

Equality Commission

FOR NORTHERN IRELAND

OUTREACH POSITIVE ACTION

**A GUIDE TO THE LAW AND GOOD
PRACTICE FOR EMPLOYERS**



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1. Introduction

- 1.1 What is an “equal opportunities employer”?
- 1.2 It is an employer who makes genuine efforts to promote equality for opportunity in employment for all persons. In other words, it is an employer who genuinely tries to-
- prevent unlawful discrimination and harassment,
 - promote a good and harmonious working environment, and who
 - takes lawful outreach positive or affirmative action ¹
- 1.3 This guide is about the third of these activities: i.e. **Outreach Positive Action.**
- 1.4 In summary, outreach positive action involves reaching out to specific under-represented or disadvantaged groups of people: for example, depending on the specific circumstances that apply in a particular workplace the groups might be: disabled people, members of the black or ethnic minority communities, women or men, Protestants or Roman Catholics, gays and lesbians.
- 1.5 It may involve, for example, encouraging members of such groups to seek employment in a particular workplace, or helping them to gain skills or qualifications through the provision of occupational training.
- 1.6 Through such outreach methods, employers may be able to increase the diversity of their workforces and promote equality of opportunity in employment for a wider group of people. Such activity may also help to improve an employer’s reputation for corporate and social responsibility.

2. Things to Do Before Taking Outreach Positive Action

Adopt “Good Practice” employment policies and practices

- 2.1 Outreach positive action is more likely to be successful if it is built on a firm foundation of good employment equality practice. This is best done by following the general good practice recommendations laid out in the Equality Codes of Practice and, in particular, the Equality Commission’s Unified Guide to Promoting Equal Opportunities in Employment. [See Appendix 2 for a list of relevant codes and guidance publications].

¹ The terms *positive action* and *affirmative action* are often used in Equality Commission publications and training materials. However, for practical purposes they are essentially the same thing and in the rest of this guide the term *positive action* alone will be used to refer to both.

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- 2.2** Examples of good practices include having and implementing an equal opportunities policy; promoting a good and harmonious working environment; dealing effectively with discrimination and harassment complaints; operating systematic, fair and objective recruitment and selection procedures; promoting flexible working.
- 2.3** Such practices are likely to benefit all job seekers and employees and are not necessarily directed at any particular groups of people, but they will often remove barriers that prevent some groups from enjoying full equality of opportunity.
- Conduct Equal Opportunities Monitoring and Reviews**
- 2.4** Outreach positive action is more likely to be successful, and is much more likely to be lawful, if it is soundly based on the findings of equal opportunities monitoring and reviews.
- 2.5** Many employers are already required by law to conduct such monitoring and reviews. For example, many employers, e.g. those with 11 or more full-time employees, are required to monitor the community background and sex of their employees and job applicants and to review and analyse the data every three years.²
- 2.6** Also, public authority employers are required to have due regard to the need to promote equality of opportunity for people in relation to nine equality categories. This duty requires public authorities to monitor the impacts of their employment practices and to consider taking positive action where appropriate.³
- 2.7** Where you are not under a specific legal duty to conduct equal opportunities monitoring and reviews, the Equality Commission recommends that you should nevertheless do so anyway.
- 2.8** Monitoring and reviews will help you to identify the particular groups of people who might be in need of assistance from outreach positive action to help them to gain full equality of opportunity.
- 2.9** Furthermore, monitoring and reviews can assist you to identify which of the lawful outreach positive action measures would be the most suitable to use.
- 2.10** Finally, monitoring and reviews will provide the evidential basis for justifying the taking of lawful outreach positive action and can thus offer you legal protection.

² These are commonly called Article 55 Reviews, after Article 55 of the Fair Employment & Treatment (NI) Order 1998.

³ Refer to Section 75 of the Northern Ireland Act 1998.



2.11 Guidance on how to conduct monitoring and reviews is given in Chapters 6 and 7 of the Equality Commission’s Unified Guide to Promoting Equal Opportunities in Employment.

Develop a written Employment Equality Plan

2.12 After carrying-out an equal opportunities review it is good practice to develop a written Employment Equality Plan, or revise an existing one. The Plan should describe the actions (including the outreach positive actions) that you propose to take to address the issues identified in the review. It can assist you to set your priorities and to focus your attentions, resources and efforts.⁴

2.13 When developing a Plan, it is also good practice to set goals and timetables. These are not legally binding targets or quotas that must be achieved. Rather, they are aspirational, reasonably achievable goals that will help you to measure the success or otherwise of the Plan.

2.14 A Model Employment Equality Plan showing how one might look is set out in **Appendix 3**.

Review your redundancy selection policy

2.15 You should review your redundancy selection policy to examine how you use length-of-service selection criteria. It is best practice not to use “last in, first out” or “LIFO” as the sole criterion for selection. This does not mean that length-of-service cannot be taken into account, but it is best if it is included as merely one of several criteria.⁵

2.16 There are several reasons for doing this and one of them applies to employers who are taking outreach positive action. If the positive action is successful it will eventually lead to an increase in the numbers of employees in the workforce who are from the under-represented or disadvantaged community or group. As these new employees will on average have relatively shorter lengths-of-service than others, they may suffer a further disadvantage if length-of-service is used as a redundancy selection criterion. This will be especially so if LIFO is the sole criterion. Therefore, to protect any gains resulting from the positive action measures, it is best to abandon the use of LIFO as the sole selection criterion.

Monitor the operation of your Employment Equality Plan

2.17 You should monitor and periodically review the operation of your Employment Equality Plan to assess how successful it has been.

⁴ An Employment Equality Plan might go under other names too, such as a “Diversity Plan” or a “Positive Action Plan”.

⁵ For more detailed advice on reviewing a redundancy policy, refer to Chapter 18 of the Equality Commission’s Unified Guide to Promoting Equal Opportunities in Employment [2009].



3. Unlawful Discrimination

- 3.1** Before taking outreach positive action, it is crucial that you understand the difference between lawful outreach positive action and unlawful outreach positive action.
You must only take lawful action.
- 3.2** In this section we will try to help you to understand this difference. The starting point is to understand what is meant by unlawful discrimination.
- 3.3** The anti-discrimination laws make it unlawful for you to discriminate against or harass employees and job seekers on the grounds of: ⁶
- Sex / Pregnancy or Maternity Leave / Gender Reassignment
- Being Married or in a Civil Partnership / Disability / Race
- Religious or similar Philosophical Belief / Political Opinion / Sexual Orientation / Age
- 3.4** The basic rule is that it is unlawful for you to make recruitment or other employment decisions on any of these grounds. For example, it is normally unlawful to employ (or, to refuse to employ) a woman simply because she is a woman; or a man because he is a man. ⁷
- 3.5** Also, where you have decided to take outreach positive action, it would be unlawful for you to simply reserve a quota of jobs for the members of particular under-represented or disadvantaged groups if those groups are defined by reference to sex, religious or similar philosophical belief, community background, race or sexual orientation (e.g. men or women, Protestants or Catholics; local people or migrant workers; gay people or straight people). ⁸
- 3.6** This means that an employer's reason for making a discriminatory recruitment decision is usually irrelevant. For example, it does not matter whether an employer has good or bad intentions when discriminating against, or in favour of, a woman job applicant. It is irrelevant that the employer might select the woman because he believes that women are under-represented in his workforce and he wishes to increase the number he employs; or that he rejects the woman because he believes that he has too many women in his workforce. In both cases the decision is based on a prohibited ground, i.e. sex, and is unlawful.

⁶ See Appendix 1 for a list of the anti-discrimination laws.

⁷ There may be exceptions to the basic rule in special limited circumstances; for example, where due to a genuine occupational requirement a job needs to be carried out by a person who has a particular sex, race or religion, etc.; or, where an age-based job criterion can be lawfully justified.

⁸ Two important exceptions to this rule are that employers are, however, allowed to reserve job vacancies for: (a) people who have disabilities (but not for people who do not have disabilities). Employers who do this should still act with some caution. Further information is given in Section 5; and (b) people in certain age groups, but only where an employer can objectively justify such an action (see paragraphs 4.3 to 4.7 in Section 4 for further information).

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- 3.7** However, the anti-discrimination laws allow some exceptions to the basic rule against discrimination. Some of these exceptions allow employers to take certain discriminatory actions, short of actually setting or reserving job quotas, in special circumstances as outreach positive action measures.
- 3.8** In the next sections of the guide we will describe these particular measures and the circumstances in which they are permitted so that employers who wish to take them may do so without breaking the law.

4. Lawful Outreach Positive Action

- 4.1** This section is mainly about the permitted positive action measures which are described in paragraphs 4.10 to 4.23. But, before describing these measures it is necessary to highlight certain exceptional issues which apply in the cases of (a) people who have disabilities, and (b) people of certain ages or age groups.

Outreach positive action for people who are disabled

- 4.2** Although the actions outlined below could lawfully be taken by you if you wish to take outreach positive action for the benefit of people who are disabled, you should also note that there are also more options open to you than those listed here. This is because the Disability Discrimination Act 1995 allows employers to take a wider range of outreach positive action measures than would be permissible under the other anti-discrimination laws. Further information is given in Section 5.

Outreach positive action for people in certain age groups

- 4.3** Similarly, although the actions outlined below could lawfully be taken by you if you wish to take outreach positive action for the benefit of people of certain ages or in certain age groups, you should also note that there may be more options open to you than those listed here.
- 4.4** This is because the Employment Equality (Age) Regulations (NI) 2006 would permit an employer to commit an act of direct discrimination (for example, reserving a quota of jobs for people in a certain age group) so long as the act can be objectively justified. This can only occur where the act is a proportionate means of achieving a legitimate aim.
- 4.5** Taking outreach positive action in an effort to help people in certain age groups to overcome disadvantages that they are experiencing in gaining employment is almost certainly a legitimate aim. The harder question to answer is whether reserving a quota of job vacancies for people in a certain age group is a proportionate means of achieving that legitimate aim.



4.6 A number of different factors would need to be considered before answering that question, such as (a) the nature, cause and extent of the disadvantage that the people in the particular age group are under; (b) whether any alternative positive action strategy short of reserving a quota of jobs would be just as effective at addressing the problem; (c) whether such an alternative strategy has been tried already, and what was its outcome, (d) the size of the proposed quota in comparison with the total number of vacancies available in the organisation, (e) the number of employees in the organisation, (f) how long the employer proposes to operate the positive action scheme.

4.7 It is not possible to answer such questions here as the answers will depend on the particular circumstances that apply in different cases. Any employer who proposes to take such positive action in respect of people in certain age groups should contact the Equality Commission for advice before doing so.

Outreach positive action (other than for people who are disabled or of certain ages or in certain age groups)

4.8 A list of the lawful outreach positive action steps is given in sections 4.10 to 4.23. Remember that these are the only ones that you are allowed to use when taking outreach positive action for groups other than for people who are disabled, or who are of certain ages or in certain age groups. You must also remember that some of these actions will only be lawful if certain pre-conditions are satisfied. Further information about these conditions is given in Sections 6 to 8 of this guide and further advice may be obtained from the Commission directly.

4.9 A good time to decide whether these conditions are satisfied is after you have completed an equal opportunities monitoring review.

Encouraging people to apply for job and training opportunities

4.10 You may be permitted to take certain outreach positive actions steps to encourage the members of particular under-represented or disadvantaged groups to apply for job or training vacancies in your workplace or to encourage them to consider taking up work in a particular occupation or profession.

4.11 This form of outreach positive action is especially appropriate where there is a group of people that is under-represented in your workforce and where the reason is largely because they are applying to work for you in answer is whether reserving a quota of job vacancies for people in a certain age group is a proportionate means of achieving that legitimate aim.

4.12 Lower than expected applicant numbers may be caused by the existence of “chill factors” that discourage people in certain groups from wanting to work for an employer. So, taking action to eliminate “chill factors” is a very good way to encourage those people to apply for your jobs.

4.13 It is crucial to remember that you are only permitted to encourage members of the targeted group, or groups, to apply to work for you. You are not permitted to reserve actual jobs for the members of the groups. You should continue to apply systematic, fair and objective recruitment and selection procedures when recruiting staff. The members of the targeted groups will have to apply for the jobs in the same way as other people and undergo the same selection procedures.

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- 4.14** Furthermore, you are not permitted to encourage applications from members of the targeted group, or groups, by offering to pay them higher wages or to award them better benefits than you would normally pay or award to everyone else for doing the same work.
- 4.15** Finally, it is also crucial that when encouraging applications from the members of one group that you do not actively discourage applications from members of another group; e.g. the members of the over-represented group. For example, in job advertisements do not say that you would “welcome applications from women, but not from men”.
- 4.16** Further information about this form of outreach positive action and the pre-conditions which apply is given in **Section 6**.

Offering training opportunities and facilities

- 4.17** You may be permitted to provide access to facilities for training exclusively to members of particular under-represented or disadvantaged groups.
- 4.18** This form of outreach positive action is especially appropriate where there is a group of people that is under-represented in your workforce and where the reason is largely because they are more likely than other groups to lack the qualifications or experience to do the work in question.
- 4.19** Therefore, providing training to members of that group can better equip them to do the work and will assist them to meet the selection criteria that you set when recruiting for job vacancies.
- 4.20** It is crucial to remember that you are only permitted to provide training opportunities. You are not permitted to reserve actual jobs for the trainees who benefit from the scheme. You should continue to apply systematic, fair and objective recruitment and selection procedures when recruiting staff. The trainees will have to apply for the actual jobs in the same way as other people and undergo the same selection procedures.
- 4.21** Further information about this form of outreach positive action and the pre-conditions which apply is given in **Section 7**.

Reserving job vacancies for persons who are unemployed

- 4.22** As noted previously, it is unlawful for you to simply reserve a quota of jobs for the members of particular under-represented or disadvantaged groups defined by reference to sex, religious or similar philosophical belief, community background, race, sexual orientation (e.g. men or women, Protestants or Catholics; local people or migrant workers; gay people or straight people).
- 4.23** However, you are expressly permitted by two of the anti-discrimination laws to reserve a quota of jobs for people who are presently unemployed, or who have been unemployed for a specified period of time. Further information about this form of outreach positive action is given in **Section 8**.



5. Positive Action for People Who Are Disabled

5.1 This section follows on from paragraph 4.2.

Giving preferential treatment to people who are disabled

5.2 The Disability Discrimination Act 1995 (“the DDA”) allows employers to do things that would not be allowed under the other anti-discrimination laws.

5.3 The DDA does not prevent employers from treating disabled persons more favourably than persons who are not disabled (but not vice versa). Therefore, it would be lawful for an employer, when taking outreach positive action, to reserve a quota of jobs for disabled people to the exclusion of people who are not disabled. Employers could also give disabled people preferential treatment in other aspects of a recruitment exercise. For example, employers could lawfully operate a “guaranteed interview scheme” for disabled job applicants.

5.4 However, employers who act in this way should still act with some caution. This is because it is unlawful to treat a person who has one type of disability more favourably than a person, or persons, who have other types of disability.

5.5 For example, it is likely to be unlawful to reserve a job vacancy for people who have sensory disabilities but to exclude from consideration people who have mental health disabilities. There are exceptions to this rule in certain circumstances for employers who are charitable organisations or who provide “supported employment”. The “supported employment” exception is discussed in paragraphs 5.7 to 5.9.

5.6 Employers do not need the Equality Commission’s approval before taking outreach positive action of kind discussed here. However, we recommend that you nevertheless seek our advice first. This is because we have certain recommendations of good practice to make (see below).

Discriminating between disabled people

5.7 Any employer who provides “supported employment” may discriminate on the grounds of disability when providing that employment.

5.8 This means that an employer could set up a “supported employment” arrangement in which he creates a number of job opportunities only for disabled people who have specified types of impairments. For example, he could restrict the opportunities to people with sight impairments.

5.9 There are limits to this opportunity. It is only currently open for the employment of disabled people who are receiving help from the Department of Employment and Learning under its Workable (NI) scheme.

The reasonable adjustment duty

5.10 It is important for employers to be aware of the reasonable adjustment duty imposed by the DDA and to understand the difference between it and outreach positive action.

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- 5.11** The DDA imposes a reasonable adjustment duty on employers in certain circumstances. These circumstances normally occur where a disabled job applicant or employee has been placed, or would be placed, at a substantial disadvantage compared to other people who are not disabled by any provision, criterion or practice applied by an employer, or by the physical features of the employer's premises.
- 5.12** For example, it might arise in the following circumstances: an employer makes all job applicants take a written selection test which lasts for 45 minutes. If a job applicant who is disabled due to dyslexia would be unable to complete the test within the 45 minutes as a result of her disability, then she would be placed at a substantial disadvantage compared to the other, non-disabled, job applicants who are taking the test.
- 5.13** In such a situation, the employer will be under a duty to make reasonable adjustments to the provision, criterion, practice or physical feature that is causing, or would cause, the substantial disadvantage. This may mean changing it in some way; or abandoning it in order to prevent the substantial disadvantage occurring.
- 5.14** In the example given in paragraph 5.12, the reasonable adjustment duty might require the employer to extend the time period for taking the test to 60 minutes, or to some other period. The extension of time only has to be made for the disabled person concerned and not for all job applicants in general. Moreover, the duty might perhaps require the employer to allow the disabled job applicant to proceed to the next stage of the selection process without taking the selection test. The extent of the duty depends on what is reasonable in the context of the particular circumstances of the case.
- 5.15** It is important to note, however, that the reason the employer would be making the adjustments in cases such as these is to ensure that he or she complies with a statutory duty; namely the duty to make reasonable adjustments. A failure to comply with this duty constitutes an act of disability discrimination.
- 5.16** Therefore, taking action to comply with the reasonable adjustment duty is not voluntary action, such as outreach positive action. Instead, it is action that is required to avoid committing an act of disability discrimination.
- 5.17** In comparison, an act of voluntary positive action would be where the employer makes all job applicants, except those who are disabled, take the selection test. In such a case, the employer does not enquire whether disabled applicants could take the test with or without difficulties related to their disabilities. The employer is merely giving all disabled applicants a pass through that stage of the selection process. This may not be, strictly speaking, a reasonable adjustment but it is lawful positive action because it does not unlawfully discriminate against persons who are not disabled.
- 5.18** A common example of a similar lawful positive action measure is a "guaranteed interview scheme" under which an employer guarantees a job interview to every disabled applicant who meets the essential job criteria.



Good practice recommendations

- 5.19** These are the recommendations of good practice that the Equality Commission would make to an employer who is considering taking outreach positive action for the benefit of people who are disabled, especially where the employer may be considering whether to provide preferential treatment such as reserving a quota of job vacancies for disabled people.
- 5.20** Identify specific aims that you want to achieve with the positive action measure. For example, show that you have identified that disabled people (e.g. all disabled people generally; or, people who have particular kinds of disabilities) are not enjoying full equality of opportunity and that you wish to address this problem. This is best done following an equal opportunities review of the kind mentioned in Section 2 *“Things to Do Before Taking Outreach Positive Action”*.
- 5.21** Following that, set specific goals and timetables for the measure linked to the aims that you have identified. This is best done by developing an Employment Equality Plan of the kind mentioned in Section 2 *“Things to Do Before Taking Outreach Positive Action”*.
- 5.22** When setting goals and timetables, plan to take action that is both proportionate and time-bound. By this we mean that-
- (a) the plan should not be open-ended and continued indefinitely. Set a time-limit on the operation of the measure (e.g. 1 year, 2 years or 3 years).
 - (b) when setting the size of a quota (i.e. when reserving a set number of job vacancies for persons who are disabled) do not make it 100%. That is, do not reserve all available job vacancies in a given period for members of the target group. For example, if there are 10 vacancies at a particular time for Clerical Officer posts, do not reserve all 10 posts for members of the target group. Instead, set a lesser quota, such as 40%, 50%, 60%, etc. and open up the remaining opportunities to all persons generally. The ultimate decision as to what size of quota to set lies within an employer’s own discretion.
- 5.23** Review the operation of the plan at the end of its set timeframe to assess whether it was successful in achieving your aims. Afterwards, consider whether to renew the plan for a further period.
- 5.24** Continue, as far as possible, to operate non-discriminatory and good practice employment policies and practices of the kinds referred to in paragraphs 2.1 to 2.3 of Section 2. By this we mean, that even though you may have reserved a number of vacant posts for people who are disabled, treat the eligible applicants for and appointees to those posts in a fair and non-discriminatory way. For example, when deciding which of the eligible applicants to appoint, apply fair and objective recruitment and selection procedures of the kind recommended in Chapter 10 of the Equality Commission’s *Unified Guide to Promoting Equal Opportunities in Employment*. Furthermore, be constantly aware of your duty to make relevant reasonable adjustments where appropriate.



6. Encouraging People to Apply for Job / Training Opportunities

- 6.1 This section follows on from paragraphs 4.8 to 4.16 and those paragraphs should be read first.
- 6.2 Employers may be permitted to take certain outreach positive action steps to encourage the members of particular under-represented or disadvantaged groups to apply for job or training vacancies or to encourage them to consider taking up work in a particular occupation or profession.
- 6.3 This is often done when advertising job and training vacancies, but it may be done in other ways too. For example, employers might also -
- (a) Develop links with influential individuals, community groups, schools, job clubs, voluntary organisations and other agencies associated with particular groups.
 - (b) Sponsor community, sporting and youth events associated with particular groups.

Roman Catholics (or, Protestants) are under-represented in a particular factory workforce, mainly because there are relatively few members of that community applying for job vacancies in the factory. The employer considers that certain “chill factors” are causing this. He takes steps to prevent these “chill factors” from operating.

For example, he carries out an audit of flags and emblems in the workplace and follows this up by banning the display of any which are likely to disrupt the good and harmonious working environment.

He reviews how he advertises his job vacancies and starts advertising in newspapers read by both communities. He also adds a “welcoming statement” to his advertisements in which he states that he would particularly welcome applications from members of the under-represented community. He also ensures that his advertisements are placed in Job Centres, job clubs and community centres situated in areas where the under-represented community predominantly live.

He develops links with schools and colleges attended predominantly by pupils and students from the under-represented community. He allows the schools to organise visits to the factory premises and offers work experience opportunities to a number of the pupils and students every year.

Finally, he sponsors the annual community festival that is held in a neighbouring area where the under-represented community predominantly live.

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- (c) Creating networks with other employers or vocational or professional organisations for the purpose of taking joint positive action.

Women, disabled people and ethnic minorities are under-represented amongst the workers in a particular industry.

A group of employers in that industry get together to jointly run a programme to encourage women, disabled people and ethnic minorities to consider taking up work in the industry. For example, instead of one single employer doing the things listed at (a) and (b) above, the employers' group carries them out on behalf of their industry as a whole, or on behalf of the members of the industry within a particular locality, such as a particular district council area.

Such a programme could also be run by, or jointly with, the trade unions, professional bodies and training organisations which operate in the industry.

Focused or general methods of encouragement

- 6.4** In the examples given above, the employer, or the group of employers and others, identified particular groups of people who were in need of encouragement and used methods of encouragement that focused specifically on the groups in question. Thus, the employer stated that he "welcomed" applications from members of the groups, but he did not expressly extend the "welcome" to other groups (although, crucially, he did not discourage applications from those groups either).
- 6.5** To focus outreach positive action efforts on a specific group, or specific groups, in this way requires certain pre-conditions to be satisfied. These conditions are described in paragraphs 6.24 to 6.62.
- 6.6** An alternative to focusing on a particular group might be to encourage everyone equally. For example, an employer's advertisements might state that he "welcomes applications from all men and women and from the members of all communities". The same employer might also develop links with each of the Protestant and Roman Catholic and ethnic minority communities.
- 6.7** Although such a general approach does not target specific groups it may, nevertheless, have some success at eliminating "chill factors" for under-represented or disadvantaged groups.
- 6.8** Such general, unfocused methods cannot be said to discriminate against any person or groups. Therefore, there are no pre-conditions to be satisfied before they can be used. However, such methods may be more costly to implement, may be less effective and may be a less efficient use of resources.
- 6.9** Employers, therefore, have a choice of using either focused or general methods of encouragement. However, the Equality Commission would recommend that employers use focused methods rather than general methods, or alternatively a combination of focused and general methods.

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- 6.10** Furthermore, where an employer has only used general methods but without achieving any success in encouraging applications from under-represented or disadvantaged groups, we would more readily recommend that he should try using focused methods in future.

Advertising job and training vacancies

- 6.11** As noted in paragraph 6.3, a very common method of encouraging applications is in the way that job and training vacancies are advertised. So, it is appropriate to say something about this.

Basic good practice

- 6.12** The basic rule of good practice is that employers should advertise their job and training vacancies as widely as is practicable so that as many eligible and suitably qualified candidates as possible have an opportunity to apply.
- 6.13** Also, where practicable, employers should use a variety of different media to publish their advertisements. For example, employers who advertise on their own corporate websites should also advertise in Job Centres, or in one or more newspapers, or on online recruitment websites.
- 6.14** So long as they follow the above guidelines, an employer who is taking outreach positive action may also lawfully encourage the members of specific under-represented or disadvantaged groups to apply for the jobs or training opportunities in question.
- 6.15** Again, following on from paragraphs 6.4 to 6.10, there may be general or focused ways of using advertisements.

General approach

- 6.16** As this approach does not require the advertisement to be directly or openly targeted at any particular group, it cannot be said to discriminate against other person or group. Therefore, there are no pre-conditions to be satisfied before it can be used.
- 6.17** In this approach the employer might simply declare in the advertisement that he is “an equal opportunities employer” and that he “welcomes applications from all men and women and from the members of all communities”.
- 6.18** Another good method is for the employer to declare that he is “an equal opportunities employer” and, also, that he provides certain working arrangements or benefits to all of his employees that job applicants may find attractive and which may encourage them to apply.
- 6.19** For example, if an employer provides flexible working arrangements to his workforce it will benefit all employees in principle, but in practice it is more likely to benefit women employees and disabled employees who are more likely to want to use them.

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- 6.20** Therefore, if the employer wishes to take positive action to encourage applications from women or disabled people, it would be a good idea to mention in job advertisements that flexible working arrangements are available.
- 6.21** Another general method of encouraging applications from particular groups would be to include references to them in any photograph or drawing that is used to illustrate an advertisement. For example, an advertisement could include a photograph that shows both men and women, or people of different ethnic origins, or people with disabilities and people without disabilities. This is a very good practice.

Focused approach

6.22 In the focused approach a particular group is identified in the advertisements or through the media where the advertisements are placed. This may lawfully be done if certain pre-conditions are satisfied (see paragraphs 6.24 to 6.61).

6.23 If the pre-conditions are met, an employer is permitted to -

- (a) Place job advertisements in specialist media which are associated with particular groups.

An employer wishes to take outreach positive action to attract more job applications from Irish Travellers. He normally advertises in the Belfast Telegraph and Irish News. He continues to do this, but also starts advertising in Job Centres. He also starts a practice of e-mailing the advertisements to organisations that work on behalf of Irish Travellers, such as An Munia Tober. He asks these organisations to place the adverts on their notice boards and websites and to draw the advertisements to the attention of their clients.

- (b) Advertisements to encourage members of particular under-represented groups to apply.

An employer wishes to take outreach positive action to attract more job applications from women. He adds the following paragraph to his advertisements -
"We are an equal opportunities employer. We welcome applications from all suitably qualified persons. However, as women are currently under-represented in our workforce, we would particularly welcome applications from women. All appointments will be made on merit."

The pre-conditions for taking the focused approach

6.24 Unfortunately, the pre-conditions for taking the focused approach vary depending on the nature of the group that the employer is trying to target in the advertisement. Slightly different rules apply when the groups are based on community background as compared to gender and race, and there are different rules again for when the groups are based on sexual orientation or age. Each of these will be examined in turn below.



6.25 In none of the cases that follow is there any need to obtain the prior approval of the Equality Commission. However, the Commission will readily provide advice to any person who requests it.

Community background⁹

6.26 Community background is a reference only to the Protestant and Roman Catholic communities in Northern Ireland.

Action by employers

6.27 The pre-condition is that the employer is taking affirmative action. The best way for an employer to show that the pre-condition is met is to show that he has carried-out an Article 55 review of the composition of his workforce and has found that one of the communities is not enjoying fair participation in his employment and that action is needed to secure such participation.

Action by other bodies

6.28 This is reference to action by other bodies such as employment agencies; vocational organisations like trade unions or professional bodies; or the providers of vocational training services. These bodies may also encourage the members of either the Protestant or Roman Catholic communities to consider or apply for particular kinds of work or occupations or training.

6.29 The pre-condition is that they are taking affirmative action. Therefore, they will need to have some evidence that shows that the targeted community is under-represented or is not enjoying fair participation in the kind of work or occupation in question.

Religious or similar philosophical beliefs and political opinion

6.30 As noted above, the community background category is a reference to the Protestant and Roman Catholic communities in Northern Ireland. It is a reference to the communities in broad religious/political terms and reflects the general Protestant/Unionist and Catholic/Nationalist divide. It does not necessarily reflect the actual religious or similar philosophical beliefs and political opinions of all of the individual members of the two communities.

6.31 For example, it is not concerned with the separate religious denominations and shades of religious or similar philosophical belief and political opinion which can be found within each community, or any other communities. It is not concerned with whether people actually subscribe to the faiths held by Presbyterians, Methodists, Baptists, Roman Catholics, Muslims, Hindus, Sikhs or Jews or whether they support any particular political parties or hold any particular philosophies or political opinions.

⁹ Refer to Article 74 of the Fair Employment & Treatment (NI) Order 1998.



6.32 So, can an employer lawfully take the focused approach to encouraging applications from the actual believers of any particular religious faith or similar philosophy or the holders of any particular political opinions?

The answer is no! The law does not permit this. ¹⁰

6.33 So, for example, encouragement positive action could not lawfully be targeted at groups who profess to be Loyalists or Republicans. As these groups are sub-sets of the wider Protestant and Roman Catholic communities respectively, then any positive action that is taken must be framed in terms of those wider community background categories.

Gender (men or women)

Action by employers ¹¹

6.34 The pre-condition is that in his workplace and within the past 12 months there were no women (or, men) working there, or their numbers were comparatively small.

6.35 Even if there are adequate numbers of women (or, men) in the employer's workforce as a whole, encouragement action could still be targeted at that group if there are no members of the group, or comparatively few of them, working in a particular occupation within the workplace.

6.36 For example, there may be reasonable numbers of women working in the workforce as a whole. However, on closer inspection they are all employed in low-level operative posts, or in entry-level grades and none of them, or very few of them, are employed in managerial posts. In this case the employer could encourage his current women employees, or women generally, to apply for promotion or appointment to managerial posts.

6.37 The test of whether women's (or, men's) "numbers are comparatively small" requires a comparison to be made between the proportion of women (or, men) employed in the relevant time period (i.e. in the 12 months leading up to the employer taking action) and the proportion of women (or, men) that one would expect to find in the general labour pool that the employer normally recruits from.

6.38 For example, the general labour pool for the kind of work in question may be composed of 60% men and 40% women. If the employer employs 200 workers and his workforce is composed of 160 men (80%) and 40 women (20%), then the number of women in the workforce is comparatively small. In this case, the pre-condition for focusing positive action encouragement on women is met.

6.39 As this shows, the best time to make judgements like this is after an equal opportunities monitoring review has been carried-out.

¹⁰ Refer to Article 4 of the Fair Employment & Treatment (NI) order 1999.

¹¹ Refer to Article 49 (1) of the Sex Discrimination (NI) Order 1976.



Action by other bodies ¹²

- 6.40** This is a reference to action by other bodies such as employment agencies; vocational organisations like trade unions or professional bodies; or the providers of vocational training services. These bodies may also encourage women or men to consider, or to apply for, particular kinds of work or occupations or training.
- 6.41** The pre-condition is similar to the one that applies to employers. It is that: it reasonably appears to the body that within the past 12 months there were no women (or, men) working in a particular kind or work or occupation, or that their numbers were comparatively small.
- 6.42** When making the comparative test, the body may apply it to Northern Ireland as a whole, or only to a part of Northern Ireland. For example, there may be women working in a particular occupation in the Greater Belfast area, but none working in that occupation in counties Fermanagh and Tyrone. Therefore, a professional body could lawfully encourage women who live in those counties to consider taking up the occupation in question.

Racial groups

- 6.43** This section applies to action taken on behalf of racial groups, which means groups defined by reference to race, colour, nationality or national or ethnic origins. It also applies to action taken for the benefit of Irish Travellers.

Action by employers ¹³

- 6.44** The pre-condition is that in his workplace and within the past 12 months there were no members of a particular racial group working there or their numbers were comparatively small.
- 6.45** Even if there are adequate numbers of persons from that racial group in the employer's workforce as a whole, encouragement could still be targeted at that group if there are no members of it, or comparatively few of them, working in a particular occupation within the workplace.
- 6.46** For example, there may be reasonable numbers of Irish Traveller and Portuguese staff working in the workforce as a whole. However, on closer inspection they are all employed in low-level operative posts, or in entry-level grades and none of them, or very few of them, are employed in managerial posts. In this case the employer could encourage his current Irish Traveller and Portuguese employees to apply for promotion to managerial posts.
- 6.47** The usual test of whether a racial group's "*numbers are comparatively small*" requires a comparison to be made between the proportion of that group employed in the relevant time period (i.e. in the 12 months leading up to the employer taking action) and the proportion of that group that one would expect to find in the general labour pool that the employer normally recruits from.

¹² Refer to Article 48(1) and (2) of the Sex Discrimination (NI) Order 1976.

¹³ Refer to Article 37(4) and (5) of the Race Relations (NI) Order 1997.

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- 6.48** For example, the general labour pool for the kind of work in question may be composed of 5% Irish Travellers and 95% all other racial groups. If the employer employs 200 workers but none of them are Irish Travellers, or only two of them are (i.e. 1%) then the pre-condition for focusing positive action encouragement on Irish Travellers is met.
- 6.49** It is also permissible to make a comparison between the numbers employed in a workforce as a whole and in parts of that workforce (see paragraph 6.46 for an example).
- 6.50** As these considerations show, the best time to make judgements like this is after an equal opportunities monitoring review has been carried-out.

Action by other bodies ¹⁴

- 6.51** This is reference to action by other bodies such as employment agencies; vocational organisations like trade unions or professional bodies; or the providers of vocational training services. These bodies may also encourage particular racial groups to consider, or to apply for, particular kinds of work or occupations or training.
- 6.52** The pre-condition is similar to the one that applies to employers. It is that: it reasonably appears to the body that within the past 12 months there were no women (or, men) working in a particular kind or work or occupation, or that their numbers were comparatively small.
- 6.53** When making the comparative test, the body may apply it to Northern Ireland as a whole, or only to a part of Northern Ireland.

Sexual orientation ¹⁵

- 6.54** This section applies to action taken on behalf of people who have a particular sexual orientation, which means people defined by reference to whether they are gay or lesbian, bisexual or straight.
- 6.55** The pre-condition is the same regardless of whether the positive action encouragement is being taken by employers or other bodies, such as employment agencies, professional bodies or training providers.
- 6.56** The pre-condition is that the employer, or other body, must reasonably believe that the acts of encouragement will prevent or compensate for disadvantages linked to sexual orientation which are suffered by people who have a particular sexual orientation.
- 6.57** For example, if an employer had evidence that showed that gays and lesbians were applying to work in his workplace in comparatively small numbers, then that might provide reasonable grounds for believing that gays and lesbians are suffering some form of disadvantage related to their sexual orientation in respect of that workplace, or with the kind of work

¹⁴ Refer to Article 37(1) and (2) of the Race Relations (NI) Order 1997.

¹⁵ Refer to Regulation 29(1), Employment Equality (Sexual Orientation) Regulations (NI) 2003.



that is done there. If the employer also had evidence to show that many gays and lesbians perceive the employer's organisation as being homophobic, then that might explain why applicant numbers from gays and lesbians are relatively small. It also indicates that tackling the perception that the organisation is homophobic might fix the problem. On the basis of evidence like this, then the pre-condition for taking encouragement positive action would be met.

Age¹⁶

- 6.58** This section applies to positive action taken on behalf of people who are at a particular age, or in a particular age group. These age categories are very flexible and the nature of the age group being targeted will depend on the nature of the problem that the employer is trying to fix. For example, where appropriate, an employer might try to take action to help (a) people aged under-21 years; or (b) people aged 20-30 years; or (c) people aged 40-50 years; or (d) people aged over 55 years.
- 6.59** The pre-condition is the same regardless of whether the positive action encouragement is being taken by employers or other bodies, such as employment agencies, professional bodies or training providers.
- 6.60** The pre-condition is that the employer, or other body, must reasonably believe that the acts of encouragement will prevent or compensate for disadvantages linked to age which are suffered by people who are at a particular age, or in a particular age group.
- 6.61** For example, if an employer had evidence that showed that people aged over 45 years were applying to work in his workplace in comparatively small numbers, then that might provide reasonable grounds for believing that "middle-aged" people are suffering some form of disadvantage related to their age in respect of that workplace, or with the kind of work that is done there. If the organisation's image of itself, as expressed in its commercial, employment and other advertising, is of an organisation that is "trendy" or "young and dynamic" or "full of youthful enthusiasm", then that might explain why applicant numbers from middle-aged people are comparatively small. It also indicates that tackling this perception might fix the problem. On the basis of evidence like this, then the pre-condition for taking encouragement positive action would be met.

7. Offering Training Opportunities / Facilities

- 7.1** This section follows on from paragraphs 4.8 to 4.9 and 4.17 to 4.21 and those paragraphs should be read first.
- 7.2** Under this form of outreach positive action, employers may be permitted to provide access to facilities for training exclusively to members of particular under-represented or disadvantaged groups.

¹⁶ Refer to Regulation 31(1) of the Employment Equality (Age) Regulations (NI) 2006.

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- 7.3** As noted in paragraphs 4.11 and 4.12, this form of outreach positive action is especially appropriate where there is a group of people that is under-represented in a workforce and where the reason is largely because they tend to lack the qualifications or experience needed to do the work in question. Thus, providing training to the members of that group can better equip them to do the work and will assist them to meet the selection criteria that you set when recruiting for job vacancies.
- 7.4** Also, this outreach positive action step is especially appropriate for use where the encouragement actions outlined in Section 6 are likely to have little or no effect on their own. For example, where an under-represented or disadvantaged group lack the necessary job selection qualifications and experience, then there may be little to be gained by merely encouraging them to apply for jobs that they are not qualified to do.

Focused or general provision of training

- 7.5** This section also shares some common features with those mentioned in Section 6, so parts of Section 6, especially paragraphs 6.1 to 6.10 should be read first as well.
- 7.6** In Section 6, at paragraphs 6.1 to 6.10, it was noted that certain outreach actions can be aimed at the entire population or alternatively could be focused directly on specific groups (e.g. women, gays and lesbians, middle-aged people).
- 7.7** The same can happen in the case of offering training opportunities or facilities. For example, where an employer wishes to take positive action for the benefit of women because they are under-represented in his workforce, he could offer training opportunities to men and women equally in the hope that women will benefit anyway. Alternatively, he might for a fixed time period offer training opportunities only to women.
- 7.8** To focus outreach training efforts on a specific group, or specific groups, requires certain pre-conditions to be satisfied. These pre-conditions are described in paragraphs 7.13 to 7.72. This is the main focus of this section.
- 7.9** In comparison, general, unfocused training opportunities cannot be said to discriminate against any person or groups. Therefore, there are no pre-conditions to be satisfied before they can be used. However, such an approach may be more costly to implement, may be less effective and may be a less efficient use of resources.
- 7.10** Employers, therefore, have a choice of offering either focused or general training opportunities. However, the Equality Commission would recommend that employers take the focused approach rather than the general one, or alternatively a combination of focused and general approaches where possible.
- 7.11** For example, where an employer wishes to take positive action for the benefit of women because they are under-represented in his workforce, he could offer training opportunities to men and women equally, but at the same time he might take action to encourage women to apply for the training opportunities (e.g. “we would particularly welcome applications from women for these training opportunities.”)
- 7.12** Furthermore, where an employer has only taken the general approach but without achieving any success, we would more readily recommend that he should try taking the focused approach in future.



The pre-conditions for taking the focused approach

- 7.13** Unfortunately, the pre-conditions for taking the focused approach vary depending on the nature of the group that the employer is trying to focus on. Different rules apply when the groups are based on community background as compared to gender and race, and there are different rules again for when the groups are based on sexual orientation or age. Each of these will be examined in turn below from paragraph 7.21 onwards.
- 7.14** Despite the different rules that apply in different circumstances, there are also some rules that are common to all circumstances. These are outlined in paragraphs 7.15 to 7.20.

Employers must only provide training facilities

- 7.15** Employers must only provide facilities for training that are genuinely just that.
- 7.16** In the case of people who are not yet employed by an employer, the offer of “training facilities” must not be contracts of employment in disguise, and employers must not inform the “trainees” that the training programme will automatically be followed by an offer of employment. Employers must continue to apply systematic, fair and objective recruitment and selection procedures when recruiting staff. The trainees will have to apply for actual jobs in the same way as other people and undergo the same selection procedures
- 7.17** In cases where training facilities are being provided to current employees only, perhaps as a means of equipping them for possible promotion opportunities, then the same rules apply. Trainees must not be given automatic promotions, but must instead apply and compete just as other employees have to.

Apprenticeships are not “training facilities”

- 7.18** The form of training arrangement known as a contract of apprenticeship is considered to be a form of employment under the anti-discrimination laws. So, unusually, apprenticeships are not considered to be “training facilities” for the purposes of providing training facilities under an outreach positive action programme. This means that employers are not allowed to discriminate on the statutory non-discrimination grounds when offering to help people contracts of apprenticeship. However, it would be permissible to provide “training facilities” gain the skills or qualifications needed to satisfy the minimum entry criteria required for a particular apprenticeship programme.

Training must help to “fit” people for employment

- 7.19** The training facilities that are provided must be designed to help “fit” the trainees for particular forms of work. This means that it is designed to help them to gain the qualifications, skills or experiences needed to do that type of work (or apprenticeship). However, there are limits to what the training facilities or courses may cover.



For example, an employer wishes to provide training facilities to help some of his women employees to gain certain finance qualifications that are needed to work at managerial level in his organisation. It would be lawful to pay the college fees that a group of women employees incur in studying for the qualification, whilst refusing to pay the fees of any male employees who are also studying for the same qualification. Later, the women (i.e. the former trainees) now have the relevant qualification and are eligible to apply for the next vacancy that arises in the managerial grades. As part of the selection process for the post there is an aptitude test which applicants must pass to be eligible for an interview. This is where the positive action must end. The employer must not exclusively give the women help to prepare them for the aptitude test. He must not “teach the test”. It would not be helping to “fit” them for the job, but would instead merely give them an unfair advantage in the selection process for the job. He could, however, provide all applicants, male and female, with help to prepare for the test.

Approval from the Equality Commission

- 7.20** Unless otherwise stated below, employers will not need to obtain the prior approval of the Equality Commission. However, the Commission will readily provide advice to any person who requests it.

Community background

- 7.21** Community background is a reference only to the Protestant and Roman Catholic communities in Northern Ireland. It is a reference to the communities in broad religious/political terms and reflects the general Protestant/Unionist and Catholic/Nationalist divide. It does not necessarily reflect the actual religious beliefs and political opinions of all of the individual members of the two communities.
- 7.22** This section refers only to a form of training that is permitted by Article 72 of the Fair Employment & Treatment (NI) Order 1998. The training may only be delivered in a way that indirectly benefits one community over the other (Protestant or Roman Catholic) but it must not be exclusively available to only one of those communities.
- 7.23** A form of direct religion-specific training is permitted in certain circumstances by a different statutory provision and this is discussed in paragraphs 7.32 to 7.38.
- 7.24** The training facilities that are provided must be of a type that will help to fit people for employment, or for employment in a particular capacity or for a particular employment or occupation. Therefore, it could be training that would help people to work in a particular workplace, or in a particular industry, occupation or profession.
- 7.25** The training facilities may be provided by an individual employer or by an employment agency or training provider or by a number of such persons acting together.
- 7.26** The pre-condition for taking action is that the employer (or other body) is taking affirmative action for the benefit of members of either the Protestant or Roman Catholic communities. Therefore, they will need to have some evidence that shows that the one of the communities is under-represented or is not enjoying fair participation in a particular workplace, or in the kind of work or occupation in question.

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- 7.27** Another important condition applies to this form of training: it must not be allocated to people on the basis of their actual or perceived religious beliefs or political opinions. Thus, it must not be allocated according to whether people are, or are perceived to be, Protestants/Unionists or Catholics/Nationalists.
- 7.28** How then may the Article 72 form of training benefit an under-represented Protestant or Roman Catholic community if it cannot be allocated on the basis of actual or perceived religious beliefs or political opinion? There are two answers or options.
- 7.29** The first option is that the training may be provided at a particular place which, given its location, may be more practicable, for the members of one community to attend than the other. For example, if an employer's intention is to take affirmative action for the benefit of the Roman Catholic community, then he could offer a training course that is held in a community centre or college located in a predominantly Roman Catholic residential area. The training course must be genuinely open to applicants from both the Protestant and Roman Catholic communities. However, given the location, it is probable that Roman Catholics are more likely to apply for entry to the course than Protestants.
- 7.30** The second option is that the training may be restricted to people in a particular class, being a class that is not defined by reference to religious belief or political opinion. For example, if a Belfast-based employer's intention is to take affirmative action for the benefit of the Roman Catholic community, then he could offer a training course that is open only to people who live in the West Belfast parliamentary constituency. Thus, the opportunity would be open to both Protestants and Roman Catholics, but given that more Roman Catholics live in that area, then more of the applicants are likely to be Roman Catholics.
- 7.31** Article 72 training may also be offered to current employees of an employer.

For example, an employer's operation is located on two sites, one (site A) in which the Protestant community is predominant and one (site B) in which the Roman Catholic community is predominant.

However, on carrying-out an Article 55 review, the employer finds that in the organisation as a whole his Protestant employees are not enjoying the same level of fair participation as his Roman Catholic ones. This is because the Protestant employees are predominantly grouped in the lower pay grades and are under-represented in the managerial grades. The employer decides to address this problem by offering Article 72 training, which will include setting up a mentoring scheme and managerial training.

The employer cannot open up the training opportunities only to Protestant members of staff. However, he could lawfully restrict the opportunities to staff who work in site A. Roman Catholics work there too and will be eligible to apply for the training, but given that Protestants are in the majority there then more of the applicants are likely to be Protestants.



Religious or similar philosophical belief

- 7.32** This section refers only to a form of training that is permitted by Article 76 of the Fair Employment & Treatment (NI) Order 1998. It permits employers to provide training to the members of groups that share particular religious or philosophical beliefs. Thus, unlike the Article 72 form of training, an employer may allocate Article 76 training exclusively to a particular group.
- 7.33** Religious belief refers to any actual or perceived religious belief or similar philosophical belief, including the absence of the same. It is a reference to actual faiths such as those held by Presbyterians, Methodists, Baptists, Roman Catholics, Muslims, Hindus, Sikhs or Jews. It also includes a reference to people who do not have any religious faith, such as atheists. Thus, it is wider than the general “Protestant” and “Roman Catholic” labels that are used to describe community background (see above).
- 7.34** The Article 76 form of training is not restricted to benefiting only the members of the Protestant and Roman Catholic communities, although it is most commonly used for that purpose. It could, in principle, also be used to benefit the members of any under-represented group who share a common religious or philosophical belief.
- 7.35** However, in other respects the nature of the training is narrower than that allowed by Article 72 (see above). For example, the training facilities that are provided must be of a type that will help to fit people for employment with a particular employer. Also, the training facilities may only be provided by that employer, or by a training provider who is acting on the employer’s behalf.
- 7.36** Also, the training may only be provided to people who do not currently work for the employer. Thus, the employer cannot operate an Article 76 training facility for the benefit of his current employees.
- 7.37** Crucially, an employer may only provide Article 76 training facilities after he has received approval from the Equality Commission.
- 7.38** The Equality Commission may not give such approval unless it is satisfied that within the past 12 months -
- (a) none of the employer’s employees were members of the particular religious or philosophical group in question, or that
 - (b) the proportion of employees from that group that were employed was small in comparison with what might otherwise have been expected.

Political opinion

- 7.39** As noted above, Article 72 training may only be done to benefit one or other of the Protestant and Roman Catholic communities in Northern Ireland, and Article 76 training may only be done to benefit groups defined by reference to religious belief.
- 7.40** In contrast, the law does not permit outreach positive action training to be focused on groups that are defined solely by reference to political opinion. So, for example, positive action training could not lawfully be targeted at groups who profess to be Loyalists or Republicans.



7.41 As such groups are sub-sets of the Protestant and Roman Catholic communities, or of people who subscribe to the Protestant and Roman Catholic religious faiths, then any positive action that is taken must be framed in those wider terms.

Gender (men or women)

Action by employers¹⁷

- 7.42** The pre-condition is that in his workplace and within the past 12 months there were no women (or, men) working there, or their numbers were comparatively small.
- 7.43** Even if there are adequate numbers of women (or, men) in the employer's workforce as a whole, training provision could still be exclusively targeted at that group if there are no members of the group, or comparatively few of them, working in a particular occupation within the workplace.
- 7.44** For example, there may be reasonable numbers of women working in the workforce as a whole. However, on closer inspection they are all employed in low-level operative posts, or in entry-level grades and none of them, or very few of them, are employed in managerial posts. In this case the employer could provide training facilities exclusively to his current women employees, or to women generally, to give them the skills or qualifications that may assist them when applying for promotion or appointment to managerial posts.
- 7.45** The test of whether women's (or, men's) "numbers are comparatively small" requires a comparison to be made between the proportion of women (or, men) employed in the relevant time period (i.e. in the 12 months leading up to the employer taking action) and the proportion of women (or, men) that one would expect to find in the general labour pool that the employer normally recruits from.
- 7.46** For example, the general labour pool for the kind of work in question may be composed of 60% men and 40% women. If the employer employs 200 workers and his workforce is composed of 160 men (80%) and 40 women (20%), then the number of women in the workforce is comparatively small. In this case, the pre-condition for focusing positive action training on women is met.
- 7.47** As this shows, the best time to make judgements like this is after an equal opportunities monitoring review has been carried-out.

Action by other bodies¹⁸

- 7.48** This is a reference to action by other bodies such as employment agencies; vocational organisations like trade unions or professional bodies; or the providers of vocational training services. These bodies may also provide training exclusively to women (or, to men) to help fit them for particular kinds of work or occupations.
- 7.49** The pre-condition is similar to the one that applies to employers. It is that: it reasonably appears to the body that within the past 12 months there were no women (or, men) working in a particular kind or work or occupation, or that their numbers were comparatively small.

¹⁷ Refer to Articles 48(1) and (2) and 49(1) of the Sex Discrimination (NI) Order 1976.

¹⁸ Refer to Article 48(1) and (2) of the Sex Discrimination (NI) Order 1976.



7.50 When making the comparative test, the body may apply it to Northern Ireland as a whole, or only to a part of Northern Ireland. For example, there may be women working in a particular occupation in the Greater Belfast area, but none working in that occupation in counties Fermanagh and Tyrone. Therefore, a professional body could lawfully provide training facilities exclusively to women who live in those counties to help fit them for the occupation in question.

Carers

7.51 It is permissible to provide training facilities exclusively to persons who have been absent from regular full-time employment because they have been discharging domestic or family responsibilities.¹⁹

7.52 The pre-conditions are -

- (a) The facilities must be open to both women and men, and
- (b) The training provider must have reasonable grounds for believing that the persons in the group have a special need for the training because of their absence from regular full-time employment.

7.53 Although the training facilities must be made open to men and women, it is probable that in practice women are more likely to apply for and benefit from the arrangement. So, the arrangement may be a way of indirectly providing a training benefit to women more than to men. If it does indirectly benefit women more than men, then the employer or training provider will have a lawful defence to any claims of indirect sex discrimination.

Racial groups

7.54 This section applies to action taken on behalf of racial groups, which means groups defined by reference to race, colour, nationality or national or ethnic origins. It also applies to action taken for the benefit of Irish Travellers.

7.55 The pre-conditions that apply here are similar to those which apply to action taken for the benefit of men or women.

Action by employers²⁰

7.56 The pre-condition is that in his workplace and within the past 12 months there were no members of a particular racial group working there or their numbers were comparatively small.

7.57 Even if there are adequate numbers of persons from that racial group in the employer's workforce as a whole, training facilities could still be exclusively provided to that group if there are no members of it, or comparatively few of them, working in a particular occupation within the workplace.

7.58 For example, there may be reasonable numbers of Irish Traveller and Portuguese staff working in the workforce as a whole. However, on closer inspection they are all employed in low-level operative posts, or in entry-level grades and none of them, or very few of them, are employed in managerial posts. In this case the employer could provide training facilities exclusively to his current Irish Traveller and Portuguese employees to help fit them for managerial work.

¹⁹ Refer to Article 48(3) of the Sex Discrimination (NI) Order 1976.

²⁰ Refer to Article 37(1)-(5) of the Race Relations (NI) Order 1997.

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- 7.59** The usual test of whether a racial group's "numbers are comparatively small" requires a comparison to be made between the proportion of that group employed in the relevant time period (i.e. in the 12 months leading up to the employer taking action) and the proportion of that group that one would expect to find in the general labour pool that the employer normally recruits from.
- 7.60** For example, the general labour pool for the kind of work in question may be composed of 5% Irish Travellers and 95% all other racial groups. If the employer employs 200 workers but none of them are Irish Travellers, or only two of them are (i.e. 1%) then the pre-condition for focusing positive action training on Irish Travellers is met.
- 7.61** It is also permissible to make a comparison between the numbers employed in a workforce as a whole and in parts of that workforce (see paragraphs 7.57 and 7.58 for an example).
- 7.62** As these considerations show, the best time to make judgements like this is after an equal opportunities monitoring review has been carried-out.

Action by other bodies ²¹

- 7.63** This is reference to action by other bodies such as employment agencies; vocational organisations like trade unions or professional bodies; or the providers of vocational training services. These bodies may also provide training exclusively to members of particular racial groups to help fit them for particular kinds of work or occupations.
- 7.64** The pre-condition is similar to the one that applies to employers. It is that: it reasonably appears to the body that within the past 12 months there were no women (or, men) working in a particular kind or work or occupation, or that their numbers were comparatively small.
- 7.65** When making the comparative test, the body may apply it to Northern Ireland as a whole, or only to a part of Northern Ireland.

Sexual orientation ²²

- 7.66** This section applies to action taken on behalf of people who have a particular sexual orientation, which means people defined by reference to whether they are gay or lesbian, bisexual or straight.
- 7.67** The pre-condition is the same regardless of whether the positive action training is being provided by employers or other bodies, such as employment agencies, professional bodies or training providers.
- 7.68** The pre-condition is that the employer, or other body, must reasonably believe that the provision of training exclusively to people who have a particular sexual orientation will prevent or compensate for disadvantages linked to sexual orientation which are suffered by people in that group.

²¹ Refer to Article 37(1) and (2) of the Race Relations (NI) Order 1997.

²² Refer to Regulation 29(1), Employment Equality (Sexual Orientation) Regulations (NI) 2003.

Age²³

- 7.69** This section applies to positive action taken on behalf of people who are at a particular age, or in a particular age group. These age categories are very flexible and the nature of the age group being targeted will depend on the nature of the problem that the employer is trying to fix. For example, where appropriate, an employer might try to take action to help (a) people aged under-21 years; or (b) people aged 20-30 years; or (c) people aged 40-50 years; or (d) people aged over 55 years.
- 7.70** The pre-condition is the same regardless of whether the positive action training is being provided by employers or other bodies, such as employment agencies, professional bodies or training providers.
- 7.71** The pre-condition is that the employer, or other body, must reasonably believe that the provision of training exclusively to people of a particular age, or age group, will prevent or compensate for disadvantages linked to age which are suffered by people in that group.
- 7.72** For example, if an employer had evidence that showed that people aged under-21 years were applying to work in his workplace in comparatively small numbers, then that might provide reasonable grounds for believing that young people are suffering some form of disadvantage related to their age in respect of that workplace, or with the kind of work that is done there. On closer inspection, it may be found that young people are less likely than older people to have the qualifications or experience that the employer normally expects job applicants and employees to have. This would explain why applicant numbers from young people are comparatively small. It also indicates that providing training to younger people (i.e. exclusively to those aged under-21 years) might help to fix the problem. On the basis of evidence like this, the pre-condition for taking positive action would be met.

8. Reserving Job Vacancies for People Who Are Unemployed

- 8.1** As noted previously, it is unlawful for employers to simply reserve a quota of jobs for the members of particular under-represented or disadvantaged groups defined by reference to sex, religion, age, disability, community background, race, sexual orientation or marital status.²⁴

Defence against claims of religious, political or racial discrimination

- 8.2** However, employers are permitted by the religious/political discrimination law and the racial discrimination law to reserve a quota of jobs for people who are presently unemployed, or who have been unemployed for a specified period of time.²⁴

²³ Refer to Regulation 31(1) of the Employment Equality (Age) Regulations (NI) 2006.

²⁴ Refer to Article 75 of the Fair Employment & Treatment (NI) Order 1998 and Article 36A of the Race Relations (NI) Order 1997.

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- 8.3** Why does this need to be said? At first glance it may seem strange to suggest that there could be legal problems if an employer decided to take this action. For example, unemployed people come from all communities and walks of life, such as men and women; Protestants and Roman Catholics; disabled people and non-disabled people; all racial groups; all sexual orientations. Therefore, if the action applies to all groups, how could it possibly cause discrimination between any of them?
- 8.4** The problem is that economic trends can affect different localities (e.g. cities, towns, counties) differently at different times. The result is that different localities can experience different levels of unemployment at different times. Furthermore, different localities, particularly in Northern Ireland, may have different proportions of Protestants and Roman Catholics and members of different racial groups living within them.
- 8.5** The result of this is that at a given time in one locality Roman Catholics may be more likely to be unemployed than Protestants, or vice versa. So, depending on where an employer's workplace is located, there may sometimes be a possibility that reserving job vacancies for unemployed people could indirectly favour one community over the other.
- 8.6** Therefore, to promote the use of this action and to protect employers who use it from potential claims of religious, political or racial discrimination, the law provides employers with an absolute defence.
- 8.7** Employers do not need the Equality Commission's approval before using this outreach positive action measure. However, we strongly recommend that you nevertheless seek our advice first. This is because there may be other risks involved with it and, also, there are certain recommendations of good practice (see below) that we attach to its use.

Claims of sex, age or sexual orientation discrimination

- 8.8** As noted above, employers who use this measure have absolute defences to claims of religious, political or racial discrimination. However, there are no similar absolute defences under the laws which prohibit sex, age and sexual orientation discrimination.
- 8.9** This means that an employer who uses the measure could possibly be vulnerable to complaints of indirect sex, age or sexual orientation discrimination. This risk may be low because, for example, a complainant would first have to prove that the measure places one group of people at a substantial disadvantage compared to a corresponding group: e.g. women compared to men; young people compared to older people; or, gay people compared to straight people.
- 8.10** But, the risk of a complaint succeeding could be further reduced substantially by following the good practice recommendations set out below.

Good practice recommendations

- 8.11** The measure is an especially good one to use if it may help to secure fair participation in a workforce for a community (i.e. Protestant or Roman Catholic) that currently lacks it. For example, if the measure is likely to give an indirect advantage to members of the Roman Catholic community and if members of that community are under-represented in your workforce, then the measure would be an appropriate positive action tool to use as it may help you to correct that under-representation.

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- 8.12** On the other hand, it is recommended that you do not use the measure if it is likely to sustain or deepen an existing absence of fair participation between the two main communities in your workforce. For example, if the measure is likely to give an indirect advantage to members of the Roman Catholic community but if members of the Protestant community are under-represented in your workforce, then do not use this measure as it may lead to a deepening of that under-representation, or it may frustrate other lawful positive action measures that you are currently taking to address that problem.
- 8.13** Do not limit the available job opportunities only to people who are receiving specific types of social security benefit. Instead, open up the opportunities to “all persons who are not in employment” or “all persons who have not been in employment for [x] months (or years)”.
- 8.14** Identify specific aims that you want to achieve with the measure. For example, show that you have identified that a particular group of people (e.g. unemployed people generally; or, Protestants or Roman Catholics; or, men or women, etc.) are not enjoying full equality of opportunity or fair participation and that you wish to address this problem. This is best done following an Article 55 review or other equal opportunities review of the kind mentioned in Section 2 “*Things to Do Before Taking Outreach Positive Action*”.
- 8.15** Following that, set specific goals and timetables for the measure linked to the aims that you have identified. This is best done by developing an Employment Equality Plan of the kind mentioned in Section 2 “*Things to Do Before Taking Outreach Positive Action*”.
- 8.16** When setting goals and timetables, plan to take action that is both proportionate and time-bound. By this we mean that-
- (a) the plan should not be open-ended and continued indefinitely. Set a time-limit on the operation of the measure (e.g. 1 year, 2 years or 3 years).
 - (b) when setting the size of the quota (i.e. when reserving a set number of job vacancies for persons who are unemployed) do not make it 100%. That is, do not reserve all available job vacancies in a given period for members of the unemployed group. For example, if there are 10 vacancies at a particular time for Production Operative posts, do not reserve all 10 posts for members of the unemployed group. Instead, set a lesser quota, such as 40%, 50%, 60%, etc. and open up the remaining opportunities to all persons generally. The ultimate decision as to what size of quota to set lies within an employer’s own discretion.
- 8.17** Review the operation of the plan at the end of its set timeframe to assess whether it was successful in achieving your aims. Afterwards, consider whether to renew the plan for a further period.
- 8.18** Continue, as far as possible, to operate non-discriminatory and good practice employment policies and practices of the kinds referred to in paragraphs 2.1 to 2.3 of Section 2. By this we mean, that even though you may have reserved a number of vacant posts for people who are unemployed, treat the eligible applicants for and appointees to those posts in a fair and non-discriminatory way. For example, when deciding which of the eligible applicants to appoint, apply fair and objective recruitment and selection procedures of the kind recommended in Chapter 10 of the Equality Commission’s Unified Guide to Promoting Equal Opportunities in Employment.



Appendix 1

The Anti-Discrimination Laws

The principal anti-discrimination laws which are relevant to employers are as follows-

Equal Pay Act (NI) 1970, and Sex Discrimination (NI) Order 1976

These laws prohibit discrimination and harassment on the grounds of sex; pregnancy and maternity leave; gender reassignment; being married or being a civil partner.

Fair Employment & Treatment (NI) Order 1998

This law prohibits discrimination and harassment on the grounds of religious belief or similar philosophical belief and political opinion.

Disability Discrimination Act 1995

This law prohibits disability discrimination and disability-related harassment against disabled persons.

Race Relations (NI) Order 1997

This law prohibits discrimination and harassment on the grounds of race; colour; ethnic or national origins; nationality; belonging to the Irish Traveller community.

Employment Equality (Sexual Orientation) Regulations (NI) 2003

This law prohibits discrimination and harassment on the grounds of sexual orientation.

Employment Equality (Age) Regulations (NI) 2006

This law prohibits discrimination and harassment on the grounds of age.



Appendix 2

Useful Publications

1. The equality codes of practice are:

- Fair Employment in Northern Ireland – Code of Practice
- Removing Sex Bias from Recruitment and Selection – A Code of Practice
- Code of Practice on Equal Pay
- Code of Practice for Employers for the Elimination of Racial Discrimination and the Promotion of Equality of Opportunity in Employment
- Disability Code of Practice – Employment and Occupation

2. Other employment-related good practice guidance publications are:

- A Unified Guide to Promoting Equal Opportunities in Employment
- Sexual Orientation Discrimination in Northern Ireland – The Law and Good Practice
- Age Discrimination in Northern Ireland – The Law and Good Practice for Employers
- Harassment & Bullying in the Workplace
- A Step by Step Guide to Monitoring – Monitoring your workforce and applicants in line with fair employment regulations
- Recruitment from those not in employment: A good practice guide for promoting equality of opportunity



Appendix 3

Model Employment Equality Plan ²⁷

Policy Statement

The Company is committed to promoting equality of opportunity in employment for all persons regardless of their sex; religious belief; political opinion; race; age; sexual orientation; or, whether they are pregnant or are taking or have taken or are intending to take statutory maternity leave; or, are married or are in a civil partnership; or, whether they are disabled; or whether they have undergone, are undergoing or intend to undergo gender reassignment.

In [insert date] we carried out an equal opportunities review of our workforce. In the review we found that women are under-represented in our workforce and amongst our job applicants. We also found that people with disabilities may be experiencing some disadvantages compared to other people under our recruitment procedures. We have decided to take action to address these issues.

We wish to achieve the following goals by the end of 2017 [or, insert other date as appropriate]-

- To increase the proportion of job applications that we receive from women from the current average of 20% per year to an average of 30%;
- To increase the proportion of our women employees from the current average of 20% to an average of 25%;
- To increase the proportion of job applications that we receive from people who have disabilities from the current average of 5% per year to an average of 10%;
- To have in place a procedure to ensure that effective support is given to job applicants who have disabilities.

In order to take practical action to implement these goals and commitments we have developed this Employment Equality Plan. This action plan builds on other policies and practices adopted by the Company previously for the purpose of promoting equality of opportunity. The action plan has been developed in accordance with the requirements of the anti-discrimination laws in Northern Ireland and with the good practice recommendations of the Equality Codes of Practice and with other good practice guidance issued by the Equality Commission.

The plan will be implemented over the course of the next 18 months.

²⁷ This is merely an example of how a plan might look. Employers who base their plans on this template should make appropriate amendments to suit their own particular circumstances and objectives.



Actions

The actions that we will take are as follows:

1. To develop an Equal Opportunities Policy [or, review and update an existing policy];
2. To develop a Harassment Policy and Procedure [or, review and update an existing policy and procedure];
3. To review the Company's recruitment and selection procedures, and in doing so to pay particular regard to-
 - how we advertise job vacancies with a view to adopting ways in which we can encourage greater numbers of applications from women and people who are disabled, and
 - how we can better meet the needs of disabled job applicants throughout the recruitment and selection process.
4. To develop and implement a Flexible Working Policy.
5. To develop and implement a Maternity Policy.
6. To review all of the Company's other employment policies and practices to ensure that they comply with the requirements of the Disability Discrimination Act 1995 and the good practice recommendations of the Disability Code of Practice – Employment and Occupation.
7. To develop and implement a programme of equal opportunities and harassment training for all staff.

Action Plan

The Company has adopted the following action plan -

	Time Period	Actions
2016	31st March	To have completed the review of our recruitment and selection procedures and to have started taking the positive action measures proposed in it.
2016	30th June	To have developed an Equal Opportunities Policy [or, to have reviewed and updated an existing policy]
2016	31st July	To have developed a Harassment Policy and Procedure [or, to have reviewed and updated an existing policy]
2016	31st December	To have delivered the programme of equal opportunities and harassment training to all staff.
2017	31st January	To have introduced the Flexible Working Policy
2017	31st March	To have introduced the Maternity Policy
2017	30th June	To have completed the review all of the Company's other employment policies and practices in relation to the Disability Discrimination Act 1995 and the Disability Code of Practice.



Further information and advice

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