INTRODUCTION

The *Equalities Review* reported that 'there are some areas where inequalities are so deep seated that not taking alternative action is condemning a whole generation or more to living with disadvantage and inequality.' It argued that there is a case for introducing time-limited proportionate balancing measures of a type not currently permissible under UK law but stopping short of positive discrimination.

The Equalities Review recommended that the Discrimination Law Review repeal the existing legislation on positive action.

The Discrimination Law Review is considering whether there is more that could be done to allow business and other organisations to make more rapid progress towards greater diversity.

CURRENT LAW

Race Relations Act 1976

In relation to employment, the RRA76 permits employers, training providers and trades unions to provide training or encouragement exclusively to members of under-represented racial groups. Typically, a job advertisement will encourage persons belonging to an under represented racial group to apply for the job.

The RRA76 also permits the use of measures to meet the special needs of members of a racial group in relation to their education, training or welfare. For example, the provision of sexual health advice to Asian women only; annual diabetes and heart checks for Asian male patients.

Weaknesses:

(i) Tackling under-representation:

1. Positive action in the RRA76 rests on the premise that under represented (racial) groups lack the right education, training and skills. This is now only partly true. Over 40% of ethnic minority young people have degrees compared with the national average of 23% - but they are still unlikely to find employment in their chosen career or even more generally.

- In exceptional circumstances, mere statistical representation is not enough to bring about sustainable change. There are other legitimate aims: integration, social cohesion, rapid cultural or institutional change, public confidence which may only be met by recruitment of higher numbers.

- The current legal provisions are viewed as too restrictive. For example, Avon and Somerset and Gloucestershire Police Forces wanted to increase the representation of BME and women police officers. Encouragement alone had not worked.

  In 2006 the two Forces advertised for new recruits to a fixed number of places. In accordance with the recruitment policy, all BME and women candidates who met the basic eligibility criteria at the first stage were selected for the second stage. All White male applicants who met the basic eligibility criteria were ranked according to their scores. The remaining places were given to the higher scoring White male applicants. So, in effect, the lowest ranking White male applicant did not get through to the second stage even though he might have scored higher than a BME or female applicant who did get through.

  Gloucestershire Police Force was challenged by an unsuccessful White male applicant and the ET held that the policy was unlawful race and sex discrimination.

- The provisions do not go as far as EU caselaw which permits 'tie breaks' in certain circumstances.

- The term 'particular work' is too restricted.

- Exclusive training is permitted only where there is GB under-representation. Under-representation in Wales or Scotland is treated as local under-representation. Where there is local under-representation, an employer or training provider may only reserve places for the under-represented group. This is in general useless in employment where there is one vacancy.

- Strong emphasis on statistical data (even though the Act requires an employer to be *reasonably* satisfied of under-representation).

- Cannot be used for apprenticeships or other on the job training.

- An employer cannot guarantee a job or interview for a job. There is therefore little incentive for an employer to invest time and money in training someone who cannot be retained. The prohibition on the offer of a job can also produce illogical situations. For example we know of one public sector employer which provides contracts for trainee solicitors and barristers. The trainees are guaranteed employment at the completion of their training. However, when the same employer devised a positive action training scheme for a trainee solicitor of EM origin it could not offer the individual a job at the end of training.

- Cannot be used for fast tracking.

(ii) Meeting Special Needs

The problem with this provision is that its scope is limited to special needs in relation to education, training & welfare.

Although 'welfare' seems a broad category, it is narrowly applied. Examples of schemes which have been referred to the CRE and which we have been advised are outside s35 include:

- Sewing and flower arranging classes for Asian women only (to assist their integration)(!)
- Canoeing classes for Asian teenage girls (to build self confidence and self esteem)
- Competitions and awards which recognise talent and achievement of ethnic minorities who are noticeably disregarded in mainstream award events e.g. Arts Council & Penguin Decibel Prize for Black Writers, Mary Seacole Awards.

EU Law
The Race Directive article 5 provides that:

> *With a view to ensuring **full equality in practice**, the principle of equal treatment shall not prevent any member state from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial origin.*[1]

To date there have been no cases before the European Court of Justice under article 5. All the caselaw on positive action has been in the area of gender discrimination. The European Court of Justice has held that measures, which prefer women over men where it is necessary to redress an existing imbalance or under-representation in a grade or sector will not violate the principle of equal treatment providing the measure does not establish an automatic or absolute preference for women.[2]

THE GREEN PAPER PROPOSALS

The Green Paper sets out a number of proposals and questions. These are as follows.

[1] *Council Directives 2000/78/EC - The General Framework for Equal Treatment in Employment and Occupation; 2004/113/EC – Directive Implementing the Principle of Equal Treatment between men and Women in the Access to and Supply of Goods and Services* contain the same wording as Article 5
[2]See Cases: C-158/97 Badeck and Others and C-407/98, Abrahamsson and Anderson

GP Proposal	To adopt wider balancing measures to allow employers and others to make more rapid progress towards redressing under-representation
GP Question	Do you agree that it would be helpful for organisations seeking to progress towards their goals of tacking under-representation and disadvantage to be able to use a wider range of voluntary balancing measures?

The CRE Response

Yes. We agree that there should be a broader framework for balancing measures. However, the Green Paper does not explain what it is meant by 'wider' and it lacks clarity: the only new provision which is expressly proposed is fast tracking to training of under-represented groups from an equally qualified pool and this is aimed specifically at police forces. This would not apply to most employers who recruit directly to a vacant position.

It is implied that wider balancing measures would extend the domestic law in line with EU case-law to permit 'tie breaks.'

One option is for the Government to incorporate Article 5 of the Race Directive. The benefits of this provision are:

- It is broader and more flexible.
- The constraints of current law are removed.
- It should make it easier for employers, service providers and others to adopt balancing measures.
- 'Disadvantage' is wider than under-representation and ought to permit competitions and awards or the types of activities mentioned above under s.35 where the objective to be achieved is something other than under-representation or particular need.
- It ought to allow for measures such as 'tie breaks' where, all things being equal in a selection for a job or admission to university, the employer (or university) may select a candidate with a protected characteristic in order to address disadvantage

The main weakness with this provision is that it lacks clarity: employers and others will not know;

- what types of measures may be used (training, encouragement or other?);
- what is meant by disadvantage; and
- what are the limits.

Also any balancing measure would have to satisfy the proportionality test: it would have to serve a legitimate aim, be appropriate and necessary and time-limited and subject to review.

The CRE considers that these weaknesses may be overcome by supplementary provisions either in primary legislation or regulations.

In addition to the above, it is important that apprenticeships and other forms of on- the- job training are excluded from the definition of employment[3] so that they can be used as balancing measures.

GP Proposal	Allow all protected groups to benefit from measures to meet particular needs in relation to education, training and welfare and other benefits
GP Question	Do you agree that measures to meet special needs in relation to education, training or welfare or any ancillary benefits should be permitted in respect of all protected groups?

CRE Response

Yes but such measures should not be restricted to the fields of education training or welfare.

It should be noted that meeting particular needs provision has already been extended to in the new provisions for goods, facilities and services for religion and belief.[4]

It is arguable that if article 5 – or similar wording - is adopted then there should not be a need for a 'special needs' provision as measures to meet particular need are measures which prevent or compensate for disadvantage.

[3] section 78 of the RRA includes apprenticeships in the definition of employment
[4] see Section 61 of the Equality Act 2006

GP Proposal	Give the Commission for Equality and Human Rights a role in issuing clear practical guidance and Codes of Practice, but not in approving positive action programmes
GP Question	*Do you agree with the proposals for the issuing of guidance by the Commission for Equality and Human Rights, but that the Commission should not have a role approving positive action programmes?*

CRE Response

The CEHR already has the power to issue guidance and codes of practice (s. Equality Act 2006) as do the existing statutory commissions.

We agree that the CEHR should not have a power to approve positive action schemes. Our reasons are:

- a requirement for approval would add another layer of regulation making it more difficult for a person to adopt balancing measures.
- it is cumbersome and would become a potentially a slow process.
- it would deter rather than encourage the adoption of balancing measures. The original 1976 Act required positive action measures to be registered with the Secretary of State. This has a prohibitive impact. This requirement was removed.
- Such a power might present a conflict of interest for the CEHR if it has to invoke its enforcement powers against an organisation which breached equality laws through a faulty balancing measure.

The CEHR should, however, undertake promotional work to encourage organisations to make more use of positive action (a recommendation of the Equalities Review).

GP Proposal	**Confine the concept of "reasonable adjustment" to disability discrimination and not to widen it to other protected areas.**

The CRE has no strong view on whether the concept of reasonable adjustment should be extended to race or other protected areas.

In terms of the measures which may be taken e.g. English language classes, prayer rooms, these might be adopted as balancing measures to prevent or compensate for disadvantage.

The critical issue is the extent to which there should be a mandatory duty to adopt balancing measures. The advantage of the reasonable adjustment provision is that it is mandatory duty.

GP Proposal	**Continue and/or broaden if necessary the scope of permitted voluntary positive action in the selection of candidates by political parties.**
GP Question	***Do you agree that we should have a power to continue the operation of the current provision (political shortlists) beyond 2015 if this is still necessary and proportionate?*** ***Do you agree that we should widen the scope of voluntary positive measures for political parties to target the selection of candidates beyond gender?***

CRE Response

The low representation of ethnic minority persons as councillors and MPs is a more complex issue than the GP might suggest.

First, the RRA76 does not expressly prohibit discrimination by political parties. We consider that political parties should be brought within anti discrimination legislation so that any discrimination which occurs in the selection process or in other areas may be challenged.

Second, we agree that political parties can do more by way of mentoring, shadowing, etc. These measures do not require new or additional measures – just commitment and leadership.

Thirdly, we consider that ethnic minority shortlists are more problematic than gender shortlists: in particular who is an ethnic minority for the purposes of the shortlist?

At this stage we do not consider that legislation permitting ethnic minority shortlists should be introduced but a full programme of balancing measures should be adopted.