The tide of reports of bullying and harassment in work settings represents a wake-up call for many organisations in their pursuit of a more inclusive and diverse workforce, explains **Charles Pigott**, employment professional support lawyer at Mills & Reeve

Positive action in health and social care

The publication of government guidance on positive action will prompt private healthcare providers to assess whether they should be doing more to improve diversity throughout their organisations.

Recent reports of bullying and harassment in a wide variety of work settings have underlined the vital importance of getting workplace culture right. A big part of this is ensuring that members of previously underrepresented groups can participate in decision making at all levels of the organisation and have full confidence in the recruitment and promotion process.

Positive action is one of the tools that can be used to increase the speed at which the staffing profile of an organisation can be changed to better reflect its front-line staff and the communities it serves.

The NHS has pioneered a number of positive action programmes, but smaller healthcare providers do not necessarily have the resources to understand the legal constraints or to monitor their effectiveness.

With that in mind, the government has – for the first time – published guidance on positive action,[1] as one of the actions agreed in last year's *Inclusive Britain Report*. Although that report was published in response to the 2021 report of the Independent Commission on Race and Ethnic Disparities, the guidance extends to positive action in relation to all protected groups.

Types of lawful positive action

As the guidance explains, 'positive action allows additional help to be provided for groups of people who share a 'protected characteristic' (for example, race, sex, or sexual orientation) in order to level the playing field'.

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There are two main types of positive action allowed by the Equality Act – which are in effect exceptions from the general rule that positive discrimination in favour of a member of a particular protected group is unlawful.

The most commonly used type is known as general positive action. That is proportionate action which aims to reduce disadvantage, meet different needs or increase participation. To quote the guidance again, examples include 'providing a leadership scheme to help an underrepresented group achieve more senior positions in an organisation or providing tailored training for a group because they have specific requirements'.

The other type of lawful positive action – which focuses specifically on recruitment and promotion – was introduced into our domestic anti-discrimination legislation for the first time by the Equality Act 2010. These newer provisions in effect allow employers, in defined circumstances, to give preference to underrepresented groups when they are choosing between two equally qualified candidates. Until now, there has been no official guidance on how these 'tie breaker' provisions are supposed to work in practice.

Key considerations

For general positive action, employers will have two key concerns about how the legal test is to be met:

- **Reasonable belief** For positive action to be lawful, an employer must have a 'reasonable belief' that the conditions are met. The guidance explains that employers are expected to have evidence to support the belief, but it does not need to be 'sophisticated statistical data'

- **Proportionality** This is a word that will be familiar to students

of anti-discrimination law. In this context it will involve balancing the seriousness of the disadvantage or the under-representation the employer has identified against the impact of the measures on the groups who don't qualify for special treatment. As part of this process, employers should check whether there are alternative measures that could achieve the same result but would be less likely to result in unfavourable treatment elsewhere

For recruitment and retention, there are additional concerns about how the requirement that the candidate to be preferred must be 'as qualified' as the other candidate is to be interpreted.

Despite some practical advice about how this requirement is to be approached, this is still likely to be territory that most employers will wish to avoid in most recruitment and promotion situations.

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Conclusions

This new guidance overlaps with the 2011 statutory Code of Practice published by the Equality and Human Rights Commission (with which it must be read).

However, the publication of a more accessible guide, which also covers the tie breaker provisions which the Code does not address – is a signal from the government that positive action is something that a wider group of employers could be considering.

NOTES

1 https://www.gov.uk/government/publications/positive-action-in-the-workplace-guidance-for-employers/positive-action-in-the-workplace