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Equality Challenge Unit

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Positive action and the legal framework

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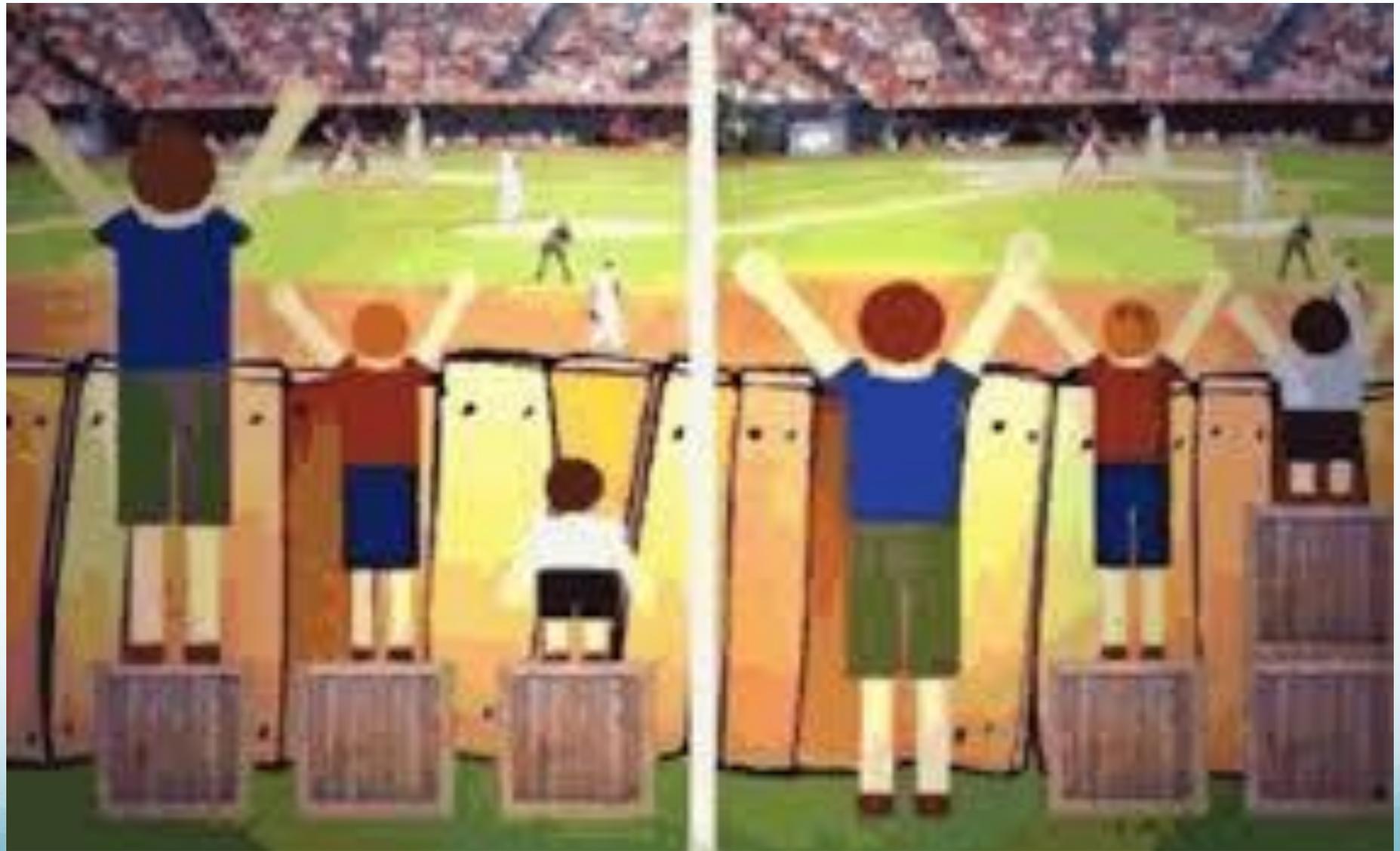


Presentation Objectives

- ✔ **What do we mean by positive action?**
- ✔ **Background to the law on positive action**
- ✔ **The UK law on positive action**
- ✔ **Research**
- ✔ **Positive action in practice**

Positive Action: Background

- The term ‘positive action’ is not a legal term and thus is not legally defined.
- It is an umbrella term that accounts for a wide range of measures involving:
- Some form of preferential treatment allocated to members of under-represented / disadvantaged /under-privileged group(s) stemming from discrimination (past or present)
- Scope contested and implementation measures controversial



Different Forms of Positive Action

- *Eradicating discrimination;*
- *Purposefully inclusionary policies;*
- *Outreach programmes;*
- *Preferential treatment;*
- *Redefining merit*

(McCrudden, 1986)

EU Law Sources

- **Article 157 (4) TFEU** - Positive action as a means to achieve full equality in practice between men and women.
- **Article 23 EU Charter of Fundamental Rights** - Right to gender equality; positive action not prevented.
- **Article 3 Recast Directive 2006/54/EC** (Men and women) (following ETD 76/207, Article 2(4))
- **Article 5 Directive 2000/43/EC** (Race and ethnic origin)
- **Article 7 Directive 2000/78/EC** (Religion and belief, age, disability and sexual orientation)
- *"With a view to securing full equality in practice, the principle of equal treatment shall not prevent...specific measures to prevent or compensate for disadvantages...."*

Key EU cases

- **Employment cases:**

- C-450/93 Kalanke v Freie Hansestadt Bremen ECR [1995] I-03051
- C-409/95 Marschall [1997] ECR I-6363
- C-158/97 Badeck [2000] ECR I-1875
- C-407/98 Abrahamsson [2000] ECR I-5539

- **Beyond employment:**

- C-366/99 Griesmar [2001] ECR I-9383
- C-476/99 Lommers [2002] ECR I-2891
- 319/03 Briheche [2004] ECR I-8807

Positive Action in Employment and Beyond – s158 EqA

Where a person *reasonably thinks* that persons sharing the protected characteristics:

- Suffer a disadvantage connected to it, or
- Have needs that are different from the needs of persons not sharing it, or
- Have a disproportionately low participation rate in the activity

When are special measures permitted?

Special measures for protected groups, which are *a **proportionate means*** of meeting the aim of:

- Enabling or encouraging persons to overcome or minimise disadvantage
- Meeting the different needs of protected groups
- Enabling or encouraging persons to participate in an activity

'Reasonably thinks'

- Objective evidence;
- More than supposition or anecdotal;
- Not necessarily requiring statistical evidence but would ensure rigorous approach;
- Student profiling, evidence from other HEI's in area; qualitative evidence (consultations, focus groups, EIA's, surveys, complaints, discrimination claims etc).

What is proportionate?

The measure must be *legitimate*, *effective* and *necessary*. This implies:

- The imbalance, need or disadvantage must be proven.
- The measure must aim at eliminating and correcting the causes of reduced opportunities.
- Is the measure reasonably necessary to achieve the aim?
- Would it be possible to achieve the aim by other actions less likely to result in less favourable treatment of others?
- If the measure has an adverse impact on other groups what steps are being taken to mitigate adverse impact?
- Does the measure rely on objective and transparent criteria?
- The measure must be temporary, i.e. it should end when equal opportunities exist in the target area.
- Are appropriate procedures in place which allow continuous review of the impact of and need for the measure?

Group Task

University A has introduced a mentoring scheme targeted at female academic staff. Consider the following:

- What evidence would you need to collect to support the introduction of this measure?
- Male academic staff are now requesting that a mentoring scheme be set up specifically aimed at them as they feel that female colleagues are receiving preferential treatment.
- John Milton considers that he suffers from confidence issues and has been turned down for a promotion due to this. He wishes to take advantage of the female mentoring scheme.

Group Task

- **University B** wishes to increase the numbers of international students from China and therefore offers a 50% bursary to all non-domestic undergraduate Chinese students. What are the issues to consider?
- **University C** wishes to increase the number of female undergraduate students studying STEMM subjects. It is considering either introducing a 50% quota on relevant courses for female students or alternatively introducing female only STEMM courses (they have data from another local university which suggests that women prefer to study separately as they feel intimidated in a mixed environment). Consider both of these options.
- The Law School within **University D** has noticed that Asian students are not performing as well as non-Asian students. They therefore wish to provide additional seminars to support Asian students. Alternatively (in order to avoid having to increase teaching hours), they are considering whether they can have separate teaching groups for Asian students. Consider both of these options.

Recruitment and promotion: the tie break – s159 EqA

- Employers can take account of protected characteristics where:
- One candidate is “as qualified as” the other;
- Employer ***reasonably thinks*** the protected group is under-represented or suffers disadvantage;
- ***Proportionate means*** of achieving the aim of overcoming the disadvantage or redressing the underrepresentation;
- Is not an automatic policy;
- Each case considered on own merits.



The limits of positive action

- The intention is to permit all action which is permitted by European law
- Thus must “remain within the limits of what is appropriate and necessary in order to achieve the aim in view”
- But despite intention not to deter those contemplating positive action
- There is still of risk of challenge
- And there is no obligation to do it

Note...

- Disability: not direct discrimination to treat a disabled person more favourably than a non-disabled person (section 13 EqA);
- Race: racial segregation is always discriminatory (section 13 EqA).

Public sector duty

- Having due regard to the need to *advance equality of opportunity (section 149 EqA)* means having due regard to the need to:
 - Remove or minimise disadvantages
 - Take steps to meet differing needs
 - Encourage participation where it is disproportionately low
- Specific duties re Scotland May 2012.

Examples of positive action in relation to education across the EU

- EU initiatives;
- LEAP (Leading Excellence in Attainment and Positive Action) project (Staffordshire University);
- Birmingham University disability grants;
- WiSETI, Cambridge University.

Positive action research

- Small-scale qualitative scoping study;
- Questionnaire distributed to HR Managers and Employers across a range of sectors;
- Twenty-four responses from across the public and private sector;
- 46% of these from UK HEI's.

Early Findings

- Limited study;
- Small scoping sample;
- Awareness and cognizance of legal provision:
 - 82% aware of the positive action provisions;
 - Awareness via third party organisations (Equality Challenge Unit, Higher Education Statistics Agency, Equality and Human Rights Commission);
- Practice and usage:
 - 40% had previously used positive action;
- Inclination and alacrity:
 - 30% could anticipate using in the future;
 - Subjective positioning/versus institutional commitment (73% commitment to benefit of legislative provision);
 - Reticence to use (risk of legal liability, fear of creating segregation, discrediting merit etc)

A leap of faith based on a robust approach?

- Is there a particular need, underrepresentation or disadvantage among a group that the HEI wishes to address?
- What is the **evidence** of that need, underrepresentation or disadvantage (i.e. reasonably think)?
- What is the **cause** of that need, underrepresentation or disadvantage?
- How will the measure **address** the need, underrepresentation or disadvantage?
- Are any other groups disadvantaged by the introduction of the measure if so who (conduct EIA)? If so, what plans are in place to **alleviate** negative impacts?
- Is there another, more effective (or less adverse to other groups), way for the HEI to address that need, disadvantage or underrepresentation (i.e. **proportionality**)?
- For what period of time will the measure be in place? What arrangements are in place to **review** the impact of the measure?
- **Publish** rationale and details of measure and review mechanisms.

Forum for Research into Equality and Diversity



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