form which asks the firm to provide information about its workforce. There are nine specified occupational classifications and four ethnic minority categories. In addition data by sex is requested. Information on pay levels is also sought.

If the employer benefits from any Federal contracts then the requirement to complete the EEO-1 arises with only 50 employees, unless the value of the contracts are less than \$10,000 per annum. If the value of the contracts exceeds \$50,000 per annum then in addition to completing EEO-1 the firm is expected to write down an "affirmative action plan" and keep it on file, available for inspection. In respect of people with disabilities the basic obligations arise where the value of the contracts exceeds \$2,500 per annum. There are no reporting requirements for people with disabilities: they do not feature on the EEO-1. However the OFCCP picks up on disability issues when it reviews companies.

In the past, where a contract of \$1 million or more was at issue the OFCCP was expected to inspect the firm's affirmative action plan. Only if it were satisfactory and the OFCCP was convinced that the employer intended to carry it out could the firm be sure of receiving the contract. This procedure was known as a "pre-award review". The theory was that knowing that a contract was assuredly yours but for reaching an agreement with the OFCCP put the OFCCP in a very strong position vis-a-vis the firm.

The regulations permitting pre-award reviews of this type still exist but they are now never used. This is for two reasons. The first is a practical one:

there were far too many contracts of over \$1 million for the OFCCP to be able to cope. The second is a legal reason: companies won actions alleging that the delays caused by that sort of administrative action caused them loss without there having been "due process".

The OFCCP's main review process now works through something called a "Neutral Administrative Plan" where contractors are selected for review more or less randomly. Compliance reviews are also conducted on the basis of complaints received but, by an agreement with the EEOC, the OFCCP generally only reviews companies where the complaint received affects large groups of people rather than individuals. The OFCCP normally would expect to carry out 6,000 reviews in a year: 5,000 routine reviews and 1,000 complaint-based reviews. In 1985 these 6,000 firms employed between them approximately 3 million workers.

To write an affirmative action plan the employer is required, *inter alia*, to examine the firm's workforce by the categories on the EEO-1 and then compare the results with data showing the availability of those same groups in the relevant catchment area for recruitment. The demographic data available are impressively comprehensive and, when linked with a high degree of computerisation, lend themselves relatively easily to mathematical analysis.

Where this comparison reveals a significant disparity, or "under-utilization" as the Americans call it, the affirmative action plan would be expected to indicate the steps the employer proposes to take, and the timescale, to achieve a greater approximation to statistical parity. This is the dominant objective which the policy is meant to be moving towards.

Numerically-expressed goals, linked to timetables, have become the principal tool of the policy. The regulations specify that the goals and timetables should be linked to "the prompt achievement of full and equal employment opportunity". Thus whilst the OFCCP is given some latitude to agree acceptable

affirmative action plans and timetables, the underlying mood of them should not be lethargic.

Having written an acceptable affirmative action plan the firm is obliged to make good faith efforts to implement it. The OFCCP is explicitly precluded from judging a firm's performance solely on whether or not the targets have been achieved within the agreed timescales: there may be very good reasons why they were not met.

The OFCCP often gets involved in detailed negotiations or discussions with a company about its affirmative action plan. The plan finally agreed would generally specify how and when it would be monitored by the OFCCP. In theory the process could hardly be simpler. In practice the staff of the OFCCP have seen their primary role as being to help the firms devise realistic affirmative action plans which the firm can then stick to over time. Everyone is anxious to avoid debarments and so far less than 30 companies have been removed from the Federal lists for failure to comply.

In the early days of the post-1965 policy big business initiated law suits which were designed to limit or curtail the scope of the OFCCP's intervention. Faced with such hostility and lack of co-operation, the OFCCP was perhaps forced down certain intrusive bureaucratic paths which, ideally, it might have wanted to avoid. That it involved itself in too much internal detail was certainly the main complaint that business made against the OFCCP.

In America everything a public body does is open to challenge in the Courts, but within the Department of Labor itself there is a system of appeal which a firm can utilise in the first instance if it disagrees with the line being taken by the compliance officers. This is where the great majority of disputes would be resolved.

The longer-term objective of American contract compliance practitioners is to get to a position where the companies are advanced enough to run their own policies without needing any detailed

help or guidance from the OFCCP. The OFCCP could then become mainly a "hands-off" agency which largely concentrated on auditing the internal equal opportunity performance of the public sector contractors.

The OFCCP's resources have been severely cut-back under Reagan's presidency. Altogether the OFCCP now has a staff complement of 1,000 and it costs about \$50 million per year to run. In 1985 the Federal government spent over \$182 billion on contracts with the private sector. Excluding contracts of less than \$25,000, this was represented by over 125,000 new contracts.

Only 100 of the OFCCP's staff are in Washington DC. The rest are spread across 67 local offices throughout the USA. The OFCCP's top officials are directly political appointees who change with the Administration.

Since Ronald Reagan came to power any organisation with Republican nominees at the head has had a credibility problem with the civil rights community. One of the principal products of this scepticism has been the proliferation of locally-based contract compliance agencies linked to the purchasing of individual cities or states. Many of these smaller agencies have developed their own particular idiosyncrasies and the business community has made it clear that they can work with a single, national policy but not a multiplicity of policies.

The results

Recent studies of the impact of contract compliance have all reached broadly similar conclusions: the policy does work.

The substantial analysis of OFCCP data by Professor Jonathan Leonard in 1985 compared the performance of enterprises which were government contractors (subject to contract compliance) with enterprises which were not government contractors and were therefore subject only to the general laws. The period examined was 1974-80.

His sample of 70,000 non-construction firms employed more than 16 million people. He concluded that:

- the black (ie Afro-American) employment share increased relatively more in contractor plants than in non-contractor plants between 1974 and 1980 irrespective of plant size, growth, industry, region, occupational structure, corporate structure, and past employment share;
- this has come about not because the government contracts only with companies with the best employment records, but because companies have changed their behaviour: contract compliance has therefore been successful in increasing blacks' share of employment;
- this positive employment impact has been relatively greater in the more highly skilled occupations and has resulted in a net occupational upgrading for minority males;
- the black employment share has increased faster at plants that have undergone a compliance review;
- the impact on non-black ethnic minorities and white females has been mixed. White females gain relatively more under the contract compliance programme in plants where their initial share of employment is small. But there is some evidence that their employment growth is relatively slower where their initial shares are great and where there have been compliance reviews;
- among non-black minorities the contract compliance programme appears to have been more effective in larger plants;
- the employment gains from contract compliance do not appear to be transient: females and black males at a sample of reviewed plants were represented less among leavers relative to hires than other workers".

One of the allegations frequently made by opponents of Executive Order

11246 is that it engendered reverse discrimination. Professor Leonard found that the relative productivity of females and minority males had not significantly declined as their employment share has increased. In other words there was no significant evidence of reverse discrimination.

The direct administrative costs to companies were found to be in the order of roughly \$50 to \$60 per employee per year. The indirect costs in terms of reduced productivity were difficult to measure, but Professor Leonard found no significant general evidence of such indirect costs.

Comparing government contractors with non-contractors over the period 1974-80 there was an overall increase of ethnic minority employment of 20 per cent among contractors, compared with 12 per cent among non-contractors. In relation to women, among government contractors the overall increase was 15 per cent whereas with non-contractors it was only 2.2 per cent.

Just as important, there were substantial changes within the workforce. For officials and managers the increase for ethnic minorities among contractors was 57 per cent compared with 31 per cent among non-contractors. For professionals the difference was even more pronounced: up by 57 per cent against 12 per cent. In the technicians grade among contractors ethnic minorities increased by 44 per cent compared with only 7 per cent among non-contractors. Lower down the occupational grades the same pattern continues but the differences were less striking.

For women the increases between contractors and non-contractors were as follows: officials and managers up 47 per cent compared with 18 per cent; professionals up 50 per cent compared with 3 per cent; technicians were up 48 per cent against 7 per cent among non-contractors. Again the same pattern is maintained in the lower grades but of particular note here might be the increase among skilled "craftsmen" where the increase was 64.5 per cent among contractors compared with a mere 4 per cent among non-contractors.

Turning to the construction industry it is important for UK readers to recall that it is the trade unions in the USA that control most of the direct hiring to construction sites. They also run the great bulk of training and apprenticeship programmes for construction trades. Thus the government's dealings with construction companies were really very often only proxies for dealings with the unions.

In 1969 58 per cent of all local construction unions reported that they had no black members at all. A further 28 per cent had less than 1 per cent. By 1971 blacks accounted for less than 4 per cent of the membership of 11 major construction trade unions. They had been almost completely excluded from the higher paid trades, accounting for less than 1.7 per cent of membership in those unions.

Partly as a result of pressure from the OFCCP and other civil rights agencies the picture began to change. Most of the effort was put into altering the position at the stage of apprentice and trainee recruitment.

Between 1970-9 the percentage of minorities in apprenticeships nearly doubled, from 10.6 per cent to 19.3 per cent. Within certain trades the growth was much more pronounced eg plumbers moved up from 7.1 per cent to 16.3 per cent and asbestos workers from 3 per cent to 23.6 per cent.

What these results show, and there are other supporting data, is that hundreds of thousands of minorities and women have been moving up the organisational ladders in a significant way and getting into occupational categories, skill areas and training schemes in much greater numbers than ever before. One analyst suggests that as the minorities and women have started to believe that discrimination might not frustrate their efforts to enter into particular careers, so they have been independently choosing educational and training options which, in turn, have helped them into those career areas. In other words success breeds success.

Policy under attack

The Right in American politics have never liked contract compliance. They have argued that it introduces a concept of group rights, for minorities and women, which can work against an individual's right to fair and equal treatment. Constantly they have sniped at the policy and repeatedly they have alleged that it is all about quotas. Neither is true.

In the summer of 1985 the most serious assault yet got underway. It was linked to a fairly crude set of political manoeuvres more to do with the struggle to succeed to the Republican Party Presidential nomination than to any substantial problems with the policy itself. A number of White House politicians, led by Attorney-General Meese, tried to amend the operational basis of the policy in such a way as, effectively, to bring it to an end. They wanted to exclude any use of numbers from the policy.

The reaction to these moves was swift and impressive in its breadth. The Urban League, the National Associa-

tion for the Advancement of Colored People, Wider Opportunities for Women, the National Urban Coalition, the AFL-CIO and a range of other important civil rights bodies rallied to its defence. However it was perhaps when the National Association of Manufacturers came out strongly in favour of maintaining the status quo that Meese was truly sunk. Soon after, a majority in Reagan's Cabinet came out against Meese's proposals.

In July 1986, the Supreme Court, with its new, conservative Chief Justice-designate sitting, had to consider the legality of "race conscious numerically-based" employment schemes (under the general law not the contract compliance regulations). By 6:3 the Court upheld the legality of the schemes. Rehnquist, the Chief Justice-designate, was in the minority.

Meese acknowledged that he was "disappointed" at the result. The forces supporting the status quo took it to be a great victory. From the recent inactivity by the White House on the issue it might be reasonable to suppose that, at least for now, contract compliance is safe.

3. The United Kingdom

Probably every public sector body in the UK has some means of vetting the bona fides of companies seeking to sell things to it. Hitherto that vetting process has largely limited itself to a consideration of the firm's financial good standing and technical competence to perform the contract in question. However, especially with central government contracts, the vetting process can go much further than that into, say, the production and quality control systems used by the firm. With defence contracts, particularly in more sensitive or secret areas of work, the vetting process can go further again, even into the intimate personal affairs of the company's senior management.

Thus contract compliance does not raise any new principle of public policy for the UK. In a sense contract compliance is simply saying that questions of discrimination rank at least equal in importance to those of security, or financial or technical competence.

Contracts have been used to support government employment and other wider policies at least since the 19th century. The House of Commons passed its first fair wages resolution in 1891. The London School Board passed a fair wages resolution in 1889. The London County Council's first fair wages resolution was also passed in 1889 in the following terms: "that the Council shall require from any person or firm tendering for any contract with the Council a declaration that they pay such rates of wages and observe such hours of labour as are generally accepted as fair in their trade, and in the event of any charges to the contrary being established against them, their tender should not be accepted" (E Leopold, *In The Service of London*, GLC, 1985).

Despite Thatcherism's deregulatory zeal, various interventionist clauses still survive in central government's contracts — eg price preference schemes to assist firms in areas of

higher unemployment, "Buy British" requirements in respect of certain products, and clauses relating to construction site facilities and standards.

The question of whether or not to use government contracts to pursue equal opportunity objectives has been directly discussed in the highest governmental circles since the 1960s.

Following the passage of the Race Relations Act in 1968 a clause was inserted in all central government contracts in 1969 requiring contractors to take "all reasonable steps to ensure that their employees and sub-contractors conform with the provisions of the 1968 Act".

No machinery was established to give effect to this clause even though the point was directly raised in the House of Commons with the then Home Secretary, Roy Jenkins. The author is unaware of a single case where a firm has lost a contract for failing to comply with this provision, or even of a case where a firm has had the provision raised with them at all for any reason. In answering a Parliamentary Question from Jack Straw MP in July 1986, the government was unable to show otherwise saying that such information is not maintained centrally and that it could

not be obtained "without disproportionate expenditure".

In 1972 the Central Policy Review Staff recommended that the Tory Prime Minister, Edward Heath, should consider going for a full-blown, American-style affirmative action policy linked to government purchasing and aimed specifically at tackling racial discrimination. The idea was given short shrift.

Following the re-election of a Labour government in 1974 the notion next surfaced in the 1975 Select Committee Report on Race Relations and Immigration and the 1975 White Paper on Racial Discrimination. During the passage of the Race Relations Bill through Parliament efforts were made to insert a clause on contracts. These were thwarted but assurances were given by the government to look further at the matter. The government did not then act on these assurances until early in 1979 when, at the government's instigation, the CRE was invited to discuss with the Department of Employment how machinery might be developed within Whitehall to give practical effect to the Race Relations Act clause in central government contracts.

The Fair Employment (Northern Ireland) Act 1976, established a Fair Employment Agency with a power to issue equal opportunity certificates to employers in return for them signing a declaration of intent to operate in a non-discriminatory manner so far as religious questions were concerned. These certificates are not difficult to obtain. They have achieved little. In 1981 the Tory government issued a directive whereunder only firms which possessed such a certificate could tender for public sector contracts. However the enforcement basis of this measure has remained extremely weak with no real follow-through. In no sense could it be called contract compliance. In September 1986, the Northern Ireland Office issued a Green Paper in which they discussed stiffening up the existing powers of the Fair Employment Agency in relation to firms seeking public sector

contracts. The possibility of extending the principle to discretionary grants and a wider range of financial assistance was also raised in the Green Paper. The government was responding to very direct pressure from the Irish lobby in the USA.

There is little to be gained by speculating about why successive governments avoided making use of their commercial power to deal with race discrimination, sex discrimination or discrimination against people with disabilities. Perhaps there really was not, until relatively recently, a sufficient consensus as to the urgency of tackling such discrimination. Achieving a consensus has always been held to be important in formulating new laws, or at least new laws in this sort of social policy area. Perhaps contract compliance is possible today because there is more of a feeling that equal opportunities is a serious business deserving serious measures. If that is so then who can deny that the inner-city disturbances have played a major part in creating that new sense of urgency or importance?

It is perhaps more productive simply to look at contemporary reality, acknowledge it and resolve what to do about it. However it is just not possible for anyone to believe that contract compliance was not taken up in the past because somehow news of it had not managed to find its way across the Atlantic.

At the GLC

Following the Labour victory at the GLC elections in May 1981, the new administration embarked upon the comprehensive set of equal opportunity initiatives promised in its manifesto. However before requiring the private sector to improve its performance it was morally and politically essential for the GLC to implement an effective equal opportunity policy for its own 23,000 employees. The previous administra-

tion at County Hall, which was Tory, had, for all practical purposes, completely ignored the issue. There was much to do on the South Bank before going further afield.

That was the major reason why the contract compliance policy was not adopted by the GLC until March 1983. However there were two other important reasons. The first was a logistical matter: the GLC's central database on its purchasing activities, whilst reputedly ahead of most of the rest of local and central government, was still quite inadequate. The Labour administration wanted the policy to apply to the whole of its approximately £700 million annual expenditure on goods and services. One-third of that amount went on construction contracts. Of the remainder less than half of the expenditure went through the central Supplies Department. The greater part went on local or departmental purchasing and some of these individual departmental contracts ran into millions of pounds. When Supplies was not doing the purchasing it would be possible for a firm to be trading simultaneously with several Council departments without the departments being aware of that fact. This situation was eventually changed but in the beginning nobody in any of the Council's central administrative areas could say how much business was being conducted with any particular firm. Parliamentary Questions put by Jack Straw in July 1986 revealed that a similar picture still exists in Whitehall today.

Nor could anyone in any of the central units of the GLC say when different departments' contracts would be coming to an end and new tenders sought. The information existed, of course, but it was scattered far and wide in the many different Council departments. A considerable amount of research and routine clerical work therefore was essential to start assembling a central database on purchasing for implementing a contract compliance policy.

A second reason for the delay was the law.

Legal advice

Unlike the USA, the UK has never had an explicit law or regulation promulgated to establish contract compliance as an instrument of policy.

However a fundamental common-law principle of the law of contract says that any two parties may agree whatever terms they like when entering into a contract, so there seemed little to obstruct the policy from a legal point of view. But as the GLC knew better than most, things are rarely that simple. Detailed legal advice was sought from leading Counsel.

The relevant law governing the conduct of public bodies in these matters makes few important distinctions between a local authority and other types of public body. Thus whilst the references here predominantly relate to councils, on the whole they apply equally to other public bodies.

The principle of the policy and key elements of the proposed practice were the subject of widespread consultation by the GLC prior to March 1983. Views were sought from business and trade union bodies, as well as the CRE, EOC and a large number of community-based organisations. People in an area much wider than London had an interest. Only about 15 per cent of GLC spending on non-construction goods and services went to firms in the GLC area. 5 per cent was spent abroad and the remaining 80 per cent in all parts of the UK.

It might be going too far to say that such prior consultation was an essential legal pre-condition but the whole exercise was extremely useful. At the end of the consultation process the response was sufficiently encouraging to confirm the GLC's belief that the idea was worth pursuing.

The legal advice made it clear that, broadly-speaking, a local authority does have the same freedom as anyone else to

buy from whomsoever it wishes on whatever terms it chooses. Overlaid upon that are a number of statutory and other common-law duties and responsibilities which qualify that right by degrees:

- councils have to draw up regulations to secure competition for their tenders and to govern the process of tendering. Normally they construct "Approved Lists" of firms from whom tenders may then be sought. If a firm is not on an Approved List it may not, as a rule, submit a tender;
- councillors have a fiduciary duty to the ratepayers not to be profligate. If they ignore the lowest tender price submitted they need to have good reasons for so doing. Equal opportunity considerations certainly can provide sufficient justification but the council would need to show that it had weighed that in the balance along with the disadvantage to the council of having to pay more for a particular product. In over three years of operating the policy at the GLC, and now at the ILEA, such a clear-cut choice has in fact never had to be made but it is always a possibility;
- a council must not act capriciously or whimsically. Councils are governed by the whole body of administrative law and the rules of natural justice. In whatever it does the council must be able to show that it is behaving reasonably. Failure to do so renders the council liable to challenge;
- a council may not "close its mind in advance" and apply a policy inflexibly. Thus the council must always stand ready to consider any special representations which a company might want to make about its particular position. Within the GLC a decision to exclude a firm would be made on the basis of a report from council officers. The company then had an opportunity to make representations to a committee of the council where the final decision was taken;

- one legal obligation of councils not shared with other public bodies arises from s.71, Race Relations Act 1976. This imposes on councils a duty which is cast very broadly to seek to eliminate racial discrimination and promote equality of opportunity in all their actions. Purchasing is one such action. There is no equivalent specific legal obligation in respect of sex discrimination or discrimination against people with disabilities but, on public policy grounds, it must be the case that civic bodies should be positively seeking ways to further adherence to these laws as well. In that sense the Race Relations Act 1976, really only underlines and strengthens the general obligations which fall on local authorities.

For a public body not to include in a contract compliance policy all of the groups that have legal protection under UK law would be a most damaging and divisive act. Any of the groups that were excluded could justifiably allege that their concerns and interests were being given less serious attention. Alternatively, trying to pursue the policy for each group separately would lead to loud and understandable protests from the business community and elsewhere.

The GLC's legal advice very strongly urged two further considerations:

- compliance should not be sought on terms, or in respect of categories which are not themselves recognised in law or prescribed in law;
- the detail of the compliance should relate as closely as possible to officially recognised standards — this suggested using the Codes of Practice of the CRE and the EOC.

From amongst all these laws and principles there emerges a solid legal basis for a contract compliance policy. It would be open to virtually any public body to adopt such a policy today. It requires no new legislation although undoubtedly a statute would help to put it beyond the vagaries of the common law. This suggests very strongly that, in

these early days of developing the practice of contract compliance, public bodies need to be cautious.

Organisation

Because of the clear legal advice the GLC received, the operational core of the policy turned on the Codes of Practice issued by the CRE and the EOC. The two Codes broadly mirror each other in all major respects so it was easy to pursue a common policy which utilised a common format.

The Codes are not revolutionary documents. They were presented to Parliament by successive Conservative Employment Secretaries Norman Tebbit and Tom King. They are addressed primarily "to employers, trade unions, employment agencies and employees (to help them understand) not only the provisions of the (law) and its implications, but also how best they can implement policies to eliminate (discrimination) and enhance equality of opportunity".

The Codes outline the relevant law but they are mainly concerned with describing general principles of the kind of better personnel practices which, if followed, would ensure that the employer stayed within the law.

The CRE explains the legal significance of its Code in the following terms: "the Code does not have the force of law. If, however, Industrial Tribunals consider any of its provisions to be relevant to a case before them they must take such provisions into account. In addition, individuals taking complaints of racial discrimination can call on the recommendations in support of their case" (*From Words To Action, Employment Report Supplement*, CRE, 1985).

The Codes therefore cover such matters as advertising policy and sources of job candidates, selection methods, the recruitment process, selection criteria, transfers and training, performance appraisals, grievance and disciplinary procedures, indirect discrimination, the vital importance of monitoring, the

management implications for implementing an overall policy, and the conditions under which positive action may take place. This is the nitty-gritty of equal employment opportunities.

A Contract Compliance Equal Opportunities Unit (CCEOU) was established within the GLC to implement the policy. Operationally the first objective was to obtain information to ascertain whether or not the GLC's supplier companies were in compliance with the terms of the Codes. This began with sending them a simple questionnaire.

A great deal of effort was put into establishing contact with any trade union organisation in the firm. The unions were sent blank copies of the questionnaire and documentation. They were informed generally about what the review would entail. Contact with the local unions could alert the GLC officers conducting the review to any particular problems or issues inside the firm. Knowing this, the firm's management would be more likely to be truthful to the GLC's officers.

The unions might use the knowledge that an equal opportunity review was getting underway to raise again for discussion or negotiation with management issues on which perhaps, hitherto, they had been unable to reach agreements.

Where the GLC received information from an individual firm on a confidential basis it was precluded from releasing it to the trade unions, or almost anyone else. The Local Government (Access to Information) Act 1985 may now have changed the rules on confidentiality. Alternatively before certain information could be divulged to third parties the company itself would have to agree to release the Council from its obligation to maintain the information on a confidential basis.

Selecting firms

On the GLC's different Approved Lists there were approximately 20,000 firms. The great majority of them had prob-

ably never won a single tender or even ever been invited to tender. This is not untypical of public sector Approved Lists. At one point a firm will have gone to the trouble of qualifying to get on. They then stayed on either deliberately, in the hope that sooner or later they might be invited to tender and win a contract, or they stayed on through inertia. There was at the time no council-wide process for regularly clearing little-used firms off the Approved Lists.

Sending questionnaires to the 20,000 firms was never going to be a practical proposition. Neither was it ever going to be possible simply to look at all contracts entered into as these numbered in excess of 14,000 per annum in the Supplies Department alone. Some of these contracts would be 'one-offs' or for very small monetary values. However even the number of regular contractors to the Supplies Department was in the region of 2,000 per annum. A fair, rational and effective means of sifting had to be found.

All firms being newly admitted to any of the GLC's Approved Lists were required to accept the terms of the policy. They were asked to sign an undertaking that they would abide by the GLC's policy and agree that they would, if called upon to do so, provide such information as might be stipulated to allow the GLC to satisfy itself on that point.

The terms of the policy were also included in tender documents. Thus every firm invited to submit a tender had to give similar undertakings to those required by newly-admitted firms. The tender documents later became fully incorporated into the contracts.

In order then to select the firms for detailed review, contracts valued at less than £56,000 in fiscal year 1982-3 were excluded. Similarly firms employing fewer than 20 (later 50) people were also excluded.

The above criteria yielded 330 supplier firms. They were all sent questionnaires. Even that was too large

a number for the CCEOU to be able to tackle promptly.

In order to produce a workable programme for carrying out detailed reviews there was thus an immediate need to devise a further process of sifting within the basic framework. Two matrices were developed.

The matrices

The first matrix was designed to select economic sectors where progress could be expected to be greatest. The questions asked were:

- Does a Trade Association which tries to set standards operate in the particular economic sector?
- Is there a Training Board in operation that might be a possible source of help for firms?
- What is the configuration of trade unions within the industry: is there a single or dominant trade union?
- Is there a particular product identity or market leader: important in relation to the potential for product substitution should that prove necessary. The publicity factor might also matter to many companies who have a high public profile.
- Is it a sector with known widespread discriminatory practices?
- Is the economic sector as a whole in decline or in the ascendancy?

The second matrix was designed to select particular firms within these more promising sectors. The matrix took account of:

- the contract's value and the proportion of a company's turnover represented by GLC business, linked to the number of people employed in the firm;
- the area or location of the firm, its proximity to areas of ethnic minority settlement and to informational or

training facilities which might be relevant to a company's endeavours to become an equal opportunity employer;

- the product: are there any specialist skills involved in its manufacture? Is the firm a monopoly supplier? The Council would be in a weaker position here;
- the trade unions: does the firm have an equal opportunity agreement with its trade unions? What is the local trade union attitude to equal opportunities?
- the number of women workers in the firm, linked to the degree of job segregation of women workers;
- the number of ethnic minority workers: considered in relation to the representation of ethnic minorities in the firm's catchment area for recruitment and in relation to the degree of job segregation of ethnic minority workers;
- percentage of people with disabilities in the company;
- complaints received about the firm or knowledge of tribunal cases or investigations by either of the statutory bodies;
- economic circumstances and prospects of the firm;
- the expiry date of any current contracts and the tender dates of new contracts: this was used more as a scheduling device, on the assumption that companies will anticipate and want the opportunity to obtain another contract.

Using the matrices, as at 31 March 1986, of the 330 supplier firms that were sent questionnaires 168 had been followed up in detail. Of these none that returned the questionnaire could be said to be already in compliance with all of the terms of both Codes. If ever there was proof of the need for the policy that statistic alone provides it. A handful of firms were very definitely already moving to a point where they would

fairly soon be in compliance with all of the terms of the Codes. Consequently it did not take long to reach written agreements with them.

Of the 168 that had been followed up 57 companies had agreed to written programmes of action to bring themselves into compliance with the policy and therefore with the Codes of Practice of the two Commissions. Among the 57 are a number of firms with national and international reputations.

By the end of March 1986, 77 firms were still engaged in discussions with the CCEOU to progress matters. 34 declined to complete the questionnaire. Of these 34, 21 were either monopoly suppliers or suppliers of goods in unique circumstances where exclusion would not have been in the best interests of the Council at that stage. 13 were excluded from the Council's Approved List but only after considerable time had been put into trying to persuade the companies of the legitimacy of the Council's endeavours.

The best known of the company exclusions was the Rowntree Mackintosh or "Kit Kat" case. Rowntree Mackintosh would not accept that the GLC had any right to ask for the information about their internal employment practices. It was put to the GLC by a variety of interests, but never directly by the company itself, that a firm such as they are, with a progressive reputation, should be excused the requirement to fill in the questionnaire. The reply, of course, had to be that the GLC had only one contract compliance policy, not two. There was not a policy that applied to run-of-the-mill firms and one which applied to those firms which had a good image.

By a different process of selection 106 building companies were also selected for review by the CCEOU. Of the 106, as at 31 March 1986, 77 had agreed programmes of action to bring them into compliance. 17 firms were continuing discussions with the CCEOU and 9 were excluded. 3 were removed from the list for reasons unconnected with the contract compliance policy.

An evaluation?

No independent evaluation of the GLC's work has been carried out. However one is bound to doubt that in such a relatively short time-frame, certainly as compared with the USA's experience, and in such a hostile general political climate, that the arithmetic of discrimination will have altered in a very dramatic way in the firms subjected to the policy. Progress is being made, but slowly.

The CCEOU's work has continued since the abolition of the GLC under the aegis of the ILEA: its officers have been going back to visit the 134 companies (57 suppliers and 77 construction firms) with whom written agreements were reached. The first agreed monitoring dates are starting to arise for many of these companies. It has become obvious that a number of them believed that with the abolition of the GLC the policy would similarly disappear. They are now being disabused of that idea. Others have been making good-faith efforts to do what they agreed to do. Documentary evidence is always sought. Company visits can also be a useful tool.

If one wished to make an attempt at judging the efficacy of the Unit's and the policy's "work-rate", one is somewhat lost for appropriate comparators. The nearest is likely to be a comparison between the number of written agreements the GLC has concluded with companies and the number of formal investigations conducted into firms by the two statutory bodies with the powers to do them ie the CRE and the EOC. The law of contract is a much more flexible instrument than the two Acts which empower the Commissions to carry out their formal investigations. However although different in origin and method of implementation, formal investigations by the Com-

missions and written agreements under the GLC's contract compliance policy are both meant to achieve a similar end, namely equal employment opportunity.

The Commissions are also clearly hemmed in by a range of factors which did not affect the GLC. The Commissions have many other things to do than conduct employment investigations and they will achieve progressive changes within firms both through their general promotional work and through their support for individuals taking firms to Industrial Tribunals. That said, the GLC's record in three years of 134 written agreements with firms probably bears favourable comparison with the CRE's of seventeen completed employment investigations since 1977 with eleven in hand. Since its formation ten years ago the EOC has completed nine employment investigations and another one is in hand.

In future the operational basis of the policy will shift towards reviewing companies at the mid-point in the performance of their contract. With the benefit of experience it is now estimated that with its current level of resources the Unit can sustain a programme of around 155 company reviews per year. These would not all be new firms. A good proportion of the review work will be linked to maintaining an on-going involvement with firms that entered into written agreements in previous years.

It is unlikely that firms would leave the regular monitoring and review system inside of three years. Therefore on present resource levels about 50 new firms per year would receive a detailed review.

The speed at which a contract compliance policy would work its way through the private sector is therefore heavily dependent on the amount of resources being put into the operational side of the work.

4. Prospects for growth

Within the labour movement the support for contract compliance has been growing apace. Neil Kinnock was the first prominent Labour Parliamentarian to endorse the policy, back in September 1983. Practically every front bench spokesperson with a relevant brief has similarly gone on record in support.

The 1986 Trades Union Congress unanimously endorsed a resolution from APEX, seconded by the GMBATU, calling on the next Labour government to implement a contract compliance policy across the whole of public sector expenditure. The TUC's Race Relations and Women's Advisory Committees and the Women's TUC itself had already come out very strongly in favour. In January 1986, following reports from the Advisory Committees, the General Council of the TUC published a guidance note to all TUC affiliates describing what contract compliance is and explaining its advantages to trade unionists.

A number of individual unions' Annual Conferences have adopted the policy, notably ASTMS, APEX, UCATT, NUPE, FTAT, SCPS, TASS and GMBATU. The T&GWU have yet to discuss it at their Biennial Conference but support from them has been very substantial and consistent.

Trade union attitudes towards equal opportunities have been undergoing a process of change in recent years. Their acceptance of and support for contract compliance is in part undoubtedly attributable to the now increased awareness within the labour movement of these issues. The emergence of black workers' groups and women's groups within the unions have been an important source of pressure for new policies and approaches to tackling discrimination. Similarly the changing composition of the labour market and the changes in the industrial structure of

Britain mean that the unions need to give much more attention to attracting and retaining women and ethnic minorities as members.

A combination of the contract compliance agency wielding commercial pressure from without, and the trade unions within the company simultaneously using collective bargaining machinery, could be a powerful weapon for getting to grips with discrimination at the workplace.

The trade unions' position within a firm could be greatly strengthened in a number of ways with the advent of contract compliance. They could head campaigns to push for adherence to the (higher) employment standards encouraged by the government. In addition, should the management prove to be difficult or unwilling to co-operate with the policy, the unions could campaign for change so that contracts, and therefore possibly jobs, were not lost.

The Labour Party Women's Conference, several Labour Party and trade union regional conferences and countless local Constituency Labour Parties are actively promoting the policy. They are being met with a ready response across all sections of the Labour Party. At the 1986 Party Conference a motion very similar to the one passed by the TUC was endorsed unanimously. Both the TUC's and the Labour Party's resolutions called on their respective national bodies to bring forward to their 1987 annual meetings a detailed proposal for establishing a national contract compliance policy. The Labour

Party's resolution also recognised that the policy can afford some protection to groups other than those on whose behalf it has so far operated. The Labour Party resolution included lesbians and gay men as groups who should benefit from a national contract compliance policy. In the USA whilst lesbians and gay men have never been covered by the Federal policy, New York City included them in their municipal programme. This part of the New York policy does not involve any monitoring, merely a requirement to undertake not to discriminate.

At their annual Conference in 1986 the Liberals came out in favour. David Steel has personally endorsed it. The Alliance issued a joint policy statement pledging support for the policy. The CRE is firmly behind it. The EOC has yet to make an authoritative statement. Ethnic minority and women's groups from all parts of the country and organisations representing people with disabilities have declared their support too.

Enemies

When the GLC first announced its policy the CBI described it as "a deplorable imposition". They have not noticeably warmed to it since then though there have been straws in a possible wind of change.

One or two other employers' organisations have also been less than overjoyed (their members tend to be more positive), even in one case, the Paint-makers' Association, going as far as to threaten a boycott should the GLC move against any of their members for failing to fill in the initial questionnaire. The GLC did. They didn't.

In October 1985, David Waddington, Minister of State at the Home Office with responsibility for race relations, appeared on London Weekend Television's *Weekend World* following another inner-city upheaval. He said that the government was considering introducing contract compliance as a

national policy to deal with racial discrimination. It is thought that he was slightly wide of his brief but, true to form, the very next day Alan Clark, then a junior Minister at the Department of Employment, fiercely denounced him. Clark was later supported by Lord Young, the Secretary of State for Employment. The ill-fated Secretary of State for the Environment Patrick Jenkin had previously announced that he would be introducing a Bill to outlaw equal opportunity-related contract compliance. When he finally grasped that this would be tantamount to seeking to amend the Race Relations Act, and to preventing councils from encouraging the observance of other statutory provisions, he backed off. His successor, the arch-Thatcherite Nicholas Ridley, made similar war-like noises when he first took over but then, in October 1986, he too climbed-down and acknowledged that contract compliance for the purposes of securing equal opportunity objectives was lawful. He said it would not be outlawed by the government.

To have moved to the present position from the strongly-stated opposition of such leading government figures as Lord Young and Nicholas Ridley represents a remarkable turn-around.

Now?

Local government accounts for only about 10 per cent of total public sector purchasing of goods and services from the private sector. At around £5 billion per annum that is certainly a substantial sum and local councils can and should step up their efforts to make that amount of money work for equal opportunity. Labour in local government must show what it is doing in practice to further the cause of equality without just sitting back and waiting for a Labour government.

However there might be political and possibly legal risks attaching to an unco-ordinated proliferation. There is therefore a pressing need to collaborate

on producing a more uniform approach with common documentation and common criteria for assessing firms.

The Association of Metropolitan Authorities is currently convening meetings of all interested bodies nationally to produce an agreement on a national policy. In London all of the councils in the Association of London Authorities have agreed to formulate a common policy. There would be real practical advantages to such co-operation, not the least of which would be to increase the amount of purchasing power being applied to the policy.

The GLC on its own, with an operational unit of 31 staff and a buying power running into hundreds of millions of pounds, occasionally felt that some of the very large companies were not quite as interested as they could have been. What was a very large contract for the GLC might be only a relatively small one for the particular company. In addition, although the aggregated spending power of the GLC was substantial, the range of products which it was buying meant that in a number of areas the amounts of money being spent were quite small.

The higher the percentage of a company's turnover a council's contracts are, the greater will be the company's attentiveness to the policy. Therefore individual local councils, with smaller contracts, may have much greater problems trying to make an impact. It should be at least at regional level that councils should be seeking to put together a collaborative venture. Perhaps it could profitably be linked into increased collaboration over purchasing policy generally, but the two do not have to go together.

There are also issues of equal importance concerning the question of resources and duplication of effort. The GLC's Unit of over 30 was a large affair by the general standards of local government though not by GLC or metropolitan standards. The CCEOU required a range of support services for its efficient working. The GLC's Unit

and its associated work cost around £700,000 in 1985-6. The great majority of local councils would not be able to fund a unit of such size, nor would it be appropriate for them to do so. Yet a small unit might find itself in difficulties when dealing with some of the larger companies in the private sector. Co-operation between councils can maximise their impact whilst at the same time minimising their costs and reducing the risk of there being a duplication of effort. Individual councils could usefully divide up companies or economic sectors between them. If a company is cleared by one, it is cleared by them all. If a firm is turned down by one it is turned down by them all. Companies would know where they are and they could not start trying to play off one council against another.

Companies have no legal or other right to expect that councils nationally should operate standard tendering policies: they never have done before. Every time a company submits a new tender to a council the onus is on the company to comply with whatever tender conditions the particular council has specified. However in a policy area such as this, which is both so new and so reliant on the common law; in cases where judges may not understand, much less sympathise with the objectives, then a heavy duty falls on all Labour councils to get their act together.

Initiatives related solely to non-equal opportunity matters within the construction industry could be considered council-by-council because very many councils do spend substantial amounts each year on construction work and therefore they have sufficient economic leverage to guarantee the interest and attention of the building firms. However it is likely that here too there would be operational and economic advantages to be gained from pursuing a common policy.

The Tory government, responding to pressure from the powerful construction industry lobby, announced in November 1986, its intention to outlaw some of

the construction-related clauses which they see as being "mere devices" for interfering with competition and guaranteeing that local authority contracts go to their own Direct Labour Organisations (DLOs). The real point of course is that the Tories are frustrated that their original attempt to rig the rules against the DLOs appears to be failing.

At the GLC, and now at the ILEA, construction questions were handled by a separate Construction Industry Contract Compliance Unit. Equal opportunity reviews, especially in relation to the absence of women workers, were carried out in construction firms only if they had got over the casual labour, health and safety and other hurdles first. The reason for this approach and the reason for the organisational split between the units was very largely based on a highly pragmatic view that was taken about the nature and size of the problems facing the construction industry. It needed specialist and detailed attention.

Introducing contract compliance

Why bother going to all the trouble of establishing a contract compliance policy? A number of objections have been raised against it: some come from a conservative perspective, others are more radical.

Under the conservative heading comes the assertion that the existing laws are perfectly adequate and that nothing further needs to be done. Alternatively it is accepted that the laws are not very strong or effective but it is suggested that British society would not tolerate laws that were significantly stronger, or worked at a faster pace. The latter point largely raises a matter of judgement and says more about the objectors' attitudes towards discrimination than it does about any acceptable view of the future of British society. As to the adequacy of existing laws, the evidence of the

persistence of discrimination is overwhelming.

A radical objection to contract compliance is that it is quite a paraphernalia when what is needed is simply stronger laws and better means of enforcement. In truth contract compliance and stronger laws, far from being mutually exclusive, are actually complementary. Stronger laws and improved means of general enforcement would help the policy. There is no competition between one type of law enforcement and another. Each has a role to play. However this radical objection does raise and highlight an important conceptual point which ought to be clarified. Contract compliance is not, in itself, a law. It is a vehicle for delivering the law. There is a need for tougher and clearer laws. Both statutory Commissions have said so. In his analysis of the US experience Professor Leonard pointed out that court cases had had a more dramatic effect at individual plant level than contract compliance. But he also pointed out that these cases were perforce very limited in number and they were usually class actions for huge sums of back-pay (these are unknown to UK law).

But whatever newer or tougher laws the UK might have, if we are unable to influence the extent to which they are honoured in practice then they may not take us much further. Laws can be as strong as we like but if they do not actually reach the parts that other laws have also so far failed to reach then who needs them?

A majority of firms that came into contact with the GLC's contract compliance policy found ways of co-operating with it and going along with it. Only a relatively small number rejected the policy outright and there have been recent signs among some of them that they may now be having second thoughts. They are considering applying to be re-admitted to the ILEA's Approved List.

If a contract compliance policy were being pursued by central government then it is suggested that, as in the USA,

the numbers of firms that would choose not to co-operate would reduce to zero or near zero. Holding out against a "soon to be abolished" GLC is one thing. Holding out against the government is entirely different.

In some cases it was quite obvious that the personnel professionals inside companies being reviewed by the GLC were delighted that, at last, there appeared to be a hard and tangible commercial reason, which their board would understand, for introducing progressive changes in employment policies or practices. There were even instances of senior managers inside companies which were GLC suppliers trying to persuade the GLC, off-the-record, to go in and do a contract compliance review in the belief that this would trigger changes which they had failed to win agreement for through their own internal processes.

A final objection made to the idea of contract compliance is that only the Courts should really be in the business of law enforcement. In truth the government, local authorities and other public sector bodies are constantly exercising quasi-judicial functions. In so doing they are governed by a well-established body of statutes and common law, especially the principles of natural justice. There is no suggestion that the operation of a contract compliance policy should be removed from that ambit.

If it were all to be left to the Courts then we should have to insist on radical measures to guarantee access to the Courts to all who really needed such access, and at the time they needed it. There would need to be other changes which would guarantee that the judiciary fully understood the anti-discrimination laws they were being asked to adjudicate upon. Even then we should still hesitate before accepting the notion that only the Courts have an interest in enforcing the law. They do not. The argument "leave it to the Courts" is really only an argument about leaving the anti-discrimination laws weak and unenforced.

Neither have the CRE or the EOC ever claimed that they should have sole jurisdiction in such matters. Quite the opposite: the Commissions are constantly urging other bodies to consider what new initiatives they can take to further the cause of equality. Contract compliance is just such a new initiative.

A national policy

To achieve optimum results contract compliance needs to be adopted for the whole of public expenditure as a government-backed national policy. This requires a series of measures, most of which could be set in train without legislation.

For example, data would have to be collected about the numbers, size, and nature of public sector contracts. And if employment patterns are to be matched with the distribution of the population, the Office of Population and Census Studies (OPCS) will need rapidly to improve the database in relation to the working population and its racial and gender composition, linked to smaller geographical units or travel to work patterns. This could be achieved through sample studies or by concentrating initially on the major conurbations or by concentrating on target industries or growth areas of the economy.

While this data is gathered, a White Paper should be issued to set out how the contract compliance policy will work. It could discuss, *inter alia*, what should be the minimum standards with which the government would be expecting firms to comply? Should the policy stay with the Codes of Practice of the Commissions? Revised or unrevised versions of those Codes? Should the Codes become mandatory? How will firms be selected for review? What will be the government's matrices? What operational procedures or regulations will govern the implementation of the policy by civil servants? Should disqualification from public sector tendering be the only sanction available or

would other powers also have a role? (for example, withholding part payments, suspension from tendering for a limited period, or delaying payments?) Precisely how would this new initiative relate to the EOC and CRE in terms of their enforcement work?

Contract compliance will lead to a massive increase in demand for positive action training. There are very substantial numbers of well-qualified women, ethnic minorities and people with disabilities who are kept out of jobs simply by discrimination.

That said it is nevertheless very much the case that past discrimination has kept disproportionately greater numbers of women, ethnic minorities and people with disabilities out of training opportunities, apprenticeships, articles, fields of experience and so on. The education and training bodies should be the principal providers of much the greater part of the positive action training that would result from the policy. Wherever women, the ethnic minorities or people with disabilities are out-of-statistical-parity with their representation within the relevant recruitment catchment area, positive action training should be made available. A firm should no longer be required to obtain any kind of permission or designation before it may sponsor a positive action scheme whether for existing employees or future ones.

Contract compliance and training agencies would need to work closely with those responsible for trying to ensure that the UK labour market's deficiencies were being remedied through training. There might be little point in sponsoring substantial training initiatives for disadvantaged groups in areas of the economy which are set to decline or where the skills obtained would quickly become obsolete.

The professions and trades will need not only to maintain better data about their current and student members, but they would also be expected to examine critically their entry criteria as well as their course contents. In particular all courses concerned with teaching man-

agement or personnel skills will need to be reviewed to ensure that they are promoting best practice.

Personnel professionals will have a vital part to play in forging the new national strategy for dealing with equal employment opportunities. The Institute of Personnel Management could have a major role in this unfolding picture. Given the commercial edge that would attach to this new initiative, personnel people in the private sector could find, as they did in the USA, their position within the corporate hierarchy goes on to an ascendant path.

A legal framework

Aspects of a national contract compliance policy should be put securely beyond the reach of the common law by becoming enshrined in a statute: such few clauses as were needed might easily be encompassed within a more general Bill dealing with other aspects of civil rights or discrimination law (the two statutory Commissions have published suggestions for improving the general anti-discrimination laws and the means of enforcement).

All firms receiving public sector contracts ought to be required to display a sign in a prominent place saying something like "We receive a public sector contract. We are an equal opportunity employer. Our policy is available for inspection on request". This will inform workers in the company, and people in the neighbourhood, that they have a right to expect fair treatment.

Large employers would have to be required to complete returns, probably annually, giving information on the composition of their workforce by race, sex and disability. Firms above a certain size that receive public sector contracts should be required to examine the composition of their workforce in relation to their recruitment catchment area and consider what action, if any, they need to take to move closer to statistical parity. Action to correct any significant under-representation should be mandatory: this should include,

where appropriate, the provision of additional training for under-represented groups.

The American notion of 'adverse impact' should be introduced to get at institutionalised discrimination. It should replace the weaker concept of indirect discrimination of the existing UK legislation. Thus, in relation to any given employment practice, it need only be shown that it has an adverse impact on the employment opportunities available to women, ethnic minorities or people with disabilities, and that there is a reasonably practicable alternative available, for that practice to become unlawful. In deciding whether or not an adverse impact exists the Americans' four-fifths rule could be used as a guide. Under this rule where it is discovered that the success rate of one group or type of candidates is less than four-fifths the rate of success of another then there is a presumption of discrimination. This presumption may be rebutted. It certainly does not mean that 'one-fifth discrimination' is acceptable. However when deciding where to focus one's energies a simple arithmetical test can help to highlight trouble spots that could benefit from immediate attention. In their discussion of possible legislative change the EOC indicated that, unlike the CRE they would not support the four-fifths rule. This is perplexing as it is not an iron law of any kind, only a statistical aid.

The size of the damages for breaking the anti-discrimination laws should be very substantially enhanced and class actions for back-pay should be permitted.

In a related field, special consideration ought to be given to the way in which public sector contracts can be used to help ethnic minority-owned or female-owned businesses, or businesses owned by people with disabilities, for example through a policy of setting aside a percentage of public sector contracts. In the USA this area has acquired increasing importance of late as contract compliance was seen to be taking care of direct employment mat-

ters. Also in public sector-sponsored land development projects clauses should be inserted into leases stipulating minimum equal opportunity requirements.

Last, but by no means least, a future government could take the opportunity of such a general Bill to outlaw discrimination against people with disabilities, putting it on the same legal basis as discrimination against women and ethnic minorities. Whether or not one was a registered disabled person under the 1944 Act should be irrelevant for these purposes. Thus if an individual's disability is in no way relevant to her or his ability to perform a particular job, or if alternative arrangements could reasonably be made to make it so, then it should be unlawful to take the disability into account when making the decision. The 3 per cent quota for Registered Disabled People should be maintained as a safety net and the enforcement powers relating to it should be greatly strengthened.

Extending the categories further to include other types of discrimination should also be considered. As already noted, Labour Party policy states that lesbians and gay men should be included. Age discrimination is another possible area.

A new institution

For contract compliance to succeed it is absolutely vital that there is a free flow of information between government departments and between other parts of the public sector. For that reason a quango is unlikely to be an acceptable or workable vehicle for implementing the new legislation.

Because so much of the work will cross departmental boundaries a Cabinet Committee of some kind will be needed to give the initiative a major political push. A series of decisions will also be necessary to ensure the proper degree of co-ordination at operational level as between the Women's Ministry, the Home Office and any relevant

regionally-based bodies which may have a significant interest.

First class liaison with the CRE and EOC will be vital, both to avoid possible duplication of effort and to see how the one's functions might help or complement the other's. The CRE and EOC both need to be maintained as strong and independent forces but the logic of increased activity on equal opportunities in employment is bound to lead to there being a need for the CRE and EOC to co-operate more and more closely on their respective employment work.

The central responsibility for a government-led contract compliance policy has to be taken by the Department of Employment (DE). And there are strong arguments for having a single national organisation as a new section of the DE — to act on behalf of the whole of the public sector. Having a single national body would avoid duplication of effort and the risk of conflicting policies. It would also make it easier to solve the start-up logistics.

It is impossible from outside to predict accurately the likely size of the agency and therefore costs. In the early stages only a very small number of staff would be likely to be required to assemble the basic framework of the policy. As the policy began to develop so

it would be necessary to recruit and train staff for the operational side of work.

The cost and administrative content of the policy can be kept to a minimum, especially if computers are used intelligently. The Americans have shown that the cost to the companies per employee is very low in relation to the administrative side of the policy: "less than the cost of the staff's Christmas turkey bonus" as one senior executive of ITT put it. The direct cost to the government would be well within the American costs of \$50 million per annum when it was eventually fully staffed and operational.

It is more difficult to predict the cost to UK companies and to the public purse of the other vital parts of the comprehensive policy which is advocated to give contract compliance its optimum working conditions, namely the increase in positive action training, child care and physical adaptations of buildings or equipment. However all of these items are already included within a range of existing government programmes and Labour manifesto pledges. Thus, in the main, a new Labour government would be looking to upgrade existing or promised new expenditure levels. It would not be introducing wholly new categories.

5. Conclusions

Unquestionably contract compliance has still to prove its real, long-term value in the UK. The GLC experience suggests that it could work here. The American data show it can. In the contemporary UK setting contract compliance is a radical policy which socialists ought to support.

Contract compliance is not a magic solution: the USA has not freed itself of racism or sexism or of discrimination against people with disabilities. Poor whites are still much wealthier than poor blacks. If you are a member of an ethnic minority in the USA you are much more likely to be unemployed than a white person, and if you are female, you are likely to be earning less than a male counterpart. Yet it is undeniable that contract compliance is eroding these differences — even in adverse economic conditions. The policy is working and the minorities, people with disabilities and women know it. They want to keep it.

It is also self-evidently true that the USA and UK are very different countries socially, politically, economically and culturally. In the USA ethnic minority politics are much more out-in-the-open. It is widely accepted that there are distinct ethnically-based socio-political blocs in American society. They are all entitled to "a piece of the action". Contract compliance fits in well with such a national attitude.

Similarly the history of slavery, the civil rights movement and the tremendous struggles of the American blacks, linked above all to the huge unrest in the cities in the '50s and '60s, forced and created a climate within which such a determined movement for equal employment opportunity became possible. Not only did it become possible, it became strong as well: so strong that even leading members of the Reagan administration could not dislodge it.

The UK has had a glimpse of the kind of civil unrest which so shook the USA. There now seems to be a growing sense that the injustices at the core of those unrests simply have to be dealt with. Contract compliance offers to play its part. When so much else American has taken root in the UK, for good or ill, it is difficult to accept that contract compliance is so culturally dissonant that it should be rejected as alien.

Underpinning the notion that contract compliance would work is the contention that companies will positively want to remain eligible to tender for public sector contracts. In other words the companies will go along with the policy in part because they might be fearful that, if they did not, a competitor would step in and take their trade. But should a new Labour government sponsor a policy which stands so squarely on the historically anti-socialist premise of competition? Certainly if a wholly, or even a very largely socially-owned economy was contemplated in the immediate future, then there would be less of a pressing need for contract compliance. Public sector employers can be required to improve their equal opportunity performance by other, more direct methods. However a large private sector is bound to remain for the foreseeable future.

So what about the private sector monopolies or near-monopolies? As indicated earlier, in several cases the GLC had to face up to not being able to find alternative suppliers for certain essential products. Would a future

Labour government be willing to stop trading with a British-owned sole supplier and order the goods abroad instead? A future Labour government could be working towards a situation where so much of the rest of industry had "gone over" to equal opportunity practice that by the time it came to facing up to the monopolies or near-monopolies they would either already have gone over themselves or they would find the pressure of public and governmental opinion too strong to resist. In other words a new government would not have to tackle the most difficult problems first.

Contract compliance is clearly not an alternative to public ownership or to a number of other forms of more direct intervention in the private sector. However within its limits it offers a cheap and less intrusive way of influencing the conditions of workers. If it were linked to reshaped policies in other areas where the public sector provides financial or other discretionary aid to the private sector its general effectiveness would increase accordingly.

That said we should be very wary of trying to load too much on to the contracts of public bodies. Politically the edifice may not be able to bear the strain. The logic of using contracts to pursue any or all government policies cannot be denied but it is not a panacea. Given the uneven way in which public expenditure affects different industries, public contracts may not be able to help much in those sectors of the economy where some of the greatest concern is being shown because of poor working conditions or low pay. Other approaches may be more productive.

And contract compliance is not a substitute for better and stronger general anti-discrimination laws which

are more efficiently enforced. Both the statutory Commissions have proposed ways in which the law and its enforcement could and should be strengthened. Contract compliance can be part of that process of strengthening, having as its sphere of operation the realm of public sector contracts.

An operational contract compliance policy would complement the roles of other interested agencies, principally the CRE and the EOC, and free their vital energies and resources to attend to those many other areas of discrimination which still blight our national life but are not so amenable to being dealt with through a contract compliance approach.

Equal opportunities in the UK has proceeded at too leisurely a pace for too long and at great cost to us all. People have been prevented from achieving their full potential through discrimination. They have been hurt and damaged by it. Peaceful society has been ripped apart with tragic losses. Productive capacity has been lost both at the level of the individual and at the broader societal level. Yet, for all the political pressure that was brought to bear in the USA, one doubts that American big business would have embraced the policy in the way they did unless they could see it contributing in a significant way to longer-term prosperity.

As a nation we cannot afford to ignore discrimination or leave it in some political backwater. It needs to be tackled and the Americans have shown ways in which this can be done.

Contract compliance is a simple idea which is readily understood. It has a clear and very strong moral argument behind it. That is why support for the policy has grown so rapidly and that is why, ultimately, it is unstoppable.

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In the USA, the government uses its purchasing power to attack discrimination and promote equal employment opportunities in the private sector. Contractors to the US government are expected to meet certain employment standards, and their performance is monitored to ensure that they do. This contract compliance policy has achieved significant success in promoting greater equality for ethnic minorities and women.

John Carr argues that contract compliance should be adopted by the government and other public sector bodies in the UK. He reviews the history and effectiveness of the policy in the United States and recent experience in UK local government. Drawing on his unrivalled experience with the Greater London Council and the Inner London Education Authority, he offers a series of proposals for introducing contract compliance nationally. Among his recommendations are:

- * a single national agency to promote contract compliance, organised as a new section of the Department of Employment;
- * regular returns by companies giving information on the composition of their workforce by race, sex and disability;
- * mandatory action where ethnic minorities, women and people with disabilities are under-represented in comparison with the companies' recruitment catchment areas;
- * adopting the American concept of 'adverse impact' so that any employment practice can be stopped if it can be shown that it has an adverse impact on the employment opportunities available to women, ethnic minorities and disabled people.

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