

# Positive action

## Learning and discussion points

In August 2018, we published a briefing note on positive action (PA) in response to the increasing number of queries we had received about PA following the introduction of gender pay gap reporting. Since then, we have held a roundtable discussion with a group of NHS HR Directors, chaired by Jane Farrell of The EW Group, where we discussed PA in practice and the barriers which stand in the way of improving diversity and inclusion (D&I) in the NHS workforce. We have also spoken at network events where those working in HR have shared their views on this topic.

This follow-up article captures the main points to take away from these discussions. Some of the information you will already know, but where you are trying to raise awareness of PA and how it can be used in your organisation, it may be useful to share this article with others.

## Board awareness

Research has shown that diversity throughout the NHS workforce improves staff performance and the experience of patients. Board members at many NHS organisations are aware of this point but in building the business case for D&I, those in HR may find the numerous resources on the NHS Employers website useful.

Since the WRES data requirement was introduced, some Trusts have seen improvements in certain areas but overall, the data has revealed only very small improvements across the nine indicators. Many organisations are now considering PA as a means to improve D&I across all protected characteristics and so it is essential that members of the Board are confident that they know the difference between PA and positive discrimination.

Section 158 of the Equality Act 2010 allows for positive action through the more favourable treatment of those with protected characteristics where it is reasonable for an employer to think that:

- those with a protected characteristic suffer a disadvantage connected to the characteristic;
- those with a protected characteristic have needs which are different to those who do not share it; or
- that participation in an activity by persons with the characteristic is disproportionately low.

Section 159 permits the selection of a candidate with a protected characteristic for recruitment or promotion in a tie-break scenario if certain conditions are met.

Positive discrimination occurs where an individual is treated more favourably because of a protected characteristic and the treatment does not comply with the PA provisions set out above. Board members will want to feel comfortable about the use of PA and why it is necessary because it can be controversial and could give rise to challenges. However, in view of the limited impact that steps taken to date appear to have had in addressing D&I at some organisations, there will normally be a good business case for utilising PA.

## Managers and culture change

It is crucial that managers appreciate the importance of D&I in order to bring about the change in culture which is required to see improvements in diversity, particularly in senior roles. Many employers provide unconscious bias training but organisations may want to consider whether this really challenges opinions and whether it helps managers to 'see the issue'. For example, when they look at a shortlist of candidates, do they think about diversity and question it?

To aid in the process of embedding D&I in their organisations, some Trusts have taken the following steps:

- Where lists for promotion are submitted and there are no candidates with protected characteristics, the manager will be asked for an explanation as to why this is the case
- D&I forms part of the appraisal process and individuals are asked what they have done to improve D&I over the past year
- Removing D&I-specific training and ensuring that it is a feature of all training sessions
- Devolving ownership of D&I issues to all staff across the organisation.

## Recruitment and promotion processes

The recruitment process as a whole, from the creation of job titles and criteria through to the focus of interviews, is identified by many as being in need of careful consideration and review.

Section 159 of the Equality Act enables employers to use PA in a recruitment and promotion context, and employers can select a candidate with a protected characteristic over a candidate who does not have that characteristic where:

- candidates are as qualified as each other;
- the employer does not have a policy of treating people with a protected characteristic more favourably; and
- taking action is a proportionate means of achieving a legitimate aim.

An employer cannot use quotas in the context of recruitment and promotion as this would be a policy of treating people with protected characteristics more favourably, but what we are seeing more of is the setting of targets, which may or may not be achieved. Targets do not fall foul of the PA provisions and are permissible: they focus minds and appear to be proving a useful tool in improving D&I. One clear example is the target which has been set for NHS Trusts of having a 50:50 gender split on their Boards by 2020.

Generally, it is felt that section 159 is of limited effect and so there have been calls in the media for positive discrimination to become lawful. However, many feel uncomfortable with this on the basis that it would promote tokenism and that significant damage can be caused to confidence when someone is promoted on this basis and then finds they are unable to carry out the job effectively. We may see more on positive discrimination and quotas as D&I remains high on the agenda, but for now they remain unlawful.

## Best use of PA to improve D&I in senior roles

The examples of PA which are currently used to address the lack of D&I in senior roles include:

- Internships/work shadowing
- Reserving places for protected groups on training courses
- Support for those with protected characteristics in respect of certain aspects of the recruitment process
- Staff networks
- Mentoring and sponsorship programmes
- Paying for attendance at national events
- Secondments

## Final thought

Organisations will be aware that one of the key lines of enquiry in the CQC well-led inspection is whether equality and diversity are promoted within an organisation and whether all staff, including those with protected characteristics, feel that they are treated equally. The CQC produced a resource in November 2018 highlighting outstanding services which have developed practices for safeguarding equality and human rights for staff and patients. The CQC good practice guide has been produced in conjunction with a number of partners.

It is clear that D&I is a subject which will remain high on the agenda with NHSI recently announcing that there needs to be a change in culture and leadership across the NHS, with better representation of BAME staff across senior teams and Boards reflecting the diversity of the communities they serve. NHSI has also stated that Trusts will be expected to set their own targets but, along with identifying targets, we suggest that consideration should be given to how these targets can be achieved. PA will be key to this and is to be used in respect of all protected characteristics.

## Contact



**Andrew Rowland**  
Partner  
020 8780 4760  
andrew.rowland@capsticks.com



**Nicola Green**  
Legal Director  
020 8780 6975  
nicola.green@capsticks.com



**Marsha Thompson**  
Associate  
020 8780 4714  
marsha.thompson@capsticks.com

Capsticks

www.capsticks.com

@capstickslp

**Birmingham**

35 Newhall Street,  
Birmingham B3 3PU  
T +44 (0)121 290 1500  
F +44 (0)121 290 1515  
DX 13003 - Birmingham

**Charley**

Ordinance House,  
6 East Terrace Business Park,  
Exton Lane,  
Charley PR7 6TB  
T +44 (0)125 726 6008

**Leeds**

Toronto Square, Toronto Street,  
Leeds LS1 2HL  
T +44 (0)113 322 5560  
F +44 (0)113 242 2722  
DX 713112 - Leeds Park Square

**London**

1 St George's Road,  
London SW19 4DR  
T +44 (0)20 8780 2211  
F +44 (0)20 8780 1141  
DX 300118 - Wimbledon Central

**Winchester**

Staple House, Staple Gardens,  
Winchester, SO23 8SR  
T +44 (0)1962 678 300  
F +44 (0)1962 678 311  
DX 2532 - Winchester