

Comments on the seventeenth and eighteenth Dutch report on

THE IMPLEMENTATION OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

from
Dutch Equal Treatment Commission (CGB)
Dutch National Ombudsman
Dutch Data Protection Authority

March 2009



Commissie **Gelijke** Behandeling

de Nationale ombudsman



COLLEGE **BESCHERMING**  **PERSOONS**GEGEVENS

The logo for the Dutch Data Protection Authority is a series of vertical blue lines of varying heights, creating a stylized 'D' shape.



1. INTRODUCTION

The CGB took note with interest of the 17th and 18th Dutch report on the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) dated 17 January 2008.¹ On the basis of its expertise, opinions and activities, the CGB would like – through this shadow report – to raise a number of issues which, in its opinion, have not been dealt with in the government report or have been dealt with insufficiently.

The Equal Treatment Commission (CGB) is an independent government body that supervises compliance with Equal Treatment legislation in the Netherlands. It does so by assessing complaints submitted to it by people who consider themselves the victim of discrimination on the basis of gender, race, nationality, religion, sexual orientation, civil status, political opinion, personal beliefs, term of employment, employment contract with a definite or indefinite term, handicap or chronic illness, and age. Equal Treatment legislation covers the most important areas of society (which may differ per ground), namely employment, offering and granting access to goods and services and education. The Opinions of the CGB are not enforceable at law. Follow-up data show that positive measures had been implemented in 70% (on average) of the cases in which the CGB considered that an unlawful distinction had been made. In addition to assessing complaints, the CGB advises the legislator and social organisations on Equal Treatment aspects and arranges education, training and information meetings on Equal Treatment legislation. In 1998 and 2004, the CGB issued similar shadow reports for the purpose of the activities of the CERD Committee.²

READING GUIDE

This shadow report was written on the basis of several articles of the CERD Convention. Where relevant, reference is made to the paragraphs of the Dutch government report. Following each point, a **suggestion for a question** has been included for the purpose of the preparation of the CERD Committee members for the dialogue with the Dutch government.

The shadow report covers the developments that took place in the reporting period of July 2002 to December 2006. In its report, the government sometimes refers to developments that occurred after this period. The CGB therefore sometimes also highlights cases dating from after December 2006.

¹ CERD/C/NLD/18.

² CGB, *Comments on the Tenth, Eleventh and Twelfth Periodic Reports of the Netherlands on the Implementation of the International Convention on the Elimination of all Forms of Racial Discrimination*, February 1998 and CGB-Advisory Opinion 2004-02, *Commentary of the Netherlands' Equal Treatment Commission on the fifteenth and sixteenth Periodic Report of the Kingdom of the Netherlands on the implementation of the Convention on the Elimination of all forms of Racial Discrimination*, February 2004.

2. GENERAL COMMENTS CONCERNING THE 17TH AND 18TH DUTCH REPORT

The Dutch government report was supposed to have been submitted to the CERD Committee on 9 January 2007. The Committee received the 17th and 18th report on 17 January 2008. Because of the fact that the term for submission of the report was exceeded by a year, the Dutch government has failed to comply with its obligations under the relevant convention. Such failures to observe set terms form an obstruction to an adequate progress of the work of the CERD Committee, and undermine the effectiveness of the UN supervision system.

The CGB regrets that the entire reporting period is not dealt with in a systematic fashion in the government report, and that it mainly concerns an explanation of the state of affairs in a limited number of years, in particular 2005 and 2006. Data on developments in the second half of 2002 and the years 2003 and 2004 have hardly been included in the report. A complete overview of the relevant developments over the entire period is therefore lacking, which would seem to suggest that the report concerns a random listing of policy measures. In addition, in its report the government often fails to provide an outline of the problem or (accurate) data that could provide more insight into the reasons why the government chose the measures reported. This makes it hard to conduct an effective assessment of Dutch policy.

3. POLICY MEASURES AIMED AT COMBATING DISCRIMINATION (ARTICLE 2 CERD)

3.1 NETWORK OF ANTI-DISCRIMINATION MEASURES WITH NATIONAL COVERAGE

In paragraphs 73 to 77 of the report, the government reports on its efforts to institute a network of anti-discrimination measures with national coverage. Until recently, nearly half of the Dutch population did not have access to a local anti-discrimination bureau. In 2005, the government instituted the Borst Steering Group to advise it. The CGB participated in this steering group. The Steering Group issued the 'Perspectives on Equal Treatment' [*Perspectief op gelijke behandeling*] report³, in which it advised the government to oblige all municipalities to finance - together with the Central Government - local anti-discrimination bureaus. These bureaus should be easily accessible, support (potential) victims of discrimination and provide information on the nature and extent of the various forms of discrimination in the Netherlands. The legislative proposal for the 'Municipal Anti-Discrimination Provisions Act' [*Wet gemeentelijke antidiscriminatievoorzieningen*]⁴ was submitted in April 2008.

The CGB is pleased with the government's efforts to institute a network with national coverage. Current anti-discrimination provisions already have an important role for the CGB in establishing the number of complaints, the grounds for discrimination and forms of discrimination. The CGB issued, in connection with the legislative proposal, Advisory Opinion 2008-07. The Advisory Opinion indicates, among other things, that sufficient attention must be paid to the quality requirements of the provisions during the expansion of the network of anti-discrimination provisions. There is a risk that municipalities will choose to implement small-scale provisions that cannot guarantee sufficient quality levels. Regional cooperation is essential for adequate quality levels. In addition, sufficient attention should continue to be paid to the further professionalisation and improvement of quality at the existing bureaus during the build-up phase of this national network.

The Cabinet's response to comments and questions from the Lower House concerning the legislative proposal⁵ shows that the quality requirements will be further elaborated in collaboration with Art. 1 (the National Association against Discrimination in which the local anti-discrimination bureaus are united) and the Association of Netherlands Municipalities (VNG). The minimum requirements pertaining to an anti-discrimination provision are laid

³ *Perspectief op gelijke behandeling*, report of the Borst-Eilers Steering Group, February 2006.

⁴ Parliamentary Papers of the Lower House, session year 2007-2008, 31 439.

⁵ Parliamentary Papers of the Lower House, session year 2007-2008, 31 439, no. 6.

down in an Order in Council. It remains unclear who is responsible for supervising compliance with the quality requirements.

In what way does the Dutch government guarantee the quality of existing and yet to be formed provisions during the development of a network with national coverage, and how will it supervise compliance with the quality requirements?

3.2 RESEARCH INTO AND COMBATING OF RACIAL DISCRIMINATION

The government notes in paragraph 8 of its report that there are several ongoing monitoring investigations. For example, the government ordered the development of the Racial Discrimination Monitor 2005 [*'Monitor Rassendiscriminatie 2005'*]⁶ and the Labour Market Discrimination Monitor 2007 [*'Discriminatiemonitor Arbeidsmarkt 2007'*]⁷, for the purpose of developing new policy on the basis of the outcome. Some remarkable results from the Racial Discrimination Monitor 2005 include:

- The 2005 investigation on actual experience, part of the Racial Discrimination Monitor, shows that more than half of those interviewed of Moroccan descent and slightly less than half of those interviewed of Turkish descent indicate to have personally experienced racial discrimination once or more in the year prior to the investigation. The percentage of those of Surinam and Antillean descent that indicate to have been discriminated during the past year amounts to 40 and 37 percent respectively.
- The experience investigation shows that discrimination on the part of the authorities and other public officials has a greater negative impact on people from the interviewed ethnic groups than other forms of racial discrimination (see also the shadow report of the National Ombudsman).
- Approximately 11 percent of students indicate that they experienced discrimination on the basis of race/ethnic background at the educational institution during the year prior to the investigation. In addition, students from the above-mentioned ethnic minority groups have great difficulty finding trainee posts. Negative perception and discrimination are probably major reasons for the above problem (see also 4.4.4).

Some remarkable results from the Labour Market Discrimination Monitor 2007:

- Many minority groups are of the opinion that they have to put in extra effort at work to prove themselves. The general negative perception of people of foreign descent is projected onto the individual applicant or employee, who, in turn, has the feeling of always having to show that this negative group image does not apply to him or her (see also 4.1.1 and 4.1.2).
- It appears that, in particular, complaints concerning hostile treatment at work (such as harassment on the basis of background or ethnicity) present problems with respect to the burden of proof for people who submit a complaint to an anti-discrimination bureau or the CGB. This often leads the CGB to conclude that the complaint is not well-founded (see also 4.1.2).

When it commissioned the Racial Discrimination Monitor 2005, the government stated that it would use the outcome to develop and implement adequate policy to combat the identified forms of (racial) discrimination. In its report to the CERD Committee, the government does not deal with the results of the Monitoring Reports drawn up on its instruction and financed by it. The above results provide, in the opinion of the CGB, sufficient grounds for implementing measures in education, among other areas.

⁶ LBR, *Monitor Rassendiscriminatie 2005*, Rotterdam, June 2006.

⁷ SCP/ Art.1, *Discriminatiemonitor niet-westerse allochtonen op de arbeidsmarkt 2007*, The Hague/Rotterdam, November 2007.

Can the government explain which problems identified by the Monitoring Investigations, which were financed by it, are, in its opinion, reason to prioritise the implementation of measures to prevent and combat racial discrimination?

In paragraph 65 of its report, the government indicates that the plan to implement the Durban Declaration and Programme of Action, the National Action Plan to Combat Racial Discrimination [*'Nationaal Actieplan ter bestrijding van Rassendiscriminatie'*], has been completed. The final report was published in July 2007.⁸ In its CERD report, the Dutch government indicates that the combating of racial discrimination will continue to be a major priority of the current Cabinet. In the Integration Memorandum 2007-2011 [*'Integratienota 2007-2011'*]⁹, the government announced that it would present a comprehensive action plan for the combating of racism in the first half of 2008. The approach will, according to the Integration Memorandum, be aimed at combating, preventing and punishing racism in all areas of Dutch society and to provide support to the victims.¹⁰

The comprehensive Action Plan for Combating Racism [*'Plan van Aanpak Racisme'*] has not yet been published; it was recently announced that it would be published before the summer of 2009. The CGB expects that this yet to be published plan will make an effective contribution to the prevention and combating of racial discrimination, with attention given to specific objectives, a clear time path and, after expiry of a certain period, an evaluation of the implemented measures.

Can the Dutch government explain her efforts, as set out in the (yet to be presented) comprehensive Action Plan for Combating Racism? Which discrimination problems will be prioritised by the government and what specific and measurable objectives have been included to prevent and combat (racial) discrimination?

3.3 *INVOLVEMENT OF COMMUNITY-BASED ORGANISATIONS*

In paragraph 62, the government, in response to CERD Recommendation 7,¹¹ provides an explanation of the manner in which it involves community-based organisations in the prevention and combating of racial discrimination, namely regular consultations with NGO's, such as Art.1. In addition, the government reports that it subsidises the National Platform for Consultation and Cooperation Concerning Racism and Discrimination [*'Nationaal Platform voor overleg en samenwerking rond Racisme en Discriminatie (NPRD)'*]. The NPRD was instituted to advise the government, upon request and independently, on the combating of racial discrimination.

What the government fails to state in its report is that, at the time of submission of the report to the CERD Committee, the NPRD was officially abolished by the government. Participants can continue to "exchange their knowledge and networks" via the National Association against Discrimination, Art. 1, but no longer do so in a formal advisory capacity to the government. Art. 1 was awarded financing at the start of 2009 to maintain the network, but experience with the 'new' NPRD has shown that few or no officials join in to consult with the NGO's. Whether the government will initiate and continue regular consultations with organisations that are active in the field of (racial) discrimination remains unclear. Perhaps the yet to be published Action Plan for Combating Racism will provide more clarity in this respect.

⁸ Parliamentary Papers of the Lower House, session year 2006-2007, 30 950, no. 9 and annex.

⁹ Parliamentary Papers of the Lower House, session year 2007-2008, 31 268, nos. 1-2.

¹⁰ Integration Memorandum 2007-2011, p. 108: The action plan will indicate in what way the relevant Ministers wish to implement the agreements made in the coalition agreement. After all, it was agreed in the coalition agreement to visibly pay more attention to the investigation and prosecution of discrimination and to combat discrimination in the labour market and in the hotel and catering industry. The action plan will devote attention to the intention of the Minister of Justice and the Minister of the Interior and Kingdom Relations of improving the enforcement of the prohibition on discrimination by improving the approach of the Public Prosecution Department and the police, which will entail that reports are always taken.

¹¹ Concluding Observations of CERD: Netherlands, 10/05/2004, CERD/C/64/CO/7.

In what way does the Dutch government promote structural cooperation and consultation with Dutch community-based organisations active in the field of the prevention and combating of (racial) discrimination?

3.4 THE EQUAL TREATMENT COMMISSION AND PETITIONS/ OPINIONS

The government report lists some figures on the CGB in paragraph 72, namely the number of questions submitted during the consultation hours and the number of Opinions. These figures do not cover the entire reporting period and are not entirely correct.

More detailed figures are provided below to provide a more accurate picture of the number of petitions and Opinions. Due to the possible interrelatedness of the grounds for discrimination 'race' and 'religion', petitions and Opinions on these grounds have also been included in the overview. The requests submitted to the Commission on the grounds of religion mainly concern the religions of ethnic minority groups, in particular Islam.

	2002	2003	2004	2005	2006	2007
Number of <i>complaints</i> on the basis of race or nationality	91	61	57	98	125	113
Number of <i>complaints</i> on the grounds of religion	15	23	39	29	56	40
Total	106	84	96	127	181	153

	2002	2003	2004	2005	2006	2007
Number of <i>Opinions</i> on grounds of race or nationality	51	41	35	32	69	48
Number of <i>Opinions</i> on the grounds of religion	18	18	18	14	28	24
Number of <i>Opinions</i> on grounds of race or nationality and religion (=multiple discrimination)	6	6	5	4	0	5
Total	75	65	58	50	97	77

Each year the CGB thus receives some 124 complaints and issues on average 70 Opinions concerning discrimination on the grounds of race, nationality and/or religion. Opinions on racial discrimination mainly concern employment relationships (for example, recruitment and selection, discriminatory treatment at work) and goods and services, such as housing and home contents insurance for members of traveller communities. Opinions in cases of nationality mainly concern mortgage, banking and telecom issues. Opinions in cases of religion mainly concern opinions on headaddress and refusing to shake hands with persons of the opposite sex for reasons of religious conviction.

4. ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ARTICLE 5, OPENING LINES AND AT E, CERD)

4.1. THE RIGHT TO WORK, ARTICLE 5, OPENING LINES AND AT E, SUB I, CERD

As stated in paragraph 118 of the government report, the unemployment rate of ethnic minorities continued to remain higher during the reporting period than that of the native¹² Dutch population.

4.1.1. ACCESS TO THE LABOUR MARKET

SELECTION PROCEDURES

The high rate of unemployment among ethnic minorities shows that migrants, asylum seekers and their descendants up to the second or third generation experience problems when trying to gain access to the labour market.

Although research has shown that the causes of these problems are highly diverse, discrimination cannot be ruled out as one of the factors that obstruct access of ethnic minorities to the labour market. Discrimination may result from negative perceptions of ethnic minorities in general or negative employer experiences with persons from this group during selection and recruitment or on the shop floor.¹³

It can be concluded from the petitions received by the CGB concerning discrimination during selection procedures that few employers openly reject candidates because of their (alleged) ethnic background. Candidates are, however, often rejected because of aspects related to their background or because of job requirements or selection and recruitment methods that turn out negatively for candidates of non-Dutch descent.

Employers are free to determine the requirements of a position or the selection method to be applied, but the requirements set and the selection method chosen should not result in the fact that candidates of foreign descent are excluded or rejected in advance for a position without good reason. Language requirements constitute an often-used selection criterion. Setting language requirements can be a legitimate requirement with respect to certain positions, for example for a teacher of the Dutch language. For many positions, however, the requirement of a fluent or accentless command of Dutch can often not be considered a necessary requirement.

What measures are being implemented by the Dutch government to increase awareness among employers of their role and responsibility in combating exclusion of ethnic minorities on the labour market and of the – often unconscious – prejudices that can work to the disadvantage of these candidates during selection procedures?

AFFIRMATIVE ACTION POLICY

In paragraph 114 of its report, the Dutch government reflects on the advantages and disadvantages of affirmative action policy in employment. The CGB recognises the possibly negative consequences of this special form of positive action. Nevertheless, the CGB emphasises the use and importance of a more integrated, systematic approach in combating the under-representation of ethnic minorities in the labour market. Pursuing a (temporary) affirmative action policy can also make a useful contribution to increasing the labour

¹² In Dutch, the word 'autochtoon' (native Dutch person) is used in contrast to the word 'allochtoon' (person of foreign heritage), whereby the latter group concerns people who have at least one parent who was born abroad. Reference is often made to non-Western persons of foreign heritage, within the meaning of the definition of Statistics Netherlands: 'Persons of foreign heritage whose country of origin lies in Africa, Asia (with the exception of Japan and Indonesia), Latin America or Turkey. The country of birth of a foreign national who was not born in the Netherlands is considered the country of origin. The country of birth of the mother of a person of foreign heritage born in the Netherlands will be considered as the country of origin, if the mother was not born in the Netherlands. If both the person concerned and his mother were born in the Netherlands, the country of birth of the father will be considered the country of origin.' A discussion about the use of these terms has been going on in the Netherlands for some time now.

¹³ Discrimination Monitor 2007, see also at 3.2 and footnote 5.

participation of ethnic minorities, especially if these measures are embedded in a larger whole of measures (diversity policy).¹⁴

Support for pursuing an affirmative action policy seems to have diminished somewhat in recent years. Moreover, a private or public sector employer, that pursues such a policy runs the risk that it will have to render account before the courts or the CGB, in addition to the risk of criticism from those who fall outside the scope of the affirmative action policy and therefore feel discriminated. The CGB issued dozens of Opinions in respect of measures based on affirmative action policy in recent years. In some cases the CGB was of the opinion that the measures implemented were not in accordance with Dutch Equal Treatment legislation. Measures pursuant to affirmative action policy form an exception to the general principle of equal treatment - and more in particular to the principle that the ethnic background of a candidate should not play a role during selection procedures - and should therefore be provided with strict guarantees, be of a temporary nature and intended to remove obstacles for disadvantaged groups.

The under-representation of ethnic minorities on the labour market should be a point for continuous attention and it is regrettable that affirmative action is not more actively promoted in the Netherlands. Implementing (temporary) special measures to remove structural disadvantaged situations can be designated as an obligation for states, as evidenced by Article 2(2) of the International Convention on the Elimination of All Forms of Racial Discrimination and the European Directives on Equal Treatment.

Does the Dutch government intend to encourage organisations in the public and private sector to temporarily take special measures to reduce the structural disadvantage of (ethnic) minorities, and to pay attention to the possibilities and impossibilities of affirmative action policy within the limits of the law and other forms of positive action, such as broader diversity policy?

EMPLOYMENT OF MINORITIES (PROMOTION) ACT

In response to recommendation 13 of the CERD, the Dutch government explains in paragraph 33 that the Employment of Minorities (Promotion) Act has been abolished. The CGB expresses its concern, as it did in the 2004 CERD shadow report,¹⁵ with respect to the abolition of this act in the absence of a proper alternative to mandatory registration. The Employment of Minorities (Promotion) Act served as a coercive tool, for the purpose of encouraging companies to pursue affirmative action policy with respect to ethnic minorities.

The Employment of Minorities (Promotion) Act imposed – among other measures – the obligation on medium-sized and large companies to register the ethnic background of their employees, with the objective of registering the effects of affirmative action measures and promoting the labour participation of ethnic minorities. The information gathered in this way turned out to be very useful for the investigation conducted by the CGB and other organisations into complaints about various forms of racial discrimination during employment. In order to establish whether instances of indirect distinction or unequal pay on the basis of race were occurring in a company, the CGB mainly used information on the numerical relationship between the native Dutch employees and employees of foreign descent in the workforce. The information also proved to be useful for measuring the effects of certain (preferential) measures on employees of non-Dutch heritage, and for determining the need for pursuing affirmative action policy. It should, for that matter, be noted in this respect that some resistance was also encountered among persons of non-Dutch heritage against the mandatory registration pursuant to the Employment of Minorities (Promotion) Act.

¹⁴ CBG Advisory Opinion 2004-10 deals in greater detail with the conditions and grounds for affirmative action policy, as a result of the draft memorandum on Affirmative Action of the Ministry of Social Affairs and Employment of December 2004.

¹⁵ Advisory Opinion 2004-02, Equal Treatment Commission, page 3.

In view of the great value of these statistical data for the prevention and combating of discrimination on the labour market, the CGB considers it important that an instrument be developed that will allow (more thorough) measurement of labour participation of ethnic minorities. It is important in this respect that employees are able to indicate (anonymously) their ethnic background on the basis of self identification.

The government explains in paragraph 33 of its CERD report that other measures were implemented following the abolition of the Employment of Minorities (Promotion) Act, aimed at combating discrimination and promoting diversity in the workplace, via the Diversity Network (DIV), among others. Although the CGB appreciates these measures, it regrets the fact that none of these measures lead to structural collection of data within organisations.

The Ministry of the Interior and Kingdom Relations recently developed a measuring tool to chart the diversity at organisations: the so-called diversity index¹⁶. The index provides information on the composition of the workforce at organisations and government agencies by gender, age and ethnic background. It is conceivable that the government will actively draw the attention of companies to this tool.

Does the government intend to develop a (more coercive) tool to encourage medium-sized and large companies to register – on the basis of self registration – the ethnic background of their employees, and to enable the measurement of the effects of affirmative action policy and the promotion of the labour participation of ethnic minorities, among others?

4.1.2. DISCRIMINATION IN THE WORKPLACE

The majority of the complaints received by the CGB with respect to a distinction being made on the basis of race, concern discrimination in the workplace. This subject is, however, completely lacking in the government report.

Although many of the petitions concerning discriminatory remarks and acts in the workplace are declared unfounded¹⁷, the CGB is of the opinion that more attention should be paid to these instances of (alleged) discrimination. The CGB often observes that (culturally-determined) differences with respect to views and expectations and defective communication are at the root of (feelings of) discrimination in the workplace. Employers do not always appreciate what forms discrimination in the workplace can take and why certain types of behaviour can be experienced as discriminatory.

In addition to complaints concerning discriminatory comments and acts, the CGB also receives many petitions concerning distinctions made on the basis of ethnic background with respect to employment conditions such as payment, receiving training and promotion. The impression exists among many of the non-Dutch employees who submit complaints in this respect that they are disadvantaged for example because of a less than perfect command of Dutch or because of unfamiliarity with internal procedures and regulations. These petitions often fail due to a lack of facts that can give reason to assume such distinctions do occur or have occurred.

¹⁶ www.diversiteitsindex.nl.

¹⁷ The reason is that there either is no discriminatory treatment or that parties make deviating declarations and that no evidence can be submitted that gives cause to suspect distinction.

PROCEDURES FOR DISCRIMINATION-RELATED COMPLAINTS

Pursuant to Equal Treatment legislation, employers are not only obliged to refrain from racial discrimination, they are required to seriously investigate complaints in this respect and to take measures if it turns out that supervisors or employees are guilty of discrimination.

It turns out in practice that many employers are insufficiently aware of this obligation and are not sufficiently willing to deal with discrimination-related complaints, or do not know what to do with such complaints. Employers and employees often think that the intention to discriminate is decisive and that discrimination does not apply if this intention is lacking. This is the reason that many complaints are rejected without investigation, or with the announcement that such matters do not occur at this employer's company. Even if an investigation is performed, it often proves difficult for employers to conduct an investigation in an independent and non-prejudiced manner. Investigations are hampered by the specific nature of discriminatory treatment, which rarely takes place openly. In addition, there is often no written evidence, or the complaint is received after considerable time has passed and the colleagues involved may have moved on to other places.

The government report lacks any information on the manner in which employers investigate, or could investigate, discrimination-related complaints. Information is also lacking with regard to the measures or actions undertaken by the Dutch government during the reporting period to inform employers and provide guidelines with respect to the obligations imposed on them within this context.

Does the Dutch government intend to inform employers on – and make them aware of the need and the use of – the prevention and combating of discrimination in the workplace, and to offer them guidelines for sound investigation and handling of complaints related to discrimination in the workplace?

4.2. HOUSING, ARTICLE 5, AT E, SUB III CERD AND RECOMMENDATION 12 OF THE CERD

The government discusses, in paragraphs 20-23 of the report, its efforts, with respect to housing, to arrive at a more mixed composition of inhabitants in deprived districts. The government hopes that, by achieving a more ethnically and socio-economically mixed composition of inhabitants, it will be possible to reduce problems in the areas of unemployment, crime and living conditions in these districts. The government mentions the Special Measures for Large City Problems Act (the so-called Rotterdam Act) as a specific measure to deal with these problems. This act makes it possible to link the issue of a housing permit to the source of income. The municipality can set the requirement, for entire districts, that a housing permit is only issued to persons who receive income from work.

In its Advisory Opinion 2005-03, the CGB remarked with respect to the distribution policy pursued by the municipality of Rotterdam that linking an income limit to the issuance of a housing permit could result in indirect distinction on the basis of race, nationality and gender. The CGB is of the opinion that this distinction cannot be objectively justified. The chosen lower income limit is not necessary, because the objectives set (including the provision of social cohesion in the districts or the prevention of illegal occupation and nuisance) can also be achieved in a different, less discriminatory manner (including expropriation or purchasing property from rack renters, and actively dealing with anti-social landlords). The CGB also discusses the government's Special Measures for Large City Problems Act, which was not effective at that time, in the same advisory opinion.

In this act, the source of the income rather than the amount of the income (as is the case in the distribution policy of the municipality of Rotterdam) is applied as criterion. The government is of the opinion that the Special Measures for Large City Problems Act can pass the test against the Equal Treatment Act [*Algemene wet gelijke behandeling (AWGB)*], in the sense that there is an objective justification (there is a legitimate objective, the means are suitable to achieve the

objective, and there are no other appropriate means), and proportionality (because those seeking a house, and who do not qualify for appropriate accommodation, can be housed elsewhere in the region). The CGB is of the opinion that this opinion in general cannot be accepted. The test performed by the government is too general and insufficiently specific in its substantiation to be able to justify the indirect distinction in general terms.

Can the Dutch government explain why, by using the source of income as testing criterion for a housing permit, the Special Measures for Large City Problems Act, in its opinion, does not constitute indirect discrimination on the basis of race, nationality or gender?

4.3 HEALTH CARE, ARTICLE 5, AT E, SUB IV CERD

The Dutch government explains its policy concerning the "interculturalisation of health care" in paragraphs 146 to 148. The government indicates that ethnic minorities make less use of health care than Dutch citizens and they have easy access to general practitioners and medical specialists.

Although the CGB has not yet received complaints or petitions in this respect, research conducted by the National Advisory Council for Public Health [*Raad voor de Volksgezondheid en Zorg (RVZ)*] shows that the quality, availability and effectiveness of care to ethnic minorities is not of the same quality as that provided to native Dutch persons.¹⁸ The RVZ considers it necessary that the available knowledge and expertise on intercultural care becomes accessible to larger groups of care providers than is currently the case. Partly in response to this research, the government has formulated policy intentions to promote interculturalisation in health care. A number of those intentions are reflected in the government report. The government reports that several parties are involved in the interculturalisation of health care and that 163 projects have been described in a report entitled "Care to make a difference" [*Zorg voor verschil*].

An explanation of how the Minister intends to deploy 'interculturalisation' in order to improve health care for ethnic minorities is lacking. It is unclear whether attention is paid, for example within the projects, to possible discrimination during the diagnosis. Nor is it clear to what extent the projects contribute to the improvement of the quality, accessibility and effectiveness of care to ethnic minorities.

How does the government intend to guarantee accessible and effective care of good quality in which no distinction on the basis of race is made? Can the government provide more information, and financial and numerical substantiation of the manner in which the 163 projects contribute to the improvement of health care provided to ethnic minorities?

4.4. EDUCATION AND TRAINING, ARTICLE 5, AT E, SUB V CERD AND RECOMMENDATION 12

4.4.1. NATURE AND SCOPE OF DISCRIMINATION AND SOCIAL SAFETY

Discrimination in education still occurs. This is also evidenced by the fact that the CGB receives annually recurring complaints in this respect from both students and teachers.¹⁹ The 2005/2006 Education Report of the Education Inspectorate shows that the extent to which racism and discrimination are reported at educational institutions strongly differs per type of education. This is confirmed by an investigation into discrimination on the basis of sexual orientation commissioned by the CGB in 2007.²⁰ This investigation shows that homosexual members of staff and students of secondary schools run an increased risk of becoming the victim of discrimination and violence. This analysis also shows that discrimination of homosexuals is often part of an overall pattern of discriminatory behaviour. The safety policy

¹⁸ National Advisory Council for Public Health, '*Interculturalisatie van de gezondheidszorg*', 2000.

¹⁹ For an overview, see Advisory Opinion 2008-03 of the CGB, '*Gelijke behandeling in het onderwijs*', April 2008. Not yet published.

²⁰ Report '*Discriminatie in en rond school*', ITS Radboud University commissioned by the CGB, July 2007.

of the 215 investigated school locations does not pay any or very little attention to anti-discrimination policy.

It is remarkable in this context that the government report does not contain any information on the extent and nature of (racial) discrimination at schools. It is also unclear what measures the government implements to contribute to schools being free of discrimination, with regard to students as well as teachers.

Does the Dutch government have recent figures on the nature and extent of (racial) discrimination at schools? What does the Dutch government do to encourage schools to offer an environment free of discrimination to both teachers and students?

Teachers are deemed to have sufficient skills to teach in a multicultural environment and to be able to respond adequately to discrimination and racism. The government seeks alignment in this context with the 'safe schools' concept: "Students, teachers and parents feel at home at a school that is safe from a social point of view. There is therefore no room for bullying, discrimination or sexual harassment".

The government fails to indicate, in its explanation of social safety at schools in paragraph 26 of its report, what measures it implements to provide teachers with the skills to teach in a multicultural environment and to encourage schools to guarantee social safety.

What measures does the Dutch government implement to ensure that teachers possess the skills necessary to respond adequately to discrimination in a multicultural environment that is socially safe?

4.4.2. KEY OBJECTIVES IN EDUCATION

In response to Recommendation 12 of the CERD, the Dutch government mentions in its report (paragraphs 24 and 25) the obligation imposed on schools providing primary and secondary education regarding their duty to contribute to the promotion of 'active citizenship and social integration', which has been in effect since 1 February 2006.

The theme of (racial) discrimination was not explicitly mentioned during the elaboration of these key objectives. It therefore does not become clear in what way the government's key objective '[active] citizenship and social integration' can actually contribute to teaching children how to deal with a culturally-diverse society, in which everyone has the right not to be discriminated against.

Does the Dutch government intend to explicitly mention the subject (racial) discrimination in the key objectives of education, for example as part of active citizenship and social integration?

4.4.2. SEGREGATION IN EDUCATION

In its government report the government mentions its aim of preventing further segregation in education. As a measure intended to achieve the above aim, the government mentions the obligation, effective as of 2006, imposed on school boards and local governments to conduct annual consultations on preventing segregation and the institution in 2007 of a Knowledge Centre for Mixed Schools. This knowledge centre was instituted to collect and disseminate knowledge on the combating of segregation.

It should be noted that the government fails to indicate why and to what extent segregation in education should be prevented. Recognising the underlying motives is important in making

the decision whether to, and if so by what means, prevent segregation.²¹ It should be taken into account in any case that the measures intended to prevent segregation, for example distribution and admissions policy, do not themselves lead to distinction on the basis of race.²²

What are the Dutch government's underlying motives for implementing measures to prevent segregation in education, for example with respect to distribution and admissions policy? Does the government take the possibly discriminatory effects of these measures sufficiently into account, and does it ensure that the measures themselves do not lead to distinction on the basis of race?

4.4.4. TRAINEE POSTS

Research shows that students from ethnic minority groups have difficulty finding trainee posts within the context of their education.²³ This is a pressing problem because traineeships form the transition from education to work. Although there is not always sufficient evidence of discrimination on the basis of race or ethnic background, it is a fact that many students with a non-Dutch background feel that they are discriminated against during the allocation of traineeships on the basis of their background.²⁴

The CGB issued several Opinions²⁵ concerning complaints from students who for religious reasons wear head scarves and were refused a trainee post for that reason. Such problems in the field of traineeships is not dealt with in the government report.

Is the Dutch government of the opinion that measures are necessary to deal with the problems experienced by students from a non-native Dutch background, due to their ethnic background or religion, when trying to find a trainee post?

4.5. ACCESS TO PUBLIC PLACE AND/OR SERVICES, ARTICLE 5(F) CERD

4.5.1. DISCRIMINATION IN THE HOTEL AND CATERING INDUSTRY

Research shows that racial discrimination still occurs in the hotel and catering industry, particularly as regards admission policy.²⁶ In 2004, the National Bureau against Racial Discrimination (LBR, currently Art. 1) provided figures that show that one third of the interviewed young persons of non-Dutch heritage sometimes felt discriminated against when going out in the evenings, for instance in catering and entertainment establishments, and that 20% of them were refused access to a catering establishment on one or more occasion.²⁷ The CGB received numerous complaints during the reporting period from applicants who asserted that they had been refused entry to a catering establishment because of their race. The Commission issued Opinions with respect to a number of those complaints that they concerned unlawful distinction.²⁸ The CGB Opinions show that when a catering establishment pursues an admission policy, it should concern a clear, systematic and verifiable (by third parties) entry policy. Policy should be implemented systematically to prevent (the appearance of) arbitrariness. Transparency and verifiability can be increased by informing visitors in advance of the admission policy in place, for example by a sign on the door. The CGB is of the opinion that if an entry policy is not transparent, systematic and verifiable, this constitutes a violation of the law.²⁹

²¹ See also: Advisory Opinion from the Education Council dated 18 May 2005, *Bakens voor spreiding en integratie*, and CGB Advisory Opinion 2005-1 dated 12 March 2005, *spreidingsbeleid in het primair onderwijs*.

²² See also CGB 2003-105 and 2005-25.

²³ Ministry of Social Affairs and Employment, *'Etnische minderheden op de arbeidsmarkt'*, 2005.

²⁴ See C. Vitalis, among others, *'Gekleurde stages. Discriminatie van stagiaires in het MBO'*, Rotterdam 2004.

²⁵ See also CGB 2004-80, 2004-153, 2005-53, 2005-91, 2006-70, 2006-144, 2007-104, 2008-14, 2008-73, 2008-121, 2008-128.

²⁶ See also LBR, *Monitor Rassendiscriminatie 2005*, Rotterdam, June 2006.

²⁷ LBR, *'Geweigerd?, Discriminatoir deurbeleid in de horeca'*, Rotterdam 2004.

²⁸ CGB 2003-2 and CGB 2004-13.

²⁹ See also CGB 2002-02 and CGB 2004-13. Similarly, CGB Advisory Opinion 2005-5, concerning the entry policy of catering establishments in the municipality of Utrecht.

It is stated in paragraph 150 of the government report that the municipalities implemented initiatives in the period 2003-2005 to prevent discrimination in the hotel and catering industry. Little is known at this time about the effectiveness of these initiatives. The government does not indicate in its report whether it is of the opinion that discrimination in the hotel and catering industry has been sufficiently dealt with or whether additional measures are required. The CGB is of the opinion that it would be advisable to conduct further investigation into the implementation and effectiveness of measures, such as imposing sanctions on operators who repeatedly and arbitrarily refuse persons entry on the basis of their ethnic background, for example by revoking the catering license of the business to prevent it from operating as a catering establishment.

Is the Dutch government of the opinion that discrimination in the hotel and catering industry has been sufficiently dealt with, and have the measures had the desired effects? Are additional measures necessary to deal with the problems experienced – in particular by young persons of non-Dutch heritage when trying to gain entrance to catering establishments?

4.5.2. OTHER GOODS AND SERVICES

It is remarkable that foreign nationals who reside lawfully in the Netherlands still experience restrictions in the area of offering and providing access to goods and services and during the conclusion, performance or termination of the related agreements, due to their race or nationality. Foreign nationals who lawfully reside in the Netherlands are often faced with extra conditions, for example during the conclusion and extension of mobile telephone contracts³⁰ and with respect to the provision of banking services³¹, which is the result of the entrepreneur's desire to cover his financial risk.

An investigation conducted by the CGB in 2006 showed that holders of a temporary residence permit are already – on the basis of their residence status and irrespective of their financial position and prospects – often unable to secure a mortgage loan, or are faced with the fact that a higher interest rate is charged. Mortgage providers fear that these foreign nationals will not comply with their payment obligations.³² In general, the CGB issued the Advisory Opinion with respect to the above-mentioned problems that these do concern indirect discrimination, and that the extra requirements or the reasons for refusal are too broadly formulated, as criteria, to be able to achieve the desired financial security.

In addition, sometimes the problem of postal code discrimination rears its head with respect to the access to goods and services. Services are not provided due to an increased security risk.³³ This mainly concerns districts and neighbourhoods with a high percentage of ethnic minorities.

The problems faced by foreign nationals lawfully residing in the Netherlands and other minorities in the area of goods and services are briefly referred to by the government in paragraph 74 of its report. It is not clear in what way the government intends to prevent and combat these problems.

In what way does the Dutch government guarantee that foreign nationals and other people of ethnic minorities who are lawfully residing in the Netherlands can fully participate in society, as regards the offer of goods and services, irrespective of their residence status and length of residence in the Netherlands or their address?

³⁰ See also CGB 2007-92, CGB 2007-170 and CGB 2006-259.

³¹ CGB 2003-49.

³² The problems related to the provision of mortgages is dealt with in, among others, the CGB publication entitled '*Risicoselectie op grond van postcode en verblijfsstatus; een onderzoek uit eigen beweging naar onderscheid door hypothecair financiers* (December 2006)', Advisory Opinion 2006-15 and 2006-16.

³³ CGB 2004-15.

5. SPORTS AND MINORITIES (ARTICLE 7 CERD)

DISCRIMINATION IN SPORTS

The CGB considers it a positive initiative that the government intends to devote attention until 2010 to the theme of integration and participation of ethnic minorities within sports (paragraphs 163-165). After all, consultations conducted by the CGB in 2007 with antidiscrimination bureaus and municipalities show that complaints about discrimination and violence in sports are in the top 5 of most received complaints.³⁴ CGB Opinions also show that ethnic minorities in the Netherlands continue to experience hindrances where participation in sports is concerned.

During the evaluation period, the CGB spoke out on more than one occasion on the dress and language requirements imposed by sports centres. A ban on headscarves mainly affects Muslimas who wear headscarves out of religious conviction.³⁵ The language requirement that only Dutch is allowed to be spoken in sports centres affects in particular ethnic minorities and migrants who do not always have a good command of Dutch. The CGB was generally of the opinion that these requirements can indeed contribute to maintaining order and safety in a sports centre, but that this objective can also be achieved with different, less burdensome means.³⁶ That is why unlawful distinction on the basis of religion or race applies in these cases.

In response to Opinion 2008-146, the State Secretary for of Health, Welfare and Sport announced at the start of 2009 that this Ministry would enter into consultations with the umbrella organisation for sports centres.³⁷ The CGB welcomes this initiative, and hopes the umbrella organisations for sports centres will take steps to prevent and combat this form of discrimination.

Can the Dutch government indicate what the outcome is of the consultations on clothing requirements with the umbrella organisation for sports centres? Does the government consider investigating discriminatory practices during the performance of occupations and operation of businesses (more specifically concerning access to goods and services) and imposing sanctions on suppliers and providers that repeatedly exclude ethnic minorities and migrants, for example by revoking permits or imposing fines?

³⁴ 2007 CGB Annual Report, paragraph 6.3.

³⁵ Advisory Opinions concerning headscarves at sports centres: CGB 2006-48, 2007-20, 2007-136, 2007-173 and 2008-146.

³⁶ See also CGB 2008-12, 2007-20, 2007-136 and 2007-173.

³⁷ http://www.ad.nl/rotterdam/waterweg/2890939/Bussemaker_begrip_voor_sportmoslima.html.

THE NATIONAL OMBUDSMAN

The National Ombudsman (No) is an independent institute charged with protecting citizens against improper government conduct. The Ombudsman attempts to resolve citizens' complaints by means of intervention, consultations or investigations. In addition to handling complaints, he also performs investigations on his own initiative into the behaviour of government agencies. The Ombudsman's testing framework concerns 'proper conduct'. Human rights and the principles of sound administration, but also ethics and due care, play an important role in this context. The Ombudsman can also make recommendations to government agencies. The opinions and recommendations of the Ombudsman are not binding, but are generally followed.

THE CONDUCT OF GOVERNMENT AGENCIES AND GOVERNMENT INSTITUTIONS (ARTICLE (ARTICLE 4 AND 5, OPENING LINES AND AT D, CERD)

The National Ombudsman annually handles thousands of complaints concerning government conduct. The fact that citizens felt discriminated against by government conduct played a role in various complaints.

ETHNIC COMPOSITION OF THE POLICE FORCE

In Recommendation 15, the CERD drew attention to the ethnic composition of the Dutch police forces. The government writes in response (paragraphs 53 to 59) that various measures have been implemented to promote diversity within the police forces. In addition, 'targets' were agreed by the Minister of the Interior and Kingdom Relations and the police forces. The government's position does not reveal what these targets are. It does become clear that only seven police forces met these targets, which means that 19 police forces failed to do so.

In 2007 (2007/80), the Ombudsman investigated complaints about discrimination in promotion procedures within the Gelderland-Midden police force. The fact that two officers of the Gelderland-Midden regional police force complained about discrimination, among other things, on the basis of their background, does not in itself mean that foreign nationals are treated negatively, but, according to the Ombudsman, it does indicate that unrest exists among this group. Partly in view of the still relatively small number of police officers of foreign heritage, vigilance will be required within the police forces to prevent distinction being made towards persons of foreign heritage or to prevent them from feeling that they are disadvantaged on the basis of their background, according to the Ombudsman.

Does the Dutch government devote extra attention to encouraging diversity within the police forces, in order to prevent distinction being made within the police forces on the basis of background?

DISCRIMINATION IN CRIMINAL LAW. ARTICLE 4 CERD

In its report (paragraphs 84 to 110), the government reports on all criminal judgments in which discrimination played a role. It is important to note in this respect that a judge can only render judgment if the police actually record reports, after which the Public Prosecutor can decide whether prosecution should take place.

The National Ombudsman has for this reason taken the position, for many years, that investigating officers should take down reports of criminal offences (such as discrimination) (Article 163 of the Dutch Code of Criminal Procedure). This obligation to take down reports is unrelated to the question of whether prosecution should take place on the basis of that report. If the decision is taken not to prosecute, the person involved will then have the option, pursuant to Article 12 of the Dutch Code of Criminal Procedure, to file an objection with the Court of Appeal. Doubt on the part of the police officer involved, as to whether or not the situation concerns a criminal offence, should not prevent him from performing his statutory duty of taking down a report.³⁸

Is the Dutch government implementing measures to guarantee that reports of discrimination are actually taken down by investigating officers?

GOVERNMENT EMPLOYEES, ARTICLE 5(D)

The Ombudsman regularly receives complaints concerning alleged discrimination at Schiphol on the part of customs employees or by the Royal Marechaussee.

- By way of illustration (2008/171): A Dutch citizen of African descent went to Schiphol Airport at night to pick up a friend. He got into an argument with a man in the arrivals section. Four members of the Royal Marechaussee intervened after which the situation escalated and the man was forcibly detained. The National Ombudsman ruled that the officials had abused their authority by removing the petitioner from the area and not doing so in the case of the other man, by using the petitioner's identity card as a means of exerting pressure, by detaining the petitioner by force instead of talking to him and by interrogating him in respect of another fact than the one for which he was arrested. This meant that the Royal Marechaussee acted contrary to the ban on discrimination.
- Passport checks also lead to complaints about discrimination with some regularity. The Ombudsman takes the position that the selection of persons to be checked should only take place on the basis of objective and verifiable criteria. The Royal Marechaussee's own experience data, and the observation of unusual, for example evasive, behaviour on the part of the person concerned can play a role in this process. The personal intuition of the official performing the check or unchanging personal features of the persons to be checked should not constitute the sole criteria for the checks. The complaints submitted in this context were declared unfounded in the period 2002-2006 (2002/195, 2002/198, 2003/156, 2006/360).
- Discrimination did not play a role as such during the 100% checks at Schiphol, but it is worth mentioning in view of the group involved. Within the context of intensified combating of drugs smuggling using the airlines, the Dutch government started the so-called 100% checks at Schiphol in December 2003, which meant that travellers from flights originating from Surinam, the Antilles and Venezuela were systematically checked. The Ombudsman ruled that the physical searches conducted by customs officials were not proper. He did not consider it consistent that someone, who is at the airport within the context of a customs check, without relevant guarantees contained in the law and without actual suspicion of a criminal offence, can be confronted with an investigation, in respect of which, within the context of an investigation, strict statutory requirements have actually been imposed. In response to a recommendation from the National Ombudsman, the State Secretary for Finance instructed the customs authorities at Schiphol on 5 January 2006 to immediately cease these physical

³⁸ National Ombudsman, for example report 2001/247 (improper), 2003/323 (improper), 2004/224 (proper), 2004/224 (proper), 2006/307 (improper).

searches. The Dutch Supreme Court later also ruled that customs officials at Schiphol were not authorised to perform physical searches of persons against whom no suspicion exists.³⁹

To what extent is the Dutch government extra alert to discrimination during checks at Schiphol, in particular in view of the increased vigilance related to counterterrorism and drugs smuggling prevention activities? In view of the specific duties related to Schiphol's position as an international border, it is of extra importance that discrimination and feelings of being discriminated are prevented.

Comments made by government employees can also lead to complaints. Comments along the lines of 'you are not in Morocco here' made to a man of Moroccan descent who was challenged for the alleged physical abuse of his (ex) wife and for uttering threats against her were improper (2003/451). The comment 'if you do not agree with the law, you can always emigrate' made by an employee of the Employee Insurance Agency (UWV) to a petitioner can be experienced as hurtful (2004/120). The Ombudsman does not consider this proper treatment.⁴⁰

INDIVIDUAL OFFICIAL COUNTRY REPORTS UPON ADMISSION OF FOREIGN NATIONALS

In addition to measures aimed at preventing racial discrimination, it is also important to guarantee the rights of certain groups. A subject worth mentioning in this context is the quality of the general and individual official country reports used by the IND in its decision-making process concerning the admission of a foreign national. Signals from interest groups indicated a great deal of dissatisfaction with the quality of these official country reports. They allegedly contained information that was insufficiently relevant, insufficiently current and incomplete, or sometimes even incorrect. One of the key problems was the fact that official country reports do not provide an overview of the available facts, but a conclusion concerning certain facts. The underlying facts are often not available to asylum seekers and their representatives, which makes it essentially impossible to enter into a discussion concerning the substance of the conclusions drawn. The IND employee who makes the decision is not able, in preparation of the decision, to consult this file to assess whether the contents of the individual official country report are supported by the underlying documents. Only a qualified IND employee is allowed to do so. This qualified IND employee will subsequently provide his findings to the employee who makes the decision. Neither the asylum seeker nor his representative are able to inspect this file.⁴¹ The Ombudsman ruled that this working method fails to recognise the responsibility of the state to present sufficient valid facts during the asylum procedure and to facilitate a fair hearing on the basis thereof.⁴² The Ombudsman made several recommendations to improve the position of the foreign national/asylum seeker during the asylum procedure, but not all of these were implemented.

Will the Dutch government be able to exercise full disclosure within the asylum procedure, so that the position of the foreign national/asylum seeker can be improved?

³⁹ Supreme Court 29 May 2007, *LIN AZ8795*: The defendant was subjected to a physical search during the 100% check. The evidence was obtained by means of an illegal physical search which constituted a considerable violation on an important legal principle, which resulted in exclusion of the evidence.

⁴⁰ Such complaints are not assessed on the basis of the ban on discrimination, but on the requirement of correct treatment.

⁴¹ Subject to application of Article 8:29 General Administrative Law Act

⁴² National Ombudsman, *De geloofwaardigheid van individuele ambtsberichten*, report 2007/200.

THE DUTCH DATA PROTECTION AUTHORITY

The Dutch Data Protection Authority (Dutch DPA) is an independent supervisory authority that supervises, in accordance with its statutory duties, compliance and implementation of acts that regulate the processing of personal data. The framework for the performance of these duties is provided by the Personal Data Protection Act (Wbp), the Police Data Act (Wpg) and other related legislation. The above concerns the legislator's implementation of Directive no. 95/46/EC⁴³ which provides explicitly for the existence of such a supervisory authority, and which further provides that this authority should perform its duties completely independently. These duties sometimes concern obligations, but usually powers of implementation in respect of which the Dutch DPA, with due observance of the law and the judgment of the courts, can decide itself. Other duties arise from the general supervisory duties. Partly in view of its independence, the Dutch DPA has a relatively large degree of freedom to determine itself how it will perform its duties with the limits of the law.

DATA PROTECTION AND DISCRIMINATION (ARTICLE 5, OPENING LINES AND AT D, CERD)

LEGAL FRAMEWORK IN THE NETHERLANDS

The Personal Data Protection Act (Wbp) prohibits the processing of personal data concerning a person's race. The line of reasoning behind this prohibition is the fact that racial data are such sensitive personal data that its processing should be prohibited. An exception to this general prohibition is only made in very exceptional cases for the above reasons: if it is unavoidable for identification purposes or if it takes place within the context of affirmative action policy concerning certain minority groups and it is necessary for this purpose.

Without prejudice to the above, Article 23(1)(e) of the Wbp provides for a possibility to not apply the prohibition contained in Article 16 of the Wbp if this is necessary in view of serious reasons of public interest, appropriate guarantees for the protection of the privacy are offered and this is provided for at law or if the Dutch DPA has granted an exemption.

The Police Registers Act (Wpolr) applied in respect of police data during the reporting period. The Wpolr became ineffective as of 1 January 2008 and was replaced by the Police Data Act (Wpg). The registration of persons on the basis of race was, in principle, prohibited pursuant to the Wpolr. Registration could only take place supplementary to other personal data and to the extent this was unavoidable for the objective of the register. The Wpg contains a provision that is virtually the same.

The concept of 'race' in the Wbp, Wpg and the Wpolr has the same meaning as it has in Article 1 of the Dutch Constitution. This concept should be interpreted on the basis of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and also comprises skin colour, background and national or ethnic descent.

ARTICLE 5, OPENING LINES AND AT D, CERD

The Dutch DPA dealt with a number of cases relating to ethnicity during the reporting period of July 2002 to December 2006.

⁴³ Directive no. 95/46/EC of the European Parliament and the Council of 23 November 1995 regarding the protection of natural persons in connection with the processing of personal data and the freedom of movement of those data (OJ L 281).

- Cases relating to police data

To improve the manner in which domestic violence is dealt with, the Minister of Justice informed the Lower House on 21 April 2004 to be principally in favour of registration of the [ethnic] origins of perpetrators and victims of domestic violence.⁴⁴ In response, two police forces conducted a pilot from 1 January 2006 in which they recorded the country of birth of the parents or grandparents of suspects and victims in cases of domestic violence in a temporary register. The objective of the pilot was to investigate whether registration of [ethnic] origins would contribute to more specific intervention scenarios for the police and care agencies. Pursuant to Article 5 of the Wpolr, registration of the country of birth of the parents or grandparents was only allowed if this was unavoidable for the purpose of the register. This applies inter alia if this data is required for the correct assessment of a criminal act. In 2007, the Research and Documentation Centre (WODC) of the Ministry of Justice conducted an evaluation of the pilot. The WODC concluded on the basis of its evaluation that it is not necessary to record the country of birth of parents or grandparents of suspects and victims of domestic violence at a national level in the police registration systems.

Can the Dutch government explain whether, and if so, in what situations the police processes police data concerning a person's race and how this processing relates to Article 5 of the Wpg which is currently in force?⁴⁵

- Cases relating to photographs

During the reporting period, the Dutch DPA was confronted on several occasions with cases in which a storekeeper put up a photograph of a person wanted for store theft in his store. A photograph contains personal data relating to the data subject's race to which a processing ban applies. In many cases, the Dutch DPA indicated that it is in most cases unlawful for storekeepers to put up photographs of alleged store thieves in the store. In addition to the circumstance that a photograph contains personal data relating to race, the Dutch DPA also held that in these cases the relevant photographs were distributed with the intention of finding a person suspected of a crime. This means that these photographs contain - in addition to personal data relating to race - criminal personal data as well.

What measures does the Dutch government implement to prevent violation of the provisions concerning special personal data, in particular by the distribution of photographs of persons suspected of crimes in the private sector?

- Cases relating to profiling

The Dutch DPA is aware that, particularly in the private sector, use is often made of client databases for profiling purposes. Profiling is intended to facilitate quicker and more efficient decisions on a person. The behaviour of the relevant person is estimated for this purpose, following which a decision on this person is taken with the aid of statistical information contained in a database. The assessment of a person that takes place *exclusively* on the basis of the statistical characteristics of the group to which the relevant person is deemed to belong, and the lack of a causal relationship between the individual and the characteristic attributed to him, is unjust.⁴⁶ The Dutch DPA has identified a trend whereby ethnic and nationality-related data are – to an increasingly frequent extent – used in order to take a negative decision

⁴⁴ Lower House 2003-2004, 28 345 no. 19.

⁴⁵ Article 5 Wpg: The processing of police data concerning someone's [...] race [...] will only take place supplementary to the processing of other police data and to the extent this is unavoidable for the purpose of the processing.

⁴⁶ *Etniciteit, profileren en het gelijkheidsbeginsel*, dr. J. Beuving, J.W. Heuver and W.J. van Helden, NJB 29 September 2006 no. 34, p. 1954.

in respect of the relevant persons. Examples of this type of discrimination include refusal to provide a (mortgage) loan or initiating a fraud investigation. Such use of group profiling will only be consistent with the statutory provisions concerning the processing of personal data relating to the data subject's race in a limited number of cases.

Does the Dutch government intend to implement measures to prevent unlawful use of group profiling on the basis of ethnicity?

- Local case consultations on the basis of ethnicity

The Dutch DPA has identified an increase in the number of consultation structures at the municipal level. A representative of the local government enters into regular consultations with the police and judicial authorities to discuss cases that deal specifically with ethnic groups. These consultations serve as starting point for a personal approach with a preventative and/or repressive objective.

What exemption does the Dutch government consider applicable to the processing of personal data concerning ethnicity during these local consultations?

ANNEX I

LIST OF SUGGESTIONS FOR QUESTION TO THE DUTCH GOVERNMENT



Commissie Gelijke Behandeling

EQUAL TREATMENT COMMISSION (CGB)

- In what way does the Dutch government guarantee the quality of existing and yet to be formed provisions during the development of a network with national coverage and how will it supervise compliance with the quality requirements?
- Can the government explain which problems identified by the Monitoring Investigations, which were financed by it, are, in its opinion, reason to prioritise the implementation of measures to prevent and combat racial discrimination?
- Can the Dutch government explain her efforts, as set out in the comprehensive Action Plan for Combating Racism, during the treatment of the Dutch report by the CERD Committee? Which discrimination problems will be prioritised by the government and what specific and measurable objectives have been included to prevent and combat (racial) discrimination?
- In what way does the Dutch government promote structural cooperation and consultation with Dutch community-based organisations active in the field of the prevention and combating of (racial) discrimination?
- What measures are being implemented by the Dutch government to increase awareness among employers of their role and responsibility in combating exclusion of ethnic minorities on the labour market and of the - often unconscious - prejudices that can work to the disadvantage of these candidates during selection procedures?
- Does the Dutch government intend to encourage organisations in the public and private sector to temporarily take special measures to reduce the structural disadvantage of (ethnic) minorities, and to pay attention the possibilities and impossibilities of affirmative action policy within limits of the law and other forms of positive action, such as broader diversity policy?
- Does the government intend to develop a (more coercive) tool to encourage medium-sized and large companies to register - on the basis of self registration - the ethnic background of their employees, and to enable the measurement of the effects of affirmative action policy and the promotion of the labour participation of ethnic minorities, among others?
- Does the Dutch government intend to inform employers on – and make them aware of the need and the use of – the prevention and combating of discrimination in the workplace, and to offer them guidelines for sound investigation and handling of complaints related to discrimination in the workplace?
- Can the Dutch government explain why, by using the source of income as testing criterion for a housing permit, the Special Measures for Large City Problems Act, in its opinion, does not constitute indirect discrimination on the basis of race, nationality or gender?
- How does the government intend to guarantee accessible and effective care of good quality in which no distinction on the basis of race is made? Can the government provide more information and financial and numerical substantiation of the manner in which the 163 projects contribute to the improvement of health care provided to ethnic minorities?
- Does the Dutch government have recent figures on the nature and extent of (racial) discrimination at schools? What does the Dutch government do to encourage schools to offer an environment free of discrimination to both teachers and students?

- What measures does the Dutch government implement to ensure that teachers possess the skills necessary to respond adequately to discrimination in a multicultural environment that is socially safe?
- Does the Dutch government intend to explicitly mention the subject (racial) discrimination in the key objectives of education, for example as part of active citizenship and social integration?
- What are the Dutch government's underlying motives for implementing measures to prevent segregation in education, for example with respect to distribution and admissions policy? Does the government take the possibly discriminatory effects of these measures sufficiently into account and does it ensure that the measures themselves do not lead to distinction on the basis of race?
- Is the Dutch government of the opinion that measures are necessary to deal with the problems experienced by students from a non-native Dutch background, due to their ethnic background or religion, when trying to find a trainee post?
- Is the Dutch government of the opinion that discrimination in the hotel and catering industry has been sufficiently dealt with and have the measures had the desired effects? Are additional measures necessary to deal with the problems experienced – in particular by young persons of non-Dutch heritage when trying to gain entrance to catering establishments?
- In what way does the Dutch government guarantee that foreign nationals and people of ethnic minorities who are lawfully residing in the Netherlands can fully participate in society, as regards the offer of goods and services, irrespective of their residence status and length of residence in the Netherlands or their address?
- Can the Dutch government inform us of the outcome of the consultations on clothing requirements with the umbrella organisation for sports centres? Does the government consider investigating discriminatory practices during the performance of occupations and operation of businesses (more specifically concerning access to goods and services) and imposing sanctions on suppliers and providers that repeatedly exclude ethnic minorities and migrants, for example by revoking permits or imposing fines?

de Nationale ombudsman

NATIONAL OMBUDSMAN

- Does the Dutch government devote extra attention to encouraging diversity within the police forces, in order to prevent situations where distinctions are being made within the police forces on the basis of background?
- Is the Dutch government implementing any measures to guarantee that reports of discrimination are actually taken down by investigating officers?
- To what extent is the Dutch government extra alert to discrimination during checks at Schiphol, in particular in view of the increased vigilance related to counterterrorism and drugs smuggling prevention activities? In view of the specific duties related to Schiphol's position as an international border, it is of extra importance that discrimination and feelings of being discriminated are prevented.
- Will the Dutch government be able to exercise full disclosure within the asylum procedure, so that the position of the foreign national/asylum seeker can be improved?

THE DUTCH DATA PROTECTION AUTHORITY

- Can the Dutch government explain whether, and if so, in what situations the police processes police data concerning a person's race and how this processing relates to Article 5 of the Police Data Act which is currently in force?
- What measures does the Dutch government implement to prevent violation of the provisions concerning special personal data, in particular by the distribution of photographs of persons suspected of crimes in the private sector?
- Does the Dutch government intend to implement measures to prevent unlawful use of group profiling on the basis of ethnicity?
- What exemption does the Dutch government consider applicable to the processing of personal data concerning ethnicity during local consultations?