BAR COUNCIL EQUALITY & DIVERSITY GUIDES
POSITIVE ACTION GUIDE FOR CHAMBERS 2020

There are long-standing issues with under-representation of certain groups at the Bar, at entry point level, at specific points in barristers' careers and in particular practice areas.

Positive action provisions can and should make a difference.

Bar Council recognises nervousness around the use of positive action measures. This document therefore sets out the background to positive action, and details specific types of positive action. In doing so, it seeks to demystify use of the provisions and encourage chambers to adopt positive action in order to tackle under-representation.

The context in which positive action is taken is important in order to understand whether it falls within the legal framework. This guide provides scenarios to cover common situations in which the positive action provisions are applicable, as well as examples of positive action programmes already adopted across the legal profession.

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INTRODUCTION

1. Positive action is the term used for permitted measures under the Equality Act[1] to remedy the under-representation or disadvantage experienced by members of protected groups in the workplace and in specific cases in the provision of goods, facilities or services. The relevant protected characteristics defined in the Equality Act are race, sex, sexual orientation, gender reassignment, age, disability, marriage or civil partnership, pregnancy or maternity, religion or belief.

2. Section 159 is a provision which did not exist under the discrimination legislation which preceded the Equality Act 2010. Previously legitimate positive action chiefly consisted of training and special encouragement to be offered on a limited and targeted basis to under-represented groups. This kind of action was aimed to enhance access to jobs and services opportunities but did not permit selection for recruitment or promotion to take place merely because of under-representation. Section 159 now 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.

3. In contrast, positive discrimination is recruiting or promoting a person *solely* because they possess a relevant protected characteristic. Positive discrimination and setting quotas to recruit or promote a particular number or proportion of people with protected characteristics remains unlawful in Great Britain (with specific exceptions such as women only shortlists to select parliamentary candidates). Disabled people are an exception and it is not unlawful to treat a disabled person more favourably in a selection process than a non-disabled person.

4. Both 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.

SECTION 158

5. This Section permits proportionate measures aimed at reversing or reducing the under-representation of those possessing a protected characteristic. Unlike Section 159 which is limited to positive action in the workplace, Section 158 is not so limited and permits positive action in relation to the provision of goods and services, and not only to recruitment and promotion. It may be used to alleviate disadvantage experienced

[1] Equality Act 2020

by people who share a particular protected characteristic, reduce their under-representation in relation to particular activities and meet their particular needs. 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.

6. There must be no pre-determined policy, so each case needs to be examined on its merits. Measures adopted may not go beyond what is reasonably necessary. Further, there needs to be an examination of whether there are alternative ways of removing the disadvantage without unfairly disadvantaging others who will not be receiving the special measure in question.

7. To establish whether there is a need for positive action there are important preparatory steps to be undertaken and these apply to both section 158 and 159. Chambers (and other Bar based organisations) will need to be able to show that they reasonably thought that people with a protected characteristic:

   (a) suffer a disadvantage connected to the characteristic;
   (b) have different needs because of the protected characteristic; or that
   (c) participation in an activity by people with that protected characteristic is disproportionately low.

   Some information or evidence will be required to indicate that one of those conditions applies, but it does not have to be sophisticated statistical data or research. Chambers should consider whether they can make a case for addressing under-representation across the profession, within a particular practice area or within a set of chambers, including certain levels of call. They will need to balance the seriousness of the disadvantage suffered, or the extent to which people with a protected characteristic are under-represented, against the impact that the proposed action may have on all groups. The Bar Council and the Bar Standards Board collect data on the profession which can be used to support positive action and can be obtained here. Additional data can be made available upon request via equality@barcouncil.org.uk. ONS data can also be referenced when considering action. Do note - there may be significant regional variation in local/regional population profiles.

8. The very wide scope of 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. Examples of such measures include:
   - ensuring the notes from evening seminars are put online so that women, who disproportionately have child-care responsibilities and may not be able to attend

the meetings, are able to access the notes;

- outreach - working with local schools and FE colleges, inviting students from groups whose participation in the workplace is disproportionately low to spend a day/week in chambers;
- offering all new tenants opportunities to be mentored by established practitioners;
- offering mentoring schemes to university students and/or aspiring barristers
- steps aimed at assisting the access of disabled barristers to court rooms and to chambers – which would overlap with the reasonable adjustments duty in the Equality Act;
- advertising in Counsel Magazine for new pupils or tenants, using wording encouraging applications from those with particular protected characteristics;
- examining opportunities to socialise and develop working relationships within chambers and ensuring that these do not favour some groups more than others.

9. The more difficult scenarios arise when the action in question amounts to **more** than a "soft measure" and instead is clearly a more substantial form of positive action, such as bursaries, exclusive access to solicitors, a rent break, or being given precedence over other colleagues for certain types of work or work-experience. These are considered in more detail below in our case study section.

10. Further there are times when those with protected characteristics will require specific actions which may impact upon others, in that the measures in question may:
    - delay the length of hearings, or
    - cause practitioners to have to travel further to court than they usually would, or
    - alter times of training courses.

11. Whether positive action is proportionate or not depends upon the factors relevant to the balancing test which is necessary to avoid exceeding the limitations set out in the Equality Act. In some cases, it will be more clearly legitimate, for example, to funnel some work opportunities to returnees from parental leave, to offer mentoring to certain barristers or to promote others to solicitors over their colleagues in chambers for a limited amount of time. In each case all competing relevant factors must be taken into account. What is proportionate in one instance may not be in another context.

12. 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.

SECTION 159 -The "Tie Break" Provision

13. Under this section, where a chambers is recruiting or promoting a member of staff or making recruitment or promotion decisions about pupillage or tenancy, if specific criteria are met that chambers may make its selection based on the fact that an applicant has a particular protected characteristic.

14. The Section only permits a chambers to take positive action by "treating a person (A) more favourably in connection with recruitment or promotion than another person (B) because A has the protected characteristic, but B does not" (all emphases added). Linked to this, the section only applies where "A is as qualified as B to be recruited or promoted". The scope of the provision is therefore relatively narrow, most obviously allowing you to consciously favour candidates with a particular protected characteristic when faced with a tie-breaker situation in a recruitment of promotion process.

15. Section 159 does not provide chambers with a general ability to treat existing employees differently as regards training, pay or other benefits nor does it allow chambers to give preferential treatment to all candidates who have a given protected characteristic, regardless of their qualifications. In particular, the section does not allow chambers to have a policy of promoting or recruiting people who share a given protected characteristic. However under-represented, a chambers cannot decide to or say, "we will have a Black or female only shortlist for pupillage or tenancy applications".

16. The requirement that candidate A is "as qualified as" candidate B and the lack of guidance of exactly what this means, has made this an under-utilised provision. It does not mean that the candidates need be identically qualified. But under the criteria chambers is using the candidates have to be equally qualified for the role. It is not expected that this tiebreaker will be frequently put to use and in the absence of case law chambers will have to decide on the meaning of "as qualified as". According to the Explanatory Notes to section 159 the question of "as qualified as" "is not a matter only of academic qualification, but rather a judgment 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."

17. Examples where section 159 might apply include applications for entry-level junior clerks where more than one candidate may well meet the same academic criteria (say, 5 GCSEs at A-C) and have the requisite literacy and IT skills. In that circumstance, a demonstrable under-representation of female clerks might properly be addressed by choosing a female clerk. Another example where section 159 could apply is in relation to a vacancy for tenants of 5-10 years' call where a number of applications are received from outstanding barristers all with differing but comparably high-quality CVs. Providing they meet the same essential criteria, such as *qualifications*, section 159 might permit the selection of a female barrister even if she has less *experience* where that lack of experience is due to time taken out of the profession whilst on maternity leave.

18. Before a chambers can apply the positive action provisions of section 159, it must ensure that the positive action it is considering is required because of -
    a) a reasonable view that the person in question has a protected characteristic
    b) which causes a disadvantage to people with that protected characteristic in general or
    c) that as regards the participation of those with that protected characteristic in a given activity is disproportionately low.

19. Where a man and a woman, who have applied for tenancy in a chancery set, are found through the selection process to be equally well qualified, it might be unlawful for the set to appoint the woman on the basis that it is good for chambers' equality and diversity statistics to increase the number of female barristers. However, appointing the female barrister may be justified if statistics show that women are disproportionately under-represented at the Chancery Bar.

20. We highlight these guiding principles for adherence to s158 and 159 before moving onto specific case studies

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.

SPECIFIC BAR-RELATED POSITIVE ACTION

21. The following scenarios are considered:

A. CHAMBERS COMMITTEES

We want to recruit barristers to chambers' committees from under-represented groups - such as more women on the management committee and the pupillage committee. Can we earmark places for women barristers?

Answer**:**

The answer is maybe – but the preparation is key to whether this is a lawful step. To show that the current circumstances warrant positive action being taken you should determine the status quo; how does the representation on committees mirror the makeup of chambers? Secondly, engage in data collection and monitoring over several months, if not longer; this is crucial to show that the circumstances exist to warrant positive action (Chambers will in any event obtain many benefits from gathering a secure and coherent evidence base). That process should include investigatory steps such as: in past elections did barristers in the under-represented group stand and if not, why not? It would be prudent to meet with them and find out if there are there factors which could be changed to encourage them to stand. If they did stand, but were not elected, Chambers could consider anonymous questionnaires to uncover the reasons for members of chambers not voting for junior female tenants.

If that data demonstrates ongoing under-representation and it is not in issue that the committee in question affects all of chambers, there will be justification to attempt to take action to remedy the position.

For example the gathered data may enable a set to identify the ongoing under-representation of women barristers of under 9 years call on its management committee (MC); and given that the decisions the MC makes affect all in chambers- a proportion of which are women under 9 years call- it may be appropriate to ear-mark a place for junior women on the MC in forthcoming elections.

Next time around, before repeating that positive action step the position should be reviewed, whereupon it may or may not be appropriate to designate the place for a second time.

It would be inappropriate to put such a measure in place before encouraging members of the under-represented group to stand.

In summary, a single act of designating a committee place can be lawful but cannot be done in isolation.

B. BRIEFING PRACTICE

(i) How do we get certain groups of barristers' briefing back to their former level after a period of non-instruction, such as where women return from career breaks and look to rebuild their practices. Can they be given preferential briefing treatment even for a limited period?

Answer:

Firstly, it is necessary to compile the evidence prior to taking any positive action measures. A chambers might have gathered earnings data for women who have returned from maternity leave, but not caught up with contemporaries by, say, eighteen months after their return. This comparative data is a precursor to the positive action measures as it would show how breaks impact upon the women who take them and should include departures.

So, once data have shown impact of taking breaks including chambers' retention difficulties (including what has been said in exit interviews), this allows positive action measures to be utilised lawfully. Those who may be impacted by a time limited period of preferential briefing (for unallocated instructions) should be consulted in advance. Preferential briefing must be for a time limited period with review measures put in place. Care must be taken not to swamp the returning individual and of course such a briefing method needs advance consent.

A set of chambers would be well advised to collectively adopt a policy where all sign up to the period of preferential briefing, in order that individuals do not have to explicitly consent on each and every occasion and so that the exercise is de-personalised. The extent of the preferential treatment should be designed to fit the circumstances. For example, an offer of 1 in 3 unallocated briefs for a 3-month period with the freedom to turn the brief down if the barrister wishes. Need to bear in mind not all instructions are equal (compare a long hearing to a 45-minute telephone conference). Also practice area is a relevant consideration – it may be a paperwork practice is easier to allocate, but it is the litigation and trials which tend to dry up when a barrister is off on leave. These are all pertinent points to discuss in advance.

(ii) How should we respond when solicitor clients are seeking to improve the diversity of barristers they are looking to brief?

Answer:

If solicitors are seeking to increase the diversity of barristers they instruct by seeking to instruct e.g. more counsel who are female, and/or Black or Asian lawyers or

lawyers from other ethnic minority groups, in pursuit of a positive action policy – chambers should be able to assume they have done their due diligence.

Chambers should be able to ask firms what framework they have put in place to support the lawfulness of any request like: "we want to instruct more women in your chambers" by explaining what is the nature of their initiative, how is it evidenced, what measures are in place to demonstrate it is a genuine endeavour.

If chambers thinks the policy seems misconceived there would be no compunction on chambers to give more weight to the initiative: the issue remains one for the firm. It would be useful for chambers to agree a policy internally to say when such requests are received chambers will be entitled to seek details of the endeavour; this should assist in avoiding the firm taking offence at a set's wariness or reluctance to engage.

C. APPLICATION OF S159 EqA EQUAL MERIT PROVISION IN RECRUITMENT

When can we apply the Equal Merit Provision in recruitment of staff, tenants or pupils?

Answer:

It may be thought there are very few occasions when this will arise, that is, when there are two candidates as qualified as one another. However, where data shows an under-representation, the first step will be to ensure there is overall agreement that widening diversity will be good for chambers and that positive action measures are not at odds with selection on merit.

Care needs to be taken as to the impact on the culture and reputation of chambers, as well as the perception from a good practice perspective. The issue must be discussed and agreed at chambers' management level in order for the criteria and procedure to be agreed and transparent. Thus, if the situation arises, chambers should be ready to utilise the background data: why the initiative exists to select the female/ethnic minority/younger/older candidate. In particular, chambers needs to think about what is acceptable evidence going to the criteria of "relevant experience" and provide examples of non-traditional experience, for example that obtained in non-professional or community settings during periods of non-salaried working.

The above is likely to apply to selection for pupillage. This is far more akin to a training contract or fixed term employment, than short-term work experience or a mini-pupillage. Pupillage falls within section 159 territory. The pupil will be working for up to a year in chambers, so the background will have to relate to a chambers' situation.

In acute situations a chambers could probably justify earmarking a pupillage place or increasing the places to add an earmarked pupillage, but it must do its homework

in advance. Such as the section 158 positive action measures like targeted advertising (encouraging applications from underrepresented groups), work experience talks and meetings or mini-pupillages for specific targeted groups. It would be advisable to demonstrate that pro-active outreach measures had been tried and failed before moving to earmarking of pupillage places which would fall under section 159.

D. ETHNICITY/SOCIAL MOBILITY BASED MINI-PUPILLAGES

Can we offer mini-pupillages and other work experience schemes based on ethnicity or social background?

Answer:

Chambers must acquire an evidence base before devising a scheme where selection for work experience is on the basis of the possession of a protected characteristic or socio-economic status. Is the chambers entitled to rely on profession-wide statistics about entry to the Bar? Or, must it focus upon its own chambers, or practice area? Taking into account the growing flexibility with which practitioners move chambers, it is probably acceptable to rely on general data concerning entry statistics to the Bar, unless a chambers limits its pool from which pupils are selected to solely those who have undertaken a mini-pupillage there. It would be wise to check queries about data with the Bar Council in advance of decisions being made.

In terms of other outreach measures which can be taken to broaden the range of applicants to pupillage there are already mentoring frameworks in existence via the Bar Council and Inns, including for example, Inner Temple's Pegasus Access and Support Scheme (PASS). The Bar Council's Placement Scheme[2] enables students to spend three days shadowing a barrister along with attending talks and receiving advocacy training from the Inns of Court, **if** they fulfil specific social mobility criteria.

It is also lawful to offer bursaries as part of a work experience package, for example to cover the costs of living in London during a week of work experience. The Middle Temple's Access to the Bar includes assistance for its mini pupillage and marshalling scheme. Various chambers also run their own schemes.

EXAMPLE: For the last five years, 1 Crown Office Row has run an assessed mini-pupillage scheme targeted at socio-economically disadvantaged applicants, which guarantees a first-round interview for pupillage to those applicants who perform well in their assessments.

The scheme is open to applicants who have attended a state school or college

[2] https://www.barcouncil.org.uk/becoming-a-barrister/school-students/bar-placement-scheme.html

AND meet one or more of the following criteria:

- neither parent went to university;
- received free school meals;
- family has received income support;
- have caring responsibilities; and/or
- were in care.

Women and applicants from Black, Asian and minority ethnic communities are particularly encouraged to apply.

The mini pupillage is a week-long and successful applicant are given a bursary of £150 and up to £150 in travel expenses.

Examples of solicitors' bursaries (as a comparator) include:

i. In 2017 Leigh Day Solicitors used the Equality Act for a "time-limited" period and advertised solicitor apprenticeships for six black students of Afro-Caribbean or African heritage who had completed A-Levels in London to a good grade level. The law firm said it needed to tackle the problem it has had attracting African and Afro-Caribbean applicants via its ordinary processes. Having failed to attract a much more diverse group of trainees and specifically including African and Afro-Caribbean applicants, leading to a complete imbalance internally in comparison to the London population, the firm used the Equality Act 2010 for a one-off positive action to try to address that balance. Interestingly whilst the firm believed the EqA 2010 allowed employers to "correct an imbalance" it acknowledged that this use of it was untested. See https://www.lawgazette.co.uk/news-focus/news-focus-thinking-positive-on-race/5101527.article.

ii. The Freshfields' *Stephen Lawrence Scholarship Scheme* is designed to address under-representation in large commercial law firms and other City institutions of black men from less privileged backgrounds. Their scheme is aimed at first-year law students, and some other students at a small group of universities. It provides the opportunity to work with lawyers and other professionals from Freshfields, Goldman Sachs and the Bank of England. Scholars also receive interview coaching, mentoring, a contribution towards study-related costs, and the opportunity to apply for a training contract at Freshfields. Between 2013 and 2018, more than 320 undergraduates have competed for scholarships, and 55 have been awarded, see here.

Noting that the Freshfields Scholarship includes the opportunity to apply for a training contract at Freshfields, would an opportunity for a student from, for example, a Black background, to be guaranteed a first round pupillage

interview in chambers if they had performed well on an assessed mini-pupillage set up specifically for Black students?

One chambers who is doing this for social mobility purposes set out its objectives clearly, see here. The 1COR scheme (above) is similar. These measures would fall under section 158. They should not deprive candidates who need to be shortlisted for interview in the normal way of interview opportunities. Given that pupillages are often well-funded, the question of additional funding from chambers to cover costs in pupillage does not often arise; however, there are examples of funding being offered to students from specific under-represented groups, for example, the Stormzy Scholarship at Cambridge University.

Mentoring provides invaluable experience to young people about how to evidence the information in their applications to demonstrate they are meeting the criteria; it can be done in the context of mini-pupillages or as an adjunct to pupillage fairs or schools' career fairs. It is perfectly possible for Chambers to offer a number of means of extending the diversity of their intake and the inclusivity of training options. Such measures will fall within the remit of section 158. They are generally not onerous although some are an additional expense, but all require thought as to the best use of practitioners' time.

E. CONTEXTUAL RECRUITMENT

Is it legitimate to factor socio-economic background into pupillage applications via scoring criteria or interviews assessment?

Answer:

Many chambers do this already but often in a fairly arbitrary way. It is common to delete evidence of gender and age in applications. But what about education: can that be taken into account? Is it relevant for the assessor to know what university the applicant attended rather than simply the degree obtained? (Chambers should be referred to criteria already utilised by other bodies such as the JAC in its attempt to encourage non-traditional applicants to the judiciary considered in the 2014 paper "Judicial Diversity: Accelerating Change[3])

A small number of chambers are already working with recruitment consultants to pilot contextual recruitment practices.

F. MARKETING

(i) Is it lawful to design marketing activities to profile specific groups in chambers (not simply practice groups which is a common practice) such as

[3] See here

women-only drinks or an Asian lawyers' network? Can under-represented groups be lawfully targeted for entry in legal directories?

Answer:

Generally, most chambers seek to market themselves in a way which will have the objective of obtaining as much work as possible. To this end sets do not often wish to limit the target audience. It is not often worth networking with narrow groups of solicitors – we expect it to occur mainly with celebratory events which may occur annually or less such as specific celebrations such as International Women's Day or 50 years since the Equal Pay Act. Chambers should be aware that marketing often happens informally – over drinks – e.g. when female barristers may be more likely to be engaged in childcare activities than their male colleagues or individuals who do not drink alcohol for religious or other reasons, may be less inclined to attend. So, activities where all are invited is a transparent way of ensuring all have access to current or new solicitors. Clearly thought needs to be given as to the time of day when attendance can be maximised and does not exclude certain groups.

Care needs to be taken where the event is question is not for an under-represented group and does not have as its aim increasing the representation of that group. The Asian Lawyers' Network[4] includes among its aims to "To represent its members and to support, develop and encourage Asians within the legal profession so as to assist them in their career aspirations consistent with the overall objective of enhancing diversity and equality of opportunity within the legal profession and the judiciary". The Bar Lesbian and Gay Group - BLAGG - to support lesbians, gay men, bisexuals and transgender persons at whatever stage they are in the profession[5]. But a male-only chambers running group would not be able to claim an enhancing-diversity objective or an aim linked to support arising from under-representation.

(ii) Should chambers prioritise or promote an under-represented group for the Legal directories?

Answer:

This is likely to be part of a wider strategy. So, if chambers adopts a positive action plan, this might encompass seeking to include those with a particular protected characteristic in the directories. If there is no plan in existence, when presenting submissions chambers should be able to back this up with evidence as to areas of under-representation as discussed above (including how the fact of the under-

[4] https://www.societyofasianlawyers.co.uk/about-us/

[5] http://blagg.org.uk/

representation informs or changes the decision of who to promote and impacts on the application of the usual criteria for promotion).

We would expect this exercise to be undertaken by chambers' Equality and Diversity Committees who will have undertaken Bar Council training and can access existing positive action guidance such as that referred to in the Appendix to this guidance.

PRACTICAL STEPS

The following points should be borne in mind by chambers wishing to adopt positive action measures under sections 158 and 159:

1) Set clear objectives and ensure you've taken preparatory 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. For example, a chambers that has 50% tenants from ethnic minority groups but across the profession or within the particular specialist practice area, ethnic minority candidates are not under-represented.
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. A single appointment can lead to a disproportionately high representation of people with that particular protected characteristic compared to the representation in the general population. For that reason, reliance on s159 in such a scenario will often be hard to justify and encouragement via s158 initiatives may be more prudent here.
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. For example, when prospective pupils are being selected post-interview,

   a. the under-represented groups in chambers (both at the junior end and more widely) should be apparent from up-to-date data prior to choices being made,

   b. the panel undertaking selection decisions need to be aware of the criteria for selection in order that they are in a position to determine (and to document) how and when one candidate might be "as qualified as" another,

in order that the tiebreaker provision can be utilised where appropriate.

CONCLUSION

22. The Bar Council is always willing to discuss examples of proposed positive action. Isolated use of the tiebreak may be of little use without ensuring an all-encompassing approach towards positive action in order to achieve the most constructive means of promoting diversity at the recruitment stage. A key concern is how to apply and interpret the term "as qualified as", without discarding the use of the tiebreaker because of a view that it would be so rare as to be impossible that one candidate would ever be "as qualified as" another.

23. Positive action can be used effectively for real change in addressing under-representation in training including pathways to pupillage, for career development via targeted access to specific streams of work and also the mitigation of disadvantage to under-represented groups via fixed bursaries or scholarships. These differ from "soft" options and will require non-standardised usage and focus upon individual need, often for time-limited periods with inbuilt review points.

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This guidance has been developed by the Equality and Diversity Committee, Bar Council which is able to advise on the application of Sections 158 and 159 of the Equality Act 2010 to chambers. For further information, please contact us at Equality@barcouncil.org.uk.

APPENDIX:

We refer chambers to the following guidance

EHRC https://www.equalityhumanrights.com/en/advice-and-guidance/employers-what-positive-action-workplace

ACAS https://www.acas.org.uk/employer-decision-protected-characteristic/helping-disadvantaged-group