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Bills Committee on Race Discrimination Bill

Paper prepared by the Legislative Council Secretariat

Scrutiny progress of the Bill

Purpose

This paper encapsulates the scrutiny progress of the Race Discrimination Bill.

Effectiveness of the enactment of the Bill

2. Since its first meeting on 16 January 2007, the Bills Committee has held 10 meetings with the Administration and received views from 34 deputations at a meeting. The majority members are dissatisfied with the approach in the drafting of the Bill because of its narrow scope of application with numerous exemptions. They are of the view that the approach in the drafting of the Bill demonstrates the Administration's lack of commitment in addressing the problem. These members have expressed serious doubt as to how far the Bill as presently drafted would bring about concrete improvements to the problem of racial discrimination in Hong Kong. They consider that, while the Bill can make certain individual discriminatory acts on the ground of race unlawful, it would not be able to prohibit longstanding discriminatory practices in the public sector arising from the implementation of Government policies and measures. The majority members are also concerned that the exemptions provided for in the Bill would have the adverse effect of legitimising discriminatory acts on the ground of race. They hold the view that the lack of clarity of the Bill would cause confusion and uncertainties to the community.

3. Members have also raised numerous issues on the Bill, a list of which is issued vide LC Paper No. CB(2)2231/06-07(02).

4. The majority members are of the view that, to facilitate the Bills Committee's decision on the way forward for its scrutiny work, the Administration needs to resolve some fundamental issues raised in the following clauses -

- (a) Clause 3 regarding the application of the Bill to the Government;
- (b) Clause 4 regarding the distinction between direct and indirect discrimination;
- (c) Clause 8 regarding the exclusion of new arrivals from the Mainland from the scope of the Bill; and
- (d) Clause 58 regarding the exception for languages.

5. As regards the exclusion of new arrivals from the Mainland from the scope of the Bill, it is the position of the members belonging to the Liberal Party that discrimination against these new arrivals should not be covered.

6. The deliberation on these fundamental issues is summarised in paragraphs 7 to 28 below.

Fundamental issues to be resolved

Clause 3 regarding the application of the Bill to the Government

Members' concerns

7. The majority members note that, while the three existing anti-discrimination ordinances expressly bind the Government, Clause 3 of the Bill provides that the Bill, when enacted, applies only to an act done by or for the purpose of the Government that is of a kind similar to an act done by a private person. They have queried the justification for granting a broad exemption for the performance of functions and powers of the Government. These members have expressed concern that Clause 3 would have the legal effect of exempting any act of the Government in the performance of its powers/functions which have contravened provisions of the Bill. Moreover, it would be difficult to determine whether an act done by the Government is an act "that is of a kind similar to an act done by a private person". They point out that a member of the public who has suffered racial discrimination by the Government would have the additional financial burden of incurring legal costs if he could only seek redress by instituting civil proceedings under the Hong Kong Bill of Rights Ordinance (HKBORO) (Cap. 383).

The Administration's response

8. According to the Administration, Clause 3 is included for the sake of clarity. The Bill, when enacted, would apply to the Government in the same way as it applies to the private sector. Clause 27(2)(h) further clarifies the

ambit of the proposed legislation to include particularly "the services of any department of the Government or any undertaking by or of the Government". The Administration has assured members that the Bill would cover areas such as provision of public medical services and education, even though law enforcement, correctional service, and immigration control are not covered. However, as the objective of the Bill is to prohibit the discriminatory acts by individuals/organisations in the private sector, it is not the Administration's intention to provide additional mechanisms under the Bill for handling public complaints about law enforcement officers' performance of duties, given the existence of other mechanisms to deal with discriminatory acts (if any) by Government officers.

Advice of the legal adviser to the Bills Committee

9. The legal adviser to the Bills Committee has given the following advice -

- (a) the obligations of the Government not to act discriminatorily as specified under HKBORO are limited to fundamental human rights listed in the Ordinance, and do not necessarily cover the day-to-day performance of functions and duties by the Government;
- (b) the Race Relations Act (RRA) 1976 of the United Kingdom (UK) has been amended in 2000 to include new provisions, in particular section 19B which extends the application of RRA to the performance of functions and duties by public authorities and section 76 which concerns the making of appointments by government; and
- (c) the approach of RRA could be adopted and amendments be made to the effect that the Bill would apply to the Government insofar as the performance of functions and duties by public authorities and the making of appointments by the Government are concerned.

Clause 4 regarding the distinction between direct and indirect discrimination

Members' concerns

10. Clause 4(1)(a) of the Bill specifies the circumstances which would constitute direct discrimination on the ground of the race of a person. Direct discrimination occurs when a person on the ground of race treats another person less favourably than he would treat others. Under Clause 4(1)(b), indirect discrimination occurs when a person imposes a requirement or condition which, although applicable to all, has a disproportionate adverse

impact on people of a particular race, and the requirement or condition imposed cannot be justified by reasons not related to race.

11. Members have queried the need to include under Clause 4 of the Bill the test of "justification" which is not included in the other three anti-discrimination ordinances. Members are also concerned that it would be very difficult for the public to assess whether the application of a particular requirement or condition would meet that test or not.

12. The majority members are of the view that Clause 4 is far from clear in defining what would constitute racial discrimination, particularly indirect discrimination. They consider that it is not necessary to distinguish arbitrarily two forms of discrimination, i.e. direct and indirect discrimination. Members have also queried the rationale for the Administration's decision of modelling Clause 4(1)(b) on section 1(1)(b) of RRA of UK, instead of the subsections (1A) to (1C) newly added to RRA in 2003. Sections 1(1A) to (1C) of RRA are reproduced in **Appendix I** for members' ease of reference.

13. Members have also expressed grave concern that members of the public might not be able to understand the tests for determining whether a requirement or condition would be justified or not. As a result, it would cause confusion and uncertainties to the community if the Bill as presently drafted is enacted. They have also requested the Administration to confirm whether the following set of circumstances would constitute racial discrimination under the Bill -

- (a) ethnic minorities being denied of timely provision of medical services due to language barrier and unavailability of interpretation services at hospitals;
- (b) the implementation of the new Obstetric Package Charge for Non-eligible Persons whose spouses are Hong Kong residents which would have the effect of putting these persons who are predominantly Chinese at a disadvantage as compared with pregnant women of other races whose spouses are also Hong Kong residents; and
- (c) the imposition of the requirement of obtaining a pass for the subject of Chinese Language in the Hong Kong Certificate of Education Examination for university admission on all local students, which has put non-Chinese speaking (NCS) students of ethnic minorities at a great disadvantage.

The Administration's response

14. According to the Administration, Clause 4(1)(b)(i) to (iii) set out the criteria for assessing whether the application of a particular requirement or condition would constitute indirect discrimination. For clarity, Clause 4(2)(a)

incorporates the internationally accepted principles of rationality and proportionality for assessing whether the application of a particular requirement or condition could be justified under Clause 4(1)(b)(ii). Clause 4(2)(b) reflects the Government's policy intent of requiring people to be mindful of the special needs of the minorities and, where reasonably practicable, not to apply a requirement or condition that would adversely affect them disproportionately. Whether a requirement or condition is justifiable would be measured by two alternative tests. The first test is whether it serves a legitimate purpose and bears a rational and proportionate relationship with the objective sought. The second test is whether or not it is reasonably practicable not to apply the requirement or condition.

15. On the need to distinguish between direct and indirect discrimination, the Administration has explained that there is a need to make such distinction. While there is no defence for direct discrimination under Clause 4(1)(a), a defence of "justification" is provided for under Clause 4(1)(b). Many discriminatory acts would be regarded as direct discrimination if these two forms of discrimination are not distinguished from one another and thus would create a lot of uncertainties. The Administration has further explained that it would not be acceptable not to allow for indirect discrimination to be justified; otherwise any requirement or condition having a disproportionate negative impact on a racial group would become unlawful even with sound justifications. For example, a tour guide serving tourists from a Chinese province might justifiably be required to speak the dialect.

16. On the rationale for adopting the relevant provisions of RRA enacted in 1976, the Administration has informed members that adopting the relevant provisions of RRA made in 1976 is based mainly on the consideration that those provisions are well-tested and their effect well-understood as they have been considered and interpreted in various court cases in UK which could serve as a useful reference for the courts and the Equal Opportunities Commission.

17. The Administration has further explained that the sets of circumstances described in paragraphs 13(a) and (b) above would not constitute racial discrimination under the Bill because the use, or failure to use of, a particular language in regard to provision of goods, services and facilities is excepted under Clause 58, and Clauses 8(2) and (3) make it clear that race does not include nationality, citizenship and resident status. The Administration, however, is unable to give a definite answer as to whether the set of circumstances described in paragraph 13(c) would constitute indirect discrimination under the Bill and has undertaken to provide a written response.

Advice of the legal adviser to the Bills Committee

18. The legal adviser to the Bills Committee has given the following advice -

- (a) the scope of Clause 4(1)(b) which specifies the circumstances which would constitute indirect discrimination is very narrow and only applies if there is a "requirement or condition";
- (b) Clause 4(1)(b) is modelled on section 1(1)(b) of RRA;
- (c) new subsections (1A)-(1C) which have been added to the relevant provision of RRA in 2003 to implement the Council of the European Union Directive 2000/43/EC which refers to "provision, criterion or practice" are considered to be broader in scope; and
- (d) new subsections (1A)-(1C) if incorporated into Clause 4 would cover the form of discrimination in the set of circumstances described in paragraph 13(a).

19. The legal adviser to the Bills Committee has also observed that Clause 4(2)(a) and (b) as presently drafted have the effect that satisfying either the rationality and proportionality test under Clause 4(2)(a) or the reasonable practicability test under Clause 4(2)(b) would suffice to establish the defence of "justification". In other words, a requirement or condition would be justifiable provided that the alleged discriminator can prove that it was not reasonably practicable for him not to apply it, no matter how irrational and disproportionate the requirement or condition is to achieve the legitimate objective.

20. The legal adviser has further observed that Clause 4(1)(a) and Clause 4(1)(b) of the Bill do not define direct discrimination or indirect discrimination as such, but describe conduct which would give rise to tortious liabilities under the Bill. The provisions subsumed respectively under the terms "direct discrimination" and "indirect discrimination" do not have the purpose of making a distinction between "direct" and "indirect" discrimination but are complementary, so that conduct that does not come within Clause 4(1)(a) but has a disparate effect on a particular race or races would be covered by Clause 4(1)(b). The approach and drafting of Clause 4 are in line with the other existing Ordinances against discriminatory conduct. If the present approach and drafting are rejected, the Bill would have to be redrafted with a different approach.

Clause 8 regarding the exclusion of new arrivals from the Mainland from the scope of the Bill

Members' concerns

21. Many members are of the view that the scope of the Bill should be extended to cover discrimination against new arrivals from the Mainland because these new arrivals constitute a distinct community and the problem of discrimination against them is prevalent. These members consider that some

people may have a preconception against new arrivals from the Mainland which is formed because of the accent and culture of these new arrivals, irrespective of their length of residence in Hong Kong. They have suggested that it is not necessary to adhere to the definition of "race" of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the meaning of "ethnic origin" should be construed in a wider sense. Other members, however, consider that although new arrivals from the Mainland do encounter differential treatment in education and employment, the Bill should not cover discrimination against these new arrivals as such discrimination is not based on racial grounds.

The Administration's response

22. The Administration has explained that "race" in the Bill means race, colour, descent, or national or ethnic origin but does not mean nationality, Hong Kong permanent resident status, length of residence in Hong Kong or indigenous inhabitant status. This definition is in line with the definition adopted under ICERD. The Bill does not exclude new arrivals from its ambit. Whether new arrivals can be regarded as an ethnic group is ultimately a question of facts. It would be determined by the court applying the test enunciated by Lord Fraser in the case of *Mandla*. An extract from the relevant judgment is in **Appendix II**. The court would look at whether new arrivals have a long shared history and a cultural tradition of their own. Should new arrivals be able to satisfy the test laid down by Lord Fraser, they should be protected as a separate ethnic group under the Bill. However, the Administration considers that discrimination against new arrivals from the Mainland is a form of social discrimination and it is wrong in principle to address the issue through legislation on racial discrimination. The Administration also points out that inclusion of new arrivals in the scope of the definition would have adverse implications on established policies and practices which are based on the seven-year residency requirement and could, in consequence, give rise to significant resources implications, although the latter is not a key factor in the Administration's consideration.

Advice of the legal adviser to the Bills Committee

23. The legal adviser to the Bills Committee has given the following advice -

- (a) the existing case law suggests that "race" is not to be understood only in its biological meaning and Lord Fraser's test for "ethnic origin" in the case of *Mandla* is applicable to cases in Hong Kong. In the light of that test, it seems clear that in considering discrimination relating to the ethnic origin of a person, factors other than "race" could be considered;

- (b) "人種" used in the Bill as the translation of "ethnic origin" is too narrow in meaning whereas "族群本源" is a better translation having regard to Lord Fraser's criteria expressed in the case of *Mandla*;
- (c) it is therefore submitted that applying the test in *Mandla*, new arrivals from Mainland are likely to be covered by the term "ethnic origin"; and
- (d) it is understood that the Administration is concerned that there will be unacceptable adverse effect on public finance if new arrivals from Mainland were able to rely on provisions in the Bill to challenge policies and practices of some Government departments. However, with appropriate exceptions or exclusions being made (as has been done in the Bill e.g. in Schedule 5), measures necessary for preserving the fiscal health of the Hong Kong Special Administrative Region could be accommodated whilst the new arrivals are given reasonable protection under the Bill.

Clause 58 regarding the exception for languages

Members' concerns

24. Some members have expressed strong dissatisfaction with the exemption in the Bill for the use, or failure to use, of particular languages in regard to the provision of goods, services and facilities; given that language is a major barrier for racial minorities to gain access to services, particularly medical services. They consider that differential treatment in access to essential services such as medical services constitutes discrimination and should not be exempted.

25. The majority members are of the view that the Bill should impose an obligation for affirmative action to ensure that ethnic minorities would have equal opportunities to receive education, in particular university education, as well as vocational training. On university admission, these members consider that the imposition of the Chinese Language requirement for entry to universities on all local students has put students of ethnic minorities at a great disadvantage. Most students of ethnic minorities would not be able to use their Hong Kong Certificate of Education Examination result in a language other than English, such as French, in place of the Chinese Language result required for admission to undergraduate programmes. They have suggested that the Administration should consider setting a quota for the admission of NCS students by University Grants Committee (UGC)-funded institutions. On vocational training, these members are of the view that it is inadequate for vocational training institutions to implement mere administrative measures to

conduct some training courses in English on a need basis because some members of ethnic minorities know very little English. They consider that a policy decision should be made to ensure that these institutions would have sufficient resources to meet the training needs of ethnic minorities.

The Administration's response

26. The Administration has explained that it would not be practicable for service providers, either in the public or private sectors, to conduct their activities and businesses in all languages or in the language of the client/customer's choice. Hence, it is not proposed to make it mandatory for particular languages to be used for the purpose of communication. Service providers who target their service at specific minority groups would conduct their business in the appropriate language as is reasonably practicable in the circumstances. It is a pragmatic approach which is believed to be in the interest of the community as a whole. The Administration has also informed members that the Hospital Authority has maintained at public hospitals/clinics and front-line departments a register of part-time interpreters who may be called upon to provide interpretation for patients as necessary, while the Labour Department has implemented various measures to facilitate the use of job seeking services by ethnic minorities.

27. On university admission, the Administration has explained that setting a privilege quota for ethnic minority students for admission to universities might result in a lesser qualified ethnic minority student being preferred over a better qualified non-ethnic minority student. This might be considered as direct discrimination on the ground of race and would be unlawful under the Bill. The Education and Manpower Bureau is holding discussions with UGC-funded institutions on the feasibility of accepting alternative qualifications in Chinese such as the General Certificate of Secondary Education (Chinese) and would revert to the Bills Committee on the outcome of the discussions.

28. On vocational training, the Administration has informed members that, if there is a demand from prospective NCS applicants for individual programmes, vocational training institutions are prepared to arrange courses conducted in English or make available supplementary English reading materials where practicable. However, the background of the tutors, course requirements and/or requirements on the job must be taken into account. The Administration would also continue to encourage these institutions to arrange for translation into the native languages of NCS participants where necessary and practicable.

Way forward

Policy objectives to be achieved

29. The majority members in general are of the view that the policy objectives of the Bill are to ensure the enjoyment of equal opportunities among people of different races and their protection from any discrimination on the ground of race. They consider that a result-oriented approach should be adopted in drafting the Bill. Racial discrimination would occur if a person has been discriminated against by reason of his race, irrespective of whether this is by way of treating that person less favourably or applying an unjustified requirement or condition to him. The Bill should apply to any act which resulted in racial discrimination and such act should be prohibited by law.

Options to be considered

30. To achieve the above policy objective and resolve the fundamental issues identified in paragraph 4, the following options can be considered -

- (a) whether Clause 3 could be amended to the effect that the Bill would apply to the Government insofar as the performance of functions and duties by public authorities and the making of appointments by the Government are concerned or alternatively by adding provisions similar to sections 19B and 76 of RRA, which are extracted and attached in **Appendix III**;
- (b) whether Clause 4(1)(b) could be revised to incorporate the new subsections (1A)-(1C) (see Appendix I) added to section 1 RRA in 2003 in order to expand the scope of indirect discrimination under the Bill;
- (c) whether Clause 8(2) and (3) could be amended so that new arrivals from the Mainland would be included within the scope of the Bill with necessary exceptions be made either in Clause 8 or in Schedule 5; and
- (d) whether Clause 58 could be amended to exclude the provision to the public of goods, facilities and services by public authority generally or particular authority specifically.

If the present approach and drafting of the Bill is rejected, a new approach may have to be adopted to re-draft the Bill in order to achieve the policy objectives fully.

Extract from the Race Relations Act 1976

X X X X X X X 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.]

X X X X X X X X

**Extract from the judgment by Lord Fraser of Tullybelton in the case of
Mandla & Another v Lee [1983] IRLR 210, HL**

X X X X X X X X

For a group to constitute an ethnic group in the sense of the (*Race Relations*) Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.

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).

Sub-s (1): **It is unlawful, etc** For the exception of certain acts in immigration and 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.

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

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.

Application 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.

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

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

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”: s 78(1)

“employment”: s 78(1)

“harassment”: s 3A

“Minister of the Crown”: s 78(1)

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