



## BAR COUNCIL EQUALITY & DIVERSITY GUIDES SHORT GUIDE TO POSITIVE ACTION 2020

Positive Action presents a real opportunity to shift the dial and improve the diversity of the Bar – something we are all keen to achieve.

**This short introduction with ideas on positive action should be read alongside our more detailed [Positive Action guide](#) which includes lots of useful scenarios and examples. We encourage you to take the time to read the longer guide.**

If you are interested in other specific action on Race in chambers, please also review the Bar Council's [Race Framework](#) document.

### INTRODUCTION

1. Positive action is the term used for permitted measures under the Equality Act<sup>1</sup> to remedy under-representation or disadvantage.
2. The relevant protected characteristics: race, sex, sexual orientation, gender reassignment, age, disability, marriage or civil partnership, pregnancy or maternity, religion or belief.
3. The relevant Sections are 158 and 159 in the Equality Act 2010:
  - a) Section 159<sup>2</sup> is limited to positive action in the workplace and permits at the point of selection, the appointment of a candidate with a protected characteristic from an under-represented group where two candidates are found to be of equal merit.
  - b) Section 158 is not so limited and permits positive action in relation to the provision of goods and services.
4. There is an emphasis on proportionality, and whether the positive action measures are lawful, will depend upon the seriousness of the disadvantage, the extremity of the need or under-representation and the availability of other means of countering them.

### REMINDER

Positive discrimination is the process of increasing the number of employees from minority groups in a company or business, which are known to have been

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<sup>1</sup> [Equality Act 2020](#)

<sup>2</sup> For more information on Section 159 please refer to Bar Council's longer guide on [Positive Action](#)

discriminated against in the past. In the UK, positive discrimination is illegal under the Equality Act 2010 as it does not give equal treatment to all.

An organisation is guilty of positive discrimination if they hire or seek an individual purely based on their protected characteristic, rather than experience or qualifications.

Positive discrimination also includes setting quotas or benchmarks in the recruitment process or promoting a specific number of people within a minority group.

### **TIP**

Sections 158 and 159 are designed to enable those who recruit to tackle deep rooted inequalities. For the purposes of good pupil, tenant and employee relations the sections ought to be exercised with sensitivity and the reasons for exercising them communicated clearly.

5. Permitted action under section 158 includes numerous “soft” options which do not impact negatively upon the groups which do not share the protected characteristic in question, e.g. inviting students from groups whose participation in the workplace is disproportionately low to spend a day/week in chambers

### **IDEAS FOR POSITIVE ACTION TO IMPROVE RACE DIVERSITY IN RECRUITMENT**

- ✓ Run a pre-interview ‘boot camp’ for students – from under-represented groups this could include mentoring on applications; interview techniques etc.;
- ✓ Encourage applications from candidates from under-represented groups - promote chambers heavily in BPTC providers/Law schools with high rates of students from different ethnic backgrounds – go talk in law schools; review literature on pupillage; imagery etc.
- ✓ Consider ‘soft targets’ to focus colleagues on increasing the number of quality applications from candidates from ethnic minority backgrounds or those from other groups

### **TIP**

For more ideas and examples of different positive action measures (e.g. in recruiting under-represented groups onto key committees, in briefing and in marketing) which may be permitted please see the longer Positive Action guide [here](#)

### **TIP**

If you are looking for data to support positive action look [here](#) or contact Bar Council [equality@barcouncil.org.uk](mailto:equality@barcouncil.org.uk) – we may be able to cut data we collect to help you.

## REMINDER

The challenges to taking positive action measures will frequently arise when those who are **not** within the disadvantaged group perceive themselves as suffering a detriment which is not justified. A delicate balance exists between equal treatment and the permitted derogation for the principle of positive action.

Positive action is more about levelling the playing field or treating people equitably. The key to legitimate action is in the pre-action thinking.

## KEY PRINCIPLES

- ✓ Gather the data or evidence base in advance to enable you to take action
- ✓ Ensure you are transparent about the action you wish to take and take into account the views of those the action will affect in advance of taking the action
- ✓ Have review points built into the action taken to enable chambers to take stock and determine if continued action is required.

## PRACTICAL STEPS

In using positive action measures (under sections 158 and 159):

- 1) Set clear objectives and ensure you've taken steps to avoid the perception that positive action denigrates the principle of meritocracy
- 2) The collection and analysis of data needs to demonstrate a connection between a protected characteristic and disadvantage, or the fact of disproportionately low participation, to help to establish the case for positive action. The information or evidence must be shown to be reasonable, but it does not need to be statistical data or research.
- 3) "Disproportionate" is not defined in relation to geographic locations or specialisms within professions or occupations. Chambers are recommended to be cautious about exercising power under section 159 to favour a candidate from a protected group where, although there is evidence of under-representation in the general practice area, there is no under-representation in the chambers.
- 4) Reliance on statistics regarding under-representation will also need to be dealt with cautiously when it comes to certain protected characteristics which have low representation in the general public as a whole, for example, a particular religious group.
- 5) Chambers should ensure transparent and objective systems for shortlisting, interviewing and selection and must consider (and be able to demonstrate) whether candidates are of equal merit in relation to the specific position.
- 6) Automatic preferences are always unlawful.
- 7) Chambers will need to freshly reconsider use of section 159 each time selection occurs, and positive action is an option, to monitor when real change has been

effected, reducing the inequality which previously justified positive action.

- 8) Data needs to be gathered and analysed regularly to assess the need for action to address under-representation

**TIP**

Consider setting targets against your positive action measures – this helps you focus on effecting change and to assess if they are working

*Bar Council may be able to advise on the application of Sections 158 and 159 of the Equality Act 2010 to chambers. First, please read the longer guide [here](#). For further information, please contact us at [Equality@barcouncil.org.uk](mailto:Equality@barcouncil.org.uk).*

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