Positive discrimination: the case for legal reform

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Discrimination is a dirty word and various types of discrimination have been unlawful since the Race Relations Act of 1965, but can we discriminate between different types of discrimination and allow 'positive discrimination' in some limited circumstances? In fact, might we need to do so in order to improve diversity and equality in the workplace? Employers and employment lawyers are grappling with this question as some proposed diversity measures face pushback from employees, activists and the law.

Currently, the Equality Act 2010 tries to draw the finest of distinctions by permitting 'positive action', but prohibiting 'positive discrimination' (ie treating an individual more favourably because they have a protected characteristic) in all but the most limited circumstances.

In practice the potential application of positive action is limited and the exceptions have been rarely used and almost never litigated. Broadly it means that if people with a protected characteristic suffer a disadvantage or are under-represented, employers can take steps to remove the disadvantages provided they act proportionately. This might include targeted open days or networking groups for women or ethnic minorities. In contrast, when it comes to recruiting or promoting, positive action is only allowed in a 'tiebreaker' situation where candidates are equally qualified. The exception is so narrowly drawn as to be useless; when could two people ever be precisely equally qualified?

Employers do use the licence the law gives them for more general positive action, but usually this is only really helpful for newer entrants to a profession and does not help increase diversity at the more senior end. The law is unclear on what practical steps employers can take and where positive action tips into unlawful discrimination.

For example, employers might consider setting shortlist quotas requiring at least 50% of candidates must be women. This seems like a mild policy change, but it is unclear whether this is lawful. The EHRC has stated it is not and that it amounts to discrimination, but ECJ case law has suggested it might be, provided the candidates meet the criteria for the role.

Employers who have tried to use the existing provisions have found themselves in an uncomfortable situation because of the increasingly outdated nature of the law. The BBC recently made headlines for reportedly offering a trainee position only to black, Asian, or ethnically diverse candidates. It was said that this was lawful because it was not recruitment for a permanent job.

This backlash seems to stem from a feeling that it is always wrong to prioritise on the basis of race, but is that right? The law already expressly allows this in certain other situations and there are other protected characteristics where direct discrimination is allowed in recruitment and promotion. For example, age discrimination can be justified provided it is a proportionate way of achieving a legitimate aim. Likewise, employers can treat disabled people more favourably than non-disabled people. In fact, going even further than this, the law actually requires that women on maternity leave must be given priority over others for suitable vacancies in a redundancy situation. There is broad consensus that all of these provisions are helpful and reasonable.

As many employers are rightly keen to address historical and significant under-representation of women and ethnic minorities at senior levels, as things stand, they are frequently finding the law to be a hindrance rather than a help. Many feel - with some justification - that their hands are tied and are increasingly frustrated at the slow pace of change. There is of course still room for employers to do more within the law to address inequality – but their hands should not be tied by legislation which aims to address the same issue.

Even aside from the moral reasons, the benefits to employers of having diverse workplaces and diversity of thought has been shown time and time again and many employers want to do as much as they legally can to create more representative workplaces.

The time is surely ripe to update the law to provide clarity and also to consider allowing a limited degree of positive discrimination for women and minority groups in recruitment and promotion. This might include allowing shortlist or even recruitment quotas, provided employers can evidence that the protected group is under-represented, the candidate is qualified for the role and the step is proportionate.

Perhaps it isn’t surprising that the law lags behind the broader consensus on diversity. The last time the legislation was updated was the Equality Act in 2010, which was itself a consolidation and update of discrimination law first introduced in the 1970s. Now is the time to revisit this issue to help give employers more freedom to create the real change that so many want to see.

