

## **BRIEFING PAPER ON POSITIVE DISCRIMINATION**

1. In 2016, the Home Affairs Select Committee (“HASC”) reported that the levels of BAME representation in UK police forces was “pitiful”. None of the UK Police forces were representative of the BAME communities that they serve. At that time, Chief Constable Giles York said: “We take the findings of this report very seriously. A diverse workforce is essential for good policing and, in recent years, progress has been too slow despite the efforts of many forces and each having a plan developed with the College of Policing. Bringing in new people has been a challenge because of budget reductions. However, some areas are now beginning to recruit and, as this opens up, I am confident the mix will change. *A more radical approach may also be needed in which the police select on merit but consider representation when making appointments. This would require legislation*”.
2. The latest figures show that only 7% of police officers are from a BAME background, compared to 14% of the population as a whole. None of the 43 police forces in England and Wales are representative or likely to be within the next 50 years.
3. It is broadly accepted that it is an absolute operational imperative to prioritise race because the current racial disparity in policing undermines legitimacy and threatens policing by consent; increasing the likelihood of adverse response or disorder relating to stop and search, or in critical incident scenarios.
4. It is also a legal requirement. Under the Public Sector Equality Duty (“PSED”) imposed by the Equality Act 2010, public bodies are required, in carrying out their functions, to seek to achieve the following objectives:
  - (a) to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
  - (b) to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
  - (c) to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

5. A representative force is necessary to eliminate discrimination, to advance equality and to foster good relations which in turn fulfils Peel-ian principles and makes crime prevention and detection much more efficient.

### **Positive Action and Positive Discrimination**

6. Positive Action is the term used for permitted measures under the Equality Act 2010 to remedy the under-representation or disadvantage experienced by workers (including police officers). The positive powers are contained in sections 158 and 159.
7. Section 158 permits proportionate measures aimed at reversing or reducing the under-representation of those possessing a protected characteristic. It applies to allow “soft” action such as training to enable individuals to gain employment and mentoring schemes. However, there must be no predetermined policy (positive discrimination bias), 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.
8. Section 158 in short allows the same type of “soft” positive action that existed prior to the Equality Act 2010.
9. Section 159 goes further. It provides that where an employer “reasonably believes” that a candidate with a “protected characteristic” suffers a “disadvantage or are under-represented” in the workplace, they can afford that person “more favourable treatment in relation to recruitment” than someone without that characteristic. It therefore permits direct discrimination in the workplace 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. Much depends upon what “as qualified as” (the equal merit test) means. If it is restricted to qualifications (or possibly, work experience), it would allow a degree of flexibility but if it includes interview performance, it is unlikely that two candidates would be of “equal merit”.
10. The “equal merit” example given by the Government Equalities Office is as follows:  
*“A health and fitness club is faced with making a choice between two applicants for a job as the manager of a leisure facility. One, a woman, has recently completed a*

*Leisure Management Foundation Degree course but has little practical experience. The other candidate is a man who has no formal qualifications but has several years' experience of working in leisure centres. Having interviewed both candidates, the employer decides that both could do the job to the same standard but in different ways as each would bring a different set of skills and experiences to the job. Therefore, because the candidates are of equal merit the manager could voluntarily use the positive action provisions when choosing between the candidates and opt to employ the man because all of the other senior positions at the leisure complex were held by women”.*

11. Section 159 applies to specific tie-breaker situations and cannot be used to “routinely favour” BAME officers. Forces should receive training on how best to utilise section 159 tie-breaker positive discrimination to promote a more representative police force.
12. By 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 workers is unlawful (with specific exceptions such as women only shortlists to select parliamentary candidates). It should be noted that the favoured candidate must be able to meet the job description and person specification; it cannot be used to employ a candidate who is unable to do the work in question. There is therefore no reason why Positive Discrimination would lower police operational standards.

**Positive Action – a palliative, not a cure**

13. In 2015 Bedfordshire Police had the third lowest number of BAME police officers nationally, when compared to the population of the area we serve. BAME officers accounted for just under six per cent of Bedfordshire Police’s workforce.
14. Bedfordshire put into place community roadshows led by the Chief Constable and with a majority BAME team in support. It also employed wider engagement events and bespoke mentoring that have helped to increase the number of BAME applications.
15. However, although BAME recruitment has improved, the retention of BAME officers is still an issue.

16. Nationally, BAME officers leave due to hostile working environments and/or a lack of career development, and often do so due to ill-health (caused by the former). For example, BAME police staff are currently 2.5 times more likely to be subject to misconduct processes and three times more likely to be dismissed for misconduct, than their white counterpart.
17. There is perceived to be a glass pyramid in which BAME staff cannot achieve a rank commensurate with their skills and experience. This also means that there are a lack of senior police BAME role models. At present, even in the most diverse force, the MPS, only about 4% of MPS senior officers (Chief Inspector or above) are BAME, despite their best efforts to develop their BAME officers.
18. Although Bedfordshire has made good progress, and better than most other forces, positive action by itself will not achieve a representative force in Bedfordshire. It will be very difficult to build upon the initial gains made, due to the historical legacy and current issues of institutional racism within police forces. This was also the experience of the PSNI. Positive action is always an effort to swim against the tide.

### **Positive Discrimination**

19. Positive discrimination is currently unlawful under EU and UK Law (but with specific exceptions such as women only shortlists to select parliamentary candidates). It is the main alternative to positive action.
20. The only use of positive discrimination in the workplace occurred in Northern Ireland from 2001 to 2011. This was achieved by a derogation being obtained from EU Law. It worked. It increased Catholic representation in PSNI from 8% to 30% in a decade. By contrast, the MPS serves greater London which has a 40% BAME population. It only has a 14% BAME police representation. This is the highest BAME representation we have achieved in any UK police force. It falls short of what was achieved in the PSNI and with positive action we are very unlikely to achieve 30% BAME levels in the MPS this Century.
21. There has been no drop in policing standards in PSNI as a result of positive discrimination. It also improved community relations and trust in the force.

22. Further, since positive discrimination stopped, the PSNI has struggled to make any forward progress on representation armed only with positive action and a genuine and sustained management commitment to resolving that issue.
23. The Chief Constable of PSNI is now apparently reconsidering whether a further derogation to achieve a 50/50 police force is required.

### **The fears about Positive Discrimination**

24. The two main fears about positive discrimination are that they are anti-white and/or would cause a reduction in standards.
25. The evidence from PSNI is that is not true.
26. Both fears are therefore without any objective basis.
27. It is not anti-white. It does however seek to counter-balance historical positive discrimination in favour of white officers. Even today, disproportionately fewer BAME officers are recruited than white, possibly due to that historical legacy. For example, in 2016 it was reported in the Guardian that although 28% of police applicants to the MPS were BAME (due to positive action efforts), it still only resulted in 17% of those engaged being BAME.
28. Positive Discrimination does not lower standards. The BAME officer has to meet the job description and person specification to be appointed to the role. Further, the statistics show that more BAME workers are under-employed than white workers. BAME officers are therefore statistically more likely to be better qualified and experienced than their white counterpart.
29. Further, if it is accepted that there is still a prevalent unconscious or affinity bias in police recruitment, and that results in lower recruitment rates, the present system is not yet objective or merits based. If that is so, positive discrimination should not be juxtaposed with a lowering of standards, as its critics often do. The comparison should be between a system in which unconscious bias means that disproportionately few BAME officers are recruited, and one in which 30% representation levels could be achieved within a decade.

30. The fears expressed about positive discrimination have no basis in fact. Some say that they are themselves not dissimilar to the fears about the impact on the standard of work caused by the arrival and recruitment of the Windrush generation. Such fears may be themselves tainted by racial prejudice, or at least may be derived from racist stereotypical assumptions.
31. Running a positive discrimination scheme in a UK force for a fixed term is the only way to gather objective evidence as to its strengths and weaknesses.
32. Currently, we only have the data from PSNI which is very positive.

### **Positive Discrimination scheme**

33. If positive discrimination is authorised, a suitable first target would be 30% or whatever the local force BAME population is, whichever is the lower. Although that would still leave the MPS behind its representative target of 40%, it would serve to more than double the current MPS BAME police representation.
34. The situation can then be reviewed after five years and again at the end of the fixed term 10 year period.
35. The positive discrimination scheme could apply to all UK forces or could be restricted to one police force.
36. The scheme should start in April 2019, to avoid the need to seek to agree a derogation from EU Law (as PSNI had to achieve), which would only further complicate the Brexit negotiations.
37. The scheme could be authorised as a derogation from the Equality Act 2010 or as an extension to s159 (and by allowing routine favour in that regard) or by defining BAME police recruitment within the “occupational requirement” exception under schedule 9, given that proper representation it is an overriding operational requirement.

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