



## Policy Briefing (Issue 25) **Race on the Agenda**

# **Positive Action in the Single Equality Bill: Myths and facts**

### **About ROTA**

Race on the Agenda (ROTA) is one of Britain's leading social policy think-tanks focusing on issues that affect Black, Asian and minority ethnic (BAME) communities. Originally set up in 1984, ROTA aims to increase the capacity of BAME organisations and strengthen the voice of BAME communities through increased civic engagement and participation in society.

**ROTA's Articles of Association state that the charity is set up "to work towards the elimination of racial discrimination and to promote equality of opportunity, human rights and good relations between persons of different groups".**

For historical and demographic reasons, our work prioritises London, but our activities and a number of our projects have national and international significance. To this end we work in close partnership with our membership and others interested in race equality, human rights and the promotion of good relations.

Our presence in London is enhanced by the regional networks of [MiNet](#) and [TJF](#). **MiNet** is the London focused BAME network of networks, which joined ROTA in 2002 to strengthen the voice for London's BAME third sector in the development of regional policy. **TJF** is a regional forum bringing together key criminal justice organisations from across sectors to work in partnership at a strategic level to provide policy support and representation of issues affecting groups that are highly victimised.

Nationally, ROTA is leading on the "**Winning the Race Coalition**" of third sector organisations aiming to influence race equality legislation.

### **ROTA definition of BAME and Approach to Race Equality**

ROTA works on social policy issues that have an impact on race equality and BAME communities. ROTA's definition of 'race' encompasses all the protected characteristics under equality legislation including colour, nationality, ethnic or national origin. We use the term BAME to refer to all groups who are discriminated against on the grounds of their race, culture, nationality or religion which includes

but is not exclusive to people of African, Asian, Caribbean, East European, Irish, Jewish, Roma and South East Asian decent. ROTA adopts a holistic approach to race equality and works in partnership with other Third Sector organisations that complement its expertise and have a similar vision

## About the Winning the Race Coalition

Race on the Agenda (ROTA) formed a national coalition of third sector bodies to highlight some areas of concern in relation to the Single Equality Bill and to develop a unified and stronger voice to our concerns. Our focus is primarily on race equality and the discrimination faced by Black, Asian and minority ethnic (BAME) groups. However, the coalition's creation aims to make the argument for cross-equality and human rights issues where appropriate.

ROTA and the coalition members have been working and will continue to work over the duration of all the stages of the Bill and its roll out to engage with key stakeholders involved in ensuring that the needs of BAME communities and the BAME third sector are met. ROTA has been representing the Winning the Race Coalition at meetings with Government Equalities Office Ministers, the EHRC, and has given evidence to the House of Commons Committee scrutinising the Bill. ROTA keeps coalition members updated with all developments.

The Winning the Race Coalition is working to ensure that effective civic participation is achieved in all processes of engagement with those who will be affected by the legislation. For a list of Coalition members and full details of the activities of the coalition visit <http://www.rota.org.uk/pages/WTRC.aspx>

## ROTA's position on Positive Action

ROTA and the Winning the Race Coalition strongly support the inclusion of the Positive Action provision in the proposed Single Equality Bill 2009 and are aware of the fragile status of this provision due to widespread misinterpretation of the measures as the Bill now enters the House of Lords stage. ROTA and the coalition think it imperative that the provisions stay in the Bill to advance equality in the UK. This briefing aims to outline what positive action is, the legal basis for it in the UK and how that legal basis is changing and why it should be supported.

## Inequality and BAME communities in the UK

**Inequality is a pervasive problem that continues to blight many communities with social and economic exclusion.** Regardless of historical discrimination the unequal distribution of power and resources that continues means that colour-blind policies have and will do little to address the entrenched disadvantage suffered by many communities.

BAME communities still suffer disadvantage and exclusion by virtue of their ethnicity once poverty, deprivation and social exclusion is controlled for. Given that that the UK has some of the most progressive race relations legislation in the UK, this disadvantage continues.

More importantly, this disadvantage and discrimination is often concluded to stem from historical imbalances of power stemming from colonisation and slavery. As such positive action is seen as means to fairly rebalance this historical undermining of power among BAME communities in the UK.

**The rate of employment for BAME individuals is still significantly lower in certain occupations**, with higher unemployment among these groups and continued entrenched disadvantage.

Data from the Annual Population Survey shows that there is significant under representation of certain groups in the labour market compared to the majority White British population. In 2004 prior to the credit crunch and at the height of the economic boom the Black Caribbean and Pakistani population between 16 and 24 years of age had three times the rate of unemployment than the White British population surveyed. The Black Other population has an unemployment rate over five times that of the White British for this age group. Even in the older age group similar differences for ethnic minority groups continue with the Bangladeshi group at almost four times the rate of unemployment for those aged 25 or above, the Pakistani group 2.5 times and the black African group three times more unemployed<sup>1</sup>.

While this data identifies disadvantage in terms of economic opportunities, this information speaks to a wider inaccessibility for certain roles. Similar data from the Annual Population Survey shows lower proportions of ethnic community groups in high income occupation. As these are not restricted to certain professions it indicates a certain mobility in the labour market that is not available for the BAME communities. With an average of 15% of the workforce as Manager and Senior Officials, with this proportions reasonably mirrored in White and Asian populations, the black population had only 10% of its working population in these positions.

**Under - representation in any business or organisation undermines the operational effectiveness of that organisation.** The experience of the police has shown that the need to represent the community accurately is a necessary part of delivering equality of service delivery more widely.

## Positive action before the Single Equality Bill

**“Positive action is** a range of measures which employers can lawfully take to encourage and train people from under-represented (racial and ethnic groups) in order to help them overcome disadvantages in competing with other applicants. However, selection for interviews and jobs must be based on judgements of individual’s ability to carry out the work required.”<sup>2</sup>

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<sup>1</sup> *Annual Population Survey, January 2004 to December 2004*, Office for National Statistics: Unemployment rates by ethnic group, age and sex 2004.

<sup>2</sup> Taylor, P (2000) “Positive action in the United Kingdom” in Appelt, E and Marosch, M, *Combating Racial Discrimination: Affirmative Action as a Model for Europe*. Berg, Oxford.

Positive action is not new. It is in fact lawful under the Race Relations Act 1976 and subsequent Amendment Act 2000 with regards to colour, nationality, and ethnic or national origin. It has also received special provision under the 2003 Sex discrimination Act with regards to gender and disability under the Disability Discrimination Act 1995.

Positive action is a term often misused and misunderstood. It has been described as soft affirmative action, however, it should not be confused with affirmative action nor positive discrimination as it often is. Positive action is not positive discrimination and does not allow for affirmative action.

Positive action is a collection of measures designed to **encourage** underrepresented groups to take up employment training or services. The key element is that it does not allow for a preference for an individual on the basis of the protected characteristic (i.e. from a BAME community) rather than other qualifications.

Positive Action is lawful under the Race Relations Act (RRA) (1976). There are essentially four types of positive action, which can be utilised under different sections of the act. These are:

- Encouragement measures
- Pre-entry training
- In-service training
- Special needs

**Encouragement** measures can be used in order to encourage members of a particular racial group to take advantage of opportunities for employment where they are under-represented. This could, for example, be in the form of a statement in job advertisements welcoming applications from individuals belonging to a specific under-represented racial group (sections 37 and 38 of the RRA).

**Pre-entry training** can be provided for members of a particular ethnic group who have been under-represented over the previous 12 months in a particular type of work. Employers and specified training bodies will be able to provide access to facilities for training in order to gain the skills required to carry out the particular job concerned. However trainees do not have employee status and are not guaranteed employment at the end of the training (section 37 of RRA).

**In-service training.** That is not to say that positive action cannot be offered to those in employment. For those in employment, employers can provide training for persons currently under their employment or they can secure the services of a training organisation to carry out the training on their behalf (section 38 of the RRA). This is what constitutes the subtle difference between sections 37 and 38 of the act.

**The special needs** of persons of a particular racial group can be met with regard to their education, training or welfare or any ancillary benefits under section 35 of

the RRA. This can be exemplified by the provision of English language courses for speakers of other languages.

Subsequently, the RRA (1976) makes provisions for both employers and training providers to encourage members of particular BME groups to apply for posts where they have been previously under-represented. It also makes provisions for training. The aim of which is to allow members of under-represented BME groups to compete on equal terms for employment opportunities, whereby selection is based solely on merit. Therefore, in theory positive action may be able to aid in increasing the level of BME groups at organisational, occupational and industrial levels.

Under-representation is a key pre-requisite for any positive action measure under the UK legislation. The following criteria are used to assess 'Under-representation':

- There are no persons of that racial group employed in that work by the organisation;
- That the number of employees engaged in that work who belong to that racial group is small in proportion to:
  - I. their representation as a percentage of the Great Britain workforce
  - II. their representation amongst the population of the area from which the organisation normally recruits either locally or nationally

Taylor, 2000:160

## Is positive action in the UK working?

Even with these provisions, which have been commended<sup>3</sup>, the Home Office targets of 7% ethnic minority recruitment has not been met with the total ethnic minority police officer rates reaching only 4.4% by March 2009<sup>4</sup>. This is obviously a major concern and raises wider issues of how it will be possible to attain the required staffing levels for equality to be met.

The slow growth resulting from setting targets and providing enabling strategies appears to be failing to achieve the required targets in anything less than a generation. This is not restricted to the Police Forces of England and Wales, it is an example of the difficulties faced by many organisations. Clearly the attempts to address the under representation of certain communities is more pressing than ever.

### **Some examples of positive action in the UK include:**

Prior to 1998 the composition of the police force of Northern Ireland was 8% Catholics and 92% Protestant, whereas the population was 45% Catholic and 55% Protestant. Given the tensions around misrepresentation by the police over the

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<sup>3</sup> Metropolitan Police Authority Race and Faith Enquiry, Interim Findings

<sup>4</sup> *Police Service Strength*, R. Mulchandani & J. Sigurdsson, Home Office Statistical Bulletin, July 1009,p5

troubled history of Northern Ireland it was essential to address this concern. Using positive action measures to address why recruits from catholic communities weren't joining and why more Catholics were leaving the force the PSNI increased the proportion of Catholics in employment in the force to 23.7%. this has relied on a policy of 50/50 recruitment from Catholic and Protestant communities to address the gaps.

The violent conflict in the province led to the need to address the under representation. But the same level of need through inequality can be seen as required within mainland Police Forces and other organisations. The Stephen Lawrence Inquiry identified that the low level of ethnic minorities in the Metropolitan Police affected the efficacy of policing of ethnic minority communities. There were specific recommendations to bring in targets to meet the under representation in the police service.

*64. That the Home Secretary and Police Authorities' policing plans should include targets for recruitment, progression and retention of minority ethnic staff. Police Authorities to report progress to the Home Secretary annually. Such reports to be published.*

*65. That the Home Office and Police Services should facilitate the development of initiatives to increase the number of qualified minority ethnic recruits<sup>5</sup>.*

To meet these targets police forces used a variety of positive action techniques that engaged ethnic minority communities and enabled them to overcome barriers to recruitment. This included providing targeted advertising, introductory training and facilitating pre-entry training.

For example in Lancashire there are significant BAME communities spread throughout several towns. Lancashire Police Service needed to address the under representation of BAME candidates. To do this they developed engagement initiatives including familiarisation days for applicants and policing debates to address some of the concerns among communities in the police force as a career. They also had courses that helped certain groups with the application process.

## Single Equality Bill

In Part 11 Chapter 2 of the Equality Bill presently before parliament there is provision for what is known as 'positive action'. These provisions are part of the body of duties, sanctions and permissions within the bill that proactively try to mitigate the past discrimination and exclusion suffered by groups with protected characteristics.

The Single Equality Bill aims to unify the numerous present equality laws that are on the UK statute book. In doing so it also recognises the continued and resilient levels of inequality and discrimination that continue to blight BAME communities as well as individuals with protected characteristics. For instance, only 15 MP's in the

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<sup>5</sup> W Macpherson, "The Stephen Lawrence Inquiry: report of an inquiry by Sir William Macpherson of Cluny", The Stationary Office, 1999

House of the Commons are from BAME communities whereas if the number was proportional to representation in the community, it would be 60 MPs. Similarly black boys are three times more likely to be excluded from school even when controlling for free school meals, an indicator of poverty<sup>6</sup>.

As a result the bill proposes to put into place permissive clauses which **will not require but do allow** employers to take stronger positive action to tackle the under representation of BAME communities in the workforce. This means that the potential actions are voluntary, but the bill aims to clarify what is allowed under the law. This will also bring it into line with the EU directives.

Under the Single Equality bill, the present provisions allow for positive action to enable or encourage people with the protected characteristic to minimise a disadvantage they suffer, participate in activity, or meet distinct needs that stop them taking part or overcoming disadvantage would continue.

Additionally the new Bill allows for employers, when recruiting or promoting an employee, to consider the under representation of certain communities within their workforce when deciding on the successful applicant. This is strictly defined as only allowable when both applicants are **equally qualified** on all other reasons, and that it is not a policy of favouring certain communities.

For example, a manager is recruiting a worker. He is aware that the ethnicity of his workforce is not reflective of the population, as there are no Asian employees even though there they are part of the population. At the end of the recruitment process the employer has two applicants who are both equally qualified for the post. One is White, one is Asian. Considering the under representation of Asian employees, and the equal merit of both candidates, the employer is allowed to make the decision based on that under representation. He therefore recruits the Asian employee.

The conditions allowed the ethnicity of the employees to be considered in the decision process is because of a clear under representation in the workforce, other qualifications for the role are equal between the two recruits and that there is no policy to favour certain groups above others, i.e. it is a case by case consideration. This is distinct from positive discrimination which will decide upon a recruit based on the ethnicity regardless of other qualifications.

## Not a Quota

As can be seen from this description, once the merits of individual candidates have been taken into account the determining choice has been based on the ethnicity of the candidate. In that sense the new proposals do amount to discrimination. But to the extent that in any job role there is discriminating choice based on merit, if that choice cannot be made on merit alone then the wider benefit of a representative workforce can be used. This is not a quota and the conditions within subsection Chapter 11 part 2 of the Equality Bill outlines that this cannot be a policy. It does not favour a certain community unless that community is under

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<sup>6</sup> *Positive Action in theory and Practice: Experiences from the UK and Europe*, UKREN Round Table Report, 27<sup>th</sup> March 29009, Eversheds Law Firm

represented and that measure can apply to all communities who are or will be potentially under represented in the future

Therefore the proposed clauses are a permissive choice for companies and organisations. But it is not just filling the ranks with unsuitable employees. It is specifically outlawed from this becoming a policy for the decision to be allowed.

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