The Equality Act 2010 and positive action

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This note considers the provisions in the *Equality Act 2010* that allow positive action in respect of employment – it should be noted that positive discrimination continues to be illegal in most cases.

Section 158 of the *Equality Act 2010* builds on existing legislation on positive action and extends it to include other "protected characteristics" such as age and disability. It allows, but does not require, "any action" to be taken to support those with a protected characteristic, as long as it is a "proportionate means". Such actions might include training to enable individuals to gain employment, or health services to address their needs. However, it does not permit "anything that is prohibited by or under an enactment other than this Act" – therefore, positive discrimination, such as quotas, continues to be illegal.

Section 159 of the Act introduced a new, specific exemption, for positive action in relation to recruitment and promotion. Section 159 permits (but does not require) an employer to take a protected characteristic into consideration when deciding whom to recruit or promote, where people having the protected characteristic are at a disadvantage or are under-represented – this positive action can be taken only where the candidates are "as qualified as" each other.

However, concerns have been voiced that "an employer that favours one job candidate over another because he or she has a protected characteristic could be exposed to a claim of unlawful discrimination in an employment tribunal by the rejected candidate, who argues, for example, that he or she is better qualified for the job".

Section 158 came into force on 1 October 2010, and section 159 on 6 April 2011. Both sections apply to England, Wales and Scotland.

The *Equality and Diversity (Reform) Bill*, a Private Member's Bill tabled by Philip Davies, sought to address issues arising from section 159, and repeal the *Sex Discrimination (Election Candidates) Act 2002*, which allowed political parties to draw up all-women shortlists of candidates for elections. The Bill was considered by the House on 21 October 2011, but it did not receive a Second Reading and so will not progress further this session.

Contents

1 Positive discrimination and positive action

The Government Equalities Office (GEO) sets out the following explanation of positive discrimination:

> Positive discrimination is recruiting or promoting a person solely because they have a relevant protected characteristic. Setting quotas to recruit or promote a particular number or proportion of people with protected characteristics is also positive discrimination. Positive discrimination is unlawful in Great Britain. However, it is important to note that it is not unlawful for an employer to treat a disabled person more favourably in comparison to a non-disabled person.[1]

Positive action and positive discrimination, although they are often confused or used synonymously, do not mean the same thing.

"Positive discrimination" in employment normally indicates actions that seek to redress historical inequalities through a reverse principle of discrimination in favour of a disadvantaged group.

Under existing employment legislation, as noted above, this is almost always unlawful, as "discriminating in favour of one group of people generally involves unlawful discrimination against another group who are treated less favourably in comparison".[2] Under section 13(1) of the 2010 Act, direct discrimination is defined as follows: "a person (A) discriminates against another (B) if, because of a protected characteristic [e.g. race, sexual orientation], A treats B less favourably than A treats or would treat others".

However, section 13 of the *Equality Act 2010* does permit some exclusions from this in respect of direct discrimination. For example, in respect of disability, section 13(3) states that "if the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B" – this allows the person A to discriminate in favour of disabled people.[3]

Positive action (or affirmative action) is laws and policies that attempt to promote equal opportunity by taking into account gender, race, disability or other equality strands in order to positively improve outcomes for these groups. The focus of positive action might be to redress systemic, historical or institutional discrimination or to promote diversity in business and public sector organisations.

The right to non-discrimination is protected under the *European Convention on Human Rights* but these principles allow for positive action. A GEO memorandum to the Joint Committee on Human Rights sets out the relevant human rights issues:

> In both EC and domestic law, it is accepted that in order to achieve full equality in practice, disadvantaged groups may actually require different treatment and equal treatment may perpetuate any disadvantage, because not all groups start off from the same position. This is a purely permissive provision which allows measures to be taken to overcome or minimise any disadvantage or to encourage participation in an

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1 Government Equalities Office, *Equality Act 2010: What Do I Need To Know? A Quick Start Guide To Using Positive Action In Recruitment And Promotion*, January 2011, p9

2 LexisNexis, *Tolley's Employment Handbook*, 2011, 25th edition, p254

3 It is further noted that the duty to make reasonable adjustments for a disabled people (section 20 of the 2010 Act) "can also be regarded as a form of positive discrimination". (LexisNexis, *Tolley's Employment Handbook*, 2011, 25th edition, p254)

> activity where participation is disproportionately low. As this provision is an exception to the equal treatment principle, by definition, any measures taken in favour of a disadvantaged group will discriminate against advantaged groups. This may raise Article 14 concerns where other substantive Convention rights are engaged, for example, Article 8. However, we consider that such discrimination could be justified because it is in pursuance of a legitimate aim, which is to help disadvantaged groups to achieve a level playing field. The provision has an in-built proportionality test, in that it can only be invoked in certain cases – and where the disadvantage etc ceases, it can no longer be used.[4]

2 Positive action – general

In summary, section 158 of the *Equality Act 2010* builds on existing legislation on positive action and extends it to include other "protected characteristics" such as age and disability. It allows "any action" to be taken to support those with a protected characteristic, as long as it is a "proportionate means". However, it does not permit "anything that is prohibited by or under an enactment other than this Act".

Section 158 came into force on 1 October 2010 in England, Wales and Scotland. However, there may be cases to which the previous legislation applies, namely where the act complained of occurred wholly before 1 October 2010.[5]

2.1 Previous legislation

Before the relevant provisions of the *Equality Act 2010* came into force, "positive action" was already permitted for specific groups. As the Government Equalities Office noted at the time:

> Current positive action provisions in employment relate to training or encouragement – such as mentoring schemes for ethnic minority staff where they are under-represented in senior roles, or open days to encourage women applicants in male-dominated sectors. The existing forms of positive action cannot be used as part of the actual appointment process.[6]

A specialist employment law online service, XpertHR, outlines the development of legislation up to the *Equality Act 2010*:

> The positive action provisions in force prior to the implementation of the Equality Act 2010 were broadly similar to the provisions under s. [section] 158 of the 2010 Act. More specifically, under s.47 of the Sex Discrimination Act 1975 and s.37 of the Race Relations Act 1976, it was permissible for employers to take steps to encourage women or men only, or people from a particular racial group only, to take advantage of opportunities for employment if the purpose of such action was to address the issue of under-representation of women, men or ethnic minority applicants in a particular field.
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> Under reg. [regulation] 25 of the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), reg.26 of the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1660) and reg.29 of the Employment Equality (Age) Regulations 2006 (SI 2006/1031), it was lawful to encourage people from a particular religion or belief only, a particular sexual orientation only or a particular age or age

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4 Government Equalities Office, *Letter dated 05/05/2009 from Vera Baird MP to Andrew Dismore MP regarding the Equality Bill - Human Rights. Inc a memorandum*, 5 May 2009, Deposited paper DEP2009-1293, para 263

5 XpertHR professional, *Attracting suitable candidates – Positive action*, para 1.111, website [taken on 18 October 2011, subscription required]

6 Government Equalities Office, *Equality Act 2010: What Do I Need To Know? A Quick Start Guide To Using Positive Action In Recruitment And Promotion*, January 2011, p4

> group only, to take up opportunities for employment, provided that the purpose of doing so was to prevent or compensate for disadvantages linked to religion or belief, sexual orientation or age (as the case may be) suffered by people from that particular group.
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> Prior to the implementation of the Equality Act 2010, the positive action provisions did not specifically apply to disability (or to gender reassignment, marriage and civil partnership or pregnancy and maternity).[7]

For example, the *Race Relations Act 1976* (RRA) exceptions applied in the case of training and positive action to redress under-representation of ethnic minorities in particular roles or organisations. Section 37(1) of the Act (as amended by section 7(3) of the *Employment Act 1989*) provided that discriminatory training programmes or a special discriminatory recruitment campaign[8] were lawful:

> where [it reasonably appears to that person] that at any time within the twelve months immediately preceding the doing of the act—
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> (i) there were no persons of that group among those doing that work in Great Britain; or
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> (ii) the proportion of persons of that group among those doing that work in Great Britain was small in comparison with the proportion of persons of that group among the population of Great Britain.

Steps taken by employers under section 37 often arise out of ethnic monitoring (e.g. ethnic monitoring questionnaires) within the organisation or during recruitment. For example, if an organisation discovered that the proportion of management from ethnic minorities in their organisation was below national levels, they might have relied on section 37 to offer training to ethnic minorities which would better equip them for management roles. However, it would not have been lawful to discriminate in their favour when management position vacancies were being filled.

Similarly, exceptions existed in the *Employment Equality (Sexual Orientation) Regulations 2003* (SI 2003/1661). Regulation 26 provided for "exceptions for positive action" that meant that the regulations did not

> render unlawful any act done in or in connection with—
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> (a) affording persons of a particular sexual orientation access to facilities for training which would help fit them for particular work; or
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> (b) encouraging persons of a particular sexual orientation to take advantage of opportunities for doing particular work,
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> where it reasonably appears to the person doing the act that it prevents or compensates for disadvantages linked to sexual orientation suffered by persons of that sexual orientation doing that work or likely to take up that work.[9]

As ACAS explained in its guidance on the regulations:

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7 XpertHR professional, *Attracting suitable candidates – Positive action prior to the implementation of the Equality Act 2010*, para 1.111, website [taken on 18 October 2011, subscription required]

8 RRA section 37(1)(a) and (b)

9 SI 2003/1661, regulation 26(1)

> Selection for recruitment or promotion must be on merit, irrespective of sexual orientation. Where employers have reason to believe that persons of a particular sexual orientation are under-represented in the workforce, it is possible to take certain steps to redress the effects of any previous inequality of opportunity. This is called 'positive action'. Employers may wish to consider positive measures such as:
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> - training their existing employees for work which has historically been the preserve of individuals of a particular sexual orientation;
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> - advertisements which encourage applications from people of a particular sexual orientation but making it clear that selection will be on merit without reference to sexual orientation.[10]

2.2 Parliamentary consideration of section 158

During the Committee stage of the *Equality Bill*, the then Solicitor-General, Vera Baird, noted that the provision in the Bill concerning positive action "is not a wholly new concept", describing it as an "extension" of the provisions that already existed.[11]

Responding to points made by the then Shadow Minister for the Disabled, Mark Harper, the Minister explained the existing deficiencies of the provision, and how the Bill would address them, although their application would be voluntary:

> Positive action provisions can apply in different ways to different characteristics. They can even apply to some and not to others. We now intend to regularise them and to make a platform for all of the strands. The first thing that the clause does is establish a permissive framework under which forms of positive action can be taken. Any use of such provisions will be entirely voluntary. There is no requirement for them to be used by specific individuals or organisations. Although they are voluntary, lots of UK businesses have recognised the benefits of using positive action to create a more diverse work force, to better understand customers' needs and to attract new business. Therefore, the provisions will be used, but it is important to emphasise that they are totally voluntary.
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> The second characteristic is that it is not, as the hon. Gentleman has said, positive discrimination. Positive discrimination would favour a person from a particular under-represented or disadvantaged group solely because they come from that particular group irrespective of merit. In the main, positive discrimination is unlawful in the UK. Therefore this is not positive discrimination. We are not talking about favouring somebody just because they come from a particular group. The provisions are about ensuring that people's needs are met, that they have equal opportunities and that they are not held back because of a particular characteristic.
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> The clause will have effect in cases in which it is reasonable to consider that those with a protected characteristic suffer a disadvantage that is linked to that characteristic, that those who share the characteristic are under-represented in some way, or that those who share the characteristic have particular needs not shared by those without the characteristic in question. In any such situation, the clause will enable organisations, public authorities, employers and service providers to take a wide range of positive action measures to address the disadvantage, and to increase the participation of people with that characteristic. Moreover, any action must be a proportionate way of accomplishing the intended outcome. I am referring to specific training opportunities,

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10 ACAS, *Sexual orientation and the workplace – Putting the Employment Equality (Sexual Orientation) Regulations 2003 into practice*, November 2005, p11, para 29

11 HC Deb 30 June 2009 c602

> targeted health services to address particular needs and providing lessons exclusively for disadvantaged pupils. We want to ensure the appropriate use—we have just canvassed this—of the positive action measures.
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> The clause contains a power to make regulations to set out what would not be permitted under it. It ensures that any act that would be unlawful under any other legislation will not be permitted by it. It also provides that if positive action measures are taken under clause 99, which is about the selection of candidates and clause 153(3) regarding recruitment or promotion, which we will come on to in a minute, those provisions will apply, rather than clause 152.
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> In addition, should the provision allowing registered political parties the use of single sex shortlists in selecting election candidates, which clause 99(7) deals with, be repealed, the clause will not allow the use of similar measures to be taken—I emphasise that point, and it is only what is permitted within the law. Where there is a specific provision to cover a specific kind of positive action, that is the provision that will prevail, not clause 152.[12]

The clause was not amended during its Parliamentary passage, and became section 158 of the *Equality Act 2010*.

The explanatory notes to the Act add that while "there were positive action provisions in previous legislation … these applied to different protected characteristics in different ways and in some cases were specific about the types of action they permitted. This section extends what is possible to the extent permitted by European law, and applies in relation to all protected characteristics".[13]

2.3 The effect of section 158

Section 158 permits a general exception to allow for "positive action" by allowing a person to take "any action", as long as it is a "proportionate means", to achieve the aims of enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage, meeting those needs, or enabling or encouraging persons who share the protected characteristic to participate in that activity.[14]

The protected characteristics are defined in section 4 of the Act as:

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sex; and,

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12 PBC Deb 30 June 2009 cc602–603
13 *Equality Act 2010 c.15–EN*, para 517
14 *Equality Act 2010*, s158(2)

- sexual orientation.

In terms of defining whether an action is "proportionate", the explanatory notes state:

> 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, the extremity of need or under-representation and the availability of other means of countering them. This provision will need to be interpreted in accordance with European law which limits the extent to which the kind of action it permits will be allowed.[15]

The explanatory notes to the Act explain that this "will, for example, allow measures to be targeted to particular groups, including training to enable them to gain employment, or health services to address their needs", but notes that "any such measures must be a proportionate way of achieving the relevant aim".[16]

Section 158(3) allows regulations to be made to specify actions, or descriptions of actions, which are not permitted as positive actions in order to "provide greater legal certainty about what action is proportionate in particular circumstances" – to date, no such regulations have been made.[17]

Section 158 can be applied if 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.

The Government Equalities Office provides the following guidance on the phrase "reasonably thinks" in the context of section 158:

> Positive action in recruitment and promotion can be used where an employer **reasonably thinks** that people with a protected characteristic are under-represented in the workforce, or suffer a disadvantage connected to that protected characteristic.
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> Some information or evidence will be required to indicate to the employer that one of those conditions exists – but it does not need to be sophisticated statistical data or research. It may simply involve an employer looking at the profiles of their workforce and/or making enquiries of other comparable employers in the area or sector as a whole. Additionally, it could involve looking at national data such as labour force surveys for a national or local picture of the work situation for particular groups who share a protected characteristic. A decision could be based on qualitative evidence which may be obtained in various ways, for instance through discussion with workers or their representatives.[18]

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15 *Equality Act 2010 c.15–EN*, para 512
16 *Equality Act 2010 c.15–EN*, para 511
17 *Equality Act 2010 c.15–EN*, para 513
18 Government Equalities Office, *Equality Act 2010: What Do I Need To Know? A Quick Start Guide To Using Positive Action In Recruitment And Promotion*, January 2011, pp7–8 (original emphasis)

However, positive action under section 158 does not allow "anything that is prohibited by or under an enactment other than this Act", under section 158(6) – as such, positive action cannot include positive discrimination as this would be contrary to section 13 of the Act.

3 Positive action – recruitment and promotion

In summary, whereas section 158 creates a general exception for positive action, section 159 of the 2010 Act creates a specific exemption under Part 5 of the Act ("Work") for positive action in relation to recruitment and promotion.[19] Section 159 permits (but does not require) an employer to take a protected characteristic into consideration when deciding whom to recruit or promote, where people having the protected characteristic are at a disadvantage or are under-represented – this can be done only where the candidates are as qualified as each other.[20]

Section 159 came into force on 6 April 2011 in England, Wales and Scotland.

3.1 Parliamentary consideration of section 159

During the Second Reading debate of the *Equality Bill*, the then Minister for Women and Equality, Harriet Harman, told the House:

> I turn to the issue of positive action, which many Members have mentioned. We will allow employers to use positive action in recruitment and promotion. The purpose of the new power is to tackle the systemic and well-documented glass ceiling that stops women from going up the career ladder in organisations. That is why the Bill includes the power to take positive action. Sometimes a company has many women in its work force, but no women on its management team. Currently, if a vacancy arises and the employer is faced with two equally qualified candidates, one a man and one a woman, the employer cannot actually say, "Right, we've got two equally qualified people for this job, but I'm going to take you, because you're a woman and I want to diversify my management team." The provision, however, will allow employers to address under-representation where they so choose.[21]
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> […]
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> By extending the use of positive action in the workplace, the Bill will allow employers to take action to make their workforce more diverse and representative of the communities they serve when selecting between two equally suitable candidates. This positive action on race in recruitment and promotion will help to make organisations such as the police more effective.[22]

In her reply, the then Shadow Leader of the House, Theresa May, said that while the Official Opposition supported the "proposal to allow companies to take into account the diversity of a work force when making appointments, so long as that applied only where there are two candidates of equal merit", it was against positive discrimination which, she said, had been suggested by the then Government:

> On positive action, I must say that there seems to be a discrepancy between what the Leader of the House has said in public and what the Bill was originally supposed to do. One example that is often given on the wider issue of positive action and its use is that in circumstances where a primary school that has only female teachers has a job

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19 LexisNexis, *Tolley's Employment Handbook*, 2011, 25th edition, p254
20 *Equality Act 2010 c.15–EN*, para 518
21 PBC Deb 11 May 2009 cc557–558
22 PBC Deb 11 May 2009 c561

> vacancy for which there are two candidates of equal merit, one of whom is a man and the other a woman, the head teacher or school governors could be allowed to appoint the man in order to address the imbalance in the work force. That must only be allowed as a tie-breaker in situations where there are two genuinely equally qualified candidates. In such circumstances, I would be happy to support the proposal to allow companies to take into account the diversity of a work force when making appointments, so long as that applied only where there are two candidates of equal merit—although I suspect that it might be hard to find many circumstances in which the candidates were genuinely absolutely equally qualified.
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> However, that is not the approach that the right hon. and learned Lady has been taking when explaining the proposal, because last week we learned that she wants to use it to pack the boards of nationalised banks with women, saying:
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> "It is about saying, 'because you are a woman I'm going to put you in this promotion'."
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> That is precisely what this proposal should not be about. The right hon. and learned Lady has given the impression that this proposal will allow widespread positive discrimination, and if that is the effect, then we oppose it. Indeed, the explanatory notes to the Bill, prepared by the Government Equalities Office, state that this proposal might allow a police service to give preferential selection to candidates from an ethnic minority where there are
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> "a number of equally qualified candidates".
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> I am not sure that there would ever be a situation where there are "a number" of genuinely equally qualified candidates, but the note continues:
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> "This would not be unlawful, provided the comparative merits of other candidates were also taken into consideration."
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> Taking into consideration the merits of other candidates is not the same as allowing positive action only when there are two candidates of equal merit. The Government therefore seem to be confused about this proposal: either it is a limited measure to be used only as a tie-break in rare cases, or it will allow positive discrimination as a widespread recruitment policy. We therefore intend to examine this proposal further in Committee.[23]

At Committee Stage, the Opposition spokesman, Mark Harper, raised the issue of allowing positive action in recruitment and promotion when there was one person "as qualified as" another person. He argued that the phrase "as qualified as" did not mean that the two people were equally qualified; rather that, they both met the criteria for the post:

> The heart of the matter is if there are two equally qualified candidates and one or the other gets the job, it does not cause too many problems. However, a situation might arise in which candidates are qualified for the job and able to meet the criteria, but there is a big difference between some of them and a number of the candidates are much better. Let us say that those who are better happen to be men and that although there are female candidates who are qualified to do the job, they are not as qualified as the male candidates. If the work force is largely male, the employer might decide to hire or promote the female candidate. It seems likely that that would stir resentment because weaker candidates are being preferred purely because of their gender. That is

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[23] PBC Deb 11 May 2009 cc571–572

> certainly not helpful to the cause of equality. That would give equality a bad name and damage the idea of fairness.[24]

The Solicitor General argued that the "as qualified as" term would not prevent an employer from picking the most suitable candidate rather than taking positive action, and that subsection 4(b) would prevent an employer from having a policy of positive action across all recruitment and promotion:

> If a candidate is, as the hon. Gentleman suggested, clearly superior or better qualified, and if the employer does not consider that person over-qualified for a job, in which case they are entitled to choose at the right level, common sense suggests that they will not be as qualified as the other person, because they are clearly superior. It is not difficult to separate people who are as qualified as each other from those who are not. We are not talking about simply crossing some sort of low threshold that will let hordes of people in, and making it a clear blanket policy involving hordes of people within a massive band of ability being preferred over hordes of people from another group who are in the same massive band of ability. We are talking, very sensibly, about somebody who meets the employer's particular requirements for the post, and somebody else who meets those requirements; it could be one on one, two on two—it makes no difference.
>
> If an employer wishes to choose between people who, in his view, are as qualified as each other, he can choose somebody from an under-represented group. This is an excellent provision that will protect a lot of businesses that do this now out of common sense, and I hope it will encourage not only other businesses but people from the public sector to do it, as well.
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> Suppose there were a practice of looking at groups of people and deciding that they were all within a range of ability, and that it would be just as easy to pick somebody from the bottom as from the top of that range. Someone could help themselves to a white person over a black person, a man over a woman, or a gay person over a straight person, but they would be implementing a policy that is not allowed under clause 153(4)(b). There is a distinction between two equally qualified people, and operating a policy that has "as qualified as" in the middle of it. In my view, it is quite clear what is available and what is not, and I hope that there can be no serious doubt about that.[25]

The issue was debated in the Lords Committee Stage, when Lord Hunt of Wirral, the shadow spokesman on Business, Enterprise and Regulatory Reform, said that as a result of the "as qualified as" requirement, the Opposition "fear is that this clause is there to allow, in effect, positive discrimination". He added that the provision in clause 4(b) needed clarification:

> Clarity is necessary because the Minister in another place said that we should not worry because Clause 158(4)(b) prevented any kind of "policy" decision. In other words, this would mean that a company could not have a policy of favouring groups who shared a protected characteristic. I wonder whether this fits with the Government's seeming change of heart about whether this provision should relate to a tie-break or pool situation. The example given in the Explanatory Notes about the police recruiting ethnic minorities seems to show instead what I would have assumed subsection (4)(b) was designed to prevent. Therefore I look to the noble Baroness the Chancellor of the Duchy of Lancaster to clarify that for us. Does subsection (4)(b) prevent a blanket policy-a policy in relation to all recruitment drives-but allow a general policy in relation to one appointment?

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[24] PBC Deb 11 May 2009 c605

> To put it another way, is it the Government's intention that a company should be able to say, "We have not employed many of this particular section of people recently", then advertise a job, interview people from all backgrounds but, when it has found a pool of 20 candidates with the relevant qualifications and skills, to pick the candidate representing what it believes to be an unrepresented class of people over the others? We welcome the commitment to positive action, but this is not the clause we felt we were welcoming when it was first introduced in another place. We are now looking for some reassurance.[26]

The Chancellor of the Duchy of Lancaster, Baroness Royall of Blaisdon, responded by saying that:

> to ensure that employers do not misuse these voluntary measures, Clause 158(4) ensures that employers cannot adopt a blanket policy of favouring candidates simply because they have a protected characteristic and are disadvantaged or underrepresented. Each case must be considered on its merits.
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> Clause 158 does not permit positive discrimination, nor is it contrary to the "merit principle". It simply allows an employer, when faced with two candidates who are as qualified as each other to carry out a specific job, to use the desirability of widening the diversity of the workforce as the criterion for choosing between them. I reassure the noble Lord, Lord Hunt, that my emphasis is no different from that expressed by my right honourable friend Harriet Harman in another place: there has been no change of heart.
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> […]
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> It has been claimed that Clause 158 would allow employers to set an artificially low qualification threshold for a job to enable them to gerrymander the selection of the successful candidate-the idea that the pass mark is set so low that almost everyone will make the grade, in the hope that at least one candidate has a targeted protected characteristic. Clause 158 does not permit an employer to recruit or promote a candidate who is less qualified than another just because the employer wants to address disadvantage or underrepresentation-in any event, this would make no business sense. Where the assessment process, in whatever form it takes, evaluates one candidate as having scored, say, 95 per cent and another 61 per cent, those candidates cannot be considered as being as qualified as each other to undertake the job. It is immaterial whether the pass mark was set at 60 per cent, 50 per cent or 40 per cent; the clearly superior candidate must always be offered the job. We are confident that the clause as drafted achieves that effect.[27]

The Minister went on to note an amendment (number 118A) tabled by Lord Lester of Herne Hill, which introduced a new sub-clause 4(c) explicitly included a proportionality principle for positive action in respect of recruitment and promotion. In supporting the amendment, Baroness Royall said:

> Amendment 118A would make it explicit that any positive action measure taken in recruitment and promotion under Clause 158 has to be a proportionate means of achieving the aims set out in subsection (2) – helping people overcome a disadvantage or participate in an activity. While we consider that Clause 158 as drafted already implicitly embodies a requirement for proportionality, I accept that there are benefits to making proportionality an explicit requirement: it would make clearer what this clause is

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25 PBC Deb 11 May 2009 c612
26 HL Deb 9 February 2010 c655
27 HL Deb 9 February 2010 cc658-659

> about, allowing employers to take positive action where proportionate, and also better reflect the terminology used in Clause 157, where proportionality is already explicit. I am therefore content to accept Amendment 118A.[28]

The amendment was duly agreed. The clause was otherwise not amended and became section 159 of the *Equality Act 2010*.

During the Second Reading debate on the *Equality and Diversity (Reform) Bill* (a Private Member's Bill), the Immigration Minister, Damien Green, who was responding the Bill on behalf of the Government provided further commentary on section 159:

> It cannot be too strongly emphasised that the principle of merit should always apply in any recruitment or promotion process that uses positive action measures. As I have already said, under these measures, a person cannot be appointed solely because they possess a certain protected characteristic that is disadvantaged or under-represented in the workplace. That would constitute unlawful discrimination.
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> An employer faced with making a choice between two or more candidates who are as qualified as each other to undertake the post in question can take into consideration whether any of the candidates possesses a protected characteristic that is disadvantaged or disproportionately under-represented in the work force. However, this does not mean that the candidates under consideration have to be identical in every respect. Any consideration of merit should take into account the relevant facts of their competence, ability, experience and any formal qualifications that may be relevant to the particular job.[29]

3.2 Section 159 in practice

As the explanatory notes to the Act highlight, section 159 creates a new power:

> while previous legislation allowed employers to undertake a variety of positive action measures, for instance offering training and encouragement for certain forms of work, it did not allow employers to take any form of positive action at the actual point of recruitment or promotion. This section extends what is possible to the extent permitted by European law, and applies in relation to all protected characteristics.[30]

The following definition of the effect of section 159 is provided by the explanatory notes:

> 518. This section permits an employer to take a protected characteristic into consideration when deciding whom to recruit or promote, where people having the protected characteristic are at a disadvantage or are under-represented. This can be done only where the candidates are as qualified as each other. 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. The section does not allow employers to have a policy or practice of automatically treating people who share a protected characteristic more favourably than those who do not have it in these circumstances; each case must be considered on its merits. Any action taken must be a proportionate means of addressing such disadvantage or under-representation.

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28 HL Deb 9 February 2010 c658
29 HC Deb 21 October 2011 c1230
30 *Equality Act 2010 c.15–EN*, para 521

519. The section defines recruitment broadly, so that for example offers of partnership or pupillage, or tenancy in barristers' chambers, are included.[31]

The GEO notes that "positive action can be used at any time in the recruitment or promotion process", citing an example as to deciding who should occupy the last place on a shortlist. The GEO adds that "it is expected that, in the vast majority of cases, any use of positive action as a 'tie-breaker' between candidates who are of equal merit for a particular post will be at the end of the recruitment process, at the actual point of appointment".[32]

The GEO provides the following explanation of how positive action provisions in recruitment and promotion will work:

> Positive action in recruitment and promotion can be used where an employer **reasonably thinks** that people with a protected characteristic are under-represented in the workforce, or suffer a disadvantage connected to that protected characteristic.
>
> In practice it allows an employer faced with making a choice between two or more candidates who are of **equal merit** to take into consideration whether one is from a group that is disproportionately under-represented or otherwise disadvantaged within the workforce.
>
> This is sometimes called either a 'tie-breaker' or the 'tipping point'.
>
> But this kind of positive action is only allowed where it is a **proportionate way** of addressing the under-representation or disadvantage.[33]

It should be noted that the term "equal merit" does not feature in section 159 of the Act – rather, it is a reference to the requirement that positive action can only be taken in recruitment and promotion if two (or more) candidates are "as qualified as" each other. In a guide for employers, the GEO explained how the term "equal merit" should be interpreted:

> In order to use positive action provisions in a tie-breaker situation, the employer must first establish that the candidates are of equal merit.
>
> Employers should establish a set of criteria against which candidates will be assessed when applying for a job. This can take into account a candidate's overall ability, competence and professional experience together with any relevant formal or academic qualifications, as well as any other qualities required to carry out the particular job.
>
> However, employers should ensure that any criteria do not indirectly discriminate against people who share a protected characteristic – for example, a requirement that staff must work shift patterns that mean they have to be on-call at certain fixed times might put women, who are more likely to be responsible for childcare issues, at a disproportionate disadvantage. This would be unlawful indirect discrimination unless it could be shown that the need for these work patterns could be objectively justified.
>
> Employers must consider whether candidates are of equal merit in relation to the specific job or position they are applying for. While two candidates may be considered

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31 *Equality Act 2010 c.15–EN*, para numbers as shown

32 Government Equalities Office, *Equality Act 2010: What Do I Need To Know? A Quick Start Guide To Using Positive Action In Recruitment And Promotion*, January 2011, p6

33 Government Equalities Office, *Equality Act 2010: What Do I Need To Know? A Quick Start Guide To Using Positive Action In Recruitment And Promotion*, January 2011, p5 (original emphasis)

> to be of equal merit for one particular post, the same two candidates might not be equally suitable for another job.[34]

3.3 Commentary on the practical application of section 159

XpertHR cautioned that:

> The positive action provisions in s. [section] 159 are voluntary and not without risk. An employer that favours one job candidate over another because he or she has a protected characteristic could be exposed to a claim of unlawful discrimination in an employment tribunal by the rejected candidate, who argues, for example, that he or she is better qualified for the job. The employer would need to be quite sure that it satisfied all the criteria required for the positive action provisions to apply and that it has evidence to back up its position. Employers should keep clear records to support their selection decisions.[35]

In June 2010 (i.e. before section 159 came into force) *Personnel Today* discussed the practical application of section 159:

> HR directors are split on the benefits of positive action, and Rachel Dineley, partner and head of diversity at law firm Beachcroft, suggests that "very few" employers would want to use the provision because of the inherent complexity. "Candidates want to be awarded a job on their merits and not because they belong to a disadvantaged group", she says.
>
> "If a robust and objective selection procedure is already in existence, the chances are the best candidate will emerge in the normal way. If such a procedure does not exist, then it should be put in place in any event, to avoid discrimination claims".[36]

4 Equality and Diversity (Reform) Bill

4.1 Consideration of the Bill

On 21 October 2010, Philip Davies presented his Private Member's Bill for First Reading.

Mr Davies previously introduced a similar Bill in the 2008-09 session, which had its First Reading in the Commons on 21 January, 2009, but was never debated.[37] This was prior to the *Equality Act 2010* being on the statute book. During the Second Reading debate of the *Equality Bill*, Mr Davies commented on the provisions relating to positive action, and recruitment and promotion:

> At worst, the Bill's real purpose is to introduce positive discrimination by the back door. Its most likely outcome is that it will have a chilling effect on employers, who will feel pressured into taking someone from an under-represented group who is not the best or the equal-best candidate for the job. It is also likely that we will see an increase in employment tribunals for employers to defend, thus wasting their time and money.[38]

The 2010-12 session *Equality and Diversity (Reform) Bill* had its Second Reading on 21 October 2011 and had the following long title:

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34 Government Equalities Office, *Equality Act 2010: What Do I Need To Know? A Quick Start Guide To Using Positive Action In Recruitment And Promotion*, January 2011, p6

35 XpertHR professional, *Attracting suitable candidates – Positive action*, para 1.111, website [taken on 18 October 2011, subscription required]

36 "Equality Act: positive action and changes to discrimination law", *Personnel Today*, 10 June 2010

37 HC Deb 21 January 2009 c758

38 HC Deb 11 May 2009 cc634–635

> A Bill to prohibit the use of affirmative and positive action in recruitment and appointment processes; to repeal the Sex Discrimination (Election Candidates) Act 2002; and for connected purposes.[39]

As such, part of the Bill sought to counteract section 159 of the *Equality Act 2010* which, as noted above, created a specific exemption under Part 5 of the Act ("Work") for positive action in relation to recruitment and promotion for those with "protected characteristics".

The provisions of Bill relating to positive action (clauses 1 and 2) would apply to "public authorities" as defined in section 6 of the *Human Rights Act 1998*, which also include "a court or tribunal, and any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament".

Clause 1(1) of the Bill stated:

> Notwithstanding the provisions of the Equality Act 2010 (c. 15), it is unlawful for a public authority to promote or engage in any form of affirmative or positive action, as defined in section 2, when recruiting employees and making appointments.

Clause 1(2) stated that it applies to "any act by a public authority which contravenes the provisions of this Act is actionable as a breach of statutory duty".

Clause 2(1) of the Bill provided a definition of "affirmative or positive action", namely that it "means any action that is intended to give a benefit or encouragement to a particular group or groups of people".

This definition is different to the wording used in clause 159 of the *Equality Act 2010*, which stated that a person with a "protected characteristic" can be treated "more favourably" than someone without such a characteristic "with the aim of enabling or encouraging persons who share the protected characteristic to (a) overcome or minimise that disadvantage, or (b) participate in that activity".

Clause 2(1) stated a list of groups to whom it would be unlawful to give any positive action intended to give "a benefit or encouragement". The list is different to the "protected characteristics" list in the *Equality Act 2010*; under the Act, positive action (under section 158 and 159) is lawful for those that share a protected characteristic.

As such, those who fell into the "protected characteristics" list but not the Clause 2 list would, it would appear, continue to be lawfully eligible for positive action; examples include those with the protected characteristics of gender reassignment, and belief.

Those categories listed in Clause 2 of the *Equality and Diversity (Reform) Bill* that are not listed in section 4 of the *Equality Act 2010* (e.g. nationality) do not have "protected characteristics"; therefore, any positive action towards a person on such a basis (e.g. the basis of their nationality) would, in any case, currently be discriminatory under the other provisions of the *Equality Act 2010*.

A comparison of the two lists is provided below.

	Equality Act 2010 – "protected characteristics"	*Equality and Diversity (Reform) Bill* – groups for

[39] http://services.parliament.uk/bills/2010-11/equalityanddiversityreform.html

	list	whom positive action (when recruiting employees and making appointments) cannot be taken
Age	✓	✓
Disability	✓	✓
Gender reassignment	✓	
Marriage and civil partnership	✓	
Nationality		✓
Pregnancy and maternity	✓	
Race	✓	✓
Religion and belief	✓	✓ (religion only)
Sex	✓	✓
Sexual orientation	✓	✓
Socio-economic status		✓

Clause 2(2) stated that the positive actions that would be unlawful:

> include, but are not restricted to, the setting and pursuit of targets in respect of any of the characteristics specified in subsection (1) for the purposes of—
>
> (a) recruitment, or
>
> (b) appointment of persons to any scheme, programme, post or other similar such position.

The one specifically stated positive action that would be made unlawful, namely the "setting and pursuit of targets" for recruitment or appointment of those with the characteristics listed in clause 2(1).

Clause 3 of the Bill would repeal the *Sex Discrimination (Election Candidates) Act 2002*.[40]

4.2 Parliamentary consideration of the Bill

Mr Davies provided the following rationale for his Bill:

> I believe in equality of opportunity and fair chances for all, which is why I am very much opposed to the concept of equality of outcome, which means fixing a result before a process has begun. In the case of jobs, that can take the form of targets or quotas and, ironically, it means that there cannot be equality of opportunity. As a Conservative, and not a Marxist, that is something that I do not support. Without fair chances, there is no fair system, and someone will always be discriminated against. The Bill seeks to take away the obsession with equality of outcome, which has replaced equality of opportunity and meritocracy. Just like democracy, meritocracy has its imperfections, but it is by far the best option in the end. Social engineering and fixing processes are not right, as they have in-built, deliberate unfairnesses, and consequently, they are not only imperfect but unjust.

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[40] For more information, see the Library Standard Note, *All-women shortlists* (SN/PC/5057)

[…]

> The Bill specifically tackles one of the worst forms of political correctness, which is institutionalised political correctness. The Bill prohibits the use of affirmative or positive action by local authorities. So-called equality and diversity measures have taken over where common sense used to prevail. The tick-box mentality has far-reaching tentacles in our schools, hospitals and emergency services. Everywhere we look there is evidence of this obsession.
>
> My opposition to the whole equality and diversity agenda is, first, that it is total nonsense in its own right. The terms "equality" and "diversity" have no real meaning, and they do not necessarily sit comfortably together. Secondly, such measures are highly discriminatory and do not sit well with those being discriminated against or, perhaps less obviously, with those supposedly benefiting from the discrimination. Thirdly, they are responsible for increasing, not decreasing, racism and sexism, in my opinion. Fourthly, they are a total and utter waste of our money.
>
> So-called equality and diversity is nonsense because we are told that it is all about being representative and that it is essential for organisations and businesses to reflect the community they serve. It is rather patronising to think that the rules have to be rigged to enable women or ethnic minorities to get a job. People from ethnic minorities and women are more than capable and are sufficiently talented to get a job in competition with people who are men and white, on a fair and transparent basis. They do not need to have the rules rigged in their favour in order to get jobs, and it is patronising to suggest that they do.
>
> The people who are really racist and sexist in this country are the ones who see everything in terms of race and gender. I do not. The gender, religion and sexuality of the person applying for a job should be irrelevant.
>
> […]
>
> Britain can truly hold its head up and say that it is not racist or sexist only when people are given jobs on merit, and merit alone. People should be given jobs regardless of their sex, age, race or sexual orientation, not because of any of these factors. This Bill gives the House a chance to vote for something that can undo one of the biggest inequalities around. It can vote to reintroduce fairness, to remove the clear injustice of equality of outcome in the name of equality and diversity, and to promote real equal opportunities for all. I commend the Bill to the House.[41]

Mr Davies argued that clause 2(2) of his Bill, concerning making unlawful the "setting and pursuit of targets" for recruitment and appointment, that "the concept of equality of outcome … in the case of jobs … can take the form of targets or quotas". Speaking for the Government, the Immigration Minister, Damian Green, argued that "targets are not quotas, nor are they the same as positive action. Targets are the end that an organisation wishes to achieve, while positive action is, essentially, the measures that an organisation can take in order to achieve its aim", and added:

> The difference between the targets that I have been talking about and the quotas that my hon. Friend is rightly sceptical about is that the target can be worked towards naturally over a period spent developing people in order that the organisation can hit the target, whereas a quota must be filled whether or not there are suitable people available to fill it. That is the absolutely crucial practical distinction. If we tried to force organisations to fill quotas, less qualified people would be appointed to positions,

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[41] HC Deb 21 October 2011 cc1187, 1188–1189, 1199

> which would be unfair on those who were better qualified, and in the long term damaging for the institution concerned. If the legislation currently in place had that effect, or indeed that intention, I would share all my hon. Friend's worries about it, but it does not, and just as the distinction between positive discrimination and positive action is key, the difference between targets and quotas is absolutely key. We have a sensible, practical set of measures that can allows organisations to improve themselves, not something that is over-burdensome.[42]

The Minister also said by banning only public authorities from using the positive action provisions of the *Equality Act 2010*, the Bill:

> would, as drafted, create a two-tier system under which it would be lawful for private organisations to continue to use positive action measures in recruitment and appointment processes, but not for public authorities. That would mean that public authorities would not have the same benefits of opportunity open to them in recruitment as private sector organisations. Not only does this disparity seem unfair, but it could be confusing for employers, especially private organisations that deliver services under contract to or on behalf of a public authority, but which may not normally be considered public authorities themselves.[43]

He added that there were safeguards to ensure that the provisions relating to positive action in recruitment and promotion were not misused, and that remedies "are available to possible victims of positive action".[44]

The Minister concluded by saying that the Bill ran counter to the Government's policy:

> By attempting to prevent the use of positive action under what I hope I have persuaded hon. Members are entirely appropriate circumstances, the aims of the Bill contradict government policy to promote fairness, equality and diversity and to tackle under-representation in targeted areas such as "women on company boards" and "elected office". Many public authorities have long used forms of positive action in relation to matters connected to recruitment and promotion, and they strongly support the continued use of those provisions. Some registered political parties have successfully used these measures in recent years and, as far as I am aware, there is no opposition from any of the major political parties to using positive action to redress gender representation.
>
> The key thing to remember is that the use of any form of positive action in our country is entirely voluntary, whether it is in providing services, in employment-related matters, in increasing participation in particular activities, or in politics. Organisations will use the provisions only if there is a real benefit for them in doing so. Without the use of positive action, it would not be possible to develop the initiatives outlined in the coalition programme for government to tackle the numerous barriers to social mobility and equal opportunities that exist in our society in relation to age, gender, race, religion and sexual orientation. It is not possible to build a fairer society without being able to take the necessary measures to end discrimination in the workplace; to promote gender equality on the boards of listed companies; to promote improved community relations and opportunities for people of black and minority ethnic backgrounds; to provide internships for under-represented groups; and to fund targeted mentoring schemes to help under-represented groups to start businesses. It is clear that my hon. Friend's Bill would remove this voluntary but important opportunity for organisations and political parties to make strides in tackling the continued disadvantage and under-

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42 HC Deb 21 October 2011 c1231
43 HC Deb 21 October 2011 c1229
44 HC Deb 21 October 2011 c1230

> representation experienced by persons with protected characteristics in work forces and in civic, public and political life across the UK. To stop the use of positive action would cause a major setback in the progress already made in addressing disadvantage or under-representation in our society. I therefore urge my hon. Friend to withdraw his Bill.[45]

The Bill was defeated by 39 votes to three.

[45] HC Deb 21 October 2011 c1234