GUIDANCE FOR IMPLEMENTING POSITIVE ACTION PROVISIONS UNDER SECTION 158 AND 159 OF THE EQUALITY ACT 2010
1. **Introduction.**

Positive action is the term used for permitted measures under the Equality Act 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. Section 159 is a new 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 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. The new Section 159 permits what is usually impermissible: direct discrimination at the point of selection, because of the under-representation of people with a protected characteristic where two candidates are found to be of equal merit.

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.

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.

2. **Section 158.**

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 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.
There must be no predetermined 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.

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 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 as a whole, within a particular practice area or within a set of chambers. 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. Relevant data can be obtained from the Bar Council’s research and statistical publications http://www.barcouncil.org.uk/about-the-bar/facts-and-figures/.

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;
- 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;
- 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.
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 exclusive access to solicitors, a rent break, or being given precedence over other colleagues for certain types of work.

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.

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 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 will not be in another context.

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 from the principle of positive action. The key to legitimate action is in the pre-action thinking.

3. Section 159.

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.

The section only permits a chambers to take positive action by “treat[ing] 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.

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 say “we will have a black or female only shortlist for pupillage or tenancy applications”.

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The requirement that candidates A and B are equally qualified makes it likely that there will be relatively few occasions on which section 159 applies. 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.”

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.

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 reasonable view that the person in question has a protected characteristic which causes a disadvantage to people with that protected characteristic in general or that as regards people with that protected characteristic, participation in a given activity is disproportionately low. 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 chamber’s equality and diversity statistics to increase the number of female barristers. Appointing the woman may be justified if statistics show that women are grossly underrepresented at the chancery bar.

The following points should also be borne in mind by sets who consider acting under section 159:

- The collection and analysis of data which demonstrate a connection between a protected characteristic and disadvantage, or the fact of disproportionately low participation, will help to establish the case for positive action.
- Some information or will be required to show for the relevant period that the participation of people with a protected characteristic is disproportionately low or that they suffer a disadvantage. The information or evidence must be shown to be reasonable but it does not need to be statistical data or research.
- “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% BME tenants but across the profession or specialist practice area BME candidates are not underrepresented.
• 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 section 159 in such a scenario will often be hard to justify.

• 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.

• Automatic preferences are always unlawful.

• Chambers will need to 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.

This guidance has been developed by the Legislation and Guidance Sub-Group of the Equality and Diversity Committee, Bar Council and approved by the Committee. The Sub-Group is willing to advise on the application of Sections 158 and 159 of the Equality Act 2010 to chambers. For further information, please contact the Equality and Diversity Section equalopps@barcouncil.org.uk.