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Positive Action Practical Advice

Considerations for the police service and stakeholders on the use of positive action initiatives to promote equality in the police service workplace

2014

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1 Preamble

1.1 Who should read this document?

There is a requirement under the Equality Act 2010 to comply with the equality duty. Those responsible for this include chief constables, chief executives, senior managers and HR professionals.

This document should also be read by relevant equality, business planning and procurement professionals. It will also be helpful for those who govern or scrutinise the police such as elected officials, councillors or board members.

Although the considerations in this document are based on advice from independent legal counsel and have been approved by the College of Policing legal department, this document is not intended to provide an in-depth analysis of the positive action provisions in law or to be the definitive legal advice on positive action. Police forces should, therefore, consult their legal department where further advice is required.

1.2 Introduction

The considerations have been produced to assist police forces and stakeholders in the use of positive action initiatives. Its aim is to promote better equality in the workplace and to assist forces in addressing the disproportionate under-representation of Black and Minority Ethnic (BME) officers and other staff who share protected characteristics within the police service.

If the police service is to be effective in preventing crime and bringing offenders to justice while maintaining the trust and confidence of the public, it needs to show that it reflects and understands the diverse communities which it serves. This should apply equally across all promotional ranks and within specialist roles.

It is, therefore, imperative that policing is representative of our communities, and is seen as an employer of choice that attracts, develops and retains talented people from those diverse backgrounds.





An improvement in the numbers of BME officers and staff remains a key priority for the College of Policing and the police service as a whole. Current data from the Office for National Statistics 2014, which outlines the representation of officers nationally, highlights that officers from minority backgrounds and other protected groups is disproportionately low. This is exacerbated in all leadership roles. See [Office for National Statistics 2014](#).

Some work has been completed, but the police service needs to make further effort to address the issue of under-representation across all ranks and specialist roles such as firearms, task force, traffic, and dog and specialist investigation departments.

1.3 Highlighting the issue

Although the police service has seen changes over the last 30 years, the representation of BME officers, at all ranks and roles, remains disproportionately low. While the service has shown that it is willing to listen and learn from past events, and support the development and progression of BME officers, more work is needed for policing if it is to be truly reflective of our communities. This will continue to be a challenge as communities in England and Wales evolve and diversity, through continued immigration, adds to the population within society.

1.4 Benefits to communities and the police service

The benefit of recruiting officers and staff from all diverse backgrounds will provide communities with greater trust and confidence in their police service. This will also enhance operational policing activities as there is far greater diversity of thinking and understanding of community needs and expectations.

Some forces are applying good practice for attracting, recruiting, developing and retaining officers from under-represented groups, but this is not consistent across the whole police service. The under-representation of BME officers and officers who share protected characteristics needs to be addressed in order to provide a consistent and sustainable approach to meet the increasing requirements for a representative police service.





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1.5 Attraction and sustainability strategies

To continue to increase the representation of talented BME officers, the police service needs to identify more innovative and creative ways of attracting potential candidates to join the police service and become valued officers throughout their careers.

A qualitative approach needs to be adopted to target the right people in the right areas. Methods of recruitment need to be reviewed and assessed to ascertain if they are still fit for purpose. Those such as canvassing places of worship, community halls, leafleting or conducting short-term recruitment drives are more often than not ineffective.

New and innovative approaches need to be adopted to highlight and attract talented individuals from the wider job market. This can be achieved by emphasising the unique nature of policing, and highlighting the diversity of career opportunities through promotion and specialisations.

Longer-term, sustainable recruitment strategies need to be imbedded into workforce planning to ensure talented members of the public are encouraged to join the service when the application process is 'live'. This avoids short-term measures that do not increase diversity in the police service.





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2 Existing legislation and considerations

2.1 Introduction

This section details the current legislation and considerations for the use of positive action and the relevant provisions of the Equality Act 2010. It also explains the differences between positive action, positive discrimination and genuine occupational requirements. This information has been sourced from the Equality Act 2010 and the Equality and Human Rights Commission.

Readers should ensure that they read the considerations alongside the most recent version of the [Equality Act 2010](#).

2.2 Equality Act 2010

The Equality Act 2010 is the main piece of equality legislation in England, Wales and Scotland that deals with positive action. It defines and sets out:

- the protected characteristics
- discrimination
- prohibited acts.

It also provides for general and specific duties for authorities and bodies carrying out public functions. It makes provisions for positive action (sections 158 and 159) and for genuine occupational requirements (Schedule 9).

2.3 Public sector equality duty

The public sector equality duty (PSED) came into force in April 2011 across England, Wales and Scotland. The general equality duty is set out in section 149 of the Act and the specific duties are imposed by secondary legislation. The specific duties came into law on 10 September 2011 in England, 6 April 2011 in Wales and 27 May 2012 in Scotland.





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In summary, section 149 of the Act requires public authorities, including the police service, when exercising their functions to have due regard to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The Act explains that having due regard for advancing equality involves:

- removing or minimising disadvantages experienced by people which are connected to their protected characteristics
- taking steps to meet the needs of people from protected groups where these are different from the needs of other people
- encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.

The Act states that meeting different needs involves taking steps to take account of a person's disabilities. It describes fostering good relations as tackling prejudice and promoting understanding between people from different groups. It states that compliance with the duty may involve treating some people more favourably than others.

Public authorities also need to have due regard to the need to eliminate unlawful discrimination against someone because of their marriage or civil partnership status. This means that the first requirement of the duty applies to this characteristic but that the other aspects (advancing equality and fostering good relations) do not apply.





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2.4 Proportionality, objective justification and due regard

The general equality duty requires public authorities when exercising their functions to have due regard to the need to eliminate discrimination, advance equality of opportunity, and foster good relations. To do this, it is necessary that organisations understand the potential effects of their activities on different groups. Where these effects are not immediately apparent, it may be necessary to carry out some form of assessment or analysis in order to understand them, eg, monitoring questionnaires or equality impact assessments.

In particular, decision makers need to:

- be aware of their responsibilities under the Act
- make sure that they have adequate evidence from consultation, if appropriate, to enable them to understand the potential effects of their decisions on different people covered by the Act
- consciously and actively consider relevant matters, in such a way that this influences decision making
- do this before and at the time a decision is made, not after the event
- be aware that the duties under the Act cannot be delegated to third parties who are carrying out functions on their behalf.

In taking a positive action measure, police forces need to demonstrate that they have done so in order to address under-representation and to increase participation in an activity (such as recruitment) by those who share a protected characteristic.

The steps and initiatives taken should be recorded, highlighting the measures necessary in trying to achieve an aim of improving officer numbers or progression from under-represented groups against the status quo.

By demonstrating that proportionate measures have been objectively justified, the police will be able to withstand scrutiny when positive action initiatives are challenged.





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2.5 Protected characteristics

The Equality Act 2010 establishes a number of characteristics on which it is unlawful to discriminate. These are known as protected characteristics, and are set out in Part 2, Chapter 1 of the Act (except for the characteristic of pregnancy and maternity, which is covered under sections 17 and 18).

The protected characteristics are:

- age
- disability
- gender reassignment
- marriage and civil partnership
- race
- religion or belief
- sex
- sexual orientation
- pregnancy and maternity.

Age

Section 5 of the Act protects against discrimination because of a person's age or their membership of a particular age group, however, people under 18 are not protected in relation to the sphere of goods, facilities, services and public functions. People over the age of 65 are also not being protected in the employment sphere.

An age group means a group of people of the same age or people in a particular age range. This can be wide, for example, a person who is 25 may fall into any of the following groups:

- 25 year olds
- young adults
- people in their 20s, over 20s, or under 30s.

Different treatment because of age will not amount to unlawful direct or indirect discrimination if it can be justified as a 'proportionate means of meeting a legitimate aim'.

Disability

Section 6 of the Act provides a person has a disability if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.





Certain conditions such as cancer, HIV infection and multiple sclerosis are automatically treated as disabilities in their own right, and are not required to meet the criteria above.

Impairment is long term if it has lasted or is likely to last for 12 months, or is likely to last for the lifetime of the person affected.

A substantial adverse effect is something which is more than a minor or trivial effect. It may not directly stop the person from carrying out normal day-to-day activities, but it may make the activity more than usually difficult.

Normal day-to-day activities are no longer defined by legislation, but generally mean activities carried out by most people on a regular or infrequent basis, such as reading a book, using a telephone, walking, cooking and using public transport.

Gender reassignment

Section 7 of the Act provides that a person has the protected characteristic of gender reassignment if they are proposing to undergo, are undergoing or have undergone a process or part of a process for the purpose of reassigning their sex by changing physiological or other attributes of sex.

The Act does not require a person to be under medical supervision to be protected. Protection extends to people in a range of situations, for example, those who have fully transitioned to their preferred gender, those who have started the process of reassignment, those who have commenced the process but decided to stop it, those who have expressed an intention to reassign their gender, those who decide to adopt the identity of the opposite sex by dressing in a different way but have not been reassigned.

Section 16 of the Act provides that it is unlawful to treat a person less favourably for being absent from work because they are proposing to undergo, or are undergoing or have undergone gender reassignment than they would be treated if they were absent due to sickness or injury.

Marriage and civil partnership

Section 8 of the Act covers this protected characteristic. A person must be married or in a civil partnership to be protected under the Act. Single people are not protected, for example: a person who is engaged to be married is not yet married and, therefore, does not share this protected characteristic. A divorcee or a person whose civil partnership has been dissolved is not married or in a civil partnership and, therefore, does not share this protected characteristic.





Race

Under section 9 of the Act, race includes colour, nationality, and ethnic or national origins. Ethnic origin relates to an ethnic group as a distinct and separate community, having the characteristics of a long shared history and a cultural tradition of its own. Other characteristics may be present, including a common religion, language, literature, geographical origin, or the perception of being a minority or oppressed group. Some religious groups, for example, Sikhs and Jews, are also recognised in law as belonging to ethnic groups.

The concept of national origin describes a person's connection with a nation by birth, whereas nationality is concerned with membership of a nation through citizenship.

People who share the same colour, nationality, or ethnic or national origins are known as a racial group. A racial group can itself consist of two or more distinct racial groups, for example, 'black Britons', who are both black and who are British citizens.

Religion or belief

Section 10 of the Act provides that religion means any religion. People who lack a religion or belief are also protected, meaning Atheists benefit from protection of the Act.

A religion or belief does not have to be well known or mainstream. There should, however, be a clear structure and belief system, collective acts of worship, and a profound belief affecting the way of life. The definition can include a specific denomination, branch or sect within a religion.

Belief, means any religious or philosophical belief, or a lack of belief.

To be considered a philosophical belief, the belief must be a weighty and substantial aspect of human life and behaviour, and must attain a certain level of cogency, seriousness, cohesion and importance. It must be genuinely held, and worthy of respect in a democratic society. There should be no incompatibility with human dignity, or conflict with the fundamental rights of others.

Sex

This is covered by section 11 of the Act. The protected characteristic of sex applies to both men and women of any age, and so includes boys and girls.

Sexual orientation

Section 12 of the Act provides that sexual orientation means a person's sexual orientation towards persons of the same sex, persons of the opposite sex, or persons of either sex.





Sexual orientation relates not only to the person's behaviour, but also to their sexual attraction. The Act also covers discrimination based on manifestation of sexual orientation, and could include discrimination based on a person's appearance, the people they associate with, or places they like to visit.

Pregnancy and maternity

Discrimination on the grounds of pregnancy and maternity is a form of prohibited conduct under the Act. Section 17 covers non-work cases (services, public functions, premises, education and associations) and section 18 covers work cases.

Pregnancy means the condition of being pregnant or expecting a baby (adoption). Maternity refers to the period after the birth, and in the context of work is linked to maternity leave. In non-work cases, protection against maternity discrimination is for 26 weeks after giving birth, and this includes treating a woman unfavourably because she is breastfeeding.

2.6 Prohibited conduct

Part 2 of the Equality Act 2010 sets out the principal types of unlawful discrimination, otherwise known as prohibited conduct.

Harassment

Section 26(1) protects against unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

The Act also prohibits conduct which is:

- unwanted and of a sexual nature and which amounts to harassment (as per section 26(1)) and
- unwanted and of a sexual nature or that is related to gender reassignment or sex, and which amounts to harassment and because of a person's rejection of or submission to the conduct, they are treated less favourably. See sections 26(2) and 26(3) of the Act.

An employer will be liable for harassment if they fail to take reasonably practicable steps to prevent third parties from repeatedly harassing an employee.

Victimisation

The Equality Act 2010 affords protection from victimisation to people who exercise their rights under the Act, or who assist others to do so.





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Victimisation occurs where a person subjects another to detriment because they believe that the person has done, or intends to do, one of the protected acts listed in section 27 of the Act, such as bringing proceedings under the Act, giving evidence, or making an allegation that a person has contravened the Act.

Direct discrimination

Section 13(1) of the Equality Act 2010 provides that a person (A) discriminates against another (B) if, because of a protected characteristic, (A) treats (B) less favourably than (A) treats or would treat others.

The treatment of the person must be different from that of another person (referred to as a comparator), less favourable than that applied to the comparator, and because of a protected characteristic.

Justification of direct discrimination is not permitted, except where the less favourable treatment is because of age under section 13(2).

Associative discrimination

This occurs where there is less favourable treatment of a person because that person is associated with a protected characteristic, for example, the person's partner or child has a protected characteristic, or the person carries out work related to a protected characteristic.

Perceptive discrimination

This occurs where the less favourable treatment is because of a person's perceived protected characteristic. The person does not actually need to possess the relevant protected characteristic and the 'because of' formulation is wide enough to allow claims for direct discrimination even where those perceptions are incorrect.

Indirect discrimination

Section 19 of the Act provides that indirect discrimination occurs where a provision, criterion or practice is applied which places people who share a protected characteristic at a particular disadvantage, and the application of this provision, criterion or practice cannot be justified as a proportionate means of achieving a legitimate aim.

This aims to combat practices which appear to be neutral at face value, but which may in fact have a disproportionate and adverse effect on certain groups.





Discrimination arising from disability

This type of discrimination is based on unfavourable treatment of a disabled person not because of the disability itself, but because of something arising in consequence of the disability, which cannot be shown as being a proportionate means of achieving a legitimate aim. This does not require a comparison of the treatment between the disabled person and the treatment of another. The key concept is whether the disabled person is subjected to any detriment.

Pregnancy and maternity discrimination

This is excluded from the definition of direct sex discrimination, and dealt with under separate provisions.

Duty to make reasonable adjustments

Section 20 of the Act states that those subject to the Act's provisions must comply with three requirements:

- where a provision, criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with non-disabled people, to take reasonable steps to avoid the disadvantage
- where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with non-disabled people, to take reasonable steps to avoid the disadvantage
- to take reasonable steps to provide auxiliary aids and services where a disabled person would otherwise be at a substantial disadvantage in relation to a relevant matter in comparison with non-disabled people.

2.7 Positive action

Any use of positive action is entirely voluntary – police forces are not compelled to use it. Employers can take positive action when they reasonably think that people sharing a protected characteristic suffer a disadvantage connected to the characteristic, or are under-represented in an activity.

The Equality Act 2010 contains provisions which can allow preferential treatment where a person reasonably thinks that:

- (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic
- (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
- (c) participation in an activity by persons who share a protected characteristic is disproportionately low.





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Positive action does not mean people will be employed or promoted simply because they share a protected characteristic. Rather it aims to encourage and assist people from disproportionately under-represented groups in order to help them overcome disadvantages associated with the protected characteristic when competing with other applicants, or to enable them to participate in the activity.

Positive action creates a level playing field to enable people to compete on equal terms and promote equality of opportunity. This ensures that all applicants are treated in an equal way or treated differently, depending on their needs, to preserve equal treatment and recruitment based on merit.

The general positive action provisions are found in section 158 of the Act, but these provisions do not apply where section 159 of the Act applies. Section 159 of the Act permits positive action in recruitment or promotion.

2.8 Section 158 Equality Act

Action prior to selection for recruitment or promotion

Section 158 of the Act allows action to be taken which is a proportionate means of achieving the aim of:

- (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage
- (b) meeting those needs, or
- (c) enabling or encouraging persons who share the protected characteristic to participate in that activity.

In recruitment, the Equality Act 2010 allows positive action **before or at the application stage**. The steps could include encouraging particular groups to apply, or helping people who share particular protected characteristics to perform to the best of their ability (for example, by giving training or support not available to other applicants before the actual official application or recruitment phase).





Any action taken must be a proportionate means of achieving the aim of:

- enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage
- meeting needs they have that are different from the needs of persons who do not share it, or
- participating in an activity in which the employer believes they are under-represented.

Example: a police force has a disproportionate under-representation of staff from ethnic minority backgrounds in a department for which a role is being advertised. As part of its recruitment activities, the police force states in its advertisements that applications from individuals from ethnic minority backgrounds groups are particularly welcomed.

Example: a police force with a disproportionate under-representation of staff from ethnic minority backgrounds targets their recruitment campaigns in specific media which generally attract readers from a particular minority ethnic group.

2.9 Section 159 Equality Act

Section 159 of the Equality Act 2010 applies specifically in a work context and after 2010. It allows employers to use positive action in recruitment and promotion.

Section 159(3) states that an employer is not prohibited from treating a person more favourably than another because they have a protected characteristic which the other person does not have.

Section 159(2) states, however, that favourable treatment has to have an aim of enabling or encouraging persons who share a protected characteristic to overcome or minimise the disadvantage or to participate in that activity.

The section does not allow employers to have a policy or practice of automatically treating people who share a protected characteristic more favorably than those who do not have it: each case must be considered on a **case-by-case** basis and its merits.

Example: a sexual offences unit that currently has only female officers and support staff could use positive action to recruit a male candidate who is as qualified, in preference to a female candidate to address the disproportionate under-representation of men in the unit.





Even if employers choose to use positive action, all recruitment or promotion must still be based on the individuals being **'as qualified as or of equal merit'**. According to the explanatory notes to section 159 of the Act, the question of whether one person is as qualified as another is not a matter only of academic qualification assessment but a judgement based on the criteria on who is best for the job, which could include suitability, competence and professional performance.

Example: a police force which has disproportionately low numbers of officers and staff from ethnic minority backgrounds identifies a number of candidates who are as qualified as each other for recruitment to a post. This includes a candidate from one particular under-represented ethnic minority background. It would be lawful to give preferential treatment to that candidate by appointing them over other candidates, provided they are as qualified as other candidates in the pool for selection.

2.10 How to identify if a group is under-represented or disadvantaged within your organisation

In order to identify if a group is under-represented or disadvantaged within your organisation or area of work, you must reasonably think the participation in an activity by those persons who share the protected characteristic is disproportionately low or that they experience a disadvantage connected with that protected characteristic. You might not know this where, for example, officers do not disclose their religion or sexual orientation or if an officer or member of police staff is disabled and they choose not to share that information.

It is necessary to have some level of information which identifies the under-representation or disproportionately low numbers of those sharing protected characteristics to demonstrate that your belief is reasonable. This does not require exhaustive data or records to be kept on staffing make-up or numbers. The most practical way forward is to ensure that assessments are made using records that are as up to date and reflective of your workforce as possible.

2.11 Is it necessary for a police force to take positive action?

Police forces do not have to take positive action and cannot be compelled to do so. However, police forces have a public sector equality duty to act and take action to address under-representation, and this may be achieved by taking positive action measures. In addition, positive action can allow police forces to better understand the communities they serve.





2.12 When can a police force use positive action?

There are explanatory notes to the Equality Act 2010. They state that the extent to which it is proportionate to take positive action measures which may result in people not having the relevant characteristic being treated less favourably will depend, among other things on the:

- seriousness of the relevant disadvantage
- extremity of need or under-representation and the availability of other means of countering them. For further information see legislation.gov.

A police force can, therefore, consider taking positive action measures, for example, where it is identified that there is an under-representation by a protected group or where such groups experience a disadvantage connected with the protected characteristic. They cannot, however, take such action simply to favour one group over another where no under-representation or disadvantage exists.

Example: a domestic violence unit could not use positive action to recruit more female police officers where women already make up 80 per cent of the department, since the steps taken are not to overcome a disadvantage associated with a protected characteristic or under-representation and would amount to unlawful direct discrimination. The department could, however, consider using positive action to allow a preference to be given to male officers when recruiting new roles as they are disproportionately under-represented in the department and this action would be a proportionate means of addressing the under-representation.

A police force recruitment process must not have a blanket policy or practice of automatically treating people who share a protected characteristic more favourably than those who do not share that characteristic. The department must still appoint the best person for the job, even if they do not share the particular protected characteristic being targeted by the positive action.

Example: a firearms department identifies from its monitoring data that women and BME groups are under-represented as firearms officers. During its next recruitment campaign, the department makes it clear that it welcomes applications from women and those from BME groups. The department holds an open day for potential officers where they can meet candidates. However, the department must not guarantee that all female or BME candidates will get through all the initial stages of the application process.





2.13 'As qualified as or of equal merit'

As stated in the explanatory notes on section 159, the question of whether one person is as qualified as another is not a matter only of academic qualification, but rather a judgement based on the criteria the employer uses to establish who is best for the job, which could include matters such as suitability, competence and professional performance. For further information see legislation.gov.

The Equality Act 2010 talks of candidates being as qualified as and using the protected characteristic as a **tie-breaker** after having taken into account: 'a candidate's overall ability and professional experience together with any qualifications as well as any other qualities required to carry out the role.'

Where two candidates have equal experience or equal qualifications and are, therefore, equally qualified, which may apply to officers in senior ranks, candidates will need to be measured taking into account the different but complementary skills they also possess. It is important when assessing candidates that the process is conducted as fairly and as transparently as possible.

2.14 Using the tie-breaker situation

Police forces can also use positive action in deciding to appoint an applicant or candidate from a group which shares a protected characteristic if they reasonably believe that the group is disadvantaged or under-represented in the workforce or if their participation in an activity is disproportionately low.

Example: a front desk enquiry office at a local police station offering advice has no Muslim employees, even though it is located in an area where there is a high Muslim population. When a vacancy arises, there are two candidates of equal merit. One candidate is Muslim and the other is not and they are as qualified as one another to be appointed to the role. The police force could choose to give a preference to the Muslim candidate under the positive action provisions.

The police force must not, however, have a general policy of treating people with the relevant protected characteristic more favourably in connection with recruitment or promotion.





2.15 Positive action in contrast to positive discrimination

As a general rule, positive discrimination is prohibited in employment. In contrast, positive action is permitted and may even be required in certain circumstances.

Positive discrimination is treating a person more favourably solely because they have a relevant protected characteristic. Positive discrimination is unlawful in Great Britain, but there are some limited exceptions to this rule. For example, it is not unlawful for an employer to treat a disabled person more favourably in comparison with a non-disabled person (see section 13(3) of the Act).

Positive action, on the other hand, is lawful as are policies that attempt to promote equal opportunity by taking into account protected characteristics in order to positively improve outcomes for those who are disproportionately represented. The focus of positive action might be to redress systemic, historical or institutional discrimination or to promote diversity in business and public sector organisations. See House of Commons Library, Standard Note SN/BT/6093 '[the Equality Act 2010 and Positive Action](#)', 24 October 2011.

2.16 Genuine occupational requirements

In addition, there are situations where, if it is a **genuine occupational requirement** for somebody in the post to be of a particular sex, race, religion or belief, age, or sexual orientation, something that would otherwise be unlawful discrimination is lawful.

Part 1 of Schedule 9 to the Equality Act 2010 states that if, bearing in mind the nature and context of the work, there is an occupational requirement to have a particular protected characteristic and the application of that requirement is a proportionate means of achieving a legitimate aim, a person would not be unlawfully discriminating under the Act against a person who does not possess that particular protected characteristic.

Example: a domestic violence unit is recruiting a police constable to the team and the inspector managing the team wishes to appoint a female officer. They consider this to be a genuine occupational requirement for the role because the majority of victims that the unit deals with are women. Applying this occupational requirement is lawful since the essential nature of the job calls for a specific characteristic. Such action is a proportionate means of achieving a legitimate aim, namely to provide an approachable service to victims who are mainly women. The use of a genuine occupational requirement, provides a defence to an act which would otherwise be unlawful.





3 Advice and considerations

3.1 Introduction

To assist police forces and stakeholders in the use of positive action initiatives, the following advice and considerations have been obtained from legal counsel covering various scenarios concerning attracting candidates, recruitment and progression of officers. The advice uses the positive action provisions contained in sections 158 and 159 of the Equality Act 2010 (EqA). (These provisions have been highlighted in **2 Existing legislation and considerations.**)

This summary has been provided to assist understanding of this document. It should, however, be read in conjunction with the full advice which can be obtained from police human resources departments. Where further information is required in relation to the provisions of the Act, officers and staff should contact their force solicitor or legal department.

3.2 Recruitment and attraction advice and considerations

Is there any particular evidence that a chief officer of police should obtain in order to reach a reasonable view on whether a particular group is experiencing a disadvantage or is under-represented?

What you can do

The requirement for both sections 158 and 159 to apply is for the decision maker to reasonably think that a disadvantage, special need or under-representation exists. The annual statistics for the police workforce in England and Wales are sufficient to show whether BME candidates generally suffer a disadvantage in recruitment or promotion.

Would it be possible to offer a cash bounty to serving police officers for putting forward minority ethnic candidates who were then successfully recruited?

What you can do

The answer is yes. The bounty would be paid to serving police officers, not on the basis of their own race or ethnic origin, but on the basis of the race or ethnic origin of the successful candidates. On that basis, there would be no direct discrimination against non-BME police officers, since such officers would equally be able to propose BME candidates for the police service.





Would it be lawful to make knowledge of a language prevalent in the police area, or knowledge of a particular culture or religion, an occupational requirement in a recruitment exercise (the indirect effect being to favour candidates of particular minority ethnic groups)?

What you cannot do

A requirement that a candidate for recruitment have particular language skills, such as knowledge of Urdu, would be likely to be indirectly discriminatory on grounds of race in respect of those not belonging to the race or ethnic group whose language it is – in the case of Urdu, those of Pakistani or Northern Indian origin.

Rather than making knowledge of a language an absolute requirement, would it be lawful to advertise it as desirable and use it as a basis for fast tracking candidates through the early sifting stages of the recruitment process?

What you need to consider

It would be lawful for a police force to design its scoring system for candidates for recruitment so as to reward candidates with particular language skills which are relevant to the community within the force area.

More points could be awarded for languages in respect of which there was a particular under-representation of officers speaking that particular language (eg, a force could decide to award one extra point for candidates speaking Polish (if there were already a number of Polish speaking officers on the force), but say five extra points for Somali speaking officers (if there were relatively few Somali speaking officers and a large Somali speaking community in the force area).

A number of forces have restricted applications to candidates resident in the force area, with the aim that the force should reflect [the] local population – presumably this approach is lawful?

What you need to consider

The full advice and considerations need to be read as there are cases for both restricting applications within a police force area and not. The overall diversity of a police force's population needs to be taken into account to justify proportionality.





There is an accredited Certificate of Knowledge of Policing (CKP) which, although not a requirement for appointment as a police officer, provides the holder with an advantage in the recruitment process and during training. Would it be lawful to offer minority ethnic candidates interest-free loans to undertake the CKP course?

What you can do

This would be more likely than not to be lawful, assuming that this is in reality an advantage given to BME candidates in their training rather than in their recruitment per se. (Please refer to full advice and considerations.)

Would it be safer to offer such loans on the basis of socio-economic background or residence in a particular area, rather than ethnicity understanding that these criteria would indirectly favour minority ethnic candidates?

What you cannot do

It would be better to base the loans (or bursaries) directly on membership of the targeted BME groups. That is because section 158(2) states that an action which would otherwise amount to direct or indirect discrimination is lawful, but only if it is a proportionate means of enabling or encouraging persons who share the protected characteristic to overcome or minimise the disadvantages attaching to that characteristic (here, race) or of encouraging or enabling them to participate in the relevant activity (here, service in the police force).

Currently forces use a variety of mentoring and assistance measures to support minority ethnic candidates prior to and during the selection process. Would it be lawful to work with education providers such as Colleges of Further Education to give further support, for example, by encouraging institutions to offer the CKP course?

What you can do

This would be a lawful measure protected under section 158(2) Equality Act 2010. Paragraph 12.24 of the Equality Act 2010 Statutory Code of Practice states that providing mentoring, as well as various forms of outreach work and networking opportunities, are all proportionate means of achieving the aim of enabling or encouraging participation.





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How can the tie-breaker approach be used lawfully to favour minority ethnic candidates in a recruitment exercise involving large numbers of candidates? For example, if candidates are divided into bands based on their percentage score in an assessment test, how narrow would [the] bands need to be, for all candidates in a particular band to be regarded as of equal merit so that minority ethnic candidates within the band could be favoured?

What you cannot do

The starting point is that it is unlawful to apply a tie-breaker in favour of a disadvantaged group to all candidates with a sufficient level of qualification – so that a lower qualified member of the disadvantaged group is selected over a more qualified member of the advantaged group simply because of their membership of the disadvantaged group.

See the Court of Justice's judgment in *Abrahamsson v Fogelqvist* Case C-407/98 [2000] IRLR 732 at paragraphs 45 and 52–56). (A summary of the judgment is available from the [Equal Rights Trust](#).)

The Court held that such a selection method was disproportionate, as it ignored the specific personal situations of all the candidates and it amounted to selection which was – ultimately based on the mere fact of belonging to the under-represented sex.

What you can do

The tie-breaker can only be applied where both candidates are equally qualified – and the candidates are the subject of an objective assessment which takes into account the specific personal circumstances of all candidates (see the Court of Justice's judgment in the *Badeck* case at paragraph 23).

Whether the proposal is lawful depends on what equal merit means in this context. There is some flexibility here, Advocate General Saggio pointed out at paragraph 37 of his Opinion in *Badeck* and at paragraph 28 of his Opinion in *Abrahamsson* that a requirement of absolute equality between two candidates before the tie-breaker could be used was a fiction in that it is impossible or extremely difficult for two or more candidates to be on an equal footing.





In the context of a large-scale recruitment exercise where a police force intended to make available a limited number of applicant information packs on a 'first come, first served basis' to those who made a telephone request within a limited time period, would it be lawful to reserve a proportion of the information packs for previously identified minority ethnic candidates?

What you cannot do

Such a measure would not be lawful.

Since the proposed measure is positive action in respect of recruitment, it comes within the scope of section 159 Equality Act 2010. However, it falls foul of section 159(4) (b) Equality Act 2010, since it amounts to a policy of treating BME candidates more favourably in connection with recruitment than non-BME candidates.

Are there other lawful measures that could be taken in the recruitment context, in reliance on the positive action provisions?

What you can do

The Equality Act, Statutory Code of Practice indicates at paragraph 12.17 that it would be lawful to identify through monitoring, consultation or a review of policies and practices any possible causes of the underrepresentation of particular groups and then:

- targeting advertising at specific disadvantaged groups, for example, advertising jobs in media outlets which are likely to be accessed by the target group
- making a statement in recruitment advertisements that the employer welcomes applications from the target group
- providing opportunities exclusively to the target group to learn more about particular types of work opportunities with the employer, for example, internships or open days
- providing training opportunities in work areas or sectors for the target group, for example, work placements.





Would it be lawful to favour minority ethnic candidates where there are opportunities for acting up in a higher rank, which provide an opportunity to demonstrate competency and thus improve the prospects of achieving promotion (bearing in mind that officers who are temporarily promoted in this way also receive an immediate financial advantage in that they are paid at the rate of the higher rank)?

What you need to consider

Whether it is lawful depends on whether acting up is properly to be regarded as a form of temporary promotion, in which case it is not lawful, or whether it is to be regarded as a form of training, in which case it is likely to be lawful.

In principle, to favour BME candidates in acting up would be direct discrimination on grounds of race. Therefore, it could only be lawful if the positive action provisions in sections 158 and 159 EqA apply (since direct discrimination cannot be objectively justified).

What you cannot do

However, if the suggested measure falls within section 159 Equality Act 2010, as the favouring of BME candidates 'in connection with promotion', it would fall outside of the scope of permitted positive action, because the force in question would have a policy of treating persons from the relevant racial group more favourably (see section 159(4)(b)).

What you can do

On the other hand, if the measure is regarded, not as a measure directly related to promotion, but as a measure related to training, it would fall within section 158 EqA. Training measures which are reserved for members of a particular racial or ethnic group can be justified under section 158 Equality Act 2010 if they are proportionate. The advice is not to provide extra remuneration for acting up in a higher rank. (Please refer to full advice and considerations for further understanding.)

3.3 Development and progression advice and considerations

Would it be lawful to run a selection course for a specialist role that was limited to female candidates?





What you can do

Yes. This would be lawful provided that all of the candidates were assessed together, so that there was no expectation that some of the female candidates on the female only course would be appointed – and that the same selection criteria were applied to female candidates as would be applied to male candidates.

What you cannot do

Otherwise, the course would risk unlawfully favouring lower qualified female candidates over higher qualified male candidates in access to the relevant specialist function. That would be direct discrimination on grounds of sex, which would not be protected by section 159 Equality Act 2010, because it would amount to a policy of treating women more favourably in connection with recruitment or promotion.

Would it be safer to restrict such favourable treatment to development opportunities such as secondment and transfers in the same rank, rather than on temporary promotion?

What you can do

Yes. It would be unlikely that favourable treatment in development opportunities such as secondment and transfers in the same rank would be regarded as more favourable treatment in connection with ... promotion.

Therefore, they would only need to meet the test of proportionality under section 158 Equality Act 2010 and not the strict requirement that the candidates be equally qualified before the tie breaker could be relied upon under section 159 Equality Act 2010. Promoting the development of an under-represented group through secondment and transfers in the same rank would be likely to be justifiable as proportionate training measures.

Would it be lawful to pay for all minority ethnic recruits to undertake the CKP course as part of their initial training, thus assisting in their professional development and increasing their promotion prospects? (Currently recruits must pay for the course themselves, although they may be offered an interest free loan.)

What you can do

Paying for BME recruits to undertake the CKP course would not be more favourable treatment in connection with promotion.





It would be a proportionate training measure which was lawful under section 158 Equality Act 2010.

In the context of the National Police Promotion Framework (NPPF) work-based assessment system for promotion to sergeant, would any of the below proposals for more favourable treatment of female and minority ethnic candidates be lawful?

What you cannot do

Female and BME candidates who have passed OSPRE Part 1 (which is a qualification obtained following a multiple choice exam) automatically undertake work-based assessment (WBA), while male non-BME candidates have to undertake a separate pass/fail selection test in order to secure a place.

What you cannot do

Have an assessment process to select candidates to undertake WBA, from among those who have passed OSPRE Part 1. Female and minority ethnic candidates are guaranteed a place at the assessment centre, but only those white male candidates selected in a paper-based sift process secure a place.

What you cannot do

Conduct interviews to select candidates to undertake the WBA from among those who have passed OSPRE Part 1. Female and BME candidates are interviewed centrally within the force, while male non-BME candidates must first secure the support of their line manager.

Are there other lawful measures that could be taken in the promotion context, in reliance on the positive action provisions?

What you can do

It is lawful to reserve places on training and development courses for BME officers or to have a wholly separate training/development scheme for BME officers, provided that this is proportionate. As explained, this depends largely on the extent to which BME officers are under-represented in the relevant force and, in particular, at the higher ranks of that force.

What you can do

As far as promotion itself is concerned, to advantage BME candidates is only lawful insofar as the positive action falls within section 159 Equality Act 2010. Again, as already explained, such positive action has to be by way of a tie-breaker on a case-by-case basis.





Would it be lawful to use criteria such as knowledge of a particular language, culture or religion (which would favour candidates from particular minority ethnic groups) as a basis for retaining individuals when reducing the workforce?

Currently, there is no provision for police officers to be dismissed on grounds of redundancy. This was considered by the recent Winsor Report, although the Home Secretary has decided not to pursue this proposal at this time. Instead, police officers can be required to retire if their retention would not be in the general interests of efficiency, provided that they have achieved service that would entitle them to a pension of two-thirds average pensionable pay (see Regulation A19 of the Police Pensions Regulations 1987 [SI 1987/257]).

What you need to consider

From December 2012, Regulation A19 (3) states that in making a determination as to whether to compulsorily retire an officer – a police pension authority shall take account of:

- a) the desirability of retaining in the force regular Policemen who possess skills or knowledge of particular importance
- b) the standard or level to which the regular Policeman in question has performed the duties of his rank or role.

On that basis, I think it would be lawful at least to have regard in individual cases to criteria such as knowledge of a particular language, culture or religion when determining whether an officer should be compulsorily retired.

What you cannot do

Have a blanket policy of compulsorily retiring officers without knowledge of particular languages, cultures or religions, but not retiring officers with such knowledge is capable of being indirectly discriminatory on grounds of race to the extent that certain racial and ethnic groups are more likely to be familiar with certain languages, cultures or religions. Section 39(2)(c) Equality Act 2010 states that an employer must not discriminate against an employee by dismissing him or her. If the criteria for dismissal are indirectly discriminatory, then they will have to be justified as a proportionate means of achieving a legitimate aim.

In order to do this, the relevant force will have to consider to what extent it is necessary and appropriate to take into account knowledge of the relevant languages, cultures or religions when deciding which officers to compulsorily retire – ie, to look at each individual case and to determine whether the particular knowledge of the relevant officer when matched with the needs of the force means that he or she should not be compulsorily retired.





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3.4 Other advice

Declaration of ethnicity

Would it be lawful to make it mandatory for candidates for recruitment or promotion to declare their ethnicity (in that their application would be rejected if they failed to do so)?

What you need to consider

There is nothing which would make it unlawful to make it mandatory to require candidates to declare their ethnicity, although relevant guidance indicates that persuasion rather than compulsion should be used to obtain monitoring information on ethnicity.

Section 60 Equality Act 2010 requires a potential employer not to ask about health or disability before offering work to a potential recruit or putting them into a pool of potential recruits. There is no similar provision regarding race or ethnicity.

To require a person to answer a question about their race or ethnicity is not directly discriminatory on grounds of race. It is not less favourable treatment because of race or ethnicity insofar as all candidates are required to answer the question.

It would only be indirectly discriminatory if it put certain candidates from particular racial or ethnic groups at a – particular disadvantage. It is suggested that it is unlikely that it would be found to put them at a particular disadvantage, provided that it was clearly explained to candidates that the information was to be used for monitoring purposes only (and not for the purposes of selection).

It is also suggested that a police force would be able to argue that it was justified in requiring the information as a proportionate means of achieving a legitimate aim of obtaining accurate statistics pursuant to the public sector equality duty.





Are there other lawful means by which candidates could be encouraged to declare their ethnicity?

What you need to consider

The Civil Service Best Practice Guidance on [Monitoring Equality and Diversity in Employment](#) gives as a case study on page 7 an online system adopted by the Home Office under which staff could access their online payslips, but only if they had provided their diversity data.

The guidance states that, with the addition of a concerted information campaign, month on month, the department saw a significant increase in declaration until reaching 99% complete ethnicity data in March 2011. A similar scheme could be used to encourage existing officers to declare their ethnicity.

As far as candidates for recruitment are concerned, a possibility might be to allow candidates to check online to see how their application was progressing, provided that they provided full monitoring information.





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4 Police forces' case studies

4.1 Introduction

The following case studies of police forces conducting positive action initiatives should assist those looking to recruit or seeking ways of developing and progressing BME officers, staff and others who share protected characteristics.

The purpose of including these case studies is to signpost police forces, stakeholders or interested parties in contacting the relevant force for further assistance on these initiatives.

The case studies are, however, unique to the forces conducting them and take into consideration local circumstances. The measures are considered to be proportionate, justifiable and necessary for these local needs. The initiatives may not be suitable for other forces, which would need to consider their objective justifications for taking positive action. Appropriate legal advice should, therefore, be sought before considering any initiatives. See [police forces positive action case studies](#).





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5 External organisations' case studies

5.1 Introduction

The need to have a diverse workforce which represents society is also being pursued by other public sector organisations and external private companies.

Positive action initiatives under the Equality Act 2010 are being used by various organisations to recruit, retain and progress Black and Minority Ethnic staff and those with protected characteristics.

The purpose of including these case studies is to signpost police forces, stakeholders or interested parties in contacting the relevant organisations for further assistance on these initiatives.

The following case studies detail how other organisations have used positive action initiatives to recruit, retain and progress those under-represented groups. See [external organisations positive action case studies](#).





6 Reading list

- adviceguide.org.uk
- adviceguide.org.uk Equalities Act 2010
- auditcommission.gov.uk
- Blackstone's Guide to the Equality Act 2010, Second Edition. Oxford: Oxford University Press.
- campbellcollaboration.org
- campbellcollaboration.org NPIA progression through the police force
- civilservice.gov.uk
- equalityhumanrights.com guidance for workers
- equalityhumanrights.com equality act
- equalityhumanrights.com Triennial review
- ethnicity.ac.uk
- equality-online.org.uk
- equalrightstrust.org
- equalityhumanrights.com
- equalityhumanrights.com
- gov.uk Fire and Rescue service Equality and Diversity strategy
- gov.uk employers quick start guide
- gov.uk employers quick start guide to positive action in recruitment and promotion
- lawsociety.org.uk
- Lokahi.org.uk
- mfb.vic.gov.au
- shef.ac.uk
- timeshighereducation.co.uk
- thesquarewhole.co.uk
- thesquarewhole.co.uk Lifelong Learning UK

