# 立法會 Legislative Council

立法會CB(2)2231/06-07(01)號文件

檔 號: CB2/BC/2/06

《種族歧視條例草案》委員會

2007年6月26日舉行的會議立法會秘書處擬備的文件

條例草案審議工作的進展

目的

本文件旨在檢討《種族歧視條例草案》審議工作的進展。

#### 條例草案制定成為法例的效用

- 2. 自2007年1月16日的首次會議後,法案委員會先後與政府當局舉行了10次會議,並在其中一次會議上聽取了34個團體/個別人士的意見。大部分委員不滿條例草案的草擬方式,因為條例草案的道顯方式,因為條例草案的草擬方式與府當局對解決有關問題欠缺承擔。對於條例草案按現有的草擬方式,能在多大程度上為本港的種族歧視問題帶來實質改善,該等委員深表懷疑。他們認為,雖然條例草案能把某些基於種族的個別歧視作為定為違法,但未能禁止公營機構在落實政府政策和措施方面存在已久的歧視行為。大部分委員亦關注到,條例草案訂立的多項豁免會造成一項不良效果,就是會將基於種族的歧視作為合法化。他們認為,條例草案的條文不夠清晰明確,不但會在社會上引起混亂,更會帶來一些不明朗因素。
- 3. 委員亦曾就條例草案提出多項事宜。委員提出的事項一覽已經發出(立法會CB(2)2231/06-07(02)號文件)。
- 4. <u>大部分委員</u>認為,為方便法案委員會決定委員會審議工作的 未來路向,政府當局須解決下列條文涉及的一些基本事官:
  - (a) 條例草案第3條有關條例草案適用於政府的情況;
  - (b) 條例草案第4條有關直接歧視和間接歧視的區分;
  - (c) 條例草案第8條有關內地新來港定居人士("內地新移民") 未獲納入條例草案涵蓋範圍的問題;及

- (d) 條例草案第58條有關語文的例外情況。
- 5. 關於內地新移民未獲納入條例草案涵蓋範圍的問題,屬於自由黨的委員的立場是,條例草案不應涵蓋歧視內地新移民的情況。
- 6. 有關該等基本事官的商議情況綜述於下文第7至28段。

#### 所須解決的基本事宜

條例草案第3條有關條例草案適用於政府的情況

委員提出的關注事項

7. <u>大部分委員</u>注意到,儘管3項現行反歧視條例明文規定對政府 具約束力,但條例草案第3條卻訂明,當條例草案制定成為法例,該法 例只適用於政府作出的或為政府的目的而作出的、與私人作出的作為 相類似的作為。他們質疑有何理據就政府履行職能和行使權力給予廣 泛豁免。該等委員關注到,第3條所產生的法律效力,可能會豁免政府 在行使權力/履行職能時作出而與條例草案的規定相抵觸的任何作 為。此外,要確定政府作出的作為是否一項"與私人作出的作為相類似" 的作為亦有困難。他們指出,受到政府種族歧視的市民若只可根據《香 港人權法案條例》(第383章)提起民事訴訟,才能尋求補償的話,便須 負起訴訟費用造成的額外經濟負擔。

#### 政府當局作出的回應

8. 政府當局表示,加入第3條是為了清晰起見。當條例草案制定成為法例,該法例適用於政府的情況,猶如適用於私營機構的情況一樣。條例草案第27(2)(h)條進一步訂明擬議法例的涵蓋範圍,包括政府任何部門或政府承辦或屬下的任何業務所提供的服務。政府當局向委員保證,條例草案會涵蓋提供公共醫療服務及教育等範疇,儘管執法工作、懲教服務和出入境管制並不包括在內。然而,鑒於條例草案的目的是禁止個人/私營機構的歧視作為,而現時又有其他機制處理政府人員的歧視作為(如有的話),政府當局無意在條例草案下增設機制,處理市民對執法人員執行職務的投訴。

### 法案委員會法律顧問提供的意見

- 9. 法案委員會法律顧問提出以下意見:
  - (a) 《香港人權法案條例》所指明政府不可作出歧視行為的 責任,範圍僅限於該條例載列的基本人權,而不一定涵 蓋政府日常履行職能和職務的情況;
  - (b) 英國《1976年種族關係法令》(Race Relations Act 1976)曾在2000年作出修訂,加入若干新條文,當中的第19B條把該

法令的適用範圍擴展至公共主管當局履行職能和職務方面,而第76條則關乎政府作出委任的事宜;及

(c) 可採取《1976年種族關係法令》的做法,作出相關修訂, 以便在公共主管當局履行職能和職務及政府作出委任方 面,條例草案會適用於政府。

#### 條例草案第4條有關直接歧視和間接歧視的區分

#### 委員提出的關注事項

- 10. 條例草案第4(1)(a)條指明何種情況屬基於任何人的種族而作出的直接歧視。當某人基於種族而給予另一人的待遇,差於他會給予其他人的待遇,即屬直接歧視。根據條例草案第4(1)(b)條,當某人施加的要求或條件雖然適用於所有人,但卻對某個種族的人造成不相稱的不利影響,而在排除了種族的理由後,施加該項要求或條件是沒有充分理據的,即屬間接歧視。
- 11. 委員質疑是否需要在條例草案第4條加入"有理可據"的原則 作為驗證準則,而這並不見於另外3項反歧視條例中。委員亦關注到, 公眾很難判斷施加某項要求或條件是否符合該項原則。
- 12. <u>大部分委員</u>認為,條例草案第4條在界定何謂種族歧視,尤其是間接歧視方面,未夠清晰明確。他們認為不必刻意區分兩種形式的歧視,即直接歧視和間接歧視。委員亦質疑政府當局為何決定條例草案第4(1)(b)條應以英國《1976年種族關係法令》第1(1)(b)條為藍本,而不是仿照在2003年新加入該法令的第(1A)至(1C)款來擬寫。《1976年種族關係法令》第1(1A)至(1C)條轉載於**附錄I**,方便委員參考。
- 13. 委員又深切關注到,市民未必能夠了解在判斷某項要求或條件是否有理可據方面所採用的驗證準則。因此,若條例草案按現有的草擬方式制定成為法例,不但會在社會上引起混亂,更會帶來一些不明朗因素。他們亦要求政府當局確實述明下列3類情況根據條例草案會否構成種族歧視:
  - (a) 少數族裔人士因語言隔閡及醫院內沒有提供傳譯服務而 未能及時獲得治療;
  - (b) 新近實施的非符合資格人士產科套餐服務收費,所針對 的是配偶為香港居民的內地孕婦,而該等孕婦主要是華 裔人士,與配偶同樣為香港居民的其他種族的孕婦比 較,此項安排對前者有欠公平;及
  - (c) 規定所有本地學生須在香港中學會考中國語文科取得及格成績,才能入讀大學的做法,使少數族裔的非華語學生在這方面大為吃虧。

#### 政府當局作出的回應

- 14. 政府當局表示,條例草案第4(1)(b)(i)至(iii)條臚列用以評估施加某項要求或條件會否構成間接歧視的準則。為使條文清晰明確,條例草案第4(2)(a)條把國際通用的合理和相稱原則納入其中,用以評估施加某項要求或條件根據條例草案第4(1)(b)(ii)條可否視為有理可據。條例草案第4(2)(b)條反映政府的政策原意,是要求公眾顧及少數族裔人士的特別需要,並在合理地切實可行的情況下,避免施加對他們會造成不相稱的不利影響的要求或條件。某項要求或條件是否有理可據,會以兩個準則來衡量。第一個準則是,該項要求或條件是否為某合法的目的而施加,並與該目的有合理和相稱的關係。第二個準則是,不施加該項要求或條件是否合理地切實可行。
- 15. 關於區分直接歧視和間接歧視的需要,政府當局解釋有必要作此區分。雖然根據條例草案第4(1)(a)條,直接歧視無可抗辯,但條例草案第4(1)(b)條卻訂明"有理可據"的免責辯護。若不把該兩種形式的歧視彼此區分開來,很多有歧視成分的作為便會視為直接歧視,因而造成許多不明朗因素。政府當局進一步解釋,不允許評估間接歧視是否有理可據是不可接受的;因為不允許的話,任何要求或條件若對某個種族群體造成不相稱的負面影響,即使有充分理據,亦會屬於違法。例如招待來自中國某省份遊客的導遊可能會被要求使用該省的方言,而這是合乎情理的。
- 16. 至於為何採納在1976年制定的《1976年種族關係法令》的相關條文,政府當局告知委員,採納在1976年訂定的《1976年種族關係法令》的相關條文,主要基於一項考慮因素,就是該等條文已在英國各宗訴訟案件中得到研究和詮釋,條文經充分驗證,其效力亦獲普遍認識,因而可供法庭和平等機會委員會用作參考。
- 17. 政府當局進一步解釋,上文第13(a)及(b)段所述的兩類情況,在條例草案下不會構成種族歧視,因為在提供貨品、服務及設施方面使用或不使用某一語文,根據條例草案第58條屬例外情況,而條例草案第8(2)及(3)條則指明種族並不涵蓋國籍、公民身份和居民身份。然而,對於上文第13(c)段所述的一類情況在條例草案下會否構成間接歧視,政府當局未能給予一個肯定的答案,但承諾會作出書面回應。

法案委員會法律顧問提供的意見

- 18. 法案委員會法律顧問提出以下意見:
  - (a) 條例草案第4(1)(b)條訂明構成間接歧視的情況,但該條 文範圍甚窄,而且只在有某項"要求或條件"的情況下才 適用;
  - (b) 條例草案第4(1)(b)條以《1976年種族關係法令》第1(1)(b) 條為藍本;

- (c) 《1976年種族關係法令》的相關條文在2003年加入新的第(1A)至(1C)款,以實施歐洲聯盟議會指令2000/43/EC,當中提述"provision, criterion or practice"("規定、準則或慣例"),所涉範圍較廣;及
- (d) 若把上述法令新的第(1A)至(1C)款納入條例草案第4條內,將可涵蓋上文第13(a)段所述一類情況涉及的歧視形式。
- 19. 法案委員會法律顧問亦察覺到,條例草案第4(2)(a)及(b)條以目前的寫法而言,效力是只要符合第4(2)(a)條所訂合理及相稱的原則,或符合第4(2)(b)條所訂合理地切實可行的原則,便足以確立"有理可據"的免責辯護。換言之,只要涉嫌歧視者能證明不施加某項要求或條件並非合理地切實可行,該項要求或條件即屬有理可據,不論該項要求或條件為達到有關的合法目的而如何不合理和不相稱。
- 20. 法律顧問又察覺到,條例草案第4(1)(a)及4(1)(b)條並無把直接 歧視界定為直接歧視或間接歧視界定為間接歧視,而只是描述根據條 例草案會導致侵權法律責任的行為。上述條文被分別劃歸"直接歧視" 和"間接歧視"兩個用語下,並不是要區分"直接"和"間接"歧視,而是互 為補充。這樣不符合第4(1)(a)條的描述,但對特定種族造成有區別效 果的行為,便會被第4(1)(b)條所涵蓋。條例草案第4條草擬的方式和寫 法與其他針對歧視行為的現行條例一致。若否定現時採用的方式和寫 法,便須要以不同的方式重新草擬條例草案。

#### 條例草案第8條有關內地新移民未獲納入條例草案涵蓋範圍的問題

#### 委員提出的關注事項

21. 部分委員認為,當局應擴大條例草案的範圍,以涵蓋內地新移民受歧視的情況,因為這些新移民構成一個獨特社群,而且歧視內地新移民的問題十分普遍。該等委員認為,有些人可能因內地新移民說話帶有口音和他們的生活習慣,而對該等新移民有成見,不論他們在香港居住了多久。他們建議不必堅持遵照《消除一切形式種族歧視國際公約》所載"種族"的定義,而"ethnic origin"("族群本源")一詞的涵義應從較廣義的角度理解。然而,有其他委員認為,內地新移民在教育和僱傭方面確實受到與他人不同的待遇,但條例草案不應涵蓋歧視該等新移民的情況,因為此類歧視並非基於種族理由。

#### 政府當局作出的回應

22. 政府當局解釋,條例草案中"種族"一詞指種族、膚色、世系、民族或族群本源,但不包括國籍、香港永久居民身份、居港年期或新界原居民身份。有關定義符合《消除一切形式種族歧視國際公約》所採用的定義。條例草案並無把新來港定居人士摒除於其適用範圍之外。新來港定居人士可否被視作一個族群,最終取決於事實。此事會由法院以Lord Fraser在 Mandla一案中闡明的準則,作出裁決。該案判決書

的內容摘錄載於**附錄II**。法院會考慮新來港定居人士是否共同擁有一段悠久歷史以及秉承獨有的文化傳統。如符合Lord Fraser列出的準則,他們便會被視為自成一個族群,而受到條例草案保障。然而,政府當局認為,歧視內地新移民是一種社會歧視。以禁止種族歧視的法例處理有關問題,在原則上實屬錯誤。政府當局亦指出,若把內地新移民納入"種族"的定義範圍內,對現時基於居港7年規定而釐定的既定政策和做法會有負面影響,結果可能會在資源方面造成重大影響。

#### 法案委員會法律顧問提供的意見

- 23. 法案委員會法律顧問提出以下意見:
  - (a) 從現行判例法可見,"種族"的涵義不應僅從生物角度理解,而Lord Fraser在Mandla一案中對"族群本源"的驗證準則亦適用於香港的案件。根據該驗證準則,有一點似乎很清楚,就是在研究與某人的族群本源有關的種族歧視問題時,亦可考慮"種族"以外的因素。;
  - (b) 條例草案以"人種"作為"ethnic origin"的中譯,涵義範圍太窄。考慮到Lord Fraser在Mandla一案中闡明的準則,"族群本源"是個較佳的譯法;
  - (c) 因此,認為採用*Mandla*一案中的準則,內地新移民很有可能會納入"族群本源"一詞的涵蓋範圍內;及
  - (d) 政府當局關注到若內地新移民可藉條例草案條文從法律 上質疑某些政府部門的政策和慣例,會對公共財政造成 不可接受的不利影響,那是可以理解的。然而,若訂立 適當的豁除/例外情況(條例草案已訂立這類情況,例如 附表5所載的事宜),當局既可推行維持香港特別行政區 財政穩健所需的措施,同時亦可根據條例草案為新來港 定居人士提供合理保障。

#### 條例草案第58條有關語文的例外情況

#### 委員提出的關注事項

- 24. 部分委員對條例草案訂明在提供貨品、服務及設施等方面使用或不使用特定語文的例外情況表示強烈不滿,因為語言是少數族裔人士享用各式服務的主要障礙,這情況尤以使用醫療服務為然。他們認為,在享用例如醫療服務等重要服務方面有不同的待遇已構成歧視,不應就此訂立例外情況。
- 25. <u>大部分委員</u>認為,條例草案應規定須採取平權行動,確保少數族裔人士有同等機會接受教育(特別是大學教育)和職業訓練。關於大學收生方面,該等委員認為,規定所有本地學生升讀大學須符合中文科的入學成績要求,已令少數族裔學生在這方面大為吃虧。大部分少

數族裔學生都不能使用他們在香港中學會考英語以外的其他語文科目(例如法語)考取的成績,來代替入讀學士學位課程方面中文科的成績要求。這些委員建議,政府當局應考慮設定大學教育資助委員會("教資會")資助院校取錄非華語學生的配額。至於職業訓練方面,該等委員認為,職業訓練機構只採取純粹的行政措施,因應需要以英語教授部分訓練課程的做法並不足夠,因為少數族裔人士可能不諳英文。他們認為當局應作出政策方面的決定,確保這些機構獲得充足資源,以配合少數族裔人士的訓練需要。

#### 政府當局作出的回應

- 26. 政府當局解釋,要求服務提供者(不論是公營或私營)以各種不同的語言進行活動和業務,或以客戶/顧客所選用的語言與他們溝通,並非切實可行。因此,當局不擬強制要求使用某種語言進行溝通。在合理可行的情況下,以特定少數族裔群體為對象的服務提供者會以有關語言進行業務活動。這是實事求是的做法,符合整體社會利益。政府當局亦告知委員,醫院管理局轄下的公立醫院/診所和前線部門均備有兼職傳譯員名冊,在有需要時可安排兼職傳譯員前來為病人提供專罪服務。勞工處亦推行各式措施,協助少數族裔人士使用求職服務。
- 27. 關於大學收生方面,政府當局解釋,設定優待配額給少數族裔學生入讀大學,或會使資格稍遜的少數族裔學生比資格較佳的非少數族裔學生獲得更高的錄取機會,此舉或會被認為是直接的種族歧視,而根據條例草案,可能屬於違法。教育統籌局正與教資會資助院校商討可否接納其他中國語文科考試資歷,例如綜合中等教育證書(中國語文科)考試,並會向法案委員會匯報商討結果。
- 28. 至於職業訓練,政府當局告知委員,若希望申請入讀的非華語人士對個別課程有需求,職業訓練機構亦準備在可行的情況下盡量安排以英語授課,或提供補充的英文閱讀材料。不過,這些機構作出安排時亦須顧及有關導師的背景、課程要求及/或有關工作要求。政府當局亦會繼續鼓勵這些機構在有需要及實際可行的情況下,安排將教材翻譯成非華語學員的母語。

#### 未來路向

#### 所擬達到的政策目的

29. <u>大部分委員</u>普遍認為,條例草案的政策目的,是要確保不同種族的人士均享有平等機會,以及保障他們不會遭受任何種族歧視。他們認為,在草擬條例草案時應採用以成效為本的方式。若某人因種族理由而受到歧視,不論該人是受到較差的對待,還是被施加一項無理的要求或條件,即屬種族歧視。條例草案應適用於任何會造成種族歧視的作為,而此類作為應受到法律禁止。

#### 可供考慮的方案

- 30. 為達到上述政策目的,以及解決上文第4段所列的基本事宜, 委員可考慮以下方案:
  - (a) 條例草案第3條可否修訂,訂明在公共主管當局履行職能和職務及政府作出委任方面,條例草案會適用於政府,或增訂類似《1976年種族關係法令》第19B條及第76條的條文。第19B條及第76條摘錄載於**附錄III**;
  - (b) 條例草案第4(1)(b)條可否修改,把在2003年加入《1976年種族關係法令》第1條的新訂第(1A)至(1C)款(請參閱附錄I)納入其中,藉以擴大條例草案針對的間接歧視的範圍;
  - (c) 條例草案第8(2)及(3)條可否修訂,使內地新移民亦獲納 入條例草案的涵蓋範圍內,並在第8條或附表5訂立所需 的例外情況;及
  - (d) 條例草案第58條可否修訂,豁除與公共主管當局(或訂明 特定的當局)向公眾提供貨品、設施及服務有關的情況。

若否定條例草案現時採用的方式和寫法,或有需要以新的方式重新草 擬條例草案,以充分達致有關的政策目的。

立法會秘書處 議會事務部2 2007年6月25日

#### Appendix I

# Extract from the Race Relations Act 1976

# $\mathbf{x}$ $\mathbf{x}$ $\mathbf{x}$ $\mathbf{x}$ $\mathbf{x}$ $\mathbf{x}$ $\mathbf{x}$

- [(1A) A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in subsection (1B), he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but—
  - (a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons,
  - (b) which puts that other at that disadvantage, and
  - (c) which he cannot show to be a proportionate means of achieving a legitimate aim.
  - (1B) The provisions mentioned in subsection (1A) are—
    - (a) Part II;
    - (b) sections 17 to 18D;
    - (c) section 19B, so far as relating to-
      - (i) any form of social security;
      - (ii) health care;
      - (iii) any other form of social protection; and
      - (iv) any form of social advantage; which does not fall within section 20;
    - (d) sections 20 to 24;
    - (e) sections 26A and 26B;
    - (f) sections 76 and 76ZA; and
    - (g) Part IV, in its application to the provisions referred to in paragraphs (a) to (f).
- (1C) Where, by virtue of subsection (1A), a person discriminates against another, subsection (1)(b) does not apply to him.]

# Lord Fraser of Tullybelton審理 Mandla & Another v Lee [1983] IRLR 210, HL一案 的判決書內容摘錄

#### $X \quad X \quad X \quad X \quad X \quad X \quad X$

本席認為,一群人必須具備某些特質,把自己視為一個獨特社群,同時在其他人眼中他們也是一個獨特社群,這群人才構成1976年的(種族關係)法令所指的族群。這些特質其中一些是必要的,另一些則並非必要,但在這群人當中普遍會有一種或多種這些特質,使他們有別於其他社群。本席認為下列是一些必要的條件:(1)這群人意識到他們共同擁有一段悠久歷史,使他們這個社群與別不同,而這些歷史回憶至今歷久彌新;(2)秉承獨有的文化傳統,包括家族和社會的風俗習慣,而該文化傳統通常(但非必然)與宗教信仰有關。除上述兩種必要特質外,本席認為下列也是一些相關的特質:(3)源自同一地區,於少數共同祖先的後裔;(4)使用同一語言,但該語言不一定是這群人獨有的;(5)共同擁有一套獨有的文獻;(6)信奉同一宗教,而該宗教與鄰近社群或其他一般社會人士信奉的宗教並不相同;(7)在較大的與鄰近社群或其他一般社會人士信奉的宗教並不相同;(7)在較大的知國家被諾曼人(Normans)征服後不久仍居於英格蘭的人民)及其征服者,可以是兩個族群。

X X X X X X X X

## Extract from the Race Relations Act - sections 19B and 76

#### X X X X X X X X

# 19B ... public authorities

[160]

- (1) It is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination.
- [(1A) It is unlawful for a public authority to subject a person to harassment in the course of carrying out any functions of the authority which consist of the provision of—
  - (a) any form of social security;
  - (b) healthcare;
  - (c) any other form of social protection; or
  - (d) any form of social advantage,

which does not fall within section 20.]

- (2) In this section "public authority"—
  - (a) includes any person certain of whose functions are functions of a public nature; but
  - (b) does not include any person mentioned in subsection (3).
- (3) The persons mentioned in this subsection are—
  - (a) either House of Parliament;
  - (b) a person exercising functions in connection with proceedings in Parliament;
  - (c) the Security Service;
  - (d) the Secret Intelligence Service;
  - (e) the Government Communications Headquarters; and
  - (f) any unit or part of a unit of any of the naval, military or air forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.
- (4) In relation to a particular act, a person is not a public authority by virtue only of subsection (2)(a) if the nature of the act is private.
  - (5) This section is subject to sections 19C to 19F.
- (6) Nothing in this section makes unlawful any act of discrimination [or harassment] which—
  - (a) is made unlawful by virtue of any other provision of this Act; or
  - (b) would be so made but for any provision made by or under this Act.]

#### NOTES

Amendments

Inserted (along with preceding cross-heading and ss 19C, 19D, 19E, 19F post) by the Race

Relations (Amendment) Act 2000, s 1.

Sidenote: words omitted repealed by the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626, reg 20(1).

Sub-s (1A): inserted by the Race Relations Act 1976 (Amendment) Regulations 2003,

SI 2003/1626, reg 20(2)(a). Sub-s (6): words in square brackets inserted by the Race Relations Act 1976 (Amendment)

Regulations 2003, SI 2003/1626, reg 20(2)(b).

For the exception of certain acts in immigration and Sub-s (1): It is unlawful, etc nationality cases, see ss 19D, 57A(1)-(3) post; as to the exception for decisions not to institute criminal proceedings, see s 19F post; as to general exceptions from this Part, see Pts V (s 34) and VI (35-42) post

As to the remedy in proceedings for unlawful acts under this section done by a person in carrying out public investigator functions or functions as a public prosecutor s 57(4A)-(4D), post. The Secretary of State may, under s 73(1)(b) post, amend by order this section so as to render an act lawful which would ordinarily be unlawful.

See the note to s 1 ante. Sub-s (1A): Person

Sub-s (3): Security Service As to the Security Service and its functions, see the Security Service Act 1989, s 1 et seq, Vol 10, title Constitutional Law (Pt 4).

Sub-s (3): Secret Intelligence Service; Government Communications Headquarters See the Intelligence Services Act 1994, ss 1, 3, Vol 10, title Constitutional Law (Pt 4).

Sub-s (3): Secretary of State See the note to s 15 ante.

This section applies to acts of granting entry clearance (within the meaning of the Immigration Act 1971, Vol 31, title Nationality and Immigration) done outside the United Kingdom as well as those done within Great Britain; see s 27(1A) post.

As to the application of this section and s 19D post in 'Control Zones' in France, see the Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003, SI 2003/2818 (made under the Nationality, Immigration and Asylum Act 2002, s 141, Vol 31, title Nationality and Immigration).

Application to Crown This section binds the Crown; see s 75(2A), (2B) post.

See the notes to s 17 Power to amend this Part; acts safeguarding national security ante.

See the Introductory Note(s) to this Act. Additional information

Cases relating to this section

R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport [2003] EWCA Civ 666, [2003] 4 All ER 247, [2003] 29 LS Gaz R 35

#### Definitions

"act": s 78(1)

"discrimination": s 3(3)(a), 78(1)

"harassment": s 3A

"social advantage": s 78(1) "social protection": s 78(1)

# 76 Government appointments outside s 4

[234]

- (1) [Subsection (2)] applies to any appointment by a Minister of the Crown or government department to an office or post where section 4 does not apply in relation to the appointment.
- (2) In making the appointment, and in making the arrangements for determining who should be offered the office or post, the Minister of the Crown or government department shall not do an act which would be unlawful under section 4 if the Crown were the employer for the purposes of this Act.
  - [(3) Subsection (5) applies to—
    - (a) any recommendation made by a Minister of the Crown or government department in relation to an appointment to an office or post where section 4 does not apply in relation to the appointment; and
    - (b) any approval given by such a Minister or department in relation to any such appointment.
  - (4) Subsection (5) also applies to—

- (a) any recommendation made by a Minister of the Crown or government department in relation to a conferment by the Crown of a dignity or honour; and
- (b) any approval given by such a Minister or department in relation to any such conferment.
- (5) In making the recommendation, or giving the approval, and in making the arrangements for determining who should be recommended or approved, the Minister of the Crown or government department shall not do an act which would be unlawful under section 4 if the recommendation or approval were an offer of employment and the Crown were the employer for the purposes of this Act.
- (6) Subsections (3) to (5) do not apply in relation to the making of negative recommendations.
  - (7) Subsection (9) applies to—
    - (a) any negative recommendation made by a Minister of the Crown or government department, or any refusal to make a recommendation by such a Minister or department, in relation to an appointment to an office or post where section 4 does not apply in relation to the appointment; and
    - (b) any approval refused by such a Minister or department in relation to any such appointment.
  - (8) Subsection (9) also applies to—
    - (a) any negative recommendation made by a Minister of the Crown or government department, or any refusal to make a recommendation by such a Minister or department, in relation to a conferment by the Crown of a dignity or honour; and
    - (b) any approval refused by such a Minister or department in relation to any such conferment.
- (9) In making a negative recommendation or in refusing to make a recommendation or give an approval, and in making the arrangements for determining whether to make such a recommendation or refusal, the Minister of the Crown or government department shall not do an act which would be unlawful under section 4 if the recommendation or refusal were a refusal to offer the person concerned employment and the Crown were the employer for the purposes of this Act.
- (10) [Subsections (11) and (11B) apply] in relation to any appointment to an office or post where section 4 does not apply and—
  - (a) the appointment is made by a Minister of the Crown or government department; or
  - (b) the office or post is an office or post in relation to which a Minister of the Crown or government department has made a recommendation (other than a negative recommendation) or given an approval.
- (11) A Minister of the Crown or government department shall not do an act in connection with—
  - (a) the terms of the appointment;
  - (b) access for the person appointed to opportunities for promotion, transfer or training, or to any other benefits, facilities or services; or
  - (c) the termination of the appointment, or subjecting the person appointed to any other detriment;

which would be unlawful under section 4 if the Crown were the employer for the purposes of this Act.

- [(11A) In subsection (11)(c) reference to the termination of the appointment includes, where the act is committed on the grounds of race or ethnic or national origins, reference—
  - (a) to the termination of the appointment by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the appointment is renewed on the same terms and conditions; and
  - (b) to the termination of the appointment by any act of the person appointed (including the giving of notice) in circumstances such that he is entitled to terminate the appointment by reason of the conduct of the Minister or the department, as the case may be.
- (11B) It is unlawful for a Minister of the Crown or government department to subject to harassment a person who has been appointed, or who is seeking or being considered for, the appointment.]
- (12) The High Court may, on an application for judicial review, make a declaration to the effect that a Minister of the Crown or government department has [contravened—
  - (a) subsection (5);
  - (b) subsection (9);
  - (c) in relation to an appointment falling within subsection (10)(b), subsection (11); or
  - (d) subsection (11B),

and may award damages in respect of the contravention.]

- (13) In Scotland, the Court of Session may, in a petition for judicial review, grant declarator to the like effect and may award damages in respect of the contravention.
- [(14) The provision made by subsection (12) in respect of judicial review does not affect the ability, where an act on grounds of race or ethnic or national origins, or harassment, is alleged, to present a complaint to an employment tribunal under section 54A(1).]
  - (15) In this section—
    - (a) references to refusal include references to deliberate omission;
    - (b) references to Ministers of the Crown and government departments include references to the National Assembly for Wales and any part of the Scottish Administration; and
    - (c) references to Ministers of the Crown and government departments so far as they relate to the making of a recommendation or a refusal to make a recommendation, or the giving or refusal of an approval, in relation to a conferment of a peerage for life under section 1 of the Life Peerages Act 1958 include references to any body established by a Minister of the Crown to make such a recommendation to the Prime Minister or to determine whether to give such an approval.]

#### **NOTES**

#### Amendments

Sub-s (1): words in square brackets substituted by the Race Relations (Amendment) Act 2000, s 3(1), (2).

Sub-ss (3)-(9): inserted (along with sub-ss (10)-(13), (14) (as originally enacted), (15)) by the Race Relations (Amendment) Act 2000, s 3(1), (3).

Sub-s (10): inserted (along with sub-ss (3)-(9), (11), (12), (13), (14) (as originally enacted), (15)) by the Race Relations (Amendment) Act 2000, s 3(1), (3); words in square brackets substituted by the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626, reg 50(a). Sub-s (11): inserted (along with sub-ss (3)-(10), (12), (13), (14) (as originally enacted), (15)) by

the Race Relations (Amendment) Act 2000, s 3(1), (3).

Sub-ss (11A), (11B): inserted by the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626, reg 50(b).

Sub-s (12): inserted (along with sub-ss (3)-(11), (13), (14) (as originally enacted), (15)) by the Race Relations (Amendment) Act 2000, s 3(1), (3); words in square brackets substituted by the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626, reg 50(c).

Sub-s (13): inserted (along with sub-ss (3)-(11), (12), (14) (as originally enacted), (15)) by the

Race Relations (Amendment) Act 2000, s 3(1), (3).

Sub-s (14): inserted (along with sub-ss (3)-(11), (12), (13), (15)) by the Race Relations (Amendment) Act 2000, s 3(1), (3); substituted by the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626, reg 50(d).

Sub-s (15): inserted (along with sub-ss (3)-(11), (12), (13), (14) (as originally enacted)) by the

Race Relations (Amendment) Act 2000, s 3(1), (3).

Sub-s (12): High Court See the note to s 50 ante.

Sub-s (15): National Assembly for Wales See the note to s 19C ante.

Further provisions S 76ZA post (other office holders) applies to any office or post where this section does not apply; see sub-s (7) thereof.

Application to Crown This section binds the Crown; see s 75(2A), (2B) ante.

Additional information See the Introductory Note(s) to this Act.

Life Peerages Act 1958 See Vol 33, title Peerages and Dignities.

#### **Definitions**

"act": s 78(1)

"body": s 78(1)

"detriment": \$ 78(1)

"employment": s 78(1)

"harassment": s 3A

"Minister of the Crown": s 78(1)

# X X X X X X X X