



College of
Policing

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Positive Action

A guide for police recruitment

Version 1.1

College of Policing Limited
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Who is this guidance for?

This guidance is written to support chief constables, chief executives, senior managers, HR teams, positive action and diversity, equality and inclusion practitioners. The document serves as guidance and is not intended to set a template for a uniform approach or serve as a code of conduct. Readers are reminded that this guidance does not serve as legal advice. The prevailing law should always take precedent. If forces are in any doubt of the legality of a proposed positive action measure, they should seek legal advice.

Version Updates

Version Number	Date of amendment	Amendment made
1.0	March 2020	First version published.
1.1	April 2020	Section 2.43. Amendment to fourth bullet point.

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Introduction

As the professional body for everyone in policing, it's vital for us – and for the public we serve – that we attract, develop and retain the best people. This applies equally to College of Policing staff and to those working in policing organisations. It means making sure that our culture and values reflect the diversity of our people and the communities in which we operate. It affects us all - every area of operations, and responsibility lies at every level.

Through the current uplift programme, Policing has an unprecedented, once-in-a-generation opportunity to make a step change in the diversity of our workforce. We will seize that opportunity. We will challenge ourselves and policing to think beyond the usual, to be radical and to act.

Recruitment can shape the new workforce but we must make sure people want to stay. We will work internally and externally across policing to make sure that we, and forces, have an inclusive culture that enables everyone to be their true self at work. This will improve productivity and our performance for the public.

With the National Police Chiefs' Council (NPCC), forces and others, the College will ensure that we have a collaborative, coordinated approach. Together, we will make a greater impact on inclusion and diversity than any organisation would do working alone.

We have a key role in making sure that our guidance is up to date, and in sharing emerging and promising practice. This guidance is designed to be a living document. We will review and amend it on a regular basis, and we will also collect and share good examples from across the service and beyond.

I am very grateful for the contributions of the Positive Action Practitioners Alliance (PAPA), the College's Diversity and Inclusion team, and others in helping us revise the guidance.

I welcome your feedback and look forward to working with you.

Fiona Eldridge
Head of Diversity, Inclusion & Engagement

February 2020

The College of Policing's Diversity and Inclusion team are proud to support the police service in their work to secure a fair, inclusive and representative workforce. We welcome feedback and encourage you to share information about your positive action strategies and ideas. Please [contact us](#).

What is positive action?

1.1. Positive action is the name given to measures under the Equality Act 2010 that promote equality of opportunity. Structures in our society mean that not everybody starts from the same position. There may be barriers that prevent people from achieving their potential. The Equality Act empowers us to remove these barriers when they are in connection to a protected characteristic, so that we can work together towards achieving true equality. Positive action is about levelling the playing field.

1.2. The protected characteristics¹ are:

- Age
- Disability
- Gender reassignment
- Marriage or civil partnership
- Pregnancy or maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

1.3. Section 158 of the Act allows positive action to support a protected group by minimising or overcoming a disadvantage, meeting a particular need or encouraging participation in an activity where it is disproportionately low. To be lawful, the action has to be proportionate.

Section 159 of the Act relates to positive action in recruitment or promotion. Under section 159, positive action allows an employer to favour someone who shares a protected characteristic over someone who does not, providing both people are as qualified as each other.

¹ This guidance will refer to people who share a protected characteristic as a 'protected group'. The Equality Act 2010 will be referred to as 'the Act'.

- 1.4. The focus of positive action is to create equality of opportunity. It should not be seen as undermining the principle of meritocracy and does not, if used lawfully, compromise fairness or objectivity in a recruitment or promotion exercise. It does, however, ask us to honestly evaluate what and who defines meritocracy, and prompts a review of our processes to identify obstacles that limit those with a protected characteristic.

Forces are encouraged to think creatively about potential positive action initiatives. This should be a holistic assessment. It is unlikely that one positive action initiative in isolation will produce significant change. Forces should consider a number of different initiatives promoting diversity, equality and inclusion. Profound change can be achieved with innovation and perseverance, for the benefit of the whole workforce.

Positive discrimination

- 1.5. Positive action should be used with care and should not be confused with positive discrimination, which is illegal. Positive discrimination is where, in an attempt to redress historical inequality, discrimination in favour of a protected group occurs. For example:

- Ring-fencing a role to a particular characteristic without legitimate reason.
- Recruiting the candidate because they share a protected characteristic over a more highly scoring candidate who does not.
- Limiting applications to female applicants only, when the role could be performed by either a male or a female.

A claim of positive discrimination will arise if an action that favours one group leads to the disproportionate detriment of other groups. It can also arise if the impact on other groups has not been considered at all. There are some limited exceptions to this rule. For example, it is not unlawful for an employer to treat a person with a disability more favourably than a person who does not have a disability. You can find more information about this [here](#).

If you are ever in any doubt whether your proposed initiative is positive action or positive discrimination, seek legal advice.

Why do we need to take positive action?

- 1.6. There are many benefits available to forces as a result of applying positive action, including the following:
- Having a wider pool of skills, experience and talent from which to recruit.
 - Greater diversity equips the police workforce with the understanding it needs to better serve Britain's diverse communities. This helps the service secure the trust and confidence of the public and, in turn, helps effective crime prevention and commitment to justice.
 - Facilitating diversity and inclusion across all ranks and within specialist posts. Securing greater diversity and inclusion encourages others from under-represented groups to apply. This helps us continue our journey as an inclusive and progressive police service.
 - Helping forces meet the public sector equality duty, a legal requirement under the Act.
 - The police service is a community. Each and every member of this community deserves to work in a fair and inclusive environment that values all colleagues as their true selves. Positive action is a demonstration of a force's commitment to this and will serve as affirmation for all protected groups, encouraging applications. It will also instil confidence from your existing team in you as an employer.

The relevance of the equality duty

- 1.7. All public authorities are bound under section 149 of the Act, to a duty known as the public sector equality duty. The duty requires public authorities, including the police, to have due regard to:
- Eliminating discrimination, harassment, victimisation and any other conduct prohibited by the Act.
 - Advancing equality of opportunity between those who share a protected characteristic and those who do not.
 - Fostering good relations between people who share a protected characteristic and those who do not.

- 1.8. The Act explains that having due regard for advancing equality involves:
- Removing or minimising disadvantages that are connected to protected characteristics.
 - Taking steps to meet the needs of people from protected groups, where these are different to the needs of others.
 - Encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.

Taking positive action is voluntary. However, there is strong argument to suggest that the equality duty commits forces to have due regard to using positive action where disadvantage, different needs or under-representation exists.

Lawful use of positive action

Positive action for general use

Applying section 158

Overview

- 2.1. You reasonably think, and have evidence to corroborate, that:
- | | |
|--|--------------------------|
| <p>a. There are people who share a protected characteristic who suffer a disadvantage connected with that characteristic.</p> <p>And/or</p> | <p>Section 158(1)(a)</p> |
| <p>b. There are people who share a protected characteristic who have needs that are different to those without that characteristic.</p> <p>And/or</p> | <p>Section 158(1)(b)</p> |
| <p>c. Participation in an activity by people who share a protected characteristic is low.</p> | <p>Section 158(1)(c)</p> |

2.2. If any or all of the above conditions exist, then action can be taken to:

a. Enable or encourage those who share a protected characteristic to overcome that disadvantage. Section 158(2)(a)

And/or

b. Meet those needs. Section 158(2)(b)

And/or

c. Enable or encourage those who share that protected characteristic to participate in that activity. Section 158(2)(c)

Very often, the conditions will overlap. For example, moving a community outreach event to a wheelchair-accessible space both meets a need and encourages participation of those with a disability.

- The action you are taking is not in connection with recruitment or promotion (see [below](#) for more information). Section 158(4)(a)

In more detail

Evidence

2.3. Forces must provide evidence of the need for positive action. You must reasonably think that one or more of the three statements given in section 2.1 of this guidance document are true.

2.4.

Disadvantage: A detriment connected to a protected characteristic may be an obstacle to an individual applying or progressing in the police service.

Different need: A need can be different because it is unique to a protected group. Alternatively, it could be a need that many different groups require, but that the group in question is being deprived of.

Low participation: This is the case when figures indicate that the number of people participating in an activity from one group is much lower than the number participating from other groups. Alternatively, you have access to evidence that allows you to anticipate a certain level of participation from a group in an activity, but actual participation did not meet expectations.



Your positive action should be led by the evidence you have of disadvantage, a different need or low participation. Avoid prioritising one protected characteristic over another. There is no hierarchy under the law and imposing one would be unethical.

What does 'reasonably think' mean?

- 2.5. When taking positive action, you must think that a disadvantage, a particular need or low participation in an activity connected to a protected characteristic is an issue. For this to be 'reasonable', it must be supported by evidence. Complex statistical evidence is not strictly necessary. However, the workforce development resources available to forces makes it likely that, if challenged, a court would expect some statistical evidence of disadvantage, a particular need or low participation.
- 2.6. Evidence of disadvantage or a particular need can be gathered from a wide variety of sources. For example, evidence could be gathered from studies produced by organisations who represent a protected group or from national and regional workforce figures.
- 2.7. Evidence of low participation can include national census data and workforce assessments, such as those produced by the Home Office. However, it should also extend to data relevant to your local area. The statistics do not have to be produced by the force, nor by another public sector source. Studies conducted by reputable third parties, such as research bodies or universities, may be useful. Qualitative evidence can also be used, for example, via consultation with community groups or the local council. Forces can use workforce data to evidence low participation of a protected group at a certain rank or post.
- 2.8. It is imperative that forces engage with the evidence available to them. This means that merely replicating figures that appear to be relevant will not be enough. You are expected to connect your findings with your objectives to mitigate disadvantage, a particular need or low participation. Only with active engagement with available data can you establish a true understanding of inequality in your workforce, and can then begin to implement creative initiatives to address this.



The setting of quotas in relation to protected characteristics is not encouraged. While statistics can help forces to understand demographic realities and set strategy directions, applying a policy to facilitate specific quotas can be challenged as an act of indirect discrimination.

Ensure that the action is proportionate

- 2.9. Any action taken must be proportionate to the evidenced disadvantage, particular need or low participation. Understanding what might be proportionate requires an assessment of the seriousness of the disadvantage, the extent of the need or the degree of under-representation. The assessment should include the impact that your action may have on other groups. The discriminatory effect on other parties will be looked at very closely if your positive action is challenged.
- 2.10. Considerations can include the cost of the measure and whether the investment of time and resources will be appropriate. Forces will have to enter into a balancing exercise, weighing up the competing interests of different protected groups with other relevant factors.
- 2.11. Forces are required to think about whether there are other ways they could achieve the aims without having any impact on other protected groups. The proportionality provision in the Act prevents employers from taking excessive measures, and limits the possibility of there being a negative impact on those who do not share the protected characteristic in question.
- 2.12. Part of the proportionality assessment is how long you intend to apply the positive action. Forces are recommended to only apply positive action for a limited time, with dates set to monitor the impact of that action. If evidence suggests that the disadvantage, need or under-representation is still a factor, the positive action measure can be reapplied or the application time for the original measure can be extended. Indefinite application would be seen as disproportionate. Forces should take care to give positive action measures sufficient time to produce results. Conversely, repeating measures that are not producing results is not an effective use of time and resources and could, therefore, not be seen as a proportionate measure.
- 2.13.

Example

In a force area, the percentage of the population who identify as having a disability is 4%. The national representation is 16%. The force has 4% representation in their workforce. The fact that the under-representation is at national, rather than local, level does not preclude the force from taking positive action. However, the force must give consideration as to whether the positive action that they intend to implement is proportionate.



Positive action can only be justified by disadvantage, a particular need or under-representation connected with one of the protected characteristics. You cannot, for example, use positive action to limit applications to those who speak a particular language, unless you can evidence that this skill is an occupational requirement. Find more information on genuine occupational requirements [below](#).

Timing

- 2.14. Section 158 cannot be used for positive action in connection with recruitment or promotion. Instead, forces should refer to section 159 which defines how positive action can be used in recruitment and promotion. While 'recruitment' is defined as a 'process of deciding', this can be defined narrowly or broadly and there is no case precedent on the interpretation of 'process'. In the absence of precedent, the safest approach would be to ensure that once a person has applied for a job or promotion, any positive actions targeting them or other applicants are carried out under section 159 and subject to the equal merit test. Forces may wish to seek their own legal guidance on the interpretation of 'process'. We recommend that forces who wish to engage in initiatives that overcome or minimise disadvantage, meet a particular need or increase participation after the point of application seek legal advice before taking action.
- 2.15. If a support initiative is implemented after the point of application, is made available for all to attend and does not target a particular protected group – and therefore does not discriminate against others – this is unlikely to be considered positive action.

Examples of use

- 2.16. The examples given below are a combination of created and actual examples of positive action. Forces should not replicate any of the examples given without first undertaking the considerations required by the legislation and explained in this guidance. Without this consideration, there is no way for you to determine if any of the suggestions here would be proportionate. Any positive action must be proportionate to the unique circumstances of your area and workforce.

2.17.

Encouraging applications

<ul style="list-style-type: none"> Place advertisements where those from a protected group are more likely to see them, creating a positive representation of the service and promising a work environment where individuals can thrive as their authentic selves. Maximise use of social networking channels. The internet's sharing utility will increase your advertisement's visibility.
<ul style="list-style-type: none"> Encourage applications from a particular protected group. For example, in advertising for a role, include the text 'we welcome applications from those who identify as LGBTQ+'.
<ul style="list-style-type: none"> Use targeted media campaigns, including blogs, podcasts and videos. These could be produced by existing officers or staff from protected groups, who may wish to share their experiences of the recruitment process or of working in the force.
<ul style="list-style-type: none"> Participate in 'connection' days by hosting or attending recruitment fairs and networking events targeting certain protected groups.
<ul style="list-style-type: none"> Issue packs to schools, colleges, universities and career advisors about working in the service, emphasising mentoring and career progression initiatives aimed at protected groups. This may introduce alternative dialogues about joining the police service to young people, as other influences may have told them that policing was not a viable career option.
<ul style="list-style-type: none"> Consider 'blind recruitment' – removing name, sex, age and any other information relating to protected characteristics – for the initial sift of written applications. This may limit the potential negative impact of bias, whether conscious or unconscious, from the panel. Ensure that all staff involved in the recruitment process have received equality training.
<ul style="list-style-type: none"> Engage staff associations. Extend invitations to potential candidates to staff association meetings for the sharing of experiences and for discussion of equality and inclusion matters and what the police service is trying to achieve.
<ul style="list-style-type: none"> Raise awareness of the experiences of officers and staff from an under-represented group. This could be via recruitment leaflets focusing on diversity,

<p>equality and inclusion, poster campaigns, and one-to-one meetings or Q&A sessions with those who share a particular characteristic.</p>
<ul style="list-style-type: none">• Ensure police contribution at local events such as Pride marches and festivals promoting equality, diversity and inclusion.
<ul style="list-style-type: none">• Identify reputable print and digital publications aimed at targeted groups and offer to write a guest article.
<ul style="list-style-type: none">• Run workshops on the applications process, including what to expect and how to effectively show your value.
<ul style="list-style-type: none">• Monitor protected group progression through the recruitment process and identify if candidate drop-out is an issue for a particular stage in recruitment. This may create an opportunity for review, troubleshooting and remedy.
<ul style="list-style-type: none">• Connect with local faith and other community groups, conveying the importance of a diverse and inclusive police service and the benefits this brings to communities. Encourage community partners to become critical friends and ambassadors.
<ul style="list-style-type: none">• When possible, ensure diverse representation at interview panels and other recruitment assessments. Consider inviting members of local community groups who represent the interests of under-represented groups.
<ul style="list-style-type: none">• Commit to the Disability Confident employer scheme.
<ul style="list-style-type: none">• Keep your website updated with your equality and inclusion priorities and initiatives, to let people know that you are proactive in this area.
<ul style="list-style-type: none">• Ensure that the force website is accessible and meets the Web Content Accessibility Guidelines (WCAG) minimum standard.
<ul style="list-style-type: none">• As vetting can cause anxiety for applicants, consider mitigations such as sharing information about the vetting process early, offering confidential discussions and providing a point of contact for queries.
<ul style="list-style-type: none">• Engage your vetting team. For example, liaise with the vetting team at all stages of the vetting process, invite the vetting team to attend positive action engagement events, have the vetting team give talks about the vetting process to applicants and provide the vetting team with opportunities to engage with potential recruits early in the application journey.

2.18.

Supporting retention

<ul style="list-style-type: none"> • Conduct post-recruitment surveys to assure the quality of the recruitment process and to monitor the welfare of new joiners.
<ul style="list-style-type: none"> • Ensure that induction processes support those from protected groups. The message that discrimination, harassment or victimisation will not be tolerated in the service should be impressed on all from day one. Equality and inclusion training should be an imperative in the induction process.
<ul style="list-style-type: none"> • Provide mentoring and 'buddy' systems or other one-to-one support opportunities. This can include 'reverse mentoring', where a junior member of the workforce mentors a senior member.
<ul style="list-style-type: none"> • Provide supportive line management and tune into the different needs that may arise because of a protected characteristic. For example, offer flexible working arrangements if possible.
<ul style="list-style-type: none"> • Appoint 'equality champions' to promote equality and to serve as points of contact for diversity, equality and inclusion issues. These opportunities should be available to individuals from all groups.
<ul style="list-style-type: none"> • Run workshops, seminars and other events aimed at protected groups' continuing professional development. For example, these could focus on self-value and strength, resilience, leadership or the promotion process.
<ul style="list-style-type: none"> • Offer shadowing and experience days with specialist units.
<ul style="list-style-type: none"> • Develop staff associations. A sense of belonging and security can be encouraged by staff networks. Ensure that these associations have access to senior leaders for support and influence.
<ul style="list-style-type: none"> • Monitor reasonable adjustment provision. Review colleague satisfaction with the adjustments provided and with the implementation process. Consider implementing the Workplace Adjustment Passport, a record of an individual's agreed workplace adjustments.
<ul style="list-style-type: none"> • Dispel myths about positive action held by the workforce.

<ul style="list-style-type: none">• Normalise the new dialogue by reaffirming regularly that your workforce is inclusive and that difference is something to be valued. Encourage colleagues to share their experiences. Senior members of the workforce should lead by example.
<ul style="list-style-type: none">• Commit to national equality standards, such as the Disability Confident scheme, the Stonewall Workplace Equality Index and other benchmarks of best practice.
<ul style="list-style-type: none">• Connect with networks such as the Mental Health Foundation, Stonewall and the National Autistic Society.
<ul style="list-style-type: none">• Review and refresh policies to ensure that they are compatible with the force equality and inclusion strategy.
<ul style="list-style-type: none">• Mark national recognition periods, such as World Autism Awareness Week, Black History Month and International Women’s Day.
<ul style="list-style-type: none">• Ensure that you complete an equality impact assessment for any initiative that may have an impact on a protected group.
<ul style="list-style-type: none">• Review in-house training to ensure that it meets equality standards and is as inclusive as possible.
<ul style="list-style-type: none">• Upskill management at all levels to improve their understanding of inclusion and to develop core leadership skills and behaviours in this field. This could include empowering colleagues from under-represented groups to have open and honest conversations with them and their team if needed, identifying early signs or triggers of unhappiness at work, and training the workforce to understand the difference between disability-related absence and sickness absence.
<ul style="list-style-type: none">• Develop strategies to enable job sharing and flexible working to support carers.

2.19.

Understanding exits and inspiring return

<ul style="list-style-type: none">• Conduct exit interviews to establish the reason for leaving, identifying whether the decision was connected to a protected characteristic. Invite feedback on how the force can improve.
<ul style="list-style-type: none">• Target advertising campaigns for re-joining at leavers from protected groups.

2.20.

Improving your approach

Do

- Think creatively about potential action initiatives.
- Collaborate with other agencies and maximise the number of opportunities to share best practice.
- Look at what other organisations, such as the [NHS](#), are doing.
- Understand and use the power of language to emphasise positive key messages.

2.21.

Don't

- Resort to standardised and tokenistic language in your communications.
- Use stereotypical depictions of people from minority groups in your advertising.
- Put pressure on colleagues with a protected characteristic to share insights into their experiences in the force. While your colleagues' input would be valuable and may help spark innovation in your positive action strategy, their involvement should not be an expectation.
- Rehash old positive action strategies if evidence indicates that they are not producing the desired result.

Positive action in recruitment and promotion

- 2.22. Positive action under section 159 of the Act is limited to recruitment or promotion. A force may favour a candidate who shares a protected characteristic over a candidate who does not, but only if both candidates are as qualified as one another. This is why section 159 is often referred to as the ‘tie-breaker’ provision. This act will not be deemed as unlawful discrimination if certain conditions under section 159 are met.
- 2.23. Although section 159 has been criticised as undermining meritocracy, the statute works hard to do the opposite. The wording of the legislation is purposefully narrow to ensure that section 159 can only be used in very limited circumstances. As the probability of receiving applications from two or more candidates who are as qualified as each other is low, it is highly unlikely that any employer will have cause to use section 159. In addition, ‘positive action by design’ is prevented by the section 159 prohibition of policy or practice favouring individuals who share a protected characteristic. Forces cannot engineer the recruitment process to better facilitate section 159 positive action.

Applying section 159

Overview

2.24. You are running a recruitment or promotion exercise:

- | | |
|---|-------------------|
| <ul style="list-style-type: none"> • You have two or more candidates whom you believe to be of equal merit, but one shares a protected characteristic. | Section 159(4)(a) |
| <ul style="list-style-type: none"> • You reasonably think, and have evidence to corroborate, that: <ol style="list-style-type: none"> 1. The candidate suffers a disadvantage connected with their protected characteristic. | Section 159(1) |
| And/or | |
| <ol style="list-style-type: none"> 2. The protected characteristic is under-represented. | |
| <ul style="list-style-type: none"> • You think that applying positive action in this instance would mitigate the disadvantage or under-representation. | Section 159 (2) |
| <ul style="list-style-type: none"> • You would like to favour the candidate with the protected characteristic. | Section 159(3) |

And

- The action you plan to take is proportionate to the aim of mitigating disadvantage or under-representation.

Section 159(4)(c)

And

- You have assessed this particular case on its own merits and you do not have a policy, nor is it standard practice, for you to treat those who share a protected characteristic more favourably than those who do not.

Section 159(4)(b)

In more detail

Equal merit

- 2.25. Positive action under section 159 can only be taken if two or more individuals are as qualified as each other. Any recruitment or promotion initiative must choose the best person for the job, irrespective of any evidence you have to indicate that disadvantage or low participation exists.
- 2.26. Assessing whether one person is as qualified as another person is not just a matter of academic qualification, but a judgement based on all of the criteria that a force uses to establish who is best for the job. This could include a combined assessment of suitability, competence or professional performance. Qualifications are not required to match exactly. If one candidate excels in their academic history, for example, while another has years of valuable work experience, an objective assessment could find these candidates to be as qualified as each other. It is the role of the recruiter to apply a fair, objective and transparent assessment of merit.
- 2.27. Where two or more candidates are deemed to be as qualified as each other, a 'tie-breaker' situation arises. At this stage, positive action can be implemented to favour a candidate who shares the protected characteristic that you believe may be at a disadvantage or is under-represented.

Avoid manipulating criteria and artificially low thresholds

- 2.28. While this is not explicitly stated in the Equality Act, section 159 is most likely to apply to the end of a recruitment process. Should a force wish to apply section 159 earlier in the recruitment process, it must be able to provide an objective rationale of how it arrived at its equal merit assessment.



It is highly unlikely that a court would deem meeting the minimum requirements for a post as an adequate threshold for equal merit. For an example of what the court deemed to be an ‘artificially low threshold’ and therefore led to a finding of direct discrimination, see [Furlong v Chief Constable of Cheshire Police](#).

2.29. If challenged, the court will scrutinise your decision very carefully. Forces should not manipulate the selection process to manufacture increased instances of candidates being as qualified as one another. Similarly, you should avoid setting an artificially low threshold to increase the candidate pool to which the positive action can be applied. A court is unlikely to view either strategy as a proportionate means of achieving one of the Act’s aims.

2.30.

Example

A force is located in an area with a high number of people who identify their race as Asian/Asian-British Bangladeshi. The force have evidence to show that their workforce is under-represented by people who identify as Asian/Asian-British Bangladeshi.

Candidates who pass the assessment centre progress to the next stage of recruitment, which is a competency-based interview. Candidates are given a pass or fail grade for their interview. The 130 candidates who passed are deemed by the force to be of ‘equal merit’. The force use section 159 to prioritise selection of candidates who identify as Asian/Asian-British Bangladeshi from the candidates who passed. On finding that there are insufficient Asian/Asian-British Bangladeshi candidates to fill all of the vacancies, the assessment centre scores are used to determine who to select from the remaining pool of candidates, with those with the highest scores being selected.

The force’s actions are likely to attract challenge, as:

- It would be difficult to justify that 130 candidates were as qualified as each other. The force must be able to clearly define ‘equal merit’ and provide evidence for their reasoning. Without this, a court would most likely see this initiative as setting an ‘artificially low threshold’.

- The force deferred to the assessment centre scores to select who to recruit to fill the final vacancies, which suggests that they could not have believed that, qualitatively, all candidates who passed the interview were as qualified as each other.

This example parallels, in part, the circumstances in [Furlong v Chief Constable of Cheshire Police](#). In that case, the primary selection criteria favoured candidates who identified with a minority protected characteristic (please refer to the judgement for further details). While the court recognised that the force had a legitimate aim, the actions taken were not seen as a proportionate response to addressing a lack of diversity in the workforce.

- 2.31. Forces should always be prepared to justify how they reached their decision of candidates being of equal merit, and keep a record of the decision-making process.

Evidence

- 2.32. After objective assessment, if you are confident that two or more candidates are of equal merit, and you wish to apply positive action to select the candidate who identifies with a protected characteristic, it is also a requirement that you ‘reasonably think’ that:

1. The individual suffers a disadvantage because of that characteristic.

Or

2. Participation in an activity by those who share that protected characteristic is disproportionately low.

What does ‘reasonably think’ mean?

- 2.33. The evidential requirement and what constitutes a ‘reasonable thought’ is similar to the requirement under section 158. You must think that either disadvantage or low participation in an activity connected to a protected characteristic is present. For this consideration to be ‘reasonable’, it must be supported by evidence. For more detailed guidance, please refer to the content under [section 158](#).
- 2.34. Recent case law is an appropriate warning to forces that this assessment process should not be taken lightly. As with section 158, complex statistical evidence is not strictly necessary. However, it is essential that forces engage fully with available data, both national and local, making an objective assessment of whether positive

action is truly warranted. There must be a genuine connection between the data and the disadvantage or low participation. The evidence you have must be specific and must focus on your recruitment or promotion exercise.

- 2.35. If a force wishes to take positive action because of low participation in an activity, then they must identify that activity. As the activity can be overarching, 'being a police constable in the police service' is likely to be sufficient.
- 2.36. The closer your analysis at this stage, the greater your ability to defend your positive action if challenged.

Ensure that the action is proportionate

- 2.37. No action taken under section 159 should go beyond what is reasonably necessary. Assessing the validity of section 159 is a holistic process. Forces will be expected to balance the seriousness of the disadvantage or low participation against the impact that the action may have on others. The more serious the discriminatory effect, the greater the need for justification of the positive action. What is acceptable in one instance may not be in another, and forces will need to review each use carefully. If challenged, a court must be satisfied that the measures taken correspond to a real need and are appropriate to the objectives pursued.
- 2.38. Forces are encouraged to avoid what the courts termed in a recent judgement as a 'substantial volume exercise'. This is the application of selection using positive action principles to a large group of people. Blanket approaches are unlikely to be viewed as a proportionate means of achieving a legitimate aim.
- 2.39. Forces should consider if there are other initiatives that could be adopted to mitigate the disadvantage or low participation. If other initiatives, section 158 positive action or otherwise, have been taken to increase diversity in your force, then you must have given these sufficient time to have taken effect. If challenged, there will be an expectation from the court that other non-discriminatory methods of increasing diversity have been attempted but have either failed or produced limited results. The court will expect the force to have undertaken sufficient analysis of the performance of a previously adopted initiative, to have concluded that it was ineffective and that its failure rendered further positive action necessary.

No policy

2.40. Forces must not have a policy or practice of automatically treating people who share a protected characteristic more favourably than those who do not have it. Each case must be considered on a case-by-case basis. The relevance of section 159 needs to be considered anew with every potential action requiring a review of the inequality, ensuring that any subsequent action is proportionate.

2.41.

Example

A force's firearms department only has male officers. During its next recruitment campaign, the force would like to guarantee an interview to all female candidates who pass the minimum application criteria. This would be unlawful. Despite strong evidence of under-representation, it is a policy of treating one group more favourably than another.

Securing a fair and inclusive recruitment and promotion process

2.42. Getting recruitment and promotion right is a key enabler for diversity. Ensuring that your processes are inclusive and accessible for everybody will help secure equality of access for all.

Strategies include:

- Ensuring that adverts are accessible and that the job description does not include language that could deter someone from a protected group from applying.
- Maximising opportunities to convey your force's commitment to equality and inclusion throughout the recruitment or promotion process.
- Accepting applications in alternative formats.
- Offering interviews for applicants who declare a disability.
- Ensuring that the process of asking for reasonable adjustments for interview is straightforward.
- Giving members of selection panels appropriate equality and inclusion training, and reminding them to review their selection to ensure that bias did not influence their decision making.

- Involving a diverse range of people in the recruitment or promotion process.
- Monitoring protected group progression throughout the recruitment or promotion process. If figures evidence disproportionate drop-out at a particular stage, consider if there is some element of the process that acts as an obstacle to a protected group.

Vetting

2.43. Forces are recommended to involve vetting teams and to encourage positive action leads to develop good working relationships with vetting managers. Providing early information about the vetting process, with clarity and transparency, may diffuse some of the anxiety held by potential applicants about vetting. This may be particularly true for those who are accustomed to environments where there is limited trust and confidence in the police service. Applicants may benefit from the following reminders:

- Every application is reviewed on a case-by-case basis. There are no automatic rejections on the basis of financial status, or because a family member has been involved in criminality.
- All information will be treated as strictly confidential, processed in adherence with data protection laws and fully respecting the candidate's right to privacy.
- The most important aspect is for the candidate to be open and honest. Information is generally only processed by vetting personnel and is not normally shared with anyone else, including potential line managers.
- If the candidate fails vetting, if appropriate, reasoning will be given to them. (Please refer to the vetting APP for more information).
- The candidate will be able to appeal any decision made. They may, in some circumstances, be able to make an appeal in person to a force's vetting manager. All appeals will be heard objectively and fairly.

Those involved in outreach and engagement will benefit from establishing a strong understanding of the vetting process. This information can then be shared with potential applicants, dispelling myths about vetting, stressing that the process is about including people and not exclusion, and instilling trust and confidence in the process.

The exceptions

Disability

- 3.1. Section 13(3) of the Equality Act allows a force to treat people with disabilities more favourably than people who do not have a disability. Action under section 13(3) is not classed as positive action. Sections 158 and 159 apply to disability in the same way as they apply to the other characteristics.

Genuine occupational requirement

- 3.2. Some organisations have roles that can only be performed by an individual who shares a particular protected characteristic. Under Schedule 9 of the Act, if an organisation can objectively justify that an identified protected characteristic is required for a role, they can limit recruitment to those who share that characteristic.

Example

A church advertising a worship leader vacancy may be able to use Schedule 9 to limit applications to people who identify as Christian.

- 3.3. Any exception to the general principle of equality for all is always carefully regulated. Employers must provide strong evidence that the nature and context of the work requires the limitation, and that their objective in applying it is both legitimate and proportionate. It is also useful to note that what counts as legitimate will shift in parallel with changes in societal and cultural attitudes.

Supporting the workforce

Inclusion for all

- 4.1. Forces are encouraged not to view diversity and inclusion as the same thing. Increasing diversity in recruitment is important but nurturing talent and fostering a truly inclusive work environment is also vital. Securing this inclusive work environment allows the workforce to understand that it is both safe and encouraged for people to bring their authentic selves to work, and emboldens them to take pride in who they are. An employer does not attain the benefits that diversity can bring if it hires for diversity only to insist on uniformity after recruitment. It is pertinent to remember that valuing difference does not compromise team cohesion and has the potential to strengthen a team's shared ethos and purpose. Working together, the police workforce can build the fair, just and inclusive police service that all of our officers, staff and volunteers deserve.

We can help you develop innovative and bold inclusion initiatives. Contact the [Diversity and Inclusion team](#).

Supporting your new recruits

- 4.2. Help new recruits and your current workforce to understand that your new officers or staff have been recruited because they have skills that will benefit the service, and because they will be an asset to the team. New recruits should not find themselves lacking the resources to do their job well.

Positive messages

- 4.3. Forces should be proactive in promoting positive dialogues and supporting the workforce in understanding that equality strategies, such as positive action, strengthen the police service and secure the representation to which the service aspires.

Why sharing information matters

- 4.4. Proactive protected characteristic data monitoring allows a force to identify patterns to highlight inequalities and areas for improvement in inclusion. Forces should encourage individuals to understand the value of sharing information about

themselves, as well as the significance of this information in supporting the policing community.

4.5. Examples of best practice include monitoring workforce demographics against:

- | |
|--|
| <ul style="list-style-type: none">• Staff progression, performance and development review (PDR) ratings, promotions and average pay. |
| <ul style="list-style-type: none">• Alleged and proven misconduct frequency and outcomes. |
| <ul style="list-style-type: none">• Continuing professional development and training opportunities offered and taken. |
| <ul style="list-style-type: none">• Length of service and reasons for leaving. |



Consult with your data protection officer to ensure that all data processing is compliant with the General Data Protection Regulation (GDPR), the Data Protection Act 2018 and other associated legislation. By letting people know that you will handle their data carefully and with sensitivity, you will encourage them to trust the data collection exercise and to disclose information.

Action plans

The below may be of use to forces considering positive action.²

Section 158

- 1 Research**
Define the disadvantage, need and/or under-representation and an analysis of the causes, considering all of the evidence available to you.
- 2 Specify aims**
Set out the specific outcomes that you are trying to achieve. These must be connected to the disadvantage, need and/or under-representation.
- 3 Assess proportionality**
Ensure that the action you plan to take is proportionate.
- 4 Define actions**
Identify which measure(s) will be adopted and set out the steps required to achieve the specified outcomes.
- 5 Measure progress**
Set out the measurable indicators of progress. How will you know that what you're doing is working?
- 6 Ask for advice**
Consider consultation with relevant staff groups and members of the protected group that your measures are intended to assist. This is encouraged at all stages of the process.
- 7 Duration**
Define the expected length of the positive action initiative. This will need to be proportionate to the disadvantage, need and/or under-representation too.

² The plans are based on The Equality and Human Rights Commission's suggested action plan, produced in their Employment Statutory Code of Practice.

8

Review

Set out review periods to ensure that the action remains proportionate.

**Document**

Keep a record of the decision-making process and your rationale, ensuring that you link your action to mitigating the disadvantage, need and/or low participation.

Section 159

1

Is the action relevant?

Do you have two candidates who you believe may be of equal merit and does one of these candidates share a protected characteristic?

Have you recently undertaken other initiatives to promote diversity? If so, have you given these sufficient time to produce results? Have you analysed these results and can you justify whether positive action is legitimate on this occasion?

2

Select a panel

Convene an appropriate panel for subsequent decision making. This may be broader than the original selection panel. You may wish to secure legal input.

3

Equal merit

Ensure that your assessment of equal merit is objective and fair, and that it would withstand external scrutiny. You must be satisfied before you proceed.

4

Confirm evidence

Set out the disadvantage and/or under-representation and an analysis of the causes, considering national and local evidence.

Make sure that any evidence you have is specific to the recruitment or promotion exercise.

5

Assess proportionality

Ensure that favouring one candidate over another in this instance would be proportionate to the disadvantage and/or under-representation identified, in a fully considered balancing exercise. Consider all of the potential consequences.

6

Legal advice

Assessing whether application of section 159 is lawful can be nuanced. Seek legal advice if there is any doubt.



Document

Keep a record of the decision-making process and your rationale, ensuring that you link your action to mitigating disadvantage or low participation.

Where to get more information

- [ACAS: The Equality Act 2010](#)
- [Disability Confident](#)
- [Equality and Human Rights Commission](#)
- [EHRC Employment Statutory Code of Practice](#)
- [EHRC Supplement to the Employment Statutory Code of Practice](#)
- [EHRC Guide to the Public Sector Equality Duty](#)
- [Government Equalities Office](#)
- [GES Equality Act 2010: What do I need to know? A quick start guide to using positive action in recruitment and promotion](#)
- [GES Equality Act 2010: Public sector equality duty](#)
- [House of Commons note on The Equality act and Positive action](#)
- [NPCC Policing Vision 2025](#)
- [NPCC Diversity, Equality and Inclusion Strategy](#)
- [Office for National Statistics](#)
- [Police workforce: England and Wales](#)
- [Stonewall](#)
- [Stonewall Employer toolkit](#)
- [The Equality Act 2010 and supporting guidance](#)
- [Understanding WCAG 2.1](#)