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The *Sex Discrimination (Election Candidates)* Bill

[Bill 28 of 2001-02]

This Bill had its First Reading on 17 October 2001 and is due to have its Second Reading on 24 October 2001. Its aim is to enable a political party to take action to reduce inequality in the numbers of men and women selected as candidates. However, it does not require parties to do this if they do not wish to.

This follows the *Jepson* case in 1996 in which an employment tribunal found that the Labour Party's use of women only shortlists was a breach of the *Sex Discrimination Act 1975.*

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Summary of main points

The aim of the *Sex Discrimination (Election Candidates) Bill* is to enable political parties to take action to reduce inequality in the numbers of men and women selected as candidates. It does this by amending the *Sex Discrimination Act 1975.*

The Bill would not compel parties to take positive action to reduce inequalities if they do not wish to.

It follows the *Jepson* case in 1996 in which an employment tribunal found that the Labour Party's use of women only shortlists was a breach of the *Sex Discrimination Act 1975.*

Following *Jepson* UK employment tribunal cases to do with racial discrimination have lent weight to the view that selection of party candidates is subject to UK employment discrimination legislation.

Women are still under-represented in UK politics. The number of women MPs doubled at the 1997 election, but fell back slightly in 2001. 18% of MPs are women. The proportion is higher in the Scottish Parliament (37%), Welsh Assembly (42%), Local Authorities (27%) and the European Parliament (24%), but lower in the Northern Ireland Assembly (14%), and House of Lords (16%).

The success rate of women candidates has generally been lower than that of men, although this has changed significantly for Labour candidates since 1997.

Parties in the UK and in other countries have used various kinds of positive action to reduce inequality. These include: all-women shortlists; "twinning" of local parties, with one man and one woman selected; "zipping" where party lists alternate men and women; and balanced shortlists.

If the European Court of Justice were to regard selection of party candidates as an employment matter, then there are potential problems with EC law even if the UK law is changed. This point has never been explicitly tested. Political parties in many EU countries use positive action to redress inequalities between men and women.

Concern about EC law has reportedly prevented the Government from taking action to amend the *Sex Discrimination Act* before. However, there have been recent developments in the European Union, which have encouraged supporters of positive action.

The provisions of the Bill extend throughout the United Kingdom. Clause 1 extends to England, Scotland and Wales only, and Clause 2 makes equivalent provisions for Northern Ireland. There is a "sunset clause" which means the Act would expire at the end of 2015 unless an order is made and approved by both Houses

CONTENTS

I Introduction

The aim of the *Sex Discrimination (Election Candidates) Bill* is to allow political parties to take 'positive action' to reduce inequality in the numbers of men and women elected as candidates. There has been uncertainty for some years about the legal status of 'positive action' to assist the selection of women as candidates for major political parties. The term 'positive action' is used in a variety of ways, often in relation to employment law. It can mean the kind of positive measures such as women-only training courses and advertising only in women's magazines, which are allowed under the *Sex Discrimination Act 1975*,[1] to equip or encourage women to apply for jobs in areas where they are underrepresented. More broadly "positive action" covers any steps taken to improve the position of disadvantaged groups. It can range from taking steps to ensure there is no direct or indirect discrimination against the group, through outreach programmes designed to attract more applicants from the group, to setting quotas which reserve a certain proportion of jobs for the group. A textbook on discrimination law says that setting quotas:

> might be referred to as reverse discrimination, as it permits the hiring of a person with fewer qualifications for the position than an unsuccessful candidate, and it is clearly unlawful under English and European law.[2]

In the context of this paper, the term is used to refer to various kinds of quota systems used in the selection of candidates by political parties. These include: all-women shortlists; "twinning" of local parties, with one man and one woman selected; "zipping" where party lists alternate men and women; and balanced shortlists. These are explained in more detail in section IV. The problem which has arisen, and which this Bill seeks to address, is the extent to which these practices are covered by anti-discrimination law.

II Women's representation in UK politics

UK political parties have adopted various kinds of quota schemes because women are still poorly represented in UK politics. Currently 18% of MPs are women. The proportion is higher in the Scottish Parliament,Welsh Assembly and European Parliament, but lower in the Northern Ireland Assembly, Local Authorities and House of Lords.

The table below shows the gender breakdown by party in the House of Commons on the basis of the June 2001 election. Also shown is the party/gender breakdown of the House of Lords, the Welsh Assembly, Scottish Parliament and Northern Ireland Assembly and UK Members of the European Parliament.

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1 Sections 47 and 48, *Sex Discrimination Act 1975*

2 Richard J Townshend-Smith *Discrimination Law: Text, Cases and Materials*, 1998, p 540

Representatives by gender

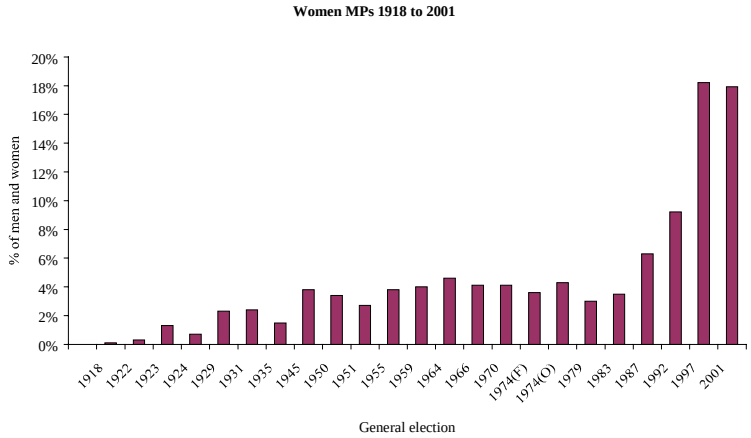
	Cons	Labour	LibDem	SNP	PC	Other	Total
Male							
House of Commons	152	315	47	4	4	18	540
House of Lords	198	155	52			189	594
Welsh Assembly	9	12	3		11		35
Scottish Parliament	15	28	15	20		3	81
Northern Ireland Assembly						93	93
European Parliament (UK Members)	33	20	6	2	1	4	66
Female							
House of Commons	14	95	5	1		3	118
House of Lords	34	45	15			23	117
Welsh Assembly		16	3		6		25
Scottish Parliament	3	28	2	15			48
Northern Ireland Assembly						15	15
European Parliament (UK Members)	3	10	5		1	2	21
% female							
House of Commons	8%	23%	10%	20%		14%	18%
House of Lords	15%	23%	22%			11%	16%
Welsh Assembly		57%	50%		35%		42%
Scottish Parliament	17%	50%	12%	43%			37%
Northern Ireland Assembly						14%	14%
European Parliament (UK Members)	8%	33%	45%		50%	33%	24%
Local Authorities (England & Wales)	26%	26%	34%		15%	22%	27%

Based on current membership; except House of Lords which is at 10 October 2001 and local authorities which is for 1997
"Other" includes the Speaker; Deputy Speakers are assigned to the party for which they contested the last election

Sources: House of Commons Library MP database
Survey of Local Authority Councillors in England and Wales in 1997, LGMB
House of Lords; Scottish Parliament; Welsh Assembly; Northern Ireland Assembly; European Parliament

Women are 51% of the adult UK population. Their proportion among representatives in Parliament and other elected bodies is generally well below this.

Since 1918, a grand total of 4,531 Members have served in the House of Commons. Of these, 252 (6%) have been women and 4,279 (94%) men. 161 (64%) of the women have been Labour MPs if this is defined as party of first election.



Until 1997 women had never been more than 10% of all MPs. Indeed, until the 1980s the proportion remained below 5%. The election of a record number of women in 1997 took the ratio to 18% and it stayed around this level in 2001.

The following table shows the number of women elected to Parliament at successive general elections since 1918:

1 Women elected at general elections 1918 to 2001

Election	Con	Lab	Lib	SDP	Other	Speaker	Total	% of all MPs
1918	-	-	-	-	1	-	**1**	0.1%
1922	1	-	1	-	-	-	**2**	0.3%
1923	3	3	2	-	-	-	**8**	1.3%
1924	3	1	-	-	-	-	**4**	0.7%
1929	3	9	1	-	1	-	**14**	2.3%
1931	13	-	1	-	1	-	**15**	2.4%
1935	6	1	1	-	1	-	**9**	1.5%
1945	1	21	1	-	1	-	**24**	3.8%
1950	6	14	1	-	-	-	**21**	3.4%
1951	6	11	-	-	-	-	**17**	2.7%
1955	10	14	-	-	-	-	**24**	3.8%
1959	12	13	-	-	-	-	**25**	4.0%
1964	11	18	-	-	-	-	**29**	4.6%
1966	7	19	-	-	-	-	**26**	4.1%
1970	15	10	-	-	1	-	**26**	4.1%
1974(F)	9	13	-	-	1	-	**23**	3.6%
1974(O)	7	18	-	-	2	-	**27**	4.3%
1979	8	11	-	-	-	-	**19**	3.0%
1983	13	10	-	-	-	-	**23**	3.5%
1987	17	21	1	1	1	-	**41**	6.3%
1992	20	37	2	-	1	-	**60**	9.2%
1997	13	101	3	-	2	1	**120**	18.2%
2001	14	95	5	-	4	-	**118**	17.9%

The election of two women at by-elections during the 1997 Parliament took the total to a record-ever 122 (18.5% of the total), although the number at the dissolution had returned to 120 following the retirement of the Speaker and the death of Audrey Wise.

III Women's political representation - international comparisons

The Inter-Parliamentary Union (IPU) compiles data for other countries. The IPU ranks countries according to the percentage of women in the lower or single House. Of 179 countries in the IPU listing the UK's 18% women puts it 39th. The Nordic countries and Netherlands head the ranking. The following table reproduces the IPU's ranking for the 20 countries with the highest percentages.[3]

[3] Situation reported as at 12 October 2001; the full listing for the most recent data appears at the following address: http://www.ipu.org/wmn-e/classif.htm.

Rank	Country	Lower or single House			
		Elections	Seats	Women	% Women
1	Sweden	09 1998	349	149	42.7
2	Denmark	03 1998	179	67	37.4
3	Finland	03 1999	200	73	36.5
4	Netherlands	05 1998	150	54	36.0
5	Norway	09 2001	165	59	35.8
6	Iceland	05 1999	63	22	34.9
7	Germany	09 1998	669	207	30.9
8	New Zealand	11 1999	120	37	30.8
9	Mozambique	12 1999	250	75	30.0
10	South Africa	06 1999	399	119	29.8
11	Spain	03 2000	350	99	28.3
12	Cuba	01 1998	601	166	27.6
13	Austria	10 1999	183	49	26.8
14	Grenada	01 1999	15	4	26.7
15	Argentina	10 1999	257	68	26.5
16	Bulgaria	06 2001	240	63	26.2
17	Turkmenistan	12 1999	50	13	26.0
=	Viet Nam	07 1997	450	117	26.0
19	Rwanda	11 1994	74	19	25.7
20	Namibia	11 1999	72	18	25.0

As a recent study from the Equal Opportunities Commission illustrates,[4] there appear to be two significant factors in determining the level of female representation in parliament: the type of electoral system in operation and the use of quotas in candidate selection.

IV Methods of 'positive action' used in candidate selection

Different types of systems have been proposed to redress the perceived imbalance in the representation of women in elective offices in the UK. These include:

- Women-only shortlists. The Labour Party has used these for Parliamentary candidate selection. Under the system, a proportion of local parties were required to shortlist only women candidates for selection. The mechanism was applied in half the 'winnable'[5] seats in 1993-96. A full list of the 35 women Labour Members elected from all-women shortlists is reproduced in Appendix 1.

4 *Women in Parliament: A Comparative Analysis,* EOC, August 2001

5 That is, Labour held and target marginals.

- 'Twinning' where two local parties select their candidates jointly, with a requirement that one man and one woman are selected. There are difficulties with this mechanism where there are too many incumbent members, but it proved effective for the Labour Party in the first elections to the Scottish Parliament, the National Assembly for Wales and the Greater London Assembly.

- 'Zipping', which can potentially be used in list type elections, such as the European Parliament or the regional element of the Scottish Parliament or National Assembly for Wales, where the members selecting the candidates on a list are required to alternate male and female candidates. The system is widely used in Europe, where proportional representation is normally used for elections, and the Liberal Democrats used 'zipping' for their selections in the European Parliament in 1999.

- Balancing under-representation through the use of lists. In the Assembly elections, Plaid Cyrmu agreed that all lists should be headed by women, since men had mostly been selected for constituency seats. Less formally, the Labour Party applied a similar system for the Greater London Assembly when the top two candidates on the party list were from ethnic minorities.[6]

- Balanced shortlists. A certain proportion of women are required to be present on a shortlist. In 2001 the Labour Party required that half the members for each shortlist be women. The Liberal Democrats used the same mechanism when selecting for constituency seats in Scotland and Wales for the 1999 Parliament and Assembly elections. The Conservatives have considered the use of such a mechanism, but have not put it into practice.[7] The main argument against its use for promoting women candidates is that it can be ineffective.

The following table illustrates positive action undertaken by major parties in the UK:[8]

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6 For details, see Appendix 1 *The Women's Representation Bill: Making it Happen* Meg Russell, Constitution Unit July 2001

7 William Hague expressed some interest in 1997. The new Conservative party leader, Iain Duncan Smith, has expressed interest in equally balanced shortlists. See *Times* 3 September 2001 'Duncan Smith offers hope for Tory women'

8 From *Women's Representation in UK Politics: What can be done within the law?* Meg Russell, Constitution Unit, 2000, p 10

Table 6: Summary of positive action policies by UK parties

	House of Commons	**European Parliament**	**Scottish Parliament**	**Welsh Assembly**
Labour	All women shortlists in 1997. 50/50 shortlists for next election.	None.	Twinning for constituency seats.	Twinning for constituency seats.
Liberal Democrats	None in 1997. 50 / 50 shortlists for next election in Scotland and Wales only.	Zipping.	50/50 shortlists for constituency seats	50/50 shortlists for constituency seats
Conservatives	None.	None.	None.	None.
SNP	None.	None.	None.	n/a
Plaid Cymru	None in 1997. For next election at least one woman and one man on a shortlist, where one is nominated. Separate run-off ballots between women and men.	None.	n/a	Women to top every additional member list, with men second, women third.

The UK political parties were slower to move towards positive action policies than European parties. There are particular difficulties in a First Past the Post electoral system with single member constituencies, where they may prevent an individual man from standing for a particular seat. It is relatively straightforward to institute such systems where a list type proportional representation system is used.

The use of positive action has caused controversy within parties. There has been strongest resistance within the Conservative Party but the Liberal Democrats and Labour have also been divided on occasion over the issue.[9] At their party conference in September 2001 the Liberal Democrats rejected a proposal to select at least 40% men and 40% women candidates for the next General Election in seats requiring a 7.5% swing or less to win. A further proposal to select a woman candidate (legislation-permitting) where the sitting MP stands down at the next General Election was also defeated. Instead the following motions were approved:

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[9] For a discussion of debates within parties, see Meg Russell, *Women's Representation in UK Politics: What can be done within the law?*, Constitution Unit, 2000, pp 8-14. The debate within the Labour Party is discussed by M Eagle and J Lovenduski, *High Time or High Tide for Labour Women?*, Fabian Society, 1998.

> 1. That a target of 40% of held seats where the sitting MP stands down, and seats requiring a swing of less than 7.5% to win, be fought by women candidates at the next general election; that a taskforce be established by the Federal Executive including members from the States Candidates Committees, the Campaigns Department and all relevant SAOs, with reasonable staff time and funding allocated to it, that reports to every meeting of the Federal Executive and to every Federal Conference on progress towards that target.
>
> 2. That the Joint States Candidates Committee[10], in consultation with relevant SAOs, undertake an immediate and urgent review of the processes by which parliamentary candidates are sought and approved, specifically including post-selection support and training for candidates. (Such a review should include surveying those already approved, all Liberal Democrat principal councillors, and others to ascertain reasons for so few women and people from other under-represented groups being on the list of approved candidates, and to recommend relevant changes to the approval and candidate recruitment processes.[11]

Plaid Cymru passed a motion at its 2001 conference calling for the 'enactment of new legislation allowing parties to operate legitimate positive action policies'.[12]

V Success of women candidates

In the 2001 general election there were 636 women candidates for all parties. This was 19.2% of the 3,319 total. It was less than the record 672 women candidates that stood in 1997. (In 1997 the number of Labour women candidates was 157 compared with 138 in 1992. In 2001 there were 149 Labour women candidates.)

The success of women candidates from one election to another changes with the overall popularity of the party they seek to represent. However, the success rate of women candidates has generally been lower than that of men. This suggests women have been less likely to stand in winnable seats than men. Figures for male and female candidates of the two main parties since 1945 are shown in the following charts.

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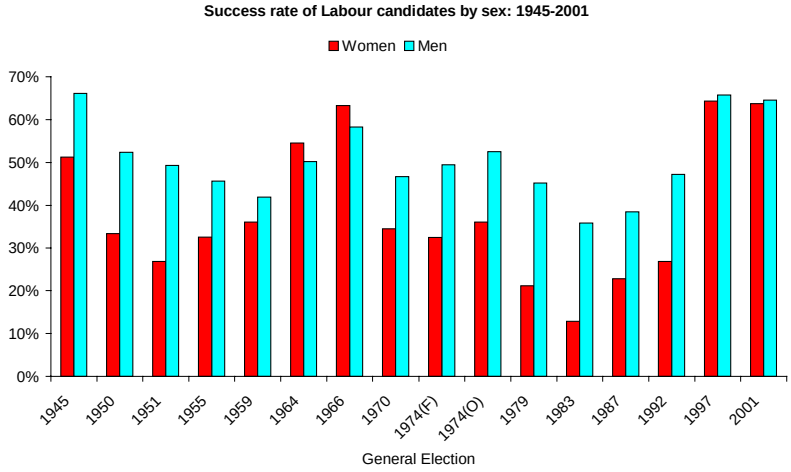
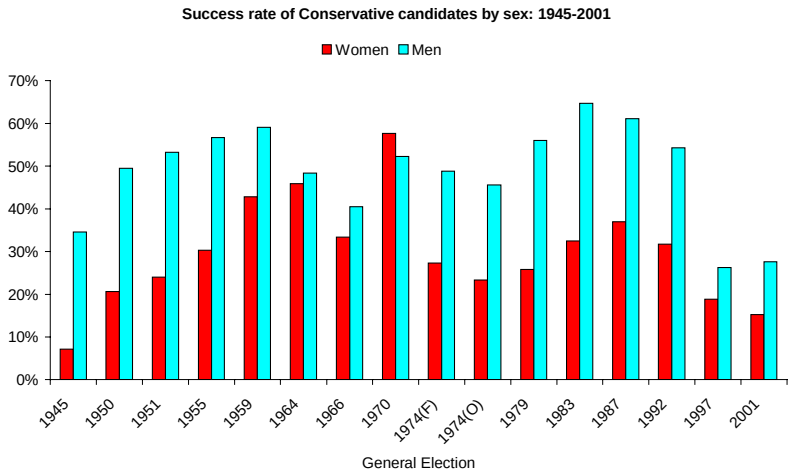
[10] That is, the devolved bodies responsible for candidate selection

[11] Liberal Democrat conference, 26.9.01. See http://www.libdems.org.uk/index.cfm?page=agenda&section=conference&body=161

[12] *Plaid Cymru* Conference resolutions 2001





There has, however, been a significant change since 1997 for Labour candidates. The success rate for women and men in the last two elections has been very similar.

The 1997 and 2001 elections were landslide victories for Labour and women in seats that had previously been thought unwinnable may have been more likely to have been won by women candidates. Also, and importantly, between 1993 and 1996 Labour adopted a policy of all women shortlists in half its seats where a Labour MP was retiring and in half of the seats it deemed most winnable.

The aim of the policy was that half of the new intake of Labour MPs would be female. The policy was a controversial one and was officially dropped in January 1996, following legal challenges at an employment tribunal. Candidates already selected remained in place. Of the 101 Labour MPs elected in 1997, 65 were new to the House of Commons or in one case returning after an absence, and 35 of these had been selected as part of the strategy of all women shortlists.[13] The authors of an Equal Opportunities Commission study argue that the all women shortlist policy had a further impact on the selection of women even after its formal abandonment.[14]

[13] *Women in Parliament: A Comparative Analysis,* EOC Research Discussion Series 2001
[14] *ibid*

2 Women candidates and % successful by party at general elections 1918-2001

General	Conservative		Labour		Lib Dem		Other		Total	
Election	Candidates	% MPs	Candidates	% MPs	Candidates	% MPs	Candidates	% MPs	Candidates	% MPs
1918	1	0%	4	0%	4	0%	8	13%	17	6%
1922	5	20%	10	0%	16	6%	2	0%	33	6%
1923	7	43%	14	21%	12	17%	1	0%	34	24%
1924	12	25%	22	5%	6	0%	1	0%	41	10%
1929	10	30%	30	30%	25	4%	4	25%	69	20%
1931	16	81%	36	0%	5	20%	5	20%	62	24%
1935	19	32%	33	3%	11	9%	4	25%	67	13%
1945	14	7%	41	51%	20	5%	12	8%	87	28%
1950	29	21%	42	33%	45	0%	11	9%	127	17%
1951	25	24%	41	27%	11	0%	0	-	77	22%
1955	33	30%	43	33%	14	0%	2	0%	92	26%
1959	28	43%	36	36%	16	0%	1	0%	81	31%
1964	24	46%	33	55%	24	0%	9	0%	90	32%
1966	21	33%	30	63%	20	0%	10	0%	81	32%
1970	26	58%	29	34%	23	0%	21	5%	99	26%
1974(F)	33	27%	40	33%	40	0%	30	3%	143	16%
1974(O)	30	23%	50	36%	49	0%	32	6%	161	17%
1979	31	26%	52	21%	52	0%	81	0%	216	9%
1983	40	33%	78	13%	75	0%	87	0%	280	8%
1987	46	37%	92	23%	106	2%	85	1%	329	12%
1992	63	32%	138	27%	143	1%	227	0%	571	11%
1997	69	19%	157	64%	140	2%	306	1%	672	18%
2001	92	15%	149	64%	139	4%	256	2%	636	19%

Note % MPs relates to proportion of candidates becoming an MP.
Source: Thrasher & Rallings *British Electoral Facts 1832-1997, Election 2001: The Official Results*

VI UK cases

This section summarises some of the cases, which in recent years have raised the issue of whether the process of selection as an election candidate should be covered by anti-discrimination employment law. Further details are given in Appendix 2.

As mentioned above, the Labour Party's use of women only shortlists was cut short by the *Jepson* case in 1996 when an employment tribunal found that this was a breach of the *Sex Discrimination Act 1975*.[15] The Act does not specifically cover the selection of candidates. Section 29(1) of the Act covers the provision of services to the public or a section of the public and prohibits discrimination in this field. However, political parties are exempted from section 29(1) by s33 of the Act, originally to ensure that women's organisations within parties were not affected. Section 13(1) prohibits bodies or authorities conferring authorisation or qualification needed for engagement in a particular profession or trade from discriminating on grounds of sex. The tribunal found that the women-only shortlist policy contravened s13(1), holding that selection as a parliamentary candidates constituted an authorisation needed for the profession of Member of Parliament.

[15] *Jepson and Dyas-Elliott v the Labour Party and others* [1996] IRLR 116

The legal position remained unclear as the Labour party did not appeal and the scope of an employment tribunal case is confined to the case before it. Appeals lie to the employment appeal tribunals, whose decisions are binding in England and Wales.[16]

The *Ahsan* case, a 1999 Employment Appeal Tribunal hearing on alleged racial discrimination in relation to the selection of a Labour council candidate, however, held that being a councillor was a 'profession' or 'occupation'.[17] The relevant legislation is s12 of the *Race Relations Act.* There is no specific exemption for political parties within this Act. This appears to add weight to legal opinion that candidates do fall within the scope of the employment provisions of the sex discrimination legislation.

A further case, the *Ishaq* case, again involved an allegation of racial discrimination against the Labour party in the selection of local council candidates. Here an another employment tribunal found against the party.[18] Meg Russell, then based at the independent Constitution Unit claimed:

> This was the first time that a tribunal had looked inside the standard candidate selection process of a party (rather than the positive action process, as in the Jepson case) and found it discriminatory. This opens up the prospect of numerous disgruntled women and ethnic minority candidates taking parties to court under the two Acts alleging discrimination'.[19]

Political parties are therefore constrained in their current selection procedures as well as in developing models of positive action. Uncertainty about the current legal position makes it difficult for parties to develop policies.

VII EC Law

There is a European dimension to the debate. Even if the UK amends the *Sex Discrimination Act 1975* to permit various forms of positive action, there is still a question mark over their legality under EC law. Article 141(4) of the Treaty of Rome, as amended by the Treaty of Amsterdam from May 1999, does allow for positive action in employment to make it easier for an under-represented sex to pursue a vocational activity. However case law would appear to preclude automatic preference for an inferior candidate solely because of her sex.

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16 For a full discussion see *Women's Representation within UK Politics: What can be done within the law?* Meg Russell Constitution Unit 2000 pp24-27

17 *Sawyer v Ahsan [1999] IRLR 609 EAT.*

18 *Ishaq v M McDonagh and the Labour Party, Hull employment tribunal dec*ision, 2 May 2000, cited in Meg Russell's *Women's Representation within UK Politics: What can be done within the law?* Constitution Unit 2000 pp 28

19 ibid Meg Russell is now a special adviser to Robin Cook, Leader of the House

The wording of Article 141(4) is as follows:

> 4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

There is also a 'positive action' provision in Article 2 (1) and (4) of the 1976 *Equal Treatment Directive*[20] which has now, effectively, been superseded by Article 141(4).

Articles 2 (1) and (4) provide:

> 1.For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.
> (…)
> 4.This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1).

These provisions have, effectively, been superseded by Article 141 (4).[21]

However, the European Court of Justice (ECJ) has tended to interpret the law to suggest that a positive action system should not be so rigid as to bar men totally from access to particular posts. The European Commission has stated that the selection of candidates does not fall within the scope of the Directive.[22] Many European political parties use quota systems for the selection of candidates (see below).

The Equal Opportunities Commission issued a consultation document in 1998 on proposed legislative amendments to the *Sex Discrimination* and *Equal Pay Acts*[23] which amongst other topics asked for views on the merits of positive discrimination for women candidates, reflecting the impact of recent judgements of the European Court of Justice relating to the *Equal Treatment Directive*.[24]

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20 *Council Directive 76/201/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions* , 9 February 1976

21 See section on the draft amending directive

22 Questions to the Commission in European Parliament, cited in *Women's Representation in UK Politics: What can be done within the law?*

23 *Equality in the 21st Century: a new approach* January 1998

24 Directive 76/207. The cases referred to were Kalanke v. Hansestadt Bremen (1995) and Marschall v. Land Nordrhein Westfalen

The consultation document discussed whether the selection of candidates fell within the *Sex Discrimination Act* or the *Equal Treatment Directive*:

> 76. In 1993, the EOC was advised by Leading Counsel, prior to the **Jepson** decision, that single-sex shortlists for Parliamentary candidates did not contravene either the SDA or the Equal Treatment Directive. The EOC took further advice subsequent to the decisions in the **Jepson** and **Kalanke** cases (but before judgment was given in the **Marschall** case). Again the advice was that the selection of Parliamentary candidates did not fall within the scope of either the SDA or the Equal Treatment Directive.
>
> 77 It has been suggested that the legal uncertainty could be resolved by an amendment to the SDA to exclude from its scope the recruitment and selection of Parliamentary candidates. However, this does not remove the uncertainty as to whether the selection of Parliamentary candidates comes within the scope of the Equal Treatment Directive and, if so, what impact the Equal Treatment Directive would have on this.

Details of the relevant cases are set out in Appendix 3. Briefly, in the *Marschall* case in 1997 the ECJ decided that, where there were fewer women than men in a particular post in the public sector, a rule requiring priority to be given to a suitably qualified woman was not contrary to the Directive provided that a suitably qualified man was guaranteed that his circumstances would be subject to an objective assessment, which could override the priority. Following the case, the EOC considered that it would be timely to consult on whether positive discrimination should be permitted in favour of women in the selection of candidates. No action followed the consultation process.

When the Amsterdam Treaty amended the Treaty of Rome from May 1999, the new Article 141 raised the status of the EU's commitment to equal treatment and positive action to treaty level. The interpretation of the amendments will be made by the ECJ, if and when it hears any relevant cases. Meg Russell cited the *Badeck* case[25] heard by the ECJ in March 2000 as an illustration of a new approach by the Court to the legality of positive action for women.[26] This case found that national rules which gave priority to women where men and women had equal qualifications were acceptable in areas where women are under-represented, provided that the rules guaranteed an objective assessment taking account of the specific personal situations of the candidates.

Proposals for amending the 1976 *Equal Treatment Directive* are currently under discussion in Europe. The draft amending directive has not yet been adopted.[27]

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[25] Case c-158/97, *Badeck and others v Landesanswalt beim Staatsgerichtshof des Landes Hessen* [2000] IRLR 432. See *New Law Journal* April 7 2000 'The need for more women Members of Parliament' for an analysis

[26] Meg Russell, *Women's Representation in UK Politics: What can be done within the Law*, Constitution Unit, June 2000, p 35

[27] Draft Directive of the European Parliament and of the Council amendng Council Directive 76/201/EEC (COM(2000) 334 and COM (2001) 321

Political agreement on a common position was agreed between the Member States at a Council on 11 June 2001. This now has to go back to the European Parliament for a Second Reading, and if there is still no agreement between Council and Parliament it will have to enter the conciliation procedure.

However, it is unlikely that there will be significant changes on positive action. The original Commission proposal for an amendment pointed out that Article 2 (4) of the 1976 Directive had been superseded by Article 141 (4) of the TEC, as amended by the Treaty of Amsterdam. It therefore deleted the existing Article 2 (4) and replaced it with a requirement that the Commission publish regular reports on positive action measures adopted by Member States under Article 141 (4):

> **2.3. Positive action measures**
>
> 28. In Directive 76/207/EEC, Article 2(4) provides that it will be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas covered by the Directive.
>
> 29. That provision was interpreted by the Court in three judgments, in the Commission v France case, the Kalanke case and the Marschall case. From this case-law, some conclusions can be drawn, and more recently in the Badek case:
>
> - the possibility to adopt positive action measures is to be regarded as an exception to the principle of equal treatment;
> - the exception is specifically and exclusively designed to allow for measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life;
> - automatic priority to women, as regards access to employment or promotion, in sectors where they are under-represented cannot be justified;
> - conversely, such a priority is justified, if it is not automatic and if the national measure in question guarantees equally qualified male candidates that their situation will be the subject of an objective assessment which take into account all criteria specific to the candidates, whatever their gender.
>
> 30. That provision has however been superseded by Article 141(4) which states that "with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers"
>
> This provision has been the subject of a Declaration annexed to the Final Act, which states that Member States, should, in the first instance, aim at improving the situation of women in working life.
>
> The publication of periodical Commission reports on the implementation of the possibility offered by Article 141(4), as proposed in the present proposal, will

> help Member States to compare the way it is implemented and citizens to have a full picture of the situation existing in each Member State.[28]

Meg Russell concluded from her survey of EC discrimination law and of the European Convention on Human Rights that neither necessarily created an obstacle to legislation in the UK. The Belgian Government adopted a mandatory quota for electoral lists in 1994, which has not been subject to challenge. Other member states do not consider that candidate selection falls within employment discrimination law; however the fact that quota systems are in use throughout Europe does not necessarily make them legal. Russell argued that the ECJ is responsive to the views of member states and the Commission, and in a case on positive action for candidate selection would be likely to influenced by the prevalence of this action in European parties and the statutory quotas in use in France and Belgium.[29]

VIII Human Rights

The European Convention on Human Rights is also relevant. Article 3 to the First Protocol, which is in force in the UK, has been interpreted as extending to the right to vote and to stand for election:

> **Article 3 – Right to free elections**
> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 14 requires access to all Convention rights to be equal. Commentators however consider that broad scope for positive action remains, as long as it meets the proportionality test, and can be justified on public policy grounds. New Protocol 12 to the Convention (which creates a free-standing right to equality) has a preamble which spells out the right of member states to take 'measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for these measures'.[30] The UK has yet to sign up to this Protocol, having expressed concerns about its uncertain coverage.[31]

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28 COM (2000) 334

29 *Women's Representation in UK Politics: What can be done within the law?* , Constitution Unit, June 2000 p 42

30 It was adopted by the Parliamentary Assembly of the Council of Europe on 27 January 2000 and opened for signature on 4 November as European Treaty number 177. On that day 25 COE states signed the Protocol

31 See E.H.R.L.R. Issue 1'The draft discrimination protocol to the European Convention on Human Rights'. See also HC Deb 20 December 2000 c203w and HL Deb 15 March 2001 c99WA

The *Explanatory Notes* to the Bill include a statement from the Secretary of State saying that in his view the Bill's provisions are compatible with Convention rights.

IX Candidate selection in other European countries

Several European political parties operate policies designed to promote the selection of female candidates. Both France and Belgium have statutory quota schemes. In a law passed in 1994 Belgian political parties were initially subject to a 25 per cent quota of women on all party lists for elections, increased to 33 per cent in 1999. In France, a new electoral law in 2000 regulates the proportion of female candidates at local, regional, national and European elections. Parties which do not comply are subject to financial penalties.[32] This legislative action followed earlier legislation in 1982 struck down by the Constitutional Council (the court governing the interpretation of the constitution in France). In 1999 the constitution was modified to allow statutes promoting equal access by men and women to elective offices and granting a role to political parties in this aim.

Other European states, such as Sweden and Norway, have parties which apply quotas to the selection of candidates without any statutory regulation. Employment law is not considered relevant.[33] Finally, German political parties fall within the Basic Law (the main constitutional document of the state), which requires a minimum level of internal party democracy, with details left to the parties. Most operate some form of positive action.

The EOC survey *Women in Parliament: A Comparative Survey*[34] offers a comparative perspective of patterns of female representation in six European states and Australia and a history of the development of quotas in some European states. The use of quotas is not confined to Europe. In Nepal, the Electoral Commission will not register political parties unless at least five per cent of its candidates for the House of Representatives are women.[35]

X Proposals for Reform

There was pressure on the Government in 1998 to amend the *Sex Discrimination Act 1975* in time for candidate selection for the Scottish Parliament and the National Assembly for Wales. New clauses were tabled to the *Scotland Bill* and the *Government of Wales Bill* at Commons committee stage to remove candidate selection from the scope of

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32 For further details see *Women's Representation within UK Politics: What can be done within the law?* pp 19-20

33 For further detail see *The Womens' Representation Bill: Making it Happen* Constitution Unit July 2001, Appendix 2 Examples from Europe

34 August 2001

35 www.election-commission.org.np/4.html

sex discrimination legislation.[36] The topic was raised also in the Commons committee stage of the *Registration of Political Parties Act 1998*[37]. The *Guardian* reported a leaked cabinet committee minute from the Lord Chancellor arguing that amendments to the *Scotland Bill* to restrict the scope of the *Sex Discrimination Act 1975* would not remove the possibility of a challenge under the EC Equal Treatment Directive.[38] This was the view set out by Henry McLeish, junior Scottish Office minister, in debate at committee stage of the *Scotland Bill* He said 'we could not guarantee that the parties would be free from challenge…The result could be a severe disruption of candidate selection procedures'.[39]

There were recommendations, in particular from the Constitution Unit, that the present legal uncertainty should be ended by the passage of a short electoral law governing the selection process in political parties and exempting candidate selection from the *Sex Discrimination Act 1975* and probably the *Race Relations Act 1976*. This would permit, rather than require parties to adopt positive action. Before the 2001 general election, Baroness Jay, Minister for Women, stated that the Home Office was looking at this proposal.[40]

The Queen's speech in June 2001 included the following:

> My Government will prepare legislation to allow political parties to make positive moves to increase the representation of women in public life. [41]

The Constitution Unit issued a further report in July 2001 designed to list the available legislative options. [42] Its author, Meg Russell, presented three options:

- Leave candidate selection within the employment field, and covered by section 13 of the *Sex Discrimination Act*, but include an amendment to the Act explicitly allowing positive action within this process.
- Exempt candidate selection altogether from the *Sex Discrimination Act*, exempting it from both employment and services aspects of the Act and draw up new legislation specifically covering candidate selection, allowing positive action. However the only protection against discrimination would be under the *Human Rights Act*.

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36 New clauses 9 and 10 *Scotland Bill* New Clause 30 *Government of Wales Bill*

37 SC Deb 23 June 1998 c 68-72

38 *Guardian* 3.March 1998 "Why Irvine sent Dewar plan to boost women in Scottish Parliament back to drawing board"

39 HC Deb vol 309 c 1143-1146

40 *Times* 17 October 2000 'Women in Parliament'. See also BBC News 6 May 2001 'Labour to change women shortlist law'

41 HL Deb 20 June 2001 Vol 626 c 6

42 *The Womens' Representation Bill: Making it Happen* Meg Russell, Constitution Unit July 2001

- Introduce new legislation specifically covering candidate selection, allowing positive action, but disallowing discrimination. This would mean that discrimination cases relating to candidate selection would not go to employment tribunals, but to a different kind of court.

Russell considered that the first option was the simplest in legislative terms. However, she also noted that this would mean that employment tribunals would continue to refer to employment law in the UK and in the EU in interpreting what types of positive action were allowable. This might act as a bar to quota schemes, generally unacceptable in EU employment law.

The second option would clarify that political parties were exempt from the *Sex Discrimination Act*, by amending the exclusion in s33 to cover the whole process of candidate selection. Similar amendments to the Race Relations Act could be made. However, the ability of a disappointed candidate to challenge decisions by parties on grounds of discrimination would be circumscribed. They would no longer be able to appeal to employment tribunals. It might be possible to use the Human Rights Act to make a challenge, but the legal position here remains unclear, as political parties are not necessarily 'public authorities' under the Act.

The third option would be to remove candidate selection from the employment law field, but continue to ensure that there would be no discrimination, by enacting positive action and anti-discrimination provisions. The drafting process would however, be complex, as Russell noted:

> This is the more complex of the three options. Not only would it, like option 1, require a positive action clause to be drafted (this might use words from the new Protocol 12 to the European Convention on Human Rights, or some other source). It would also require a clause or clauses drafted preventing discrimination - which would require some decisions to be taken about how this was to be defined, given that this would be designed to be a looser regime than applies in employment (a new clause might explicitly cite the importance of parties' democratic rights to choose their own candidates). It would require consideration of where cases should be heard, if not in either Employment Tribunals (as in option 1) or the High Court (as in option 2) and what system of penalties might apply for parties which breached the rules. Finally, as in option 2, there should really be an amendment to the Race Relations Act to ensure that all cases of discrimination in the selection process were treated in the same way. This would beg the question of whether government was going to legislate to allow positive action on race as well as gender grounds, and a political decision would need to be made.
>
> The only disadvantages of this option, however, appear to be its relative complexity. In terms of outcome it is the most attractive of the three. It has the advantage of both separating the selection process from employment legislation and at the same time outlawing discrimination, with the potential for legal redress through a more convenient system than the High Court. It would acknowledge

> that candidate selection by parties is a distinct process, and would introduce a degree of regulation specially designed for the purpose. Unlike option 2, it would not remove existing protections from candidates who have been 'negatively' discriminated against.[43]

The third option would not fit in neatly with existing law, and Russell suggested that it would have to be achieved either through amendment to s33 of the *Sex Discrimination Act* or to the *Political Parties, Elections and Referendums Act 2000*, which provides for the registration of political parties. In the event, the Government has rejected this option as too complex, given a crowded legislative session.

Patricia Hewitt MP, Secretary of State for Trade and Industry and Minister for Women, re-iterated the commitment in the Queen's Speech at the Labour Party Conference in October 2001 that a bill would be introduced in 2001/2. The Labour Party Conference would then be able to "vote on the changes to our rules and constitution that would allow us to select more Labour women for Parliament "in 2002. [44]

XI The Bill's Provisions

The Bill would amend the *Sex Discrimination Act 1975* to allow registered political parties to take action to reduce inequality between men and women elected as its candidates. It is important to note that while the Bill will permit parties to take positive action, it will not oblige them to do this. The Explanatory Notes state:

> The legislation will be permissive not prescriptive, and will allow political parties to decide whether and in what way they wish to reduce the inequality.[45]

The main provision of the Bill is in **Clause 1** (**Clause 2** for Northern Ireland). This inserts a new section (42A) into Part V of the *Sex Discrimination Act 1975*. Part V covers general exceptions from Parts II to IV of the Act.

Part II of the Act prohibits sex discrimination in employment. This contains the section (s13) relied on in the *Jepson* case cited on page 16 above, which prohibits discrimination by bodies giving authorisation or qualifications needed for people to enter a particular profession. Part III of the Act prohibits sex discrimination in other fields, including provision of goods, facilities or services, for which there is already an exception for political parties.[46] Part IV covers "other unlawful acts", including discriminatory advertisements and practices.

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43 *The Womens' Representation Bill: Making it Happen* p. 24

44 Labour Party conference speech, 1 October 2001, http://www.labour.org.uk

45 *Sex Discrimination (Election Candidates) Bill- Explanatory Notes* (Bill 28-EN)at http://www.publications.parliament.uk/pa/cm200102/cmbills/028/en/02028x--.htm

46 s33 (see Section VII above and Appendix 2)

Clause 1 states that nothing in Parts II- IV will affect, or make unlawful arrangements made parties to regulate candidate selection, so long as these are adopted to reduce inequality in the numbers of male and female candidates.

The clause only exempts arrangements made by "registered political parties". Under s22 of the *Political Parties, Elections and Referendums Act 2000,* parties have to register with the Electoral Commission to put forward candidates for election to the Westminster Parliaments, the Scottish Parliament, the National Assembly for Wales, the European Parliament, and to principal councils in Great Britain. However the *Explanatory Notes* point out that parties which only field candidates to parish councils in England and Community Councils in Wales do not have to register under the 2000 Act, but will nevertheless need to do so if they wish to use the provisions in the Bill.

The provisions apply to the following elections:

- Parliamentary elections
- Elections to the European Parliament
- Elections to the Scottish Parliament
- Elections to the National Assembly of Wales
- Local government elections

According to the *Explanatory Notes*, the Bill will not cover elections for the Mayor of London, or directly elected mayors, as these do not fall within the definition of local elections in the Bill.

Presumably, dissatisfied candidates would wish to use EC law to challenge any positive action policies promoted by political parties. As noted above in section VII, it cannot be predicted with certainty that the selection of candidates for political office will be considered beyond the scope of EC employment law. However, the Bill will clarify the current uncertain position of candidate selection in political parties in UK employment law.

Clause 2 makes similar provisions for Northern Ireland, by inserting an equivalent new Article in the *Sex Discrimination Northern Ireland Order 1976*.[47] This Order mirrors the *Sex Discrimination Act 1975.*

Clause 3 is a "sunset clause" which provides for the Act to expire at the end of 2015 unless an order is made to the contrary. Any such order would have to be laid in draft before, and approved by, each House of Parliament. Such clauses are unusual in UK legislation.

Clause 4 provides for the territorial extent of the Bill. The provisions of the Bill extend throughout the United Kingdom. Clause 1 extends to England, Scotland and Wales only, and Clause 2 makes equivalent provisions for Northern Ireland.

Electoral legislation extends to the whole of the United Kingdom, but legislation relating to equal opportunities covers England Scotland and Wales only under the devolution settlement. However equal opportunities legislation is devolved to Northern Ireland under the *Northern Ireland Act 1998*. Therefore it is necessary to insert within the Northern Ireland legislation (originally passed under direct rule) equivalent provisions to those in Clause 1. There have been discussions in Northern Ireland as to the essential nature of the Bill, with recognition that essentially it touches on electoral law, which is an excepted matter under the *Northern Ireland Act 1998*. Therefore it would seem sensible for the UK government to legislate in this area. There are precedents, in that the *Freedom of Information Act 2000* legislated for Northern Ireland, although it was a devolved area. For Scotland, both electoral law[48] and equal opportunities legislation is reserved to Westminster. The National Assembly for Wales does not have power to make primary legislation covering Wales.

XII Issues the Bill does not cover

A. Race

As described Section VII and Appendix 2, the Employment Appeal Tribunal in the *Ashan* case held that being a councillor counted as a 'profession' or 'occupation' for the purposes of section 12 of the *Race Relations Act 1976.*

Russell notes:

> One of the most difficult questions surrounding the Bill is whether it should also legalise positive action in the candidate selection process to increase the number of ethnic minority representatives in elected office. The original document discussed at Labour Party conference which first considered changing the law seemed to suggest that this would happen. However, race has not been mentioned in more recent announcements and the government's intentions are not clear.
>
> There are strong arguments on both sides of this debate. The issue of improving representation of ethnic minorities in elected office has been moving rapidly up the political agenda. The issue reached prominence particularly in the selection of candidates for the Greater London Assembly elections in 2000 and the general election in 2001. Following this election there are 12 ethnic minority MPs - up two from 1997. A parliament which reflected society would include approximately 55 such members.

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47 SI 1976/1042

48 Although the administration of local elections is a devolved area under the *Scotland Act 1998*

> The political parties have so far failed to find a means to effectively improve ethnic minority representation. There are therefore some calls for positive action to be applied by the parties to facilitate this. If the law is being changed to facilitate positive action for women, this would be an obvious point at which to do the same for race.
>
> The barriers to positive action for ethnic minority candidates are twofold. First, there is obviously a legal barrier: following the Ahsan case, it has been confirmed that Section 12 of the Race Relations Act (equivalent to S13 of the Sex Discrimination Act) applies to candidate selection. This forbids discrimination, including positive discrimination. This legal obstacle is clearly a disincentive for parties to act.
>
> However there are further difficulties. One of these is that it is practically more difficult to devise positive action measures for ethnic minority candidates than for women. Women and men are distributed fairly uniformly across the UK, in every constituency. Ethnic minority communities, in contrast, tend to be concentrated in some areas more than others. Men and women are roughly equal halves of the population. The ethnic minority population is smaller, and is itself diverse. This makes design of mechanisms by the parties difficult. It is notable that whilst the gender lobby in the 1980s had a clear set of demands - including, in the Labour Party, introduction of all women shortlists - the race lobby has not itself devised a blueprint for reform of selection procedures should a change in the law occur.[49]

There are also difficulties with European law. According to Russell, the new Directive on Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin could conceivably apply to candidate selections.[50] Similarly, the new Directive Establishing a General Framework for Equal Treatment in Employment and Occupation covers discrimination on a wide range of grounds, including sexual orientation and religion, age and disability.[51]

The Bill makes no amendments to the *Race Relations Act 1976.*

B. Job-Sharing

A recent case relating to job-sharers standing as candidates to the Scottish Parliament raised interesting questions. Lorraine Mann, prospective Scottish Parliamentary candidate for the Highlands and Islands Alliance in the Highlands and Islands Region, stood as a job-sharer along with another party member for election to the Scottish Parliament in May 1999. Eight other Alliance members stood on the same basis. The Regional Returning Officer declined to give a positive view as to whether a job-sharing candidature was competent or appropriate. Ms Mann took the case to an employment tribunal.

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49 *The Womens' Representation Bill: Making it Happen* p. 16
50 2000/43/EC
51 2000/78/EC

Although she won the first case, the ruling was reversed at an Employment Appeal Tribunal in December 2000.[52] The EAT judgement concluded that the employment tribunal system had no jurisdiction to entertain the matter, as the decision of the Regional Returning Officer fell within the scope of electoral law, but stated: ' we have little hesitation in concluding that membership of the Scottish Parliament constitutes an 'occupation' This would tend to buttress legal arguments that being a Westminster Member is also within the scope of employment law.[53] The EAT judgement considered that the feasibility of a job-share arrangement for a Member should properly be considered by primary legislation.

According to press reports Ms Mann has lodged a further challenge on issues of sex discrimination and human rights, which is due to be heard in November 2001. [54]

The Bill does not clarify this issue.

XIII Conclusions and Reactions to the Bill

Legislation would need to be completed by the end of the 2001-2 session if it were to affect the selection procedures for the next general election. Moreover, selection processes for the elections to the Scottish Parliament and the National Assembly for Wales are due to begin very shortly. However, given the Liberal Democrats Conference motion on the subject in September 2001 and the Conservative Party's stated opposition to using quotas, Labour may be the only one of the three largest parties to use the system for the Commons.[55] Plaid Cymru and the SNP may be expected to attempt some form of positive action for the National Assembly for Wales and the Scottish Parliament elections.

The Equal Opportunities Commission has welcomed the Bill. Its press release noted the comments of Julie Mellors, Chair of the EOC, as follows:

> This bill represents a great opportunity to create a new, more representative form of British politics. All the political parties acknowledge that they need more women. This piece of legislation will give them the means to achieve that goal.
> There are plenty of talented women who would make excellent MPs but who simply do not get selected at the moment. Political parties must act soon if they want to change that situation in time for the next election.

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52 See http://wood.ccta.gov.uk/eat/eatjudgments.nsf for the full judgement

53 For further detail, see Appendix 2

54 *Financial Times* 24 July 2001 'Blair's all women shortlist hit by Scots case'

55 There were indications before the 2001 general election that the Conservatives would support legislation to exempt parliamentary candidates from employment law. See *Times* 6 April 2001 'Tory party to 'impose selection of women'.

Appendix 1 - Labour women candidates in women-only seats[56]

(selected prior to Industrial Tribunal result 8 January 1996[57])

3 Women candidates elected

A total of 38 women candidates were selected as candidates for the 1997 general election as a result of all-women shortlists. Thirty-five were elected. The following women were elected as Members of Parliament at the 1997 General Election following selection in seats designated "women-only" seats.

Candidate/Member	Constituency	Region
Candy Atherton	Falmouth & Camborne	South & West
Julie Morgan	Cardiff North	Wales
Dari Taylor	Stockton South	North & Yorkshire
Chris McCafferty	Calder Valley	North & Yorkshire
Phyllis Starkey	Milton Keynes South-West	Central
Sally Keeble	Northhampton North	Central
Gillian Merron	Lincoln	Central
Diana Organ	Forest Of Dean	South & West
Kali Mountford	Colne Valley	North & Yorkshire
Margaret Moran	Luton South	Central
Melanie Johnson	Welwyn & Hatfield	Central
Judy Mallaber	Amber Valley	Central
Shona McIsaac	Cleethorpes	Central
Jacqui Smith	Redditch	West Midlands
Jenny Jones	Wolverhampton & South West	West Midlands
Karen Buck	Regents Park & Kensington North	Greater London
Laura Moffat	Crawley	South East
Liz Blackman	Erewash	Central
Louise Ellman	Liverpool Riverside	North West

[56] Source: Library Information List, L:\library\parliament\PILs\members\women\6. All-women shortlists.doc

[57] *Jepson and Dyas-Elliott v the Labour Party and others* [1996] IRLR 116.

Gisela Stuart	Birmingham Edgbaston	West Midlands
Janet Dean	Burton	West Midlands
Ann Keen	Brentford & Isleworth	Greater London
Helen Brinton	Peterborough	South East
Ann Cryer	Keighley	North & Yorkshire
Siobhan McDonagh	Mitcham & Morden	Greater London
Debra Shipley	Stourbridge	West Midlands
Anne McGuire	Stirling	Scotland
Linda Gilroy	Plymouth Sutton	South & West
Sandra Osborne	Ayr	Scotland
Betty Williams	Conwy	Wales
Fiona Mactaggart	Slough	South & West
Angela Smith	Basildon	South East
Jackie Lawrence	Preseli/Pembrokeshire	Wales
Maria Eagle	Liverpool Garston	North West
Anne Begg	Aberdeen South	Scotland
Total number elected		**35**

4 Unsuccessful candidates selected on all-women shortlists

In addition to the above, the constituency Labour parties of three other constituencies, not designated as "women-only" seats, chose to have all-women shortlists. None of these candidates were elected.

Susan Brown	Oxford West & Abingdon	West Midlands
Deborah Gardiner	Isle Of Wight	South and West
Debbie Sander	Woodspring	South & West

Source: Labour Womens Network, 1999

Appendix 2 – Cases on application of Part II of the *Sex Discrimination Act 1975* to selection as an election candidate

The *Jepson* case suggested that selection as a party candidate was covered by Part II of the *Sex Discrimination Act 1975* (discrimination in the employment field) and that all women shortlists were therefore illegal sex discrimination against men. As the case was only heard at an employment tribunal and did not go to appeal it did not constitute a precedent.

However, a subsequent race discrimination case did go to the Employment Appeal Tribunal (EAT) which, like the tribunal in *Jepson*, found that selection as an election candidate was covered by Part II. The case was *Sawyer (sued on his own behalf and on behalf of all other members of the Labour Party) (appellant) v. Ashan (respondent)*.[58]

A Scottish case concerning an attempt to stand as a jobshare in the elections to the Scottish Parliament has not overturned these rulings. This case is the *Mann* case.

Jepson and Dyas-Elliott v The Labour Party and others [59]

Mr Jepson was not considered for selection as a Labour Party candidate in the two constituencies of Regents Park & Kensington North and Brentford & Isleworth , because those two constituencies were required to have all-women shortlists in accordance with the Labour Party's policy designed to increase the number of women MPs. Mr Dyas-Elliott was not considered for Keighley for the same reason. They both complained that they had been unlawfully discriminated against on the grounds of sex, contrary to section 13 (1) of the *Sex Discrimination Act 1975*. This provides that:

> It is unlawful for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade to discriminate against a woman –
>
> (a) in the terms on which it is prepared to confer on her that authorisation or qualification, or
>
> (b) by refusing or deliberately omitting to grant her application for it, or
>
> (c) by withdrawing it from her or varying the terms on which she holds it.

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58 [1999] IRLR 609 EAT

59 [1996] IRLR 116

Section 82 defines "profession" to include "any vocation or occupation". The provisions relating to sex discrimination against women "are to be read as applying equally to the treatment of men".[60]

The Labour Party's main argument in its defence was that selection as a Parliamentary candidate did not constitute an "employment" and so was not covered by Part II of the Act ("Discrimination in the Employment Field") within which section 13 falls. The employment tribunal, in a judgment delivered on 19 January 1996, rejected this argument and stated that the job of being an MP was a profession and covered by Part II and that, in the real world, selection as a candidate by a major political party constituted a necessary "qualification" for being an MP.

The Labour Party had argued that selection as a Parliamentary candidate should be covered by section 29(1) of the Act ("Discrimination in provision of goods, facilities or services") which is in Part III of the Act. This provides that:

> It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a woman who seeks to obtain or use those goods, facilities or services –
>
> (a) by refusing or deliberately omitting to provide her with any of them, or
>
> (b) by refusing or deliberately omitting to provide her with goods, facilities or services of the like quality, in the like manner and on the like terms as are normal in his case in relation to members of the public or (where she belongs to a section of the public) to male members of that section.

Section 33 of the Act specifically excepts political parties from the operation of section 29(1) in relation to "special provision for persons of one sex only in the constitution, organisation or administration of the political party":

> **33 Exception for political parties**
>
> (1) This section applies to a political party if—
>
> *(a)* it has as its main object, or one of its main objects, the promotion of parliamentary candidatures for the Parliament of the United Kingdom, or
>
> *(b)* it is an affiliate of, or has as an affiliate, or has similar formal links with, a political party within paragraph (a).

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[60] *Sex Discrimination Act 1975*, s 2(1)

> (2) Nothing in section 29 (1) shall be construed as affecting any special provision for persons of one sex only in the constitution, organisation or administration of the political party.
>
> (3) Nothing in section 29(1) shall render unlawful an act done in order to give effect to such a special provision.

As a subsidiary argument, the Labour Party mentioned Article 2(4) of the EC *Equal Treatment Directive* which states that:[61]

> This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1) [which include "access to employment"]

The tribunal found that this provision did not have direct application as the Labour Party is not an "emanation of the state", and, in any case, the *Kalanke* case suggested that it did not authorise positive discrimination of the kind involved in all women shortlists.

Sawyer (sued on his own behalf and on behalf of all other members of the Labour Party) (appellant) v. Ashan (respondent).[62]

In this case, which concerned selection as a candidate for local council elections, the EAT held:

> The employment tribunal had correctly held that it had jurisdiction to entertain the applicant's complaint that the Labour Party discriminated against him on racial grounds by failing to select him as a candidate for the office of local government councillor contrary to s.12 of the Race Relations Act, which makes it unlawful for an authority or body which can confer a recognition or an approval which is needed for or facilitates engagement in a particular profession (vocation or occupation) to discriminate.
>
> The endorsement of a candidate by the relevant process within the Labour Party, thus enabling him or her to describe himself or herself as the Labour Party candidate for election is an approval by a body which is needed for engagement in the particular occupation of Labour councillor.
>
> The Labour Party, or its regional executive committee, is a "body" within the meaning of s.12. There is no reason to exclude unincorporated associations, such as the Labour Party, or committees thereof, from being within the intendment of

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61 Directive 76/207

62 [1999] IRLR 609 EAT

> the word "body".
>
> Being a councillor or a Labour councillor is a "profession" or "occupation". It is not a necessary ingredient for engagement in a profession, vocation or occupation that the proponent has to be engaged in it full time or that it should be his or her sole occupation. Nor is it a necessary feature of engagement in a profession or occupation that the proponent should attract remuneration or even that remuneration should necessarily be his or her aim.
>
> The word "approval" was wide enough to embrace the Labour Party's selection process. Section 12 does not require the "approval" to be sufficient in itself, only that it should be needed.
>
> Labour Party approval was "needed for" engagement in the particular occupation of being a Labour councillor. If being a councillor is an occupation, then being a Labour councillor is an even more "particular" occupation.
>
> The EAT could not accept the argument on behalf of the appellants that Part II of the Act, and thus s.12, is directed only to contractual relationships falling within the definition of "employment" in s.78. It is not a requirement of a complaint relying on Part II that the kind of work to which it relates must be only that which is provided under a contract of service or a contract personally to execute any work or labour. Part II refers to "discrimination in the employment field" as opposed to "discrimination in employment", and the additional word suggests that something wider is concerned than mere "employment".

(1) Ms Lorraine Mann (2) Mr A Mccourt vs (1) Secretary of State for Scotland (2) the Advocate General for Scotland.[63]

This case was concerned with an attempt to stand as a jobshare in the election to the Scottish Parliament. Although the applicant lost her case at the Employment Appeal Tribunal, this was not because selection as a candidate was considered to fall outside Part II of the Sex Discrimination Act. Indeed, the EAT made it clear that it considered that this was covered by Part II:

> The third issue, namely whether or not the office of a member of the Scottish Parliament is a profession within the meaning of the section, was decided in favour of the applicant under particular reference to ***Jepson and Dyas-Elliot v The Labour Party and Others [1996] IRLR 116*** and ***Sawyer and Others v Ahsan [1999] IRLR 609.*** The position of both the Advocate General and Mr Truscott was that these cases were distinguishable from the problem in the present case but in any event no concession was made by either of them on either point and indeed Mr Truscott argued positively that the Returning Officer could not meet the criterion of a body or authority which position was supported by the

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63 Employment Appeal Tribunal website, http://wood.ccta.gov.uk/eat/eatjudgments.nsf

Advocate General, who as will be seen, approached the matter on a much wider basis. The "profession" point was also live before us but only faintly argued by either side as being less important than the main issues that were being raised.

(…)

39. We have little hesitation in concluding that membership of the Scottish Parliament constitutes an "occupation" at least simply by reference to that particular word and its natural meaning. Acts of the returning officer are part of the essential steps required for someone to gain access to the Scottish Parliament as a member and insofar as there are such limited discretions it therefore seems to us that if the matter turned on purely the issue of section 13 and its relevance to the current situation we would have determined the matter as a matter of jurisdiction in favour of the original applicant.[64]

[64] http://wood.ccta.gov.uk/eat/eatjudgments.nsf

Appendix 3 - EC Case Law

There have been several European Court of Justice (ECJ) cases which tested Article 2 (4) of *Council Directive 76/207/EEC* on positive action in favour of women. The first three - *Badeck* (March 2000), *Marschall* (November 1997) and *Kalanke* (October 1995) - involved male challenges to German State laws giving priority to equally qualified women applicants for certain public posts where women were under-represented at that level. The fourth – *Abrahamsson* (July 2000) – involved Swedish legislation intended to address underrepresentation of women in university appointments. The ECJ rulings are reproduced below, together with a commentary from a legal journal.

Kalanke v. Freie Hansestadt Bremen *(October 1995)* [65]

> Article 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions precludes national rules such as those in the present case which, where candidates of different sexes shortlisted for promotion are equally qualified, automatically give priority to women in sectors where they are underrepresented, underrepresentation being deemed to exist when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organisation chart.

Hellmut Marschall v Land Nordrhein-Westfalen (Germany) (November 1997) [66]

> A national rule which, in a case where there are fewer women than men at the level of the relevant post in a sector of the public service and both female and male candidates for the post are equally qualified in terms of their suitability, competence and professional performance, requires that priority be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour is not precluded by Article 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, provided that:
>
> -in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male

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65 Case C-450/93, reported in 1995 IRLR 660

66 ECJ Case C-409/95

candidate, and -such criteria are not such as to discriminate against the female candidates.

Georg Badeck and others (Land of Hesse) (March 2000) [67]*:*

Article 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions does not preclude a national rule which

-in sectors of the public service where women are under-represented, gives priority, where male and female candidates have equal qualifications, to female candidates where that proves necessary for ensuring compliance with the objectives of the women's advancement plan, if no reasons of greater legal weight are opposed, provided that that rule guarantees that candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates,

-prescribes that the binding targets of the women's advancement plan for temporary posts in the academic service and for academic assistants must provide for a minimum percentage of women which is at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline,

-in so far as its objective is to eliminate under-representation of women, in trained occupations in which women are under-represented and for which the State does not have a monopoly of training, allocates at least half the training places to women, unless despite appropriate measures for drawing the attention of women to the training places available there are not enough applications from women,

-where male and female candidates have equal qualifications, guarantees that qualified women who satisfy all the conditions required or laid down are called to interview, in sectors in which they are under-represented,

-relating to the composition of employees' representative bodies and administrative and supervisory bodies, recommends that the legislative provisions adopted for its implementation take into account the objective that at least half the members of those bodies must be women.

Abrahamsson and Anderson v Fogelqvist (July 2000) [68]

1. Article 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and

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[67] ECJ Case C-158/97
[68] ECJ Case C-407/98

working conditions and Article 141(4) EC preclude national legislation under which a candidate for a public post who belongs to the under-represented sex and possesses sufficient qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where this is necessary to secure the appointment of a candidate of the under-represented sex and the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments.

2. Article 2(1) and (4) of Directive 76/207 and Article 141(4) EC also preclude national legislation of that kind where it applies only to procedures for filling a predetermined number of posts or to posts created as part of a specific programme of a particular higher educational institution allowing the application of positive discrimination measures.

3. Article 2(1) and (4) of Directive 76/207 does not preclude a rule of national case-law under which a candidate belonging to the under-represented sex may be granted preference over a competitor of the opposite sex, provided that the candidates possess equivalent or substantially equivalent merits, where the candidatures are subjected to an objective assessment which takes account of the specific personal situations of all the candidates.

4. The question whether national rules providing for positive discrimination in the making of appointments in higher education are lawful cannot depend on the level of the post to be filled.

Comment on *Abrahamsson*:

The ECJ's ruling in *Abrahammson* gives us a clearer idea of the type of positive action measures that will breach EC equality laws. Thus, provisions that dictate an automatic preference for an inferior candidate (even if she meets basic qualifying standards) solely because of her sex are precluded by the Directive, and are not rescued by the application of Article 141(4) of the Treaty of Rome.

Indeed, even where a man and a woman are equally qualified or meritorious — the so-called "stalemate situation" referred to in *Badeck* — positive action measures must not give automatic and unconditional preference to the woman. But, as *Abrahammson* reaffirms, it will be permissible to confer preference on a female candidate who possesses equivalent or substantially equivalent merits to a male competitor, provided that the candidatures are the subject of an objective assessment that takes account of the specific personal situations of the candidates. That objective assessment may, however, itself take account of certain positive and negative criteria (see the examples given at p.6) that, although formulated in sex neutral terms capable of benefiting men also, generally favour women. In *Abrahammson*, the ECJ adds the important qualification that such criteria must be "transparent and amenable to review in

order to obviate any arbitrary assessment of the qualifications of the candidates" [69]

[69] "EC law precludes positive action measures granting automatic preference", *Industrial Relations Law Bulletin 654*, December 2000