COMMISSION FOR RACIAL EQUALITY

REPORT OF FORMAL INVESTIGATION INTO THE DEPARTMENT OF HEALTH

Index

CHAPTER 1

BACKGROUND TO THE FORMAL INVESTIGATION

Introduction

1. In January 2007 the Commission for Racial Equality (the Commission) decided to commence a formal investigation of the Department of Health (the Department), arising from its apparent failure to meet its obligations under s71(1) of the Race Relations Act 1976 (the Act) to have due regard to the need to eliminate discrimination, promote equality of opportunity and good race relations[1] by omitting to carry out Race Equality Impact Assessments (REIAs) of its proposed policies.[2]

2. The Commission came to the view that the Department was failing in its duties under the Act following more than two years of sustained and detailed monitoring activity of Whitehall Departments.[3]

3. In 2005 the Commission decided to pro-actively monitor the performance of Whitehall departments in respect of their race equality duty in view of their key role in setting the national policy agenda, and its further role as the sponsoring bodies for organisations across public sector.

4. Between April 2005 and November 2005 the Commission audited the Race Equality Schemes (RESs)[4] of Whitehall departments and agencies, reviewed compliance with the employment duty, and began monitoring race equality impact assessment activity across ministerial departments. The Commission found the RESs of all departments and agencies audited to be clearly non-compliant. Each authority was given detailed comments and required to ensure that these comments were incorporated into the second RES (2005-08). Despite this, in January 2006 a second review of schemes (2005-08) revealed continued non-compliance by many departments.

5. On 16th February 2006, the Commission wrote to Sir Gus O'Donnell, Cabinet Secretary to outline the findings of the monitoring project and to express the Commission's concerns regarding the progress of Whitehall departments in respect of the race equality duty (RED). The letter was accompanied by a

[1] The report will frequently refer to the Race Equality Duty (RED) which encompasses the general duty to promote race equality under s71(1) of the Act as well as related specific duties imposed by Order by the Secretary of State, such as the duty to publish a Race Equality Scheme

[2] The purpose of a race equality impact assessment is a systematic way to find out how a policy or legislative proposal will effect different racial groups. It is a way of ensuring that policies are tailored to meet the needs of all racial groups and that introducing such a policy or piece of legislation does not adversely effect a particular racial group. For Commission's guidance on REIAs see www.cre.gov.uk

[3] This is part of the Commission's wider activity to implement its Monitoring and Enforcement Plan (2005-07). The findings of this activity are summarised in Monitoring and Enforcement Plan Implementation Report, Commission for Racial Equality, 2007

[4] A RES is timetabled, realistic plan setting out an authority's arrangements for meeting the general and specific duties under the Act

detailed dossier outlining the main findings of the Commission's Whitehall monitoring of each of the above audits.

6. The report underlined the need for immediate remedial action to address on-going non-compliance and a clear sense of ownership at the most senior levels across Whitehall.

7. Given the widespread failure of departments to meet their general duty to promote race equality by carrying out proper REIAs, the Commission decided to take a strategic approach to its enforcement powers by identifying one of the worst performing departments and to examine specific approaches to REIAs.

Why did the Commission launch an investigation?

8. The Commission chose to commence an investigation into the Department, using its powers under s48(1) of the Act, due to its persistent failure to carry out any REIAs of its proposed policies including legislative proposals and the failure to have in place a fully compliant RES.

9. The Commission's concerns regarding the results of its monitoring of the Department's performance in respect of REIAs were supported by the Department's response to a parliamentary question by Keith Vaz, MP, asking how many REIAs the Department had undertaken. The Health Minister stated:

'In the period April 2004 to March 2005, 29 policies were assessed as part of the regulatory impact assessment process for race equality impact. None of these revealed the need for full race equality impact assessment. No race equality impact assessments have been completed since April 2005.' [5]

10. The Commission wrote to the Department on separate occasions to request REIAs of five named policies. The policies concerned were:

- Draft Mental Health Bill
- Health Reform Bill
- Our Health, Our Care, Our Say White Paper
- Choose & Book
- Transition: Getting it right for young people

11. With the exception of the Mental Health Bill, on each occasion the Department stated that it had not deemed it necessary to carry out a separate REIA.

12. The Commission has held longstanding, wider concerns regarding the RED performance of the Department.

13. In April 2005 the Commission, following a formal assessment, informed the Department that its initial RES (2002-05) was non-compliant. It also the

[5] House of Commons, 5th December 2005

Department that it was failing in its employment duty. In August 2005 the Commission had to remind the Department of its obligation to carry out a REIA of the Mental Health Bill. In January 2006, despite the Commission's detailed comments on the Department's first RES, an assessment of the Department's second RES found it to be non-compliant.

14. This lack of attention for the impact of its policies on ethnic minorities is in blatant contradiction with well-established differential health outcomes for ethnic communities and growing stakeholder interest in a range of health issues[6].

15. Considering all the above, the Commission concluded that the Department had made insufficient progress in relation to the RED. The scale of the Department's non-compliance with the RED was such that the Commission was obliged to consider using its enforcement powers.

16. The Commission's formal grounds for believing that the Department was in breach of its RED were:

- The failure of the Department to carry out REIAs during the period April 2004 to March 2005, evidenced by the Department's own admission in response to a Parliamentary Question and to the Commission itself
- The failure of the Department of Health to carry out adequate REIAs in respect of Our Health Our Care Our Say and the Mental Heath Bill
- The failure to publish a compliant RES or have fully compliant employment monitoring systems in place

17. The Commission decided to use its investigative powers, rather than issue a compliance notice in respect of its non-compliant RES in order to undertake a more thorough examination of why the Department had failed to have in place adequate arrangements for carrying out REIAs. An investigation gives the Commission the scope to fully explore the systemic reasons for non-compliance. It enables the Commission to examine the Department's overall approach to policy development and conduct of REIAs. This includes the Department's REIA template, its filtering process, and training provisions, monitoring systems, publication strategy and senior management's role in the REIA process. In conclusion, the formal investigation enables the Commission to establish a greater understanding of what ultimately led to the systemic and ongoing non-compliance.

18. In August 2006 the Commission wrote to the Department to advise that it was minded to commence a formal investigation into its failure to comply with the RED. The Commission gave the Department the opportunity to provide evidence that it was complying with the RED and taking the necessary steps to impact assess and monitor its existing and proposed policies.

19. Between August and December 2006, the Commission was in correspondence with the Department and met the then acting Permanent Secretary and senior

[6] 'A lot done, a lot to do: Our Vision for an integrated Britain', Commission for Racial Equality, 2007

officials in December. The Commission received information on steps that the Department would take in response to its letter. While noting the Department's undertaking to put systems in place to address the defects that had been identified by the Commission, it still had concerns about the ability of the Department to discharge its duty effectively. In particular, the Department published its REIA of the Mental Health Bill in November 2006. As noted elsewhere in this report, the Commission audited the REIA and found it to be significantly non-compliant, in the sense that it did not adequately serve to discharge the Department's duty under the Act.

20. In February 2007 the Commission wrote to the Department announcing its decision to carry out a formal investigation and invited the Department to make representations.

The Department's representations

21. The Department made written representations to the Commission in March 2007. The Department denied that it had not complied with s71(1) of the Act and suggested that it was not necessary to fulfil the specific duties in order to comply with the general duty.

22. The Department also queried the powers of the Commission to conduct an investigation of this kind, in view of its focus on a possible breach of the RED rather than the anti-discrimination provisions of the Act. At this stage, the Department proposed that an agreement between the two organisations would be the best way forward. The Commission, however, having carefully considered the Department's representations, declined this suggestion.

23. Following further correspondence with the Permanent Secretary and discussions with departmental officials, the Commission revised the terms of reference to focus on key policy areas and the Department agreed to co-operate with the investigation.

Terms of Reference

24. The Terms Of Reference were drafted to focus on three key policy areas, to determine whether the Department had been fully compliant with the RED and if not what the reasons were for this. In determining this it was necessary to consider the broader context of the Department's systems for implementing the RED. The Terms of Reference are:

(i) To investigate whether the Department of Health has fully complied with s.71 of the Race Relations Act 1976 in the development of the following policies:

- Mental Health Bill
- Our Health, Our Care, Our Say
- Independence, Wellbeing and Choice;

(ii) To investigate the extent to which and reasons why such failure to comply with s.71 has occurred.

(iii) To make appropriate recommendations and report and to otherwise consider whether any more precise action pursuant to the Race Relations Act 1976 should be taken.

Methodology

25. The main part of the investigation involved documentary analysis of the materials relating to the development of three policy areas, as well as analysis of the Department's overarching systems for implementing the RED. It was considered that the latter was necessary to fully understand the reasons for any failure to address the RED in the development of those policies. Much of the information was obtained directly from the Department itself, while some documents were located on the Department's website and from other external sources.

26. Interviews were also undertaken with the Permanent Secretary, key Departmental officials who were involved in the development of the three named policies and members of the Department's Equality and Human Rights Group (EHRG).

CHAPTER 2

DEPARTMENTAL SYSTEMS: OVERARCHING APPROACH TO RACE EQUALITY

Introduction

27. This chapter examines the Department's overall approach in respect of the RED. Its purpose is to examine the systems that were in place to respond to the RED at the time that policies under scrutiny were being developed. It is of particular relevance to parts two and three of the terms of reference which relate to the possible reasons why any failure to comply with the RED in relation to the particular policies may have occurred and inform any recommendations the Commission may wish to make. For example, did the Department set out with good intentions and simply get lost along the way? Or did the Department never really place itself in a position from which to achieve compliance? In order to establish this, it is important to understand exactly what the Department did in the period leading up to and after the introduction of the RED.

28. It begins with reference to the Department's original RES and moves through successive RESs and, approaches to REIAs.

29. There is an examination of the systems which the Department put in place in the period since 2002, in order to enable it to meet its legal requirements in respect of the RED, i.e. those mechanisms which enable a public authority to meet its legal obligations. These are RED advice to staff, training arrangements; departmental frameworks and development of REIA related tools. The Commission is of the view that these systems, if appropriately implemented would enable a public authority to carry out systematic REIAs.

30. The chapter closes with an assessment of the Department's overall RED performance in the period prior to the commencement of the investigation.

31. It sets out the findings of the audits undertaken prior to the Commission's initial indication that it was minded to carry out a formal investigation. This is because in building its grounds for belief for the investigation, the Commission provided the Department with detailed comments on key aspects of its approaches to RED compliance. The Commission is of the view that this advice would have been extremely helpful to the Department in producing any revised documentation during the period of the investigation.

RED COMPLIANCE

Equality Schemes

Race Equality Scheme (2002-05)

32. The Department's original RES was published in May 2002, in line with the legal requirements regarding publication.[7] It was reviewed and found to be clearly non-compliant in April 2005.[8] The Commission provided the Department with substantive comments on the specific areas requiring improvement to ensure that the Department's RES 2005-2008 would be legally compliant. Concerns included an incomplete list of policies and functions for their relevance to race equality as well as inadequate arrangements for assessing and consulting on proposed policies.

33. Even at this relatively early juncture the Commission had serious concerns regarding the Department's arrangements for meeting the requirement to assess and consult on the impact of proposed policies. The Commission's feedback to the Department in respect of race equality impact and consultation stated:

> *There is no impact assessment or consultation tool or process described, or guidance included in the scheme. Section 2.2 (i) refers to an equality impact assessment tool, which has been applied to proposed policies on mental health and diabetes. The section then states that the tool will be developed for the use of policy makers and that it will help them fulfil the specific duty. However the tool or further description or details of the process used to impact assess policies is not included. Neither are there any details concerning guidance on use of the tool.*[9]

34. The RES contained some limited references to the development of a REIA tool.[10] However there was no timetable for its introduction, nor any other details relating to implementation. As will be elaborated further in this chapter, the Department only finalised its REIA tool in April 2005, i.e. at the latter end of the RES' 2002-2005 life.

35. Finally, the Commission also expressed some reservations regarding the Department's arrangements for addressing adverse impact.

36. The Commission specifically required all Whitehall departments, including the Department, to incorporate its comments into the second RES (2005-08),

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[7] See www.dh.gov.uk for copies of all Department of Health RES/SES

[8] The Commission uses a standard template to assess compliance with the RES duty, which follows the Commission's Statutory Code of Practice and related guidance

[9] Letter from Nick Johnson (CRE) to Sir Nigel Crisp (DH), April 2005

[10] The Commission/Home Office REIA guidance recommends that authorities use a structured, legally proofed template in order to ensure consistency in approaches to REIAs. The tool enables a policy developer to consider whether individual policies are relevant to race equality to proactively monitor the likely impact upon different ethnic minority communities.

due for publication in May 2005, otherwise the Commission would have to consider taking enforcement action.

Race Equality Scheme (2005-08)

37. In January 2006, the Commission undertook a second audit of Whitehall RESs. The results were again disappointing. The Department's second RES was found to be non-compliant. In particular there was a specific concern that the Department had not taken on board the Commission's comments regarding REIA arrangements. These were clearly absent from the second RES. This clearly undermined the Department's ability to meet its general duty in relation to the development of new policies.

38. In the Commission's view, the roots of the current investigation lie in the failure of the Department to fully take on board the Commission's feedback and advice in April 2005. Had it addressed the gaps as identified by the Commission it would subsequently have been in a far stronger position to meet the wider requirements of the RED and specifically the need to assess the impact of proposed policies.

39. The Commission provides an up to date assessment of the Department's latest RES or Single Equality Scheme (SES) and other recent RED developments in Chapter 3.

40. It is the Commission's view the Department has never published a fully compliant RES, despite feedback from the Commission on its previous Schemes.[11]

Race Equality Impact Assessments (REIA)

41. In addition to assessing the compliance of Departmental RES/SESs, the Commission has also undertaken extensive audits of Whitehall's performance in terms of REIAs. In August 2005, in response to stakeholder concerns that the Department was not satisfactorily carrying out a REIA of the Mental Health Bill, the Commission formally wrote to the Department reminding it of its legal responsibilities in respect of REIAs (See Chapter 3).

42. This lack of attention to race in policy making was most starkly demonstrated in the case of the Department, which in response to the Commission's request stated that the following policies had been developed without the need to carry out a REIA:

- *Agenda for Change*[12]

[11] The Commission has also found the Department non-compliant in relation to the employment duty, this is being dealt with outside the investigative process.

[12] The Commission originally proposed that Agenda for Change should be included as part of the current investigation. However during discussions regarding the Department's representations, the Department agreed to provide monitoring data on the impact of the policy. The Commission is still awaiting this data.

- *£60 million to help older people live independently*
- *£60 million package to support carers*
- *Establishment of a new national partnership body for voluntary sector*

43. As noted elsewhere, in response to a Parliamentary Question by Keith Vaz, MP in December 2005, the Department was one of a small number of departments, which confirmed that they were yet to carry out any REIAs. This response identified and reaffirmed the Department as being of particular concern. It remains the Commission's view that the failure of the Department, in spite of the overwhelming relevance of so much of its work, warranted specific attention and action.

44. This action was widened and led the Commission to systematically request copies of completed REIAs of any recently announced policies and legislation to all departments. This project determined that Whitehall has a poor record of carrying out REIAs.

RED systems

45. Having established that the Department was not meeting its legal obligations in relation to its RES and not carrying out REIAs, it is important for the Commission to try to understand why this occurred.

46. In the proposal and developmental stages of the investigation, the Commission gave the Department opportunities to provide evidence of its efforts to meet the requirements of the RED. The Department provided a number of documents to support its assertion that it had proactively sought to meet the requirements of the RED and, more specifically, to meet the requirements in respect of the implementation of the specific duties, namely assessing the impact of proposed policies.

47. In addition to those documents the Department has supplied, the Commission identified a number of other documents which were relevant to the investigation. These include documents which potentially supported the Department's case but had not been identified by the Department, including documents which the Commission was able to access via the Department's own website. The Commission has not been able to ascertain why the Department did not deem these documents to be relevant to the investigation.

RED-focussed advice to staff

48. During the early years of the RED, the Department sent out a number of messages setting its basic expectations to NHS Trusts. Sir Nigel Crisp, the then Permanent Secretary and Chief Executive of the NHS issued correspondence to NHS Trust Chief Executives. These messages start in January 2001, giving advance notice of the introduction of the Duty in May 2002 and provided useful links to Commission and Home Office guidance.[13] This sent an important message, in advance of the commencement of the RED.

[13] DH Letter to NHS Chief Executives, January 2001

Sir Nigel Crisp made a number of such interventions, as well as conference speeches dealing with issues of race equality and leadership.[14] The Commission is of the view that this represented a positive aspect of the Department's initial approach to the RED.

49. This reflects one half of the Department's responsibilities, i.e. those to the NHS. The other half relates to the need to prepare and train its internal departmental staff. As will be shown there is some evidence that the Department was aware of its responsibilities in this respect.

50. The Department organised three RES advice sessions between November and December 2002. These were delivered by the then Equality Strategy Group (latterly reconfigured as the Equality and Human Rights Group) and took place in London and Leeds. The aim of the sessions was to address perceived uncertainty about the requirements of the RES and its significance for day to day working. The sessions were aimed at Branch or Section Heads (middle managers) and intended to last twenty minutes per session. The Department assessed the impact of these sessions in a contemporaneous 'management note'.[15] It records that the three sessions were attended by a total of 26 people, out of a total of 248 Branch Heads and that a number of attendees were from below Branch or Section Head levels. The note outlines:

- Participants were poorly prepared for the sessions
- There was a poor awareness of the Department's RES
- Perception amongst some attendees that the RES was associated with employment issues

51. The note further states that:

'Some participants also reported being under pressure to take BME issues seriously in their policy areas and were not sure how to develop this further.' Many participants requested links to be made for them on how the race equality agenda related to specific work areas.'[16]

52. The note's authors identified three specific 'next steps'. These are:

- Identify DH policy teams who would pilot a REIA using the Equality Impact Assessment Tool
- Commission production of a leaflet/brief summary of the requirements of the RES for the Department. This should be available for early 2003 and posted on the Department's website

[14] This includes: Speech by Sir Nigel Crisp, Chief Executive, to Chief Executives Conference, 10 February 2004 Department of Health; Speech by Sir Nigel Crisp, Chief Executive, 28 April 2004 Department of Health

[15] Race Equality Scheme: Advice Sessions – Feedback from three sessions held between November 02 – December 02 (Management Note), undated.

[16] Race Equality Scheme: Advice Sessions – Feedback from three sessions held between November 02 – December 02 (Management Note), undated.

- Possibility of extending the advice sessions to other parts of the Department such as the Executive Agencies or DHSCs who are also covered by the RES.

53. The issue of REIA approaches is dealt with in greater detail below, however the Commission has established that the Department did issue an advice note to all staff in March 2003 through its monthly bulletin.[17] The bulletin provided a basic overview of the new RED including general, specific and employment duties. This was a welcome development as it sent a clear signal to all staff regarding the Department's expectations in respect of the RED. The bulletin also set out the Department's basic expectations in respect of monitoring existing policies and the impact assessments of new policies. Finally, it mentioned that the Equality Strategy Group was developing an Equality Impact Assessment toolkit.

54. The Commission is of the view that this was a positive development, as it set out clear expectations. However there are minor concerns regarding the broader content of the Bulletin. For example, although it states that:

'The general and specific duties apply only to those of our functions we have assessed as relevant to race equality/community relations.'[18]

55. This is of concern because the Department had at that point already omitted to identify any functions or policies as being relevant to race equality in its RES of 2002-2005.[19] The aforementioned management note is clear in its advice to senior managers:

'A way has to be found to re-assess the Department's functions and policies that will engage policy colleagues.'[20]

56. It should be noted that the Commission's assessment of the Department's RES in April 2005 found that the RES did not include an adequate list of policies and functions assessed as relevant to race equality. It would appear that having correctly identified a key area of non-compliance in early 2003, the Department did not take the necessary remedial action.

57. The 'management note' also records that:

'The Department is required to publish an annual report on the progress of policies and programmes in promoting race equality.'[21]

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[17] Race Equality Advice to All Staff – Monthly Bulletin, Number 28

[18] Race Equality Duty Advice to all Staff, Equality Strategy Group, 2003. The advice note was available via the Department's website, however, the hyperlink is no longer active.

[19] Race Equality Scheme: Advice Sessions – Feedback from three sessions held between November 02 – December 02 (Management Note), undated.

[20] Race Equality Scheme: Advice Sessions – Feedback from three sessions held between November 02 – December 02 (Management Note), undated.

[21] Race Equality Scheme: Advice Sessions – Feedback from three sessions held between November 02 – December 02 (Management Note), undated.

58. Although there is no such legal requirement to do so such a progress report would have been considered an example of good practice, had it been produced.

59. The Commission is of the view that the content of advice to internal departmental staff compares relatively poorly with a document which the Department had previously issued to NHS Trusts in May 2002.[22]

Training

60. Having arrangements for the provision of RED training is not only a legal requirement under the specific duties, it is also fundamental to ensuring that all staff are aware of requirements of the RES and ultimately the potential consequences of their actions.

61. It appears from documentation submitted and the responses of those who were interviewed that the Department did not undertake systematic RED-specific training across the whole of the organisation. There were some ad hoc sessions involving members of the EHRG (and its predecessor), but a structured approach to RED training was absent. To quote a senior official at the Department:

'there was a programme of training on diversity which followed through this period and I just want to be clear that that training did not, as I recall it, include specific training on the use of a methodology for equality impact assessment.'[23]

62. The Department's narrative and a number of interviewees identified that the Department ran a series of wider diversity training sessions entitled 'Valuing Diversity'. On a number of occasions Departmental officials forwarded 'Valuing Diversity' as a key part of the Department's efforts to meet the training requirements of the specific duties. The Department cites that 90% of staff attended either Valuing Diversity or 'Race Equality workshops' during 2002-03. The Commission was able to clarify that these were the only equality training sessions that the Department has offered and these officers had accessed in the period since 2001.

63. The value of this particular course is called into question by the content of the aforementioned management note. It states:

'From information received during the advice sessions, we conclude that the Valuing Diversity training was a lost opportunity because there was reportedly no discussion on the race equality legislation and its implications on the Department's work. All there was on the RRA was an appended paper to the training pack.'[24]

[22] Putting race equality to work in the NHS – a resource for action, Department of Health, 2002
[23] Interview number 4, 10 September 2007
[24] Race Equality Scheme: Advice Sessions – Feedback from three sessions held between November 02 – December 02 (Management Note), undated.

64. EHRG Officials noted that the 'Valuing Diversity' sessions were supplemented with some wider discussions of the duty.[25] However, this leaves three key questions:

- Did the above acknowledgement did not lead to the development of specific duty focused training?
- Did the Department consider that it needed to address gaps in the knowledge of those staff who attended the course in 2002-03?
- Did the Department put in place in training arrangements in respect of those staff who joined the organisation after 2002-03?

65. The answer in each case appears to be no. This poses fundamental questions about the ability of staff to understand and meet the requirements of the RED. The availability of sound RED training represents a fundamental aspect of wider compliance with the RED.

66. The management note indicates that senior officials were aware of these concerns and in particular the gap in training provision, but that no significant remedial action was put in place. It is clear from further discussions with the senior officials in the Department and the responses of those interviewed that there has been no further RED focussed training within the Department.[26]

67. The Commission concludes that:

- The Department did not put in place sufficient RED training arrangements to ensure that its staff were equipped to meet the wider requirements of the RED.
- General diversity training which does not place sufficient emphasis on the Duty will not ensure that a public authorities meets its obligations under the RED.

68. Issues in respect of the RED training are magnified in relation to training staff in relation to REIAs. In addition to the absence of generic duty-focussed training, there was no bespoke training on the requirements in respect of REIAs, prior to the initiation of the investigation. It appears that there has been some one-to-one sessions involving members of the EHRG, but no systematic approach to REIA training during the period 2002-07.

Departmental frameworks

69. The Department of Health published an 'Equalities Framework: Priorities for Action' in 2003. This document set out the Department's overarching approach to Equality. This work was led by Hugh Taylor, now Permanent Secretary. The Department omitted to supply a copy of the document. However it was referenced in the aforementioned all staff bulletin and the Commission has been able to locate a copy via the Department's website.[27]

[25] Interview number 5, 11th September 2007
[26] Interviews 1, 2, 3, 4 and 5, August and September 2007
[27] A copy of the Framework is available via www.dh.gov.uk

70. On first reading, the Framework is a very positive document. It sets out a broad view of the Department's approach to race equality work. Positive aspects include:

- A clear outline of priority areas.
- Identification of priorities in terms of both opportunity and risk.
- References to the development of an inspection regime to ensure equality and national standards
- A requirement for board members to 'show leadership' and 'support and hold to account those responsible for taking forward work'
- Identification of Board-level champions including Hugh Taylor, Sarah Mullally, Sir Liam Donaldson and Sian Jarvis
- Reference to fulfilling statutory obligations (systems reform/major programmes/national bodies sponsored by the Department)
- A 'commitment to build equality into modernisation and systems reform'
- A pledge to implement procurement practices in line with Commission guidance.
- A commitment to produce an action plan

71. The framework identified the following as priorities for the Department:

- Systems reform to shape health and social care for the future
- Major programmes, including national service frameworks
- Capacity building within the system
- Creating a Department of Health that is fit for purpose

72. Most importantly for the purposes of this investigation, the framework set out the Department's commitment to meet its legal responsibilities in respect of race equality impact assessments and monitoring of existing policies. It noted:

'The Department is required under the Race Relations Act (as amended) to assess and monitor the impact of its policies and services on all racial groups and to consult the latter when developing policy.'

73. It goes on to offer a board-level commitment to ensure that 'the impact on different social groups is monitored':

'We will undertake equality impact assessments of key national programmes, and implement action plans developed as a result, to improve outcomes for users and to ensure that statutory obligations are being fulfilled.'[28]

74. During the course of the interview phase, the Commission was able to ascertain that, despite the positive focus of the framework, much of its content was never realised, which the Department partly put down to turbulence within the Department at that time. Furthermore:

[28] DH Equality Framework: Priorities for Action, 2003, Department of Health, 2003, pp.5-6

'the board-level commitment to that corporate framework wasn't a substitute for the continuing duties that are clearly set out under our race equality duty…What I think is it didn't emerge as strongly as I would have liked when we pushed it forward was as a corporate call to action in the Department.'[29].

75. There is some evidence that individual actions contained within the action plan were progressed, however a significant number were not. This is most starkly evidenced in respect of REIAs. The systematic approach to REIAs was never rolled out across the Department.

76. The Commission is of the view that this document is arguably the most promising document the Department produced during the period prior to its intervention. It is therefore disappointing that the Department did not see fit to furnish the Commission with a copy. The Commission can only surmise as to the reasons of this.

77. The Commission is of the view that, on the basis of what it has been presented by the Department, and the documentation it has otherwise obtained, the Department had, by the end of 2003, largely identified all of the key arrangements it would need to ensure that it could meet requirements of the Duty. However, the Department's failure to fully implement its Equalities Framework undermined this considerably. It is, however, in the development of the REIA processes where potential progress was most crucially undermined.

Development of REIA approaches

78. The Department asserts that it set out its approach to REIAs in its RES 2002-05.[30] However, as noted previously, the Commission concluded that the Department's first RES was highly non-compliant. One of the key areas of concern was the inadequacy of its arrangements in respect of REIAs.[31] The Department's own narrative places a strong emphasis on the importance of work to develop a REIA tool.[32]

79. The Department records that the Equality Strategy Group (latterly the EHRG) was charged with responsibility for 'developing and promoting race equality impact assessment within the Department. It notes:

'the intention of producing an impact assessment tool by the end of the 2002-03 financial year, several options for building on existing work were explored, including the Policy Appraisal for Equal Treatment work done by the Cabinet Office's Women's Unit and the 'Fairway' electronic equality impact assessment tool in use in the Department for Education and Skills.' [33]

[29] Interview 4, 10th September 2007
[30] Department of Health Action on Race Equality Impact Assessment (The Narrative), 2007
[31] Whitehall RES Audit, CRE, 2005
[32] Department of Health Action on Race Equality Impact Assessment (The Narrative), 2007
[33] Department of Health Action on Race Equality Impact Assessment (The Narrative), 2007

80. During the course of the interviews, a Departmental official recorded that attempts to import the DfES electronic template ran into technical and financial difficulties and ultimately stalled. It was further noted that this led to a significant delay, with the Department finally agreeing and disseminating a REIA tool in April 2005.

81. The tool and accompanying material set out why 'Equality Impact Assessments' are needed, (the new requirement) and advice as to what an EIA should look like. It notes that web-based guidance had been launched by the Home Office and the Commission for Racial Equality and that:

'Home Office ministers expect all departments to use the REIA tool as part of the RIA (Regulatory Impact Assessment) process.'[34]

82. The important point here is that the Department itself repeats the assertion that it expected policy makers to use the REIA template as part of a wider process. This is different from merely covering or mentioning race equality in the course of a RIA. This is a crucial point to recall when considering the Department's later REIA-related activities.

83. The overarching document is accompanied by an Equality Screening tool and REIA tool. The Department has acknowledged that there was significant delay in the production of these materials.[35] The documents were published in April 2005. The Commission has assessed each of these documents and the following provides an overview of the Commission's assessment of each document.

Screening tool

84. This is a simple two-page document covering all six equality strands and Human Rights. It sets out that:

'Proposed policies must be subject to screening and those identified as having significant implications for equality of opportunity following such a review must be subject to a full impact assessment.'[36]

85. This opening paragraph sets the tone for the remainder of the document, which focuses on just one strand of the duty (equality of opportunity). There is not sufficient coverage of either the duty to 'eliminate unlawful discrimination' or 'promote good race relations'.

86. The screening is limited to three questions which focus on establishing whether there is:

- Any evidence of higher or lower participation or uptake by different groups?

[34] www.cre.gov.uk
[35] Interview 5, 11th September 2007
[36] Equality Screening Document, Department of Health, 2005

- Any evidence that groups have different needs, experiences or issues and priorities in relation to the particular policy?
- Have consultations with relevant groups, organisations or individuals indicated that particular policies create problems which are specific to them?[37]

87. The tool is undermined by:

- The use of closed questions, which may encourage time strapped policy makers to answer 'No' and therefore avoid the need for a REIA.[38]
- Limited coverage of the three core questions would not ensure the development of compliant REIAs. For example, the Commission would expect that any REIA screening tool would, as a bare minimum, include an active consideration of the individual strands of the duty. The questions are limited to light probing in relation to impact in terms of equality of opportunity.

88. The Commission has encountered REIA/EIA screening documents of this type before and they rarely lead to assessments being undertaken in all relevant policy areas. The reality is that the impact of this was negated by the Department's failure to roll-out REIAs across all key aspects of policy making. However, it is highly unlikely that this tool would have led to the production of compliant REIAs. This however, is irrelevant as the Department has acknowledged that it did not roll-out such a programme.

Equality Impact Assessment tool

89. The Department also provides a further document entitled 'Equality Impact Assessment – Where screening of a policy undertaken (sic) and EQIA required'. The document is divided into seven key sections. These reflect the main stages of a REIA. This is positive, although the coverage of each stage is insufficient and would need to be supplemented by detailed, bespoke REIA training in order to provide additional advice and guidance. Such systematic training was not provided. The Department has noted that the EHRG undertook some briefing sessions with individual teams, but has been unable to provide further evidence, including dates, minutes of meetings, number of teams involved and contents of advice and guidance.

90. The Equality Impact Assessment tool document is also flawed. Its strength is hampered by:

- Use of a number of closed questions

[37] Equality Screening Document, Department of Health, 2005

[38] The Commission has consistently argued that all REIA screening and full assessment tools should be built around open questions. These encourage policy developers to properly think through the implications of proposals. This requires the individual policy maker to outline the evidence which underpins the decision regarding the need for a REIA or otherwise. The screening stage is a fundamental part of any REIA system, as it can mean the difference between assessments taking and not. A poor screening tool could effectively remove any likelihood of a public authority being able to deliver compliant REIAs.

- The absence of a full REIA template
- Poor coverage of the different strands of the duty
- Absence of supporting advice and explanations
- Poor sequencing of content of sections
- Failure to consider the impact on different ethnic groups
- Failure to require policy developers to produce an action plan – there is a proforma attached which allow policy developers an opportunity to list

91. The Commission is of the view that the EIA template would not have ensured the systematic development of compliant REIAs. However, again this discussion is irrelevant, as the Commission has concluded that the screening would have effectively filtered out the vast majority of relevant policies before even reaching the full REIA stage. Indeed, the fact that the Department did not ultimately utilise the Equality Impact Assessment tool means that this discussion is now of little consequence. However, the Commission's conclusion is that, had it attempted to roll-out its approach to REIA using the above documents, it is unlikely that this would not have led to the development of compliant REIAs in relevant policy areas.

92. Having developed a REIA tool, including screening component and guidance, EHRG officers confirmed that the REIA tool was agreed and distributed to policy teams. However, it is clear that the relevant systems required to ensure that REIAs are systematically undertaken in relation to all relevant policies were not put in place.

93. There were no performance management systems put in place to monitor whether REIAs were being completed at a local level. This effectively meant that nobody at an operational or (senior) management level, was charged with ensuring REIAs happened in key policy areas. It would appear that it was left to relevant policy teams to determine whether a REIA was required and whether the tool should be used. This was confirmed by EHRG officers during the interview phase:

'…Our function isn't if you like to clear RIAs or REIAs so we'll work alongside policy colleagues that are undertaking that process but there wont be a requirement for them to come to us with their final draft for us to clear it before it can go out.'[39]

94. Similarly, no systems were developed to quality check or legally proof policies in order to ensure that assessments were compliant. The failure of the Department to systematically roll-out REIAs across the Department, negated the impact of this. However it is particularly relevant in the case of the REIA of the Mental Health Bill.

'Not the final one…So we were party to a lot of the discussions that happened around that and some of that was actually quite challenging, there were some quite different opinions on how that should be gone about. But not that the

[39] Interview 5, 11th September 2007

Mental Health Bill team draft the final impact assessment then show it to us before publishing, no.'[33]

95. As previously indicated, the absence of a formal departmental programme of REIA training undermined the wider project. EHRG officers state that they undertook ad hoc sessions with individual policy teams (as identified via the interviews relating to the three individual policies). However, there is no data available regarding timings, number of participants or content of these sessions.

96. In the light of the above, the Commission has concluded that the Department failed to put in place key systems (training, scrutiny and legal proofing) to ensure that it was able to develop a systematic approach to REIAs during this period. The REIA of the Mental Health Bill would appear to be a one-off exercise.

97. There is evidence of activity relating to a REIA of the Mental Health Bill during the course of 2005-06. At this time there were also interventions by the Commission and stakeholder organisations on these issues. This is explored in greater detail in chapter 3.

The use of Regulatory Impact Assessments (RIA)

98. During the course of the investigation the Department has suggested that it regularly considered the impact of its policies via its RIAs.[40] The Department repeatedly states that its approach to RIAs forms a key part of its consideration of race equality and its work to meet its RED requirements.

99. In 2003, the Commission, seeing an overlap between RIAs and REIAs worked with the Cabinet Office to develop guidance to assist policy makers to build a full consideration of race equality into RIAs. Both Cabinet Office and Commission guidance are explicit in their expectations:

'Policy writers who have to carry out regulatory impact assessments of their proposals (this applies mainly to central government departments) should build race equality impact assessments into the regulatory impact assessment procedures.'

100. It is quite clear that those who undertook a RIA must carry out the REIA component to the same level as if it were a separate REIA. However, from the results of the Commission's own monitoring exercises, Whitehall departments have a poor record of considering race equality as part of RIAs. The Commission has therefore held longstanding concerns in this respect.

101. In preparing its evidence base for the investigation, the Commission reviewed a selection of the Department's wider RIA back catalogue. These provide no evidence of any systematic or consistent consideration of race equality. The

[33] Interview 5, 11th September 2007.
[40] In 2003, the Cabinet Office introduced the Regulatory Impact Assessment process, which sought to measure the likely cost of legislative developments for business and commerce.

RIAs fall into two categories. Firstly, those which include a cursory reference to race equality. For example, the Partial RIA of the Health Bill, published in October 2005, includes just a single reference to the impact of proposals of ethnic minority owners of pharmacies. The RIA records that there are 'no other impacts in terms of race equality'.[41] This is a Bill which sets out to make major changes in the sphere of public health and is clearly relevant to race equality.

102. Secondly, there are those RIAs which do not even contain a cursory reference to race equality let alone proper consideration to it as is required. For example, the RIA of National minimum standards for adult placements, published on 11th August 2004.[42] Again, there is a clear relevance to race equality and therefore one would expect to see a full consideration of the race equality.

Recommendation: That the Cabinet Office put in place adequate monitoring of RIAs across Whitehall and that this should include a rigorous and robust consideration of race equality for legal compliance.

Why was there no systematic approach?

103. There appears to have been a complete disconnection between the preparatory efforts of the Department and its delivery of compliance in relation to REIAs. There was an apparent flurry of RED activity between 2002 and early 2004. There is then a considerable hiatus through to April 2005, when the tool is published, and little or no evidence of systematic progress until the point that the Commission formally warns the Department that it is minded to initiate an investigation in August 2006.

104. During the interviews, Departmental officials confirmed that this hiatus occurred and that it was variously explained by two reasons. Firstly, the focus on the roll-out REIAs slipped as a result of the 'turbulence' which accompanied large-scale reorganisation within the Department during 2004-05. Secondly, the greater emphasis was placed on the RED performance of NHS Trusts.[43] Each of these assertions is dealt with in turn.

105. The Commission accepts that reorganisations can have a destabilising impact upon the morale and performance of individual public authorities. As a consequence it accepts this can lead to some delays in the development of particular initiatives. However this alone cannot explain the almost wholesale stalling of progress in this entire area. This assertion is undermined by the fact that the Department published its REIA tool in April 2005, but this did not trigger any specific actions or progress in terms of the development REIAs.

106. Turning to the assertion that the Department concentrated on the RED performance of NHS Trusts and as a result placed a lesser emphasis on its own

[41] http://www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Regulatoryimpactassessment/DH_4121917
[42] http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_4087392
[43] Interview 4, 10 September 2007

compliance. The Commission believes that this argument is somewhat undermined by the findings of Healthcare Commission monitoring project which found that more than a third of NHS Trusts had yet to publish a RES for the period 2005-08, and just 2% had evidence of REIA activity on their websites.[44]

Conclusion

107. The Commission had previously identified that during the period prior to the commencement of the investigation, the Department had not published a compliant Race Equality Scheme.[45]

108. In relation to REIAs, the Commission has concluded that the Department made significant steps during the course of 2002-03 to put in place the basic systems that are needed to ensure a coherent approach to REIAs, including advice to staff, and the Equalities Framework. This is then supplemented, after delays, by the development of a REIA tool (which did not ensure compliance with the Act), with (limited) guidance, which included a reiteration of the Home Office's assertion that all departments should utilise a formal REIA process. These should have enabled the Department to roll-out a departmental approach to REIAs. However, the Department has admitted that this did not happen and has cited the 'turbulence' associated with reorganisations and its twin focus on the RED performance of the Department and NHS Trusts as explanatory factors.

109. The Commission suggests that the following played an important role in preventing sufficient progress:

- Absence of fully compliant RES
- Absence of departmental RED training
- Absence of Departmental REIA training
- Failure to identify a body within the Department with overall responsibility for ensuring REIAs were completed
- Absence of legal and senior management sign-off of REIAs
- Absence of senior management scrutiny of REIAs.

110. The Department's failure to develop a systematic, departmental approach to REIAs across areas of policy and service development fundamentally undermines the Department's assertion that it had had 'due regard' to the RED. However, in order to test this completely, it is important that the Commission assesses the degree to which it had considered the impact in terms of race equality in relation to the development of three named polices.

[44] Healthcare Commission, RED Audit of NHS Trusts, 2006

[45] The Commission provides an assessment of the RES and Single Equality Schemes which the Department has published in the period following the announcement of the investigation.

CHAPTER 3

SPECIFIC POLICY AREAS

Introduction

111. In order to determine the degree to which the Department has met its legal responsibilities in respect of assessing the impact of proposed policies, the Commission chose to focus on three specific policies which were at various stages of development during the period April 2004 – March 2005. Each has been identified as relevant to race equality and each has been the subject of correspondence from the Commission requesting copies of REIAs.

112. The three policies are:

- Mental Health Bill
- Our Health, Our Care, Our Say
- Independence, Well Being and Choice[46]

113. This chapter begins with a short overview of the individual policies. It then goes on to provide an analysis of the approaches which the Department adopted in respect of the individual policies and the degree to which this enabled it to meet the requirements of the RED. This begins by setting out the Commission's overarching view of each policy in respect of compliance. Finally, the Commission highlights a number of areas of concern which it has identified as a result of its analysis of the three policies.

114. The chapter concludes with an analysis of the Department's recent RED performance. This assesses the compliance of a number of developments during the period since the Commission indicated that it was minded to commence an investigation.

(i) OVERVIEW OF THE INDIVIDUAL POLICIES

Mental Health Bill

115. The Commission has had a longstanding interest in the delivery of mental health services because of well-established differential outcomes for a number of different ethnic minority communities.

116. There has historically been a lack of reliable ethnicity data relating to the delivery of mental health services. In spite of this, there was significant local and anecdotal evidence of the disproportionate impact of services upon ethnic minority communities. In March 2005, the first full national Census of Mental

[46] The White Paper 'Our Health, Our Care. Our Say' grew out of a consultation exercise called 'Your Care, Your Health, Your Say'. For the purposes of this report the Commission uses the title as adopted in respect of the White Paper when referring to all stages of the policy development process.

Health inpatient services was undertaken.[47] The 'Count Me In' Census was intended to provide a snapshot of inpatient service use on a single day. The result was the most comprehensive picture of service use to date, recording the experiences of more than 97% of service users. The Census confirmed that people from a number of ethnic minority communities had very different experiences of mental health services.

117. In March 2007, the results of the second annual 'Count Me In Census', carried out in March 2006, were published. These results reaffirmed the findings from the initial Census. The Census collected ethnicity data relating to 98.9% of inpatients within 328 mental health units.[48] Headlines statistics include:

- 21% of inpatients were from ethnic minority backgrounds
- 70% of black and minority ethnic patients were in 23 of the 238 organisations
- Highest admission rates were among men from the 'Other Black' group at 18 times higher than average.
- Black Caribbean, Black African and Other Black people were between 35% and 53% less likely to have been referred to services by their GP
- The Black Caribbean group had the highest median duration of stay.[49]

118. Concerns regarding the experiences of ethnic minority communities of mental health services were underlined by the inquiry into the death of David 'Rocky' Bennett. In a mental health unit in Norfolk in 1998. The inquiry identified significant systemic failings in key parts of the mental health system and made specific recommendations, designed to ensure that services could meet and respond to the needs of clients from different ethnic backgrounds. In response to the inquiry, the Department launched its Delivering Race Equality in Mental Health (DRE) strategy (which had already been in development prior to the publication of the inquiry report).[50] DRE sought to re-orientate services in order to meet the needs of different communities.

119. The wider service delivery context ensured that any attempt to make changes to or replace the Mental Health Act, 1983, was always going to be of particular interest to the Commission and those organisations representing ethnic minority communities.

120. During the period 1999 – 2007, the Department sought variously to amend or replace the Mental Health Act 1983. This involved a number of attempts to develop proposals in response to its own identification of the need to improve the delivery of services and on-going stakeholder concerns regarding the workings of the 1983 Act. This proved to be an extremely difficult process

[47] The Healthcare Commission and Mental Health Act Commission and Healthcare Commission (funded by the Department of Health)
[48] Count Me In Census 2006, Commission for Health Care Audit and Inspection, 2007
[49] Count Me In Census 2006, Commission for Health Care Audit and Inspection, 2007
[50] Delivering Race Equality, Department of Health, 2005. It should be noted that the Commission has consciously chosen to not explore aspects relating to the implementation of DRE because it is of the view that this is clearly beyond the boundaries of the current investigation.

with a number of significant delays, prior to finally navigating its way through the parliamentary process in 2006-07.

121. In considering the 'Mental Health Bill', the Commission is conscious that there is a clear twin stage aspect to the Department's work. These relate to the first Mental Health Bill 2004-05 and the second Mental Health Bill 2006-07.

122. The seeds of the development of the Mental Health Bill can be traced back to the findings of an expert committee published in 1999.[51] This leads to the successive developments of Green (1999) and White papers (2000), publication of a draft Mental Health Bill in 2002 and a revised draft Bill in September 2004.[52]

123. In 2004, the Department of Health contacted the Commission to seek clarifications regarding aspects of the REIA process. The Commission provided appropriate advice regarding the mechanics of impact assessment. This represented the last occasion in which Commission officials provided specific advice in respect of the various incarnations of the Bill.[53]

124. By the time that the Draft Mental Health Bill reaches Parliament it has already been more than four years in gestation. This reflects the widespread interest in mental health and the external stakeholder interest in a number of the proposals to this point.

125. Many of the key issues were drawn out during sessions of the joint pre-legislative scrutiny committee. The committee took evidence from stakeholders, including a number representing ethnic minority communities. The committee's report was published on 23 March 2005. The report contained a number of detailed changes it wished to see made to the draft Bill. This led to a commitment to make further revisions and undertake further consultation with stakeholders. In early 2005, there were a number of calls from stakeholder organisations for the Department to carry out a rigorous REIA of the draft Bill. There were a very significant number parliamentary questions concerning the Department's intention in this respect, particularly between July 2005 and June 2006. The Department reported to Parliament that work on the REIA had begun in late 2004.[54] The Commission has been unable to establish further details relating to these early stages of the REIA.

126. The Commission was formally approached in August 2005 and again in December 2005 by stakeholder organisations concerned that the Department

[51] This section is based on a timeline of the Mental Health Bill which can be found on the Department of Health's website www.dh.gov.uk

[52] Mental Health Bill Timeline, www.dh.gov.uk

[53] On a number of occasions in the intervening period, the Department approached the Commission to invite it to actively participate in advisory groups and to assist it in the development of REIAs of the Bill(s). On each occasion, the Commission declined these invitations; as active participation may have compromised the Commission's subsequent activities in its role as a regulator. The Commission has been consistently clear with the Department and other public authorities that, whilst it will offer general advice regarding REIA processes, it will not actively become involved in the development of individual policies or REIAs.

[54] Ministerial response to Parliamentary Question, 23 Nov 2005

was not commited to carrying a full REIA of the proposals. The Commission wrote to the Department on each of these occasions, firstly to remind the Department of the need to carry out a full REIA and secondly, to remind it of the requirements of such an assessment.

127. During the course of 2005, the Department brought together an advisory group, chaired by Rabinder Singh, QC to enable the Department to draw upon the expertise of key stakeholders. This was the first of a number of such advisory and consultative groups established in respect of the two Mental Health Bills.[55] The Commission also acknowledges that the Department undertook a significant number of consultation events at different stages of the development of the Bill.[56] The Commission also notes that the Department published a literature review and commissioned additional research regarding mental health issues.

128. On 7th December 2005, the Department acknowledged that it was delaying passage of the proposals, in order to allow additional time for a full REIA to take place. In March 2006 the Department announced that it would no longer pursue the Draft Bill, but would develop proposals to amend the existing Mental Health Act 1983. At this stage, the Department was reminded by the Commission (and stakeholder organisations) of the need to carry out a full REIA of whatever proposals it brought forward.

129. The Department carried out a consultation on new draft proposals which focused on four key amendments to the Act. These were:

- Broaden the defintion of mental illness
- Introduce Supervised Community Treatment Orders
- Remove the Treatability Test
- Introduce provisions arising from the Bournewood ruling.

130. On 16th November 2006, the Department introduced the Mental Health Bill 2006-07 into the House of Lords. It also simultaneously published a REIA of the Bill.[57] A copy of the REIA can be found on the Department of Health's website.

131. This was the first REIA to be published by the Department since the requirements of the duty came into affect in May 2002.

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[55] Events surrounding the various advisory groups set in relation to the two incarnations of the Mental Health Bill are subject to considerable controversy. The Commission does not propose to explore these issues here.

[56] The Commission is aware that the delivery, content of and departmental responses to a number of these events is extremely contentious. The Commission has audited the evidence provided by the Department and sought additional evidence from external stakeholders, but does not propose to provide further commentary as part of this report. The Commission will provide wider commentary on the process as a part of the follow-up to the investigation.

[57] The Commission has subsequently notified the Department that it does not believe that it is acceptable to simultaneously publish Bills and REIAs. The Commission has set out that it expects that REIA of legislative measures should be published alongside the relevant White Paper and/or at least one-month in advance of the legislation entering the parliamentary process. This ensures that stakeholders can consider the content of the Bill and propose necessary amendments.

132. The Mental Health Bill 2006-07 completed its passage through Parliament, having undergone a number of amendments. It received Royal Ascent on 19th July 2007.

Independence Well-Being and Choice

133. *Independence, Well-being and Choice* was a formal consultative paper on the future direction of adult social care provision in England. It was released for public consultation in March 2005. Its objective was to raise awareness of the need for change and engage a range of stakeholders in thinking about sustainable solutions to be delivered over the next 10-15 years. [58]

134. The key proposals to deliver this vision included:

- Wider use of direct payments and the piloting of individual budgets to stimulate the development of modern services delivered in the way people want;
- Greater focus on preventative services to allow for early targeted interventions, and the use of the local authority well-being agenda to ensure greater social inclusion and improved quality of life;
- A strong strategic and leadership role for local government, working in partnership with other agencies, particularly the NHS, to ensure a wide range of effective and well-targeted provision, which meets the needs of our diverse communities; and
- Encouraging the development of new and exciting models of service delivery and harnessing technology to deliver the right outcomes for adult social care.[59]

135. From Spring to Autumn 2004, a 'pre-consultation' phase took place. This included:

- The Social Care Institute for Excellence (SCIE) collation of responses from the 'social care audience' There were two separate consultation periods
- An electronic survey of health professionals (May-June 2004)
- The Department opened a mailbox for any comments on the future of social care
- SCIE held a series of seminars for 16 focus groups, including 6 consisting of service user representatives
- Ministerial meetings with 30 major service user and carer representative stakeholder organisations
- Officials wrote to around 250 voluntary organisations, inviting them to propose ideas/comments for Independence, Well-being and Choice by the end of October. A number of organisations provided detailed written comments in response
- Various stakeholder meetings

[58] Executive Summary, Independence, Well Being and Choice, 2007
[59] Executive Summary, Independence, Well Being and Choice, 2007

- Two reference group seminars were held in October and November 2004. Participants consisted of key Whitehall departments and public sector stakeholders[60]

136. The Department also commissioned three pieces of work to help inform the debate:

- Institute for Public Policy Research reviewed the current system of resourcing social care to identify any new models of financing social care
- Tavistock Institute examined how the existing levels of financial resources for social care could be used in a way which would support a strategy of personalised service[61]
- Social Policy Research Unit, University of York identified, collated and summarised recent ideas, proposals and suggestions from a range of relevant stakeholder organisations on potential future directions for adult social care.[62]

137. The Department also commissioned the Care Service Improvement Partnership (CSIP) to undertake further consultation following the publication of the Green Paper, as well as separately commissioning the SCIE to undertake work with 'hard to reach' communities. The CSIP consultation concluded in July 2005 and a report on these consultations and the SCIE exercise was published on 19 October 2005. It should be noted that none of the consultation exercises included ethnic monitoring of participants.

138. The stated intention was that the Department would publish a follow-up White Paper to the Green Paper, with a full RIA (a Partial RIA was published with the Green Paper). In July 2005, the Government decided that the outcome of the consultation on the Green Paper would be merged with a further consultation 'Your Health, Your Care, Your Say' to become the 'Our Health, Our Care, Our Say' White Paper at the end of January 2006.

Our Health, Our Care, Our Say

139. The Department's approach to "Our Health Our Care Our Say" was a departure from its usual policy development process. It adopted a 'deliberative' approach, whereby the public were asked to explain what they liked and what they wanted to change about local health and social services. The Department states that it set out to move away from traditional Whitehall –driven approaches. The result was an extensive listening exercise known as "Your Health Your Care Your Say".

140. The main consultation phase (pre-policy development), entitled a 'Citizen's Summit' was built around four regional events. These events were delivered by external providers and involved initial invitations to 125,000 people. The events focused on key main themes:

[60] Executive Summary, Independence, Well Being and Choice, 2007
[61] Executive Summary, Independence, Well Being and Choice, 2007
[62] Independence, Well being and Choice: The Narrative, 2007

- Designing services so that they better fit people's lives
- Bringing together health and social care to more effectively address individual needs
- Meeting people's needs at different period's of their life, for example, end of life care
- Enabling people to help themselves
- Use of new technologies to provide health and community services
- Public involvement around shaping local services.[63]

141. The Department clearly conveyed the message regarding the need to engage those groups whose voices are often lost in public consultation processes to the event's organisers. This resulted in the targeting of local wards with high ethnic minority populations. Prior to the event, all participants were asked to complete a questionnaire on health and social care (Citizen's Guide) and were provided with an ethnic monitoring form.

142. In addition, the Department also produced a questionnaire in *Take-a-break* magazine and two NHS magazines. It also asked stakeholders to run their own listening events at a local level in an attempt to further reach out to particular communities. The University of Lancashire was also commissioned to facilitate further local events.

143. As previously noted, the 'Our Health, Our Care, Our Say' White Paper (the White Paper) was published on 30 January 2006. It pulled together the policy proposals which emerged from the Your Health, Your Care, Your Say exercises and Independence, Well Being and Choice Green Paper. It sets out the overarching objective of improving community health and social care services in England. The four key themes were:

- Better prevention for improved health and well-being;
- Giving people greater choice and control over the care they receive;
- Providing rapid and convenient access to high quality, cost effective, care closer to home; and
- Support for people with long-term conditions.[64]

(ii) ANALYSIS: THE EXTENT TO WHICH THE DUTY TO PROMOTE RACE EQUALITY WAS CONSIDERED IN THE PROCESS OF POLICY DEVELOPMENT

144. The Commission has undertaken a thorough of analysis of the three policies in order to determine the degree to which the Department is able to demonstrate compliance with Section 71(1) in respect of the development of the three, named policies. This analysis draws upon contemporaneous documents, copies of relevant REIA (Mental Health Bill), RIAs (the other two policies), and interview testimonies from key Departmental officials. The Commission

[63] Your health, Your Care Your Say consultation letter to stakeholder organisations from the National Director for Mental Health, undated
[64] Source Partial RIA on the Our Health Our care Our Say White Paper, January 2006, p.1

has pieced together this evidence in order to attempt to determine whether the Department sufficiently built into the relevant policy development processes a proactive consideration of race equality.

Mental Health Bill

145. The Department published a REIA of the Mental Health Bill. This is significant, as it represents the first REIA that has been published by the Department. The absence of other full REIAs and the Department's acknowledgement that it did not adopt a 'systematic and transparent approach' to REIAs[65] means that the Commission has concluded that the sustained interest of stakeholder organisations in the development of the REIA must have played a key role in ensuring that the Department carried one out. This is not to suggest that those responsible for development of the Bill did not reach the conclusion that a REIA would be required, but simply that external interest and questioning ensured that an assessment was developed and ultimately published. The Department is very clear that it was the Department's decision to undertake the REIA.

146. Questions regarding the intricacies and merits of the process adopted are extremely interesting, but for the moment these are of secondary importance to two key questions:

- Did the Department publish a REIA?
- Did the REIA comply with the requirements of the RRA?

147. The Commission has audited the final, published REIA of the Mental Health Bill. The following are the key areas of concern:

- The absence of a baseline consideration of the impact of the existing Mental Health Act 1983
- The apparent absence of a rigorous internal consideration of the potential impact of the proposals prior to opening up the REIA to external comment, as evidenced by the reactive nature of the content of the REIA
- The failure of the REIA to adequately address all three strands of the general duty. The only genuine references to the RED occur when this appears to support particular proposals
- It is not clear whether a legally proofed REIA auditing tool has been used to carry out the REIA. The Department has recently supplied the Commission with a copy of its latest REIA tool, which the Commission has determined is unlikely to produce compliant REIAs
- The wholesale absence of the consideration of service-specific data. Where such data exists it should be presented, where this is not currently available one would expect to see a specific action point requiring the collection of said data
- The distinct lack of monitoring of existing processes and those proposed by the legislation

[65] Interview 4, 10th September 2007.

- The failure to identify appropriate actions in response to identified existing adverse impact
- The failure to provide data or reasoned argument to support the Department's justification of potential adverse impact
- The failure to address identified, potential adverse impact arising from the proposed changes to the Mental Health Act 1983.

148. Despite the fact that the REIA of the Mental Health Bill marked a watershed, as the first REIA of a proposed policy that the Department had published and that the Department had undertaken various consultation exercises and negotiated often difficult relationships with stakeholders, the Commission concluded that the Department had failed to produce a REIA that complied with the requirements of the RRA. The fundamental area of concern is that the Department's REIA had identified a number of examples of potential adverse impact, but had singularly failed to address these. This meant the Commission could reach no other conclusion. It is simply not acceptable to go through the motions of a REIA and fall at the final hurdle. To do so, negates the value of any work carried out up to and until that point. Two fundamental principles of any REIA is that:

- The assessment must be open, honest, rigorous and robust
- Adverse impact, whether arising from existing service provision or the proposed policy must be addressed

149. Therefore if any part of a policy is identified as having a negative impact on any ethnic group, it must be removed, or at the very least, the impact must be mitigated.

150. Evidence in relation to the REIA process adopted has established a number of other concerns and questions:

- Failure to undertake a screening assessment of the first Mental Health Bill[66]

[66] In relation to the first Bill it is not clear when the decision to initiate the REIA was taken, or what prompted the adoption of this course of action. It is clear that a number of key documents were produced during the course of 2002-04 relating to the Bill, which give little or no indication of the policy's relevance for race. The Draft Mental Health Bill (2004) contains three limited references to race and ethnicity in terms of evidence of differential outcomes; there is nothing relating to proposed actions and no reference to the intention to carry out a REIA. Similarly, Improving Mental Health Law, Towards a new Mental Health Act, which was published in September 2004 to accompany the 2004 draft Mental Health Bill, contains three cursory references to race. Two of these note that the proposed code of practice will include references to the duty. The Government's response to the Joint Committee's report was published on 13 July 2005. The first actual reference to the existence of a REIA comes in the Government's response to the report of the Joint Committee on the draft Mental Health Bill 2004. The Department is clear that this decision was taken by the Bill team in light of the clear relevance of these issues for race equality, the Commission believes that the Department's actions were, at least in part, prompted by the demands of stakeholder organisations for it to carry out a full REIA. Speaking in the House of Commons in July 2005, the Minister for Health records that work on a REIA of the proposals in late 2004 is being undertaken. In light of the fact that the Draft Bill was published in September 2005, it would not appear that work had begun on the REIA prior to publication. Ultimately, the potential impact was reduced by the fact that the Bill was itself delayed on a number of occassions. However, this could not have been anticpated at the time. It would appear

- The fact that the Department did not start the REIA of the first Bill until after the Draft Bill had been produced
- The degree to which the Department had undertaken an internal assessment of the likely impact of the proposals prior to opening it up to external advice and scrutiny from the various advisory groups
- The nature of the discussions regarding the decision not to include an assessment of the existing impact of the 1983 Act, once the decision was taken the Department should pursue an amendment Bill
- The Department's inability to provide any draft copies of the REIA of the first Bill
- The degree to which the Department incorporated the comments and concerns of stakeholders into the final REIA
- The wider lack of basic ethnicity data collection in relation to service delivery which the Department is obliged to collect.

151. It is proposed that these concerns will be specifically addressed directly with the Department as part of the follow-up to the investigation. A number of findings emerge from this analysis:

- The Department should have begun work on the REIA significantly prior to the publication of the first Mental Health Bill.
- The REIA(s) of the Bill(s) should have lead to wholesale changes to ethnicity data collection across all mental health services.

Finding: The Commission must conclude that the deficiencies in the process outlined above demonstrate that while there was some consideration of the likely impact on race equality this was not sufficient to meet all three strands of the RED in the formulation of REIAs for either the Mental Health Bill of 2004-05 or 2006-07.

Recommendation: That the Department should draw up plans to monitor the implementation of the amended Mental Health Act for its impact on race equality, publish these results and keep the CEHR informed of its plans in this respect.

Our Health, Our Care, Our Say

152. The Commission is conscious that in July 2005 the Department determined that it would merge its work in relation to the Your Health, Your Care, Your Say and Independence, Well Being and Choice into a single White Paper entitled Our Health, Our Care, Our Say. It is therefore important to judge the degree to which the Department considered the likely impact of the policies both prior to, and after the merger. The Commission is clear that the Department should have built in a consideration of race equality impact at the earliest stages of the policy development in respect of these and all other relevant policies.

153. It is clear that the Department did undertake positive pre-policy development consultation activity, which sought to garner the views and experiences of a

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clear from the above timings that work on the REIA did not begin untill after the draft bill had published.

broad range of communities, including individuals from a range of ethnic minority communities in respect of both Our Health, Our Care, Our Say and Independence, Well Being and Choice. This is deemed positive and the Commission broadly supports the Department's decision to use a 'deliberative approach' to policy development in such instances. The Commission believes that this type of activity should form part of a wider process which would ultimately lead to a full consideration of impact. The Commission has concluded that the Department has not been able to demonstrate that it sufficiently considered the race equality impact of the proposals which ultimately emerged as the White Paper.

154. The following offers an analysis in terms of the initial, twin policy threads, before bringing this together to offer conclusions regarding the White Paper.

Independence, Well Being and Choice

155. The Department has asserted that it had 'due regard' to the RED in the development of Independence, Well Being and Choice, primarily as a result of its approach to consultation. Whilst noting that the Department commissioned CSIP to target 'hard to reach groups', it is not possible to determine the degree to which the remaining consultation activities gauged the views of ethnic minorities and relevant stakeholders.[67] The Department acknowledged that it did not systematically carry out ethnic monitoring of these events.[68]

156. The Commission has reviewed each of the documents supplied by the Department in relation to the various consultation exercises. In the case of one of the events, it is clear that there has been an attempt to gauge the views of ethnic minority communities; in the second SCIE survey, 31 of the 112 service users who responded were listed as BME respondents. This is reflected in the resulting report, although the analysis is limited.[69] Other consultation event reports contained some limited references to ethnic minorities.[70] It is interesting that a number of other documents identified issues relating to ethnic minorities, thus underlining the relevance of this policy area for race equality.[71] The Department does not however develop this analysis, nor take this as a signal that a REIA is required. Finally, in other cases it is not possible to determine whether other exercises specifically sought to or succeeded in gauging the views of ethnic minority respondents, or

[67] Interviewees stated that there is an extensive database that CSIP polled, with each and every written submission, with the names and addresses of those that replied or wrote in a written submission. This had been synthesised together with group feedback from consultation events run by CSIP. From the SCIE report which was commissioned to look at seldom-heard groups, including BME groups, the interviewees understood that there were approximately 21,000 individual comments on aspects of the green paper which were collected in that database. Again, there is no ethnic breakdown of these responses.

[68] Interview number 2, 20th August 2007

[69] *The New Vision for Adult Social Care: Responses to a survey conducted by the Social Institute for Excellence* commissioned by the Department of Health, 2005

[70] *Developing Social Care: service users' vision for adult care support,* SCIE, 2005.

[71] *Responses to the Consultation on adult Social care in England: Analysis of feedback from the Green Paper* (based on post-publication consultation by CSIP SCIE) 19 Oct 2005

to offer an analysis of issues affecting ethnic minorities.[72] It is perhaps telling to note that the document which sets out the arrangements for the Green Paper consultation fails to make any reference to race equality or the RED.

Recommendation: That all future consultation activities should include full ethnic monitoring.

157. The Commission has not been convinced that the consultation process alone, as described by the Department, is enough to ensure that a public authority has complied with the RED. The consultation phase is just one part of the policy development process and should represent just a single part of the process of assessing impact. It is clear that some parts of the process proactively sought the views of ethnic minority stakeholders, however this is not reflected in the policy.

158. The Department has identified that it carried out a Partial RIA of the Green Paper. The Commission has assessed the Partial RIA and determined that it makes no reference to race equality. The Department's written and oral evidence states that it was advised in October/November 2004 by its Regulation and Legislation team that when undertaking a partial-RIA of the Green Paper, it was not necessary to conduct a REIA. In its oral evidence, it was noted that it was guided by the Cabinet Office guidance regarding REIAs.[73] In support of this assertion, the Department has supplied an extract from *RIA News* published by the Better Regulation Executive in September 2004, which notes that while a separate full REIA may not be necessary with policies that require an RIA, 'race impacts should be considered at all the appropriate stages of policy development within the RIA.'

159. It goes on to state: 'where a policy will not have race equality impacts, this will need to be recorded in the Equity and Fairness section of the RIA.' The document concludes by stating that Race Equality Units (or equivalent) within Departments would be able to advise policy makers on the race equality impacts of policy proposals and that 'they should be (the) first point of contact about race impact queries.'

160. It is clear that the EHRG was not the first 'point of contact', although it has confirmed that it concurred that there was no need to carry a separate REIA.[74]

161. The Commission is of the view that this advice was erroneous. It believes that the Department misinterpreted the Cabinet Office' guidance. The Cabinet Office guidance clearly indicates that race equality should be considered at 'all the appropriate stages of policy development within the RIA.' This means that the RIA should include the full assessment of impact in those cases where the policy is relevant to race equality. The Commission acknowledges that it is perfectly possible that a Whitehall Department could meet the requirements

[72] The New Vision for Adult Social Care: Responses to a survey conducted by the Social Care Institute of Excellence, commissioned by the Department of Health, August 2004;
[73] RIA News, BRE, 2004
[74] Interview 5, 11th September 2007

of the RED via the RIA, but that in order to do so, the authority would have to demonstrate that it had carried out a rigorous assessment to the degree that it would have done were it to have carried out a separate REIA. The use of RIAs as a vehicle for a REIA should not be seen as an opportunity to be less rigorous.

162. During the interview stage, participants suggested that those formulating the Green Paper, had 'had a continual understanding' of the importance of race in terms of policy development across all areas of work of the Department.[75] However, no evidence was proffered that there was any specific departmental training or guidance about the requirements of undertaking REIAs, although there was a general knowledge of impact assessments in relation to environmental and health issues specifically.

Commission: Did any of this training or any of the guidance cover the requirements of the Race Equality Impact Assessment?

DH official 1: Not as far as I can remember.

DH official 2: I can't remember. I don't think it covered specifically the impact assessments, but we knew there was one, because we do impact assessments for other areas, including environment impact assessment, health impact assessment.[76]

163. The Commission is of the firm view that the Partial RIA should have included an active consideration of race equality issues. This should have set out a provisional evaluation of the likely impact of the policy, an indication of relevant internal assessments or consideration of impact, identification of gaps in current research and data collection and identification of potentially differential impact upon different ethnic minority communities.

164. It is important to also briefly note that the Department is also very clearly of the view that its considerations regarding impact assessment were heavily influenced by the belief that the contents of the Green Paper would only have positive impacts for ethnic minority service users. From oral and written evidence submitted to the investigation, it appears that the basis for this assertion is simple: that more responsive services would benefit all communities. This assertion is not backed by specific evidence and should clearly have formed part of the considerations within the RIA/REIA.

165. The final and ultimate test is whether the Green Paper itself demonstrates that the Department has considered and addressed the impact of its proposals for race equality. Analysis of the Green Paper has found that there are a small number of references to ethnic minorities, however, these are principally limited to noting the changing nature of the British population and the

[75] Interview number 2, 20 August 2007.
[76] Interview number 2, 20 August 2007

resulting changing needs of older people from ethnic minority communities.[77] The most significant reference to the needs of ethnic minorities is provided in the section entitled 'Our Vision' which states of social care services: 'They should be tailored to the religious, cultural and ethnic needs of individuals'.[78] Whilst it is welcome that the Department is sending a clear signal to service providers regarding inclusive provision of services, this is not an indication of the degree to which it has considered the proposals for their impact on race equality.

166. From analysis of the Green Paper, Partial RIA, additional material provided by the Department and accounts of those responsible for the development of the policy (interview stage); it is clear that the Department did not undertake a systematic consideration of race equality during the relevant stages of the policy development process.

167. Following the decision to merge the Green Paper with the concurrent work 'Our Health, Our Care, Our Say, the Department did commit itself to carrying a full RIA of the proposals once these reached the White Paper stage. It could be argued, and the Commission is receptive to this argument, that the Department had a second chance to consider the impact of the proposals, once it emerges as the 'Our Health, Our Care, Our Say' White Paper.

Finding: The Department did not fully comply with the RED in the development of the Independence, Well-Being and Choice proposals.

Our Health, Our Care, Our Say

168. As noted previously, the development of 'Our Health, Our Care, Our Say' utilises a 'deliberative' approach to pre-policy development consultation. This appears to have led to a positive and proactive attempt to gauge the views and experiences of a range of different communities. The Commission is aware and welcomes the fact that the Department took key steps to ensure the involvement of the different communities at this stage of the policy development process. It should be noted that, in spite of this general welcome, the Commission does have some concerns regarding aspects of the approach. These include:

- The degree to which the initial random selection process ensured that all ethnic groups were fairly represented in the process
- Approaches to ethnicity data collection and monitoring in respect of consultation events
- Absence of consideration of service delivery data as a supplement to consultation responses
- Absence of questions designed to explore the health and care issues affecting different ethnic groups

[77] Independence, Well-being and Choice: Our Vision for the Future of Social Care for Adults in England, Green Paper, Department of Health, 2005, p.22 & p.30

[78] Independence, Well-being and Choice: Our Vision for the Future of Social Care for Adults in England, Green Paper, Department of Health, 2005, p.17

- Reliance of reports on outlining most popular responses to questions.
- Absence of analysis of responses by ethnicity
- Absence of the views of stakeholder organisations that work with ethnic communities and relevant health issues
- Poor exploration of impact of services upon ethnic communities in the evaluation reports.

169. The effect of these concerns has particular bearing on the development of the policy, although the Commission is conscious that these shortcomings could have been addressed or overcome, had the Department undertaken a full assessment of the impact of its proposals.

170. The Commission did not find that the Department had developed this generally positive start into a full consideration of the race equality impact of the proposed policy.

171. The Department states that it considered the impact of the policy within its partial RIA.[79] The partial RIA was published in March 2006. It should be noted that the Commission formally wrote to the Department on 7th February 2006 alerting it to the fact that the Our Health, Our Care, Our Say White Paper would require a Race Equality Impact Assessment.[80] In its response, the Department stated:

All emerging Department of Health policies will be subject to a race equality impact assessment, particularly those arising from the White Paper. We shall be publishing the Regulatory Impact Assessment of the white paper, which includes broad consideration of race equality issues, in the near future. As we further develop the proposals in the White Paper, we shall ensure that the Race Equality Impact Assessment forms a major part of the process. We are at an early stage in this, and are currently scoping the best way to take the whole agenda forward. Colleagues here have already engaged with their Home Office colleagues to discuss this issue.[81]

172. It is not clear the degree to which the Commission's intervention ultimately influenced the content of the RIA. It is noteworthy that the content does represent the most expansive commentary of any RIA from the Department up to that point. The race equality section of the RIA covers three pages. Whilst there is an outline of the consultation phase of the project, there is no explanation as to how it considered the likely impact of the proposals for race equality by those developing the policy, or the results of any such analysis. The Department offers just four key ideas emerging from its extensive consultation with ethnic minority groups:

- Information on leading a healthy lifestyle e.g., an understanding of the health aspects of certain ethnic groups
- Information in different languages

[79] Partial Regulatory Impact Assessment, Our Health, Our Care, Our Say', March 2006
[80] Letter from N. Johnson (CRE) to Sir Nigel Crisp (DH), 07/02/06
[81] Letter from Department of Health to N. Johnson, 7th February 2006

- Messages delivered by people from within the communities regarding training local people to be health advocates
- A one-step assessment or case manager for those with language difficulties who could give advice that is culturally sensitive and in the native language.

173. The Commission notes that the partial RIA of the White Paper does include some reference to race equality and is thus a slight improvement on the earlier RIA of Independence, Well Being and Choice The partial RIA also makes general assertions that ethnic minority groups will automatically benefit from certain proposed changes in health and social care without any evidence to support them. However, the Commission does not believe that this coverage is sufficient. Drawing on analysis of the various consultation events, the Commission has concluded that the four themes do not adequately reflect the content of the various consultation responses or a comprehensive coverage of issues in terms of race equality.

174. The failure of the Department to more fully explore the impact of its proposals runs counter to the well-developed body of literature in respect of choice in relation to public service delivery.[82]

175. As noted in relation to the earlier partial RIA of Independence, Well Being and Choice, this partial RIA and accompanying White Paper appears to be underpinned by the assumption that because part of the White Paper's aim is to reduce health inequalities it will therefore automatically benefit all communities. This assertion was underlined by the comments of departmental officials during the course of the interviews.

176. No research or other evidence base is provided to support such an assertion. The Department does not present any relevant service delivery data in order to underpin such statements and does not present relevant data derived from the consultation events.

177. The Commission is of the firm view that the RIA is not sufficient to demonstrate that the Department has had 'due regard' to the RED.

178. Following the Commission's formal intervention on 11th August 2006, the Department supplied a partial email dated 25 August 2006, as part of its evidence that it had assessed the impact of the named policies. The partial e-mail provides a response to a question posed by an officer in EHRG regarding the degree to which the 'Our Care, Our Health, Our Say' team had considered the impact of its proposals for race equality. It states:

[82] Johnson, N. Choosing to be Unequal, Renewal, 2005; Farrington-Douglas, J. & Allen, J. (2005) Equitable Choices for Health. IPPR, London; Barber, S. &Gordon-Dseagu, V. Equity Issues relating to Access and Choice, Programme – Summary and Recommendations. College of Health, London, 2003; Williams, J. & Rossiter, A. Choice: The Evidence: The operation of Choice systems in practice: national and international evidence. The Social Market Foundation, 2004

We have not identified any adverse impact that the White Paper proposals will have on BME groups, indeed the proposals reflect what people in BME groups want from community health and social care. However, policies are still being worked up and evaluated of the impact on race equality, and if these identify an adverse impact on race action will be taken to address those issues.

179. It is not clear on what basis it has been concluded that there is no adverse impact or what evidence is available to support the repeated assertion that the impact will be positive.

180. The aforementioned e-mail contribution asserts that the 'judgements' contained in the RIA are not 'conclusive' and suggests that it would be 'impractical to measure the impact… until these policies have been properly appraised.' This appears to be an acknowledgement that the full impact has not been assessed. Indeed the e-mail goes on to propose that a fuller consideration of impact will be undertaken during a roll out of pilot projects:

In many cases, the White Paper proposes that we should pilot an approach to inform future policy development to find out what works, for whom, when and in what circumstances. Pilot leads throughout the Department for Health have been given support to design an evaluation process for each of the pilots that includes a full race equality impact assessment. The evaluation will also build on ways of monitoring the effect new policies have on people in BME groups. Where pilot evaluation schemes are already underway policy leads will work with national evaluators to ensure that a full race equality impact assessment is carried out.[83]

181. The fact that pilots are already underway suggests that the REIA would not have taken place without the Commission's specific intervention.

182. The Department has indicated that the results of the pilots will not be available until March 2008.[84] By this stage a number of de facto initiatives (all be it pilots) will have been in operation for a significant period. The Commission believes that such an approach does not constitute consideration of impact of proposed policies, but rather monitoring of impact of existing arrangements. This question of the role of pilots and de facto delayed assessment of impact is dealt with at a later point in this report.

183. Finally, the e-mail confirms that those responsible for developing the policy are aware of the shortcomings of the stated approach in terms of consideration of impact. It notes that it is 'aware that it is not enough to say intuitively these policies should be better for BME groups' and that many of the policies that have been included in the White Paper 'still need to be properly tested and evaluated'.

184. In considering this aspect of the investigation, the Commission also returned to the earlier correspondence with an officer within the EHRG who stated:

[83] E-mail supplied as part of Department of Health's submission of evidence as part of the current investigation.
[84] This includes Pilots of the Direct Payments and Individual Budgets initiatives.

'We will be considering the race equality impact of the "Our health, Our Care, Our Say" White Paper proposals as they are further developed. You might also wish to note that the partial Regulatory Impact Assessment of the White Paper – published on 10 March – includes a broad consideration of race equality issues, and makes a specific commitment to conducting a full equality impact assessment as part of the implementation strategy.'[85]

185. It is clear that this approach was endorsed by the EHRG.[86]

186. The Commission is concerned that this appears to be an approach which is being advocated across the Department and that this is supported by the advice available from the EHRG.

187. The interview stage has demonstrated that there is some confusion about the mechanics of impact assessment. One participant when asked if the Department had considered doing an impact assessment on the pilots replied that:

'Well we couldn't because no-ones ever done it before. No-one has done individual budgets before...'[87]

188. Although the participant went onto say that there would have been a degree of screening before the pilots were rolled out we have not seen this evidence, in order to confirm this claim.

189. Had the Department properly assessed the policies within the White Paper, it could have been more confident about the likely results of the pilot exercises. A REIA would have helped pre-empt difficulties for *all* users. The Commission is concerned that this approach is symptomatic of the poor understanding of the requirements of the RED within key parts of the Department. It also underlines the value of bespoke RED and specific REIA training.

190. The Commission is of the view that this approach is not sufficient to comply with the requirements of the RED. The Department is statutorily obliged to assess all functions and policies for race equality *prior* to their implementation. Pilot studies can affect thousands of people and the Department is obliged to consider the likely impact on different groups and the effect that implementing and removing new policies might have on them. Retrospective consideration of race equality is insufficient and puts the Department at risk of legal challenge.

191. In light of the shortcomings of the Department's RIA, the Commission is concerned that the Department is effectively proposing to defer its legal requirement to assess the impact of proposed policies until the implementation stage. This effectively means that the Department would be introducing

[85] Correspondence from DH official to N. Johnson (CRE), 3 April 2006
[86] Interview number 5, 11th September 2007
[87] Interview number 2, 20th August 2007

policies which could be discriminatory in effect and then expecting those charged with service delivery to assess impact at this stage.

192. The Commission is aware that, following its initial intervention in August 2006 that the Department indicated that it would undertake a review of key areas. The Commission believes that this should be extended to review those areas of policy which have subject to partial or full RIAs, or instances in which pilot projects have been developed.

193. The Commission has concluded that the key component which is missing from the Department approach to Our Health, Our Care, Our Say, was a proactive and systematic consideration of the impact of the proposals by the policy makers. The Department has not been able to supply any evidence that such an assessment or analysis occurred.

194. Whilst it is possible to identify the views of ethnic minority consultation participants with the various reports documenting the individual sessions, by the time the White Paper is produced, it is not possible to fully determine how these views have helped shape the final policy. There is very little within its 226 pages that practically explains the likely impact of the proposals in terms of race equality. The report does refer to hard to reach/ seldom heard groups, but it is not always apparent when the Department is explicitly referring to ethnic minority views or experiences or wider hard to reach groups such as the elderly, homeless or young people. In turn, when ethnic minorities are explicitly cited, they are invariably treated as a homogenous group, with insufficient exploration as to how a particular policy proposal will practically affect different communities. If these aspects have been examined in documents outside the White Paper, these have not been provided by the Department to indicate whether such in-depth analysis took place.

195. There are two references to the RED, both refer to local authorities fulfilling the RED rather than the Department ensuring that it adhered to its own statutory obligations. [88] Whilst the Commission welcomes the Department's acknowledgement of its expectations in respect of local service provision, it does not set out further guidance as to what it expects, and arguably its own failure to fully assess the impact of the overarching policy proposals will have a negative impact upon service delivery agents.

196. The fundamental flaw in the Department's approach is simple. Having garnered the views of individuals the Department then reverted to in-house policy development which failed to consider the impact of proposals in respect of the RED. This ultimately led to the development of a White Paper in which a number of broad brush assertions were presented, but without an appropriate evidence base. It is this failure to consider impact during the policy development phase which fatally undermines the Department's assertion that it had due regard to the RED.

[88] Our Health, Our Care, Our Say, White paper Department of Health, 2005, p.45 and 189

197. It is not sufficient to state that the Department asked people what they wanted and delivered the relevant policy. This approach does not reflect the actions and motivations of policy developers, the interactions with existing policies and current patterns of take up of public services. This problem is compounded by the fact that the Commission has not been convinced that the views of those who participated in the consultation are adequately reflected in the content of the White Paper.

Finding: The Department did not fully comply with the requirements of the RED in respect of the development of Our Health, Our Care, Our Say' White Paper.

Recommendation: That the Department revises its in-house advice regarding REIAs and the role of pilot projects.

Recommendation: That the Department undertake appropriate REIAs in this area, addressing concerns highlighted above and report to CEHR.

Reviewing recent progress

198. Having determined that the Department had failed to adequately consider the race equality impact of the three named policies, the Commission thought it was important to bring its analysis of the Department's RED performance up to date.

199. In the period since the Commission indicated that it was minded to commence an investigation in August 2006, the Department has published a number of documents which are relevant to the investigation and proposed a number of actions intended to address the Commission's primary concerns.

200. In considering the content of these documents, it is important to note that in setting out the grounds for the investigation the Commission has provided the Department with detailed outlines of its concerns. In a number of incidences this includes itemised assessments. The Commission is of the view that the depth of this analysis alone should have greatly assisted the Department to produce compliant systems and documents. Therefore, in light of this the Commission expects the Department to have achieved, or to have made very significant progress towards compliance.

201. The remainder of this chapter offers an assessment of these developments and what they mean for the Department's ability to meet the requirements of the RED in the future.

Race Equality Scheme & Single Equality Scheme

202. In December 2006, the Department published a SES (2006-09). The Commission's assessment of the SES was that it is actually less compliant than its RES predecessor. It was extremely confusing as it appeared to sit alongside the existing RES (2005-08), whilst also setting out the Department's approach to the new Gender and Disability duties. As part of its correspondence with the Department regarding the then proposed formal

investigation the Commission notified the Department of its assessment of the new SES (2006-09). The Commission is also aware that the Disability Rights Commission and Equal Opportunities Commission both communicated concerns about the SES in relation to the disability and gender duties.

203. In June 2007, the Department published a revised SES (2007-10). In preparing this SES (2007-10) it is clear that the Department was aided by detailed comments and feedback from the three Commissions. It is clear that the Department has taken into account a number of the Commission's comments in its revision. The Scheme is overall, an improvement on the previous version. It includes an action plan and indicates that staff will be trained to carry out REIAs. However, there remain key gaps and concerns. These include:

- The absence of an EIA tool and adequate arrangements for carrying out REIAs[89]
- The assessment of policies and functions is for relevance to general equalities, and is not race specific
- No criteria is set out to determine how the Department sought to determine relevance
- The action plan does not cover all areas of relevance
- Details regarding REIA consultation and publication processes are vague
- Lack of comprehensive monitoring of the impact of existing policies
- No evidence that generic RED training is being rolled out across the Department.

204. The Commission's conclusion is that the current SES is non-compliant. The Department has now produced four separate schemes (plus minor revisions of the individual documents), yet has failed to meet all of the basic requirements of the specific duties. Consequently, the Commission concludes that the Department has failed to put in place arrangements to meet the requirements of the specific duties.

Recommendation: That the Commission issue a Compliance Notice under s.71(D) of the Act.

RED training

205. The Commission notes that the SES 2007-10 action plan refers to the RED being delivered to those staff responsible for procurement. However there is no similar commitment to roll-out role-specific RED training for all staff within the Department.

[89] It should be noted that the Department had previously published a REIA and screening tool in November 2006 (this is reviewed in this chapter) and this was an integral part of the SES 2006-09. It is disappointing that the tool does not form part of SES (2007-10). The action plan (page 63) within the SES (2007-10) indicates that the Department will publish a revised tool once it has carried out REIA training (The Commission assumes that this refers to the pilots). The document does not indicate what tool will be used in the intervening period.

206. The Commission must therefore conclude that the Department continues to fail to train staff in the requirements of the RED.

Recommendation: That the Department should roll-out role-specific RED training for all staff, with immediate effect.

REIA training

207. The Commission has noted and welcomes the Department's decision to commission REIA training for staff and to roll this out across the Department. The delivery of pilot training sessions began in Spring 2007, and it is proposed that the training will be rolled out across the Department over an 18 month period. The Department has noted that it is anticipated that by March 2008, 25% of staff will have received the training.[90] The Commission is concerned that the current timeframe will mean that the Department will not be in a position to achieve a fully compliant approach to REIAs until late 2008.

208. The Commission has reviewed the training material supplied by the Department and has identified a number of minor gaps. The Commission will provide the Department with a separate analysis of this audit, upon completion of the investigation.

Recommendation: That the Department should escalate the roll-out of its REIA training programme in order to ensure full compliance by March 2008.

Recommendation: That the Department should incorporate the Commission's proposed amendments to its training materials, as identified by the Commission and provide additional advice to those staff who have already received training.

REIA screening and assessment tool

209. The Commission audited the screening and impact assessment tools which were supplied by the Department as part of the investigation and that appears in the SES 2006-09. The Commission's view is that this particular tool is an improvement on the previous version, which was published in April 2005. In particular, the main assessment document includes a better coverage of the RED, however a number of problems remain, including use of some closed questions, issues in relation to the consultation elements and absence of a formal sign-off process. The tool itself is useful, but would require a number of improvement and additional supporting systems.

210. However, the Commission remains deeply concerned about the screening tool, that has been provided. Whilst, it is an improvement on the previous version, the Commission is not convinced that the tool would lead to REIAs being systematically carried out across all relevant policy areas. The central

[90] Department of Health Action on race Equality Impact Assessment (The Narrative), 2007

problem remains that it is built around closed questions. These are unlikely to encourage policy makers to decide that they should carry out a REIA. The reality is that the screening is likely to filter out relevant policies before they reach the full REIA stage.

211. It should be noted that the REIA tool is not listed in the SES 2007-10.

212. The Commission therefore concludes that as a result, the limitations of the screening tool mean that the overall approach to REIAs will not lead to REIAs being carried out in relation to all relevant policies.

213. The Commission's assessment of the recent RED developments has led it to the conclusion that the Department is still not in a position to meet key aspects of its RED obligations.

Conclusion

214. The Department has made some attempt to consider racial equality issues in the development of the three areas of policy that form part of the Commission's inquiries. However this has fallen considerably short of the requirements of the RED.

215. In the case of the Mental Health Bill a REIA was carried out but there were deficiencies in terms of timing, scope and consideration of mitigation of adverse impact. In Our Health Our Care Our Say there was some coverage of race equality in the RIA but this was minimal; there was a consistent assumption that as the policy was designed to reduce inequalities this would automatically benefit race equality. Furthermore the approach to pilots that the Department has taken should not be seen as a substitute for a REIA. In developing Independence Well Being and Choice there was a consultation exercise which included consultation with ethnic minorities but this could have been further developed and monitored. There were then no references to race equality in the RIA and the Department did not follow the Cabinet Office Guidance. The Department needs to take the necessary steps to ensure that these areas of policy development and implementation fully comply with the requirements of the RED.

216. Finally, the Commission's assessment of the Department's recent activity in respect of the RED does not lead the Commission to the conclusion that it can yet fully meet its legal requirements in relation to the RED.

CHAPTER FOUR

CONCLUSIONS

217. The Commission has assessed the degree to which the Department considered race equality in the development of the three named policies. Written and oral evidence provided by the Department has been examined, as well as a wide range of externally sourced material. This detailed assessment has given the Commission a clear insight into the nature and practice of policy development within the Department and specifically a greater understanding of the position of race equality issues within these processes.

218. On the basis of the evidence considered, the Commission has concluded that the Department did not have 'due regard' to the RED in the way in which it developed the three named policies. It is clear that the Department took some steps to gauge the views of people from different ethnic minority communities. This is particularly true of its work in respect of the various incarnations of the Mental Health Bill (2004-05 and 2006-07). However, in all three cases, the Department failed to develop this initial work into a full assessment of impact on race equality.

219. In relation to the Independence, Well Being and Choice Green Paper and the subsequent Our Health, Our Care, Our Say White Paper, the Department was unable to provide sufficient evidence to support its assertion that it had complied with the RED. In considering the evidence provided and in undertaking of its own assessment of the contents of the Green and White Papers and accompanying partial RIAs, the Commission did not identify anything which could be viewed as an assessment of the likely impact of the policy for race equality. It is the Commission's view that the Department did not undertake an adequate assessment of the impact of the proposed policies.

220. The situation in respect of the Mental Health Bill(s) is quite different. It is clear that the Department did undertake a REIA and that the assessment was published alongside the Bill in November 2006.[91] The Department was able to provide detailed evidence regarding consultation events, advisory groups and other related activities. The Commission is acutely aware that the processes associated with the development of the Bill and associated REIA were extremely contentious. The Commission has purposely decided this report will not provide a commentary on the merits of the conflicting views of the Department and key stakeholder organisations regarding the individual aspects of this process. The Commission will furnish the Department with its considered observations at a later date.

221. The Commission's view is that, whilst the Department published a REIA of the Mental Health Bill, this document does not represent a full assessment of impact on race equality. In summary, the Commission's primary concerns relate to the failure of the Department to offer a baseline assessment of the

[91] The Department has not been able to satisfactorily state why it chose to carry out a full REIA of the Mental Health Bill and not of other major policies. This issue was covered extensively in Interviews 1,4 and 5.

impact of the existing Mental Health Act, 1983 and to address adverse impact in terms of both existing provision and the likely impact of the proposals contained within the Bill. The Commission has concluded that simply having a process which leads to the development of a document which provides an assessment of impact is meaningless, if the authority does not then address the adverse impact that it has identified as part of the process. Such an approach undermines the potential value of such an exercise. The central risk is that in such situations, the authority could be introducing a policy which has the potential for adverse/discriminatory impact. To this effect, the Commission has recommended that the Department review, as a matter of urgency, the Mental Health Act.

222. The Commission has concluded that the Department failed to comply with the RED in relation to the three named policies.

223. The Commission considered the assessment of the Department's generic RED systems were central to the Department's ability to meet its requirements in respect of the RED.

224. The Commission is of the view that, during the early period of the RED, the Department undertook some initial work which, had it been built upon, should have enabled it to meet much of its legal obligations in respect of the RED.

225. The Department sent initial messages regarding the importance of the RED to both staff within the Department and the wider NHS. The Commission concluded that the Equalities Framework: Priorities provided a sound assessment of the key areas requiring attention. It is also clear that staff within the then Equality Strategy Group provided senior managers with an indication of gaps in relation to the RES (2002-05) and race equality training.

226. However, these positive steps and initiatives were neither sustained nor fully developed. Potentially constructive tools, such as the Equalities Framework, were not fully utilised or implemented. The Department's initial progress in respect of RED awareness did not then lead to the development of compliant RED systems across the Department.

227. There were clearly delays in the development of the Department's RED focused activity and specifically the development of its first REIA tool, which was published in April 2005. The Commission has audited the tool and found that it is unlikely that it would have led to systematic delivery of REIAs, however, had it been properly supported with appropriate systems it could have been an important first step. The tool could have been developed and modified to ensure future compliance. This clearly did not happen. The Commission is of the view that any potential progress was undermined by the Department's failure to put in place wider RED systems. These include RED specific training for all staff, REIA training and guidance for relevant teams, appropriate ethnicity data collection and legal and policy monitoring systems. The Department has acknowledged that it disseminated the REIA tool to relevant parts of the Department but did not put in place any systems to

monitor whether REIAs were being undertaken or the quality of the documents produced.[92]

228. Similarly, the quality of advice available to senior managers in respect of the RED, REIAs and the coverage of race equality issues in RIAs undermined the Department's ability to meet its RED obligations.

229. The Commission has not sought to suggest that the Department did not undertake any positive work during the relevant period. This report makes clear that the Department took some initial positive steps and highlights some positive aspects of the Department's approach to consultation. However, this work has been fundamentally undermined by the failure to develop appropriate RED related systems.

230. The Commission believes that a systematic approach to the undertaking of REIAs, underpinned by key RED systems, would have helped pre-empt difficulties for *all* potential users of the services at the heart of the 3 key policy areas.

231. The Commission is concerned that the approaches adopted in respect of the three policies are symptomatic of the poor understanding of the requirements of the RED within key parts of the Department. It is clear from written and oral evidence and the Department's commentary on the draft version of this report that there remains a residual poor understanding of the requirements of the RED and REIAs specifically. This evidence has raised concerns within the Commission regarding the ability of the Department to ensure future RED compliance. It is therefore important that the Commission review the Department's most recent RED-focussed work.

232. Having reviewed the latest RED focussed work, the Commission still retains major concerns regarding the ability of the Department to ensure future compliance. Hence the report's conclusions that a compliance notice be served on the Department.

233. The Commission trusts that through the process of undertaking the formal investigation, and the release of these findings and recommendations outlining key actions that the Department should take that it will fully embrace the benefit, as well as its legal obligation, of ensuring full-scale RED compliance.

234. The Commission expects that the Commission for Equality and Human Rights (CEHR) will have a primary role in ensuring that the Department fully address the findings of this investigation and implement all of its recommendations.

235. Finally, if the formal investigation enables the Commission to establish a greater understanding of what ultimately led to the systemic and ongoing non-compliance in the Department, it will assist the future Commission for Equality and Human Rights to continue its obligation to educate, advise and

[92] Interview 5, 11th September 2007.

inform public authorities, and indeed the public in general, and to enforce the obligations where and if necessary.

September 2007