THE BRITISH EQUALITY FRAMEWORK IS INCAPABLE OF ACHIEVING EQUALITY IN THE WORKFORCE

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Discrimination in the workforce continues to exist in Britain, where certain groups — for example, women, disabled people, and ethnic minority groups — are underrepresented or underpaid. This paper explores the effectiveness of the British legal framework in achieving equality in the workforce under the Equality Act 2010. While this Act has achieved significant improvements upon the previous legal framework, it still assumes a complaints-led approach to tackling employment discrimination. This is problematic, not only because it results in few successful cases against employers, but also because it fails to address deep-rooted systemic issues of inequality in the workforce. An examination of approaches used in other jurisdictions reveals an advantage of positive action over positive discrimination measures because they are not detrimental to non-disadvantaged groups. It is recommended that Britain should adopt a substantive equality approach similar to that of Northern Ireland and incorporate mandatory positive action provisions into the Equality Act 2010.

1 INTRODUCTION

In Great Britain (Britain), certain groups of people are disadvantaged within the workforce. Ethnic minorities and the disabled are under-represented for example, in comparison to their share of the population. Women are also under-represented and often paid less than men for equal work. These inequalities are the result of past discrimination against these groups. Prior to the Second World War, the population of Britain was predominantly white.[1] In the 1950s, industries were expanding and there was a shortage of workers so people who were regarded as 'cheap labour' were recruited from the New Commonwealth (India, Bangladesh, Pakistan, etc). British people treated the newcomers with hostility. They were excluded from society and they only found work in poorly paid occupations, which white workers did not want.[2] Disabled people were traditionally thought to be a 'burden' and considered to be unfit for work. They were classed as 'idiots' and 'lunatics' and they were segregated from society in institutional asylums.[3] With regards to women in Britain, their role was traditionally considered to be motherhood and looking after the home.[4] They were perceived to be the weaker sex; they were not educated to the same standard as men

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[1] Deborah Phillips, 'Black Minority Ethnic Concentration, Segregation and Dispersal in Britain' (1998) 35(10) Urban Studies 1681.

[2] ibid.

[3] English Heritage, 'A History of Disability: From 1050 to the Present Day' <http://www.english-heritage.org.uk/discover/people-and-places/disability-history/> accessed 16 April 2013.

[4] Gerry Holloway, *Women and Work in Britain since 1840* (Routledge, Abingdon 2005).

and they generally held a lower status in society than men.[5] It took a long time for women to be given equal rights to men.[6] Women have been described under a Marxist theory as a pool of cheap and unskilled workers that can be tapped into when required and disposed of when there is no longer a use for them.[7] These stereotypes and negative attitudes towards these groups of people continue today. They are systemic issues of inequality, deep-rooted within British society, and within the British workforce.

This paper does not propose to address the philosophy of equality, nor does it ask whether equality should be a keystone in our society and workforce. The goal of achieving equality is clearly stated in the Equality Act 2010 and its predecessors. Rather, the question which this paper asks is whether, given the importance of this goal in the modern British polity, the system created by the 2010 Act is capable of achieving it. The argument it makes is that it is not.

Section two firstly outlines the discrimination problems in Britain and highlights that there has been no (or little) improvement in the last few decades, under the 'complaints-led' formal equality approach. A brief history of British equality legislation is then offered and it is acknowledged that the Equality Act 2010 is, in general, an improvement on the old legal framework. Yet, as the section discusses, there are serious problems with the complaints-led model (still used in Britain), and specific problems regarding the British Employment Tribunal Service and the role of the Equality and Human Rights Commission (EHRC). There is, it is argued, a strong case for adopting proactive measures under the substantive equality approach.

The third section follows by analysing the different forms of proactive measures that have been adopted in other jurisdictions, assessing three 'positive discrimination' approaches — 'affirmative action' in the United States (US) and quotas in India and the European Union (EU) — and comparing these with three instances of statutory 'positive action' duties in Canada, South Africa and Northern Ireland. As the section demonstrates, positive action has clear advantages over positive discrimination, as it is not detrimental to non-disadvantaged groups. It is also demonstrated that when positive action is implemented and enforced in a manner that gives regulators the power to punish, as well as persuade, it produces far superior results than formal equality, as the example of Northern Ireland shows.

The fourth section starts by providing a brief history of the position of positive action schemes under British legislation. It is then explained how recommendations to

[5] ibid.
[6] Patricia M. Thane, 'What difference did the vote make? Women in public and private life in Britain since 1918' (2003) 76(192) Historical Research 268.
[7] Irene Bruegel, 'Women as a Reserve Army of Labour: A Note on Recent British Experience' (1979) 3 Feminist Review 12.

impose mandatory positive action duties on employers were rejected by Parliament for being burdensome on businesses. It is argued however, that the benefits of mandatory employer duties far outweigh any burden. The section then discusses the positive action provisions provided by the new Equality Act and argues, by drawing on the experience of other jurisdictions, that they are insufficient to redress the past discrimination experienced by disadvantaged groups, as they fail to impose obligations on employers. The limitations of the 'public sector equality duty' are also discussed. The section concludes with a discussion which highlights the likely objections to positive action from employers, and responses are provided to overcome these.

Finally, the fifth section draws the threads of the argument together. The complaints-led model under the formal equality approach, it argues, is incapable of addressing systemic issues of inequality within the British workforce and thus cannot redress past discrimination of disadvantaged groups. To the extent the current positive action provisions in the Equality Act 2010 are based on this approach, they will not succeed in achieving equality. Northern Ireland, notwithstanding its very different conditions, offers a better model with its substantive approach to equality, which Britain should seriously consider adopting.

2 THE FAILINGS OF THE BRITISH APPROACH

2.1 Formal and Substantive Equality

The statistics set out in the *Cambridge Review*[8] and the more recent report of the *National Equality Panel*[9] demonstrate the extent of the discrimination problem in Britain. Over the past few decades there has been no increase in the representation of ethnic minorities and disabled people in the British workforce.[10] For example, the unemployment rate for ethnic minority men continues to be twice that of white men, and the disabled continue to be three times less likely to find work than their able-bodied counterparts.[11] The gender pay gap was reduced from 30 per cent in 1975 to 17.2 per cent in 2007.[12] However, in thirty two years there should have been a greater reduction than 12.8 per cent.[13]

[8] Bob Hepple, Mary Coussey, Tufyal Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart Publishing, Oxford, 2000) 12-13.
[9] National Equality Panel, *An Anatomy of Economic Inequality in the UK – Report of the National Equality Panel* (Government Equalities Office 2010).
[10] ibid; Hepple, Coussey, and Choudhury (n 8).
[11] ibid.
[12] Hepple, Coussey, and Choudhury (n 8); Sandra Fredman, 'Reforming Equal Pay Laws' (2008) 37(3) Industrial Law Journal 193, 194; H. Daniels, *Patterns of Pay: Results of the Annual Survey of Hours and Earnings 1997-2007* (Employment, Earnings and Innovation Division, Office for National Statistics).
[13] Fredman (n 12) 194; Daniels (n 12).

The ultimate goal is to achieve equality within the British workforce. There are a number of alternative approaches towards achieving this. The concept of 'formal equality' can be described as one of consistency; based on the equal treatment principle. It aims to eliminate unfair treatment by treating all individuals in the same way.[14] This is the predominant approach adopted in British anti-discrimination law.[15] Conceptual arguments in favour of formal equality include primacy of individuals, impartiality and state neutrality.[16] The formal approach has been criticised, however, as it fails to take account of the realities experienced by disadvantaged groups.[17] Treating everybody the same can result in underlying forms of discrimination being ignored.[18] The different needs of different social groups cannot be accommodated if all people/groups are treated the same.[19] The use, in Britain, of this restrictive formal approach to equality perhaps explains why there has been no significant improvement in relation to the discrimination of disadvantaged groups. Ethnic minorities, the disabled, and women for example, all have very different needs regarding employment, and the issues they face also vary.

Fredman and many other academics promote the adoption of a 'substantive equality' approach.[20] Substantive equality targets disadvantaged groups to achieve equality.[21] The substantive view takes account of past discrimination, and looks to the law to correct the results of this.[22] It goes against the equal treatment principle, but supporters of substantive equality argue that preferential treatment of certain social groups can be justified, as it is necessary to remedy past discrimination that affected those groups, in order to achieve equality.[23] They support the use of 'proactive measures'.[24] These will be discussed below. Substantive equality has two main branches; 'equality of opportunity' and 'equality of results'. 'Equality of opportunity' aims to provide a 'fair and equal starting point for all'.[25] It requires the removal of barriers to encourage participation from disadvantaged groups. It has been suggested, however, that this alone will not necessarily equip individuals to take advantage of

[14] Catherine Barnard and Bob Hepple, 'Substantive Equality' (2000) 59(3) Cambridge Law Journal 562; Noreen Burrows and Muriel Robison, 'Positive Action for Women in Employment: Time to Align with Europe?' (2006) 33(1) Journal of Law and Society 24; Colm O'Cinneide, 'Positive Action and the Limits of Existing Law' (2006) 13 Maastricht Journal of European and Comparative Law 351.
[15] Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press, Oxford 2011).
[16] Nurul Izza Idris, 'Rethinking the Value of Preferential Treatment' (2009) 15 UCL Jurisprudence Review 45.
[17] Noreen Burrows, 'Positive Action' (2010) 96 Employment Law Bulletin 4.
[18] O'Cinneide (n 14) 351.
[19] Idris (n 16) 58.
[20] O'Cinneide, 'Fumbling Towards Coherence: The Slow Evolution of Equality and Anti-Discrimination Law in Britain' (2006) 57 Northern Ireland Legal Quarterly 57.
[21] Burrows and Robison (n 14) 27.
[22] Fredman (n 15) 236.
[23] O'Cinneide (n 14) 354.
[24] ibid.
[25] O'Cinneide (n 20) 59.

opportunities.[26] For example, educational qualifications (which can be a barrier) may be relaxed, but disadvantaged groups may still lack the practical experience necessary to do the job, and may therefore be unsuitable for the particular role.[27] Other social factors, such as child-care obligations or lack of transport, can also get in the way.[28] The concept of equality of opportunity can therefore only achieve limited success[29] unless suitable resources are provided to members of disadvantaged groups to put them in a position where they are capable of taking advantage of opportunities.[30] 'Equality of results' seeks to remedy the disadvantages faced by disadvantaged groups.[31] The past discrimination experienced by disadvantaged groups in Britain can only be corrected by the equality of results approach, which will include proactive measures being taken by employers. For the purpose of this discussion, the term 'substantive equality' will refer to the 'equality of results' branch of substantive equality.

As mentioned above, British legislation has traditionally adopted a predominantly formal approach to equality, which has been unsuccessful in remedying the problems of discrimination faced by disadvantaged groups.[32] Whilst British legislation has developed considerably over the past two decades, in terms of its structure and its scope, this has remained unchanged.[33] The focus of the reforms has been on simplification and harmonisation, rather than altering the approach. Equality legislation in Britain began almost fifty years ago, with the Race Relations Act 1965, and over the following three decades, many other anti-discrimination laws were enacted, including the Equal Pay Act 1970, the Sex Discrimination Act 1975, and the Disability Discrimination Act 1995.[34] In the year 2000, the *Cambridge Review* criticised the framework of legislation for being outdated and fragmented.[35] The law only covered race, sex and disability, and there were many inconsistencies between the protections afforded to each in terms of discrimination.[36] Other characteristics such as age, religion and sexual orientation were not protected under these laws. Employers, and even lawyers, found the framework difficult to use, as they were required to have knowledge of several domestic statutes (as mentioned above), European Community directives and principles, the Human Rights Act 1998 and the European Convention on Human Rights and Fundamental Freedoms. The review

[26] Sandra Fredman, Sarah Spencer, 'Beyond Discrimination: It's Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes' (2006) 6 European Human Rights Law Review 598.
[27] ibid.
[28] ibid.
[29] Burrows and Robison (n 14) 27.
[30] Fredman and Spencer (n 26).
[31] Burrows and Robison (n 14) 27.
[32] Fredman (n 15).
[33] Bob Hepple, 'The New Single Equality Act in Britain' (2010) 5 The Equal Rights Review 11.
[34] Bob Hepple, *Equality: The New Legal Framework* (Hart Publishing Ltd, Oxford 2011).
[35] Hepple, Coussey, Choudhury (n 8).
[36] ibid.

found the legislation to be unworkable due to the complexity of having too many laws.[37]

The Cambridge Review recommended that there should be a single Equality Act with clear fundamental principles which would adopt a unitary approach, and would cover all protected characteristics (e.g. race, sex, etc.).[38] The protected characteristics would also be extended to cover discrimination on a wider set of grounds.[39] Following the review, Lord Lester, introduced a Private Member's Bill in 2003, which encapsulated the recommendations of the review.[40] The Government acknowledged that the existing equality framework was not working as had been hoped, so it commissioned its own independent reviews.[41] In 2007, it published the *Equalities Review* which examined discrimination in Britain, and also a proposal for a single Equality Act (the *Discrimination Law Review*). In 2009, the Government's Equality Bill was presented to Parliament, and the Bill finally received royal assent in April 2010.[42] The Equality Act 2010 has updated, harmonised and simplified the previous anti-discrimination legislation. It intends to provide a workable framework, which both protects people from unfair treatment, and promotes a more equal society.[43] The new Act is a significant step forward for equality in Britain, as there are now nine protected characteristics (race, sex, disability, age, religion or belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment) rather than just three previously. However, the underlying principle of formality has not changed. Nor has the process by which discrimination is dealt with.

2.2 The Complaints-Led Process

Under the old law, issues of discrimination would be challenged by way of employees/potential employees making complaints against their employers/potential employers under a 'reactive', 'complaints-led' anti-discrimination model.[44] This remains the same under the Equality Act 2010, whereby employees/potential employees are able to bring claims before an employment tribunal to challenge an employer's alleged wrongdoing.[45] The process for dealing with discrimination in Britain has always been a reactive, complaints-led process, under the formal equality approach. It has been criticised for a number of reasons.[46]

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[37] ibid.
[38] Hepple (n 33) 14.
[39] Hepple, Coussey, Choudhury (n 8).
[40] Hepple (n 33) 14.
[41] Lizzie Barmes, 'Equality Law and Experimentation: The Positive Action Challenge' (2009) 68(3) Cambridge Law Journal 623.
[42] Hepple (n 33) 14.
[43] Ed, 'Equality Act 2010' (2010) 16(9) Health & Safety at Work 8, 8.
[44] Hepple, Coussey and Choudhury (n 8).
[45] Equality and Human Rights Commission, 'Your Choices' <http://www.equalityhumanrights.com/advice-and-guidance/guidance-for-workers/what-to-do-if-you-believe-youve-been-discriminated-against/your-choices/> accessed 23 January 2013.
[46] Fredman (n 15).

The first problem with the complaints-led model is its individualistic core. There must be an individual victim of discrimination, and the onus is on that person to challenge the discrimination so that a step towards equality can be made.[47] The EHRC advises individuals to think very carefully about taking their complaint to an employment tribunal, as this can be very demanding on their time and emotions.[48] Many people might be put off from claiming due to the stress involved with the process. Individuals may just have to accept that they have been discriminated against and try to move on, whilst their employer gets away with it, and possibly continues to discriminate.

Another problem with the complaints-led model is that it must be possible to identify a specific perpetrator. It is recognised that discrimination is often not the fault of a specific individual, but rooted in the deep institutional structure of an organisation.[49] Even if an individual is successful at an employment tribunal, this will only give rise to a remedy for that individual, rather than addressing the systemic issues within the organisation.[50] This was the case prior to the new Equality Act 2010, and the new Act has done nothing to change this. It is noted that under Section 124 Equality Act 2010, tribunals are permitted to make recommendations to employers to remedy their wrongs. However, as employers who fail to comply with recommendations are, at worst, penalised by a mere increase in compensation, this can hardly be seen as an effective instrument with which to overcome systemic equality issues within the structure of organisations.[51] The complaints-led model only addresses the inequalities arising from employers' individual acts of discrimination (if victims actually complain). It is inadequate for addressing systemic equality issues within organisations.[52]

A third problem with the complaints-led model is that it assumes that employers will be so fearful of employees bringing claims in employment tribunals (especially if they have had action brought against them in the past), that they will be motivated to voluntarily review and improve/update their equality policies and practices.[53] In reality however, the fact that discrimination claims are adversarial in nature makes employers view equality as a cause of conflict. Instead of being motivated to improve their practices to achieve equality, claims or fear of claims from employees can actually make employers defensive and resistant to change.[54] In addition, the British

[47] Aileen McHarg, Donald Nicolson, 'Justifying Affirmative Action: Perception and Reality' (2006) 33(1) Journal of Law and Society 1.
[48] Equality and Human Rights Commission (n 45).
[49] McHarg and Nicolson (n 47).
[50] ibid.
[51] Fredman (n 15) 290.
[52] Sandra Fredman, Sarah Spencer, 'Equality: Towards an Outcome-Focused Duty' (2006) 156 Equal Opportunities Review.
[53] Fredman and Spencer (n 26) 599.
[54] Bob Hepple, 'Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation' (2011) 40(4) Industrial Law Journal 315, 316; Sandra Fredman, 'Changing the Norm:

system suffers from specific procedural weaknesses arising out of the tribunal system and the role of the EHRC.

2.3 The Tribunal System

Although the discrimination problem in Britain appears to be substantial; given that certain groups are under-represented in the workforce, and the gender pay gap is still very much an issue, Employment Tribunal statistics show that the number of claims brought against organisations in tribunals is small.[55] In addition to potential claimants' concerns about the process being demanding on their time and emotions, a number of other reasons might explain the low numbers of claims. Making a claim to a tribunal can be a very lengthy process. For example, a report in 2003 highlighted that an equal pay claim could take between eight and ten years from start to finish.[56] Another factor which might deter people from claiming is the possible expense to be incurred. Claimants must bear their own expenses, and as compensation awards are generally low, even a successful claim could result in financial loss.[57] Taking these factors into consideration, it is understandable why there are low numbers of discrimination claims made to tribunals.

Statistics show that not only is there a small number of claims made to tribunals, but the number of successful claims is also very low.[58] In 2009-10 only 2 per cent of sex discrimination claims were successful at tribunal. Other grounds of discrimination produced similar figures. Only three per cent of race discrimination cases, three per cent of disability discrimination cases, two per cent of age discrimination cases, two per cent of religion or belief cases, and five per cent of sexual orientation cases were successful in tribunals in 2009-10.[59] This fact is made worse by evidence which highlighted that a considerable number of repeat alleged discriminators could be identified from a search of Employment Appeal Tribunal judgments.[60] Amongst the offenders were large organisations which have thousands of employees. These included local authorities.[61] Perhaps these employers see how low discrimination claim success rates continue to be, so they keep discriminating against employees, or potential employees, because they are unlikely to be found guilty at a tribunal.

Positive Duties in Equal Treatment Legislation' (2005) 12 Maastricht Journal of European and Comparative Law 369, 373.

[55] Ministry of Justice Tribunals Service, 'Employment Tribunal and EAT Statistics 2009-10' <http://www.tribunals.gov.uk/Tribunals/Publications/publications.htm> accessed 23 December 2013; Fredman (n 15) 281.

[56] K. Godwin, 'Equal Value Update' (2003) 117 Equal Opportunities Review 5, 8; Sandra Fredman, 'The Public Sector Equality Duty' (2011) 40(4) Industrial Law Journal 405, 416.

[57] Fredman (n 15) 283.

[58] Fredman (n 15) 281.

[59] Ministry of Justice Tribunals Service (n 55).

[60] Anon, 'Equality Bodies Failing to Enforce Discrimination Law' (2006) 157 Equal Opportunities Review.

[61] ibid.

An attempt can be made to explain the low success rates for claimants in employment tribunals. One difficulty which claimants face relates to obtaining evidence. Relevant evidence is often in the hands of the employer and inaccessible to the claimant.[62] Research has shown that claimants with legal representation are more likely to be successful in a discrimination case, not only because a legal representative would be better at understanding the procedure, and also the relevant legislation, but that they would also be more skilled in obtaining evidence from the defendant.[63] The problem for claimants is that they often cannot afford to pay for legal representation. There is no legal aid available to claimants for representation at employment tribunals, and claimants are unlikely to be offered a 'damages-based' or 'conditional fee' agreement by a lawyer unless there is a strong chance of a large compensation award.[64] The EHRC was given the power to provide claimants with financial assistance for legal representation under Section 28 Equality Act 2006. However, due to budgetary constraints on the EHRC, it is likely that only a small number of claimants receive funding.[65]

2.4 The Role of the EHRC

In addition to the issues raised about the employment tribunal system, the role of the EHRC also raises concerns. The EHRC was established under the Equality Act 2006. Three previous equality commissions: the Commission for Racial Equality, the Disability Rights Commission, and the Equal Opportunities Commission merged to form one single Commission.[66] It covers all nine of the characteristics protected under the Equality Act 2010. The single commission has a wider remit than its predecessors. Its role is to protect, enforce and promote equality and human rights.[67]

With regards to enforcing equality law (which there appears to be a distinct lack of in the British system), the Equality Act 2006 gave the EHRC powers to conduct both inquiries and formal investigations. EHRC inquiries are more like fact-finding exercises than mechanisms for enforcing equality law.[68] The Commission might, for example, conduct an inquiry into a particular sector. It may well uncover issues of discrimination, and is entitled to publicise a report detailing inequalities found,, and is permitted to make recommendations for improvement.[69] However, because the recommendations are not legally binding, and specific organisations or individuals cannot be named in the report, the value of the EHRC inquiry, in terms of enforcing equality law, is questionable.[70]

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[62] Fredman (n 15) 283.
[63] ibid.
[64] Hepple (n 45) 328.
[65] Fredman (n 15) 287.
[66] Equality and Human Rights Commission, 'Vision and Mission' <http://www.equalityhumanrights.com/about-us/vision-and-mission/> accessed 24 January 2013.
[67] Equality and Human Rights Commission 'About Us' <http://www.equalityhumanrights.com/about-us/index.html> accessed 24 January 2013.
[68] Fredman (n 15) 297.
[69] ibid.
[70] ibid.

The second enforcement power of the EHRC, to conduct a formal investigation, appears to be a more useful enforcement mechanism. The Commission can launch a formal investigation if it suspects that a person has committed an unlawful act. An investigation can lead to an 'unlawful act notice' which may require the person to take action to remedy any wrongdoing.[71] However, this investigative power is hindered by several procedural protections for the person suspected of discrimination. The respondent is given three opportunities to make representations. The first relates to the terms of reference of the investigation, the second relates to the subject of the investigation, and the third gives the person 28 days to make representations on the report before it is finalised.[72] It is agreed that respondents should be provided with *some* protection in the process. However, they are given too many opportunities to 'wriggle out' of a notice being served by the Commission. The investigation process is also reliant on complainants coming forward, which, as has already been discussed, does not occur in great volumes. The Commission will not suspect wrongdoing if nobody speaks out about an employer's discriminatory practices.

Further concerns over the EHRC's role result from the Coalition Government's plans to restrict the powers of the EHRC, and to make further cuts to its annual budget.[73] In 2011-12, the Commission's budget was £48.9 million, compared to £70 million in 2007.[74] The Government plans to reduce this to £26 million by 2015.[75] If the Commission's powers (which are already of questionable value) are going to be restricted, and the resources with which they conduct inquiries and investigations significantly reduced, the Commission will be even less of a force in the fight against discrimination than it is now.

2.5 The Case for Proactive Measures

It has been demonstrated that there are many issues with the complaints-led model of anti-discrimination under the formal approach, and that specifically the British system is very problematic. Despite the advances in equality law brought by the Equality Act 2010, the process for combating discrimination is still focussed on individual complaints, and thus fails to address systemic issues of inequality within organisations. Some groups of people continue to be under-represented, and unequal pay is still very much an issue.[76] If the system is not changed, how can we expect the results to change? Many commentators recommend that Britain should adopt a substantive approach to equality to combat its discrimination problem. This would mean changing to a model which is 'proactive' rather than 'reactive' or 'complaints-led'. Such a model would include proactive measures being taken by employers.

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[71] Hepple (n 34) 151-152.
[72] ibid.
[73] Hepple (n 45) 319.
[74] ibid.
[75] ibid.
[76] Kate Godwin, 'Positive Action: Possibilities and Limits' (2007) 170 Equal Opportunities Review 22.

It should firstly be noted that proactive measures come in two main forms: 'positive action' and 'positive discrimination'. There is much confusion within the literature over the distinction between the two. Malamatenious says that positive action measures are designed to encourage members of disadvantaged groups to participate in employment, for example by offering training opportunities, whilst positive discrimination would, for example, be a mandatory requirement for employers to recruit a certain proportion of candidates from disadvantaged groups which are under-represented within their workforce.[77] Noon agrees with Malamatenious' definition of positive action. However, he defines positive discrimination as being the recognition and consideration of protected characteristics, by an employer, within their appointment and selection decision-making process.[78] For the purpose of this discussion, the EHRC's definition of positive action will be taken is as follows: '[T]he steps that an employer can take to encourage people from groups with different needs, or with a past track record of disadvantage or low participation, to apply for jobs'.[79] This can be extended to include the steps that an employer can take in the recruitment/selection decision-making process to increase the representation of disadvantaged groups in their workforce.[80] Positive discrimination will refer to mandatory requirements for employers to recruit certain proportions of candidates from disadvantaged groups.

Employers can use proactive measures to break down systemic forms of inequality within their organisations (such as under-representation of disadvantaged groups) and redress past discrimination.[81] Proactive measures can take a variety of forms, including preferential treatment, statutory duties, quotas, and contract compliance.[82] These will be discussed throughout the following two sections.

Proactive measures are controversial because they conflict with the equal treatment principle; they allow for the use of unequal treatment in order to achieve equality.[83] It is argued that although proactive measures may, for example, increase the representation of disadvantaged groups in the workforce, this may be at the expense of 'innocent third parties', particularly from the white male population, and especially where the principle of merit (which requires people to be rewarded on the basis of their skills and abilities) is disregarded.[84] Members of disadvantaged groups have

[77] David Malamatenious, 'Redressing the Balance' (2003) 153 New Law Journal 1208.
[78] Mike Noon, 'The Shackled Runner: Time to Rethink Positive Discrimination?' (2010) 24(4) Work, Employment and Society 728.
[79] Equality and Human Rights Commission 'Positive action and recruitment – What is 'positive action'?' <http://www.equalityhumanrights.com/advice-and-guidance/guidance-for-workers/recruitment/positive-action-and-recruitment/> accessed 11 April 2013.
[80] O'Cinneide (n 14).
[81] O'Cinneide (n 20); Godwin (n 76).
[82] Christopher McCrudden, 'Rethinking Positive Action' (1986) 15 Industrial Law Journal 219; O'Cinneide (n 14) 354.
[83] Fredman (n 54) 369.
[84] Christopher McCrudden (n 82) 219; Jonathan S Leonard, 'What was Affirmative Action?' (1986) 76(2) The American Economic Review 359.

been 'innocent' victims of discrimination for many years, however, and this discrimination needs to be redressed. Proactive measures can break down systemic forms of discrimination, which are the causes of the inequalities suffered by disadvantaged groups within the British workforce, and deliver justice to such groups by compensating them for the past discrimination that they have suffered at the hands of society.[85]

As has been discussed, the current complaints-led model, under the formal equality approach, is incapable of delivering this justice and redressing past discrimination. It only addresses individual acts of discrimination. The proactive model, under the substantive equality approach deals with many of the problems identified within the complaints-led model.[86] Instead of the responsibility being on the individual to make a complaint about discrimination and the employer 'reacting' to it, the initiative lies with the employer to take positive measures to combat discrimination within their workplace.[87] There is also no need to identify an individual perpetrator in the proactive model. Rather than proving fault, and punishing a specific individual, the focus is on the organisation as a whole. The employer takes action to identify systemic equality issues within the organisation's structure, and then creates policies and procedures to remedy these inequalities, and eliminate discrimination.[88] Rather than being defensive towards complaints from individuals, the employer is in control and has the opportunity to make real changes within the organisation.[89] The proactive model is capable of dealing with systemic issues as it considers the equality rights of all employees, not just the individuals who make a complaint.[90] If employers take proactive measures towards eliminating discrimination within their workforces, they should receive far fewer complaints from employees and reduce the risk of claims for compensation.[91] The proactive model, under the substantive equality approach, has been adopted in a number of jurisdictions outside of Britain. This will be discussed in the next section.

3 PROACTIVE MEASURES IN OTHER JURISDICTIONS

3.1 A Contractual Approach – the US Model

The US adopted the proactive model, and used a contract compliance system to remedy the under-representation of disadvantaged groups.[92] The US has a history of

[85] McHarg and Nicolson (n 47).
[86] Fredman (n 54).
[87] ibid.
[88] ibid.
[89] ibid.
[90] ibid.
[91] Fredman (n 12) 193.
[92] Raya Muttarak, Heather Hamill, Anthony Heath, Christopher McCrudden, 'Does Affirmative Action Work? Evidence from the Operation of Fair Employment Legislation in Northern Ireland' (2012) Sociology <http://soc.sagepub.com/content/early/2012/10/01/0038038512453799> accessed 20 February 2013.

discrimination against black people (in the US 'black people' refers to Native Americans, Africans and other ethnic minorities).[93] The US was discovered by white European settlers who oppressed the Native Americans, gained control of the land and brought black slave labour from Africa. Even after slavery was abolished, black people continued to be poorly treated and discriminated against (they were disadvantaged).[94] Blacks were under-represented in the US workforce so an Executive Order was issued by President Kennedy in 1961. This required organisations seeking or wanting to maintain government contracts to take positive action measures (there termed 'affirmative action') to increase the representation of blacks within their workforces. This involved developing affirmative action plans, including goals and timetables.[95] The process allowed employers to prefer less well qualified candidates to better qualified candidates on the grounds of race (there was no regard for the principle of merit).[96] By way of enforcement, the Office of Federal Contract Compliance Programs (OFCCP) had extensive investigatory powers, including the ability to conduct compliance reviews.[97] If the OFCCP found an employer's affirmative action plan to be unacceptable, it could issue a notice to the employer, and where the employer did not comply, the organisation could be barred from holding government contracts.[98]

The affirmative action measures under the 1961 Executive Order are thought to have been successful in increasing representation of black people in the US workforce.[99] A comparison of data from 1974 and 1980 from government contracting firms and non-government contracting firms showed that the employment growth rate for black males was 3.8 per cent faster in contracting firms, and 12.3 per cent faster for black females.[100] At the same time however, the employment growth rate for white males was reported to be 1.2 per cent slower in the contracting firms.[101] The affirmative action measures were accused of being positive discrimination against white males; the numerical targets included in the goals and timetables of affirmative action plans were perceived to be quotas (measures which require employers to recruit a certain proportion of candidates from disadvantaged groups) which were detrimental to white male employment.[102] The affirmative action measures required in government contracts in the US were abolished by the Reagan government in 1981, and the black

[93] Ashwini Deshpande, 'Affirmative Action in India and the United States' (World Bank, 2005) <https://openknowledge.worldbank.org/handle/10986/9038> accessed 20 February 2013.
[94] ibid.
[95] Jonathan S Leonard, 'The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment' (1990) 4(4) Journal of Economic Perspectives 47.
[96] Sionaidh Douglas-Scott, 'Affirmative Action in the US Supreme Court: The Adarand Case – The Final Chapter?' (1997) Spr Public Law 43.
[97] Fredman (n 15).
[98] Leonard (n 95).
[99] ibid; Muttarak et al. (n 92); Deshpande (n 93).
[100] Leonard (n 84) 359.
[101] ibid.
[102] Leonard (n 95).

economic advance, which had been experienced as a result of affirmative action, faltered.[103]

The experience in the US shows that 'mandatory' proactive measures imposed on employers can achieve the desired results of increased representation of disadvantaged groups in the workforce. However, when numerical targets are involved in the process and the principle of merit is disregarded, there can be a detrimental effect on non-disadvantaged groups. Perhaps if the principle of merit had been included in the affirmative action programme, and employers could only choose to recruit a black person over an equally qualified white person, there may not have been a detrimental effect to white male employment. The employment growth rate for blacks would perhaps have been slower; however this would have been much less controversial than the system that was used.

3.2 The Quota System – India and the EU

The US abolished the affirmative action measures in government contracts for positive discrimination. However, other jurisdictions have willingly adopted the positive discrimination approach. India has a widespread quota system which is the largest in the world.[104] Quotas are a special kind of positive discrimination, the legality of which varies widely between nations. In India, a caste system, which has now been abolished, separated the Indian people into five castes. The people in the bottom caste were considered to be 'untouchables' and they suffered disadvantages in the form of exclusion, oppression and discrimination in employment.[105] A quota system, enshrined in the Indian Constitution in 1950, targets this group of people to bring them into the mainstream, and compensate them for past discrimination. In addition to the former 'untouchables', the quota system also targets people from tribal communities who were outside of the caste system (but still excluded from the mainstream), as well as any other people who have been similarly disadvantaged.[106]

Although the Prime Minister has urged the private sector to enhance and promote the employment of disadvantaged groups, the quota system, at present, only covers the public sector.[107] Article 16(4) of the Indian Constitution reserves a percentage of jobs in the public sector for the disadvantaged groups. The quotas are proportional to the disadvantaged groups' share of the population, with a total of 49 per cent of jobs being reserved.[108] The quota system in India is described as being a partial success. Each of the disadvantaged groups has experienced a rise in monthly per capita expenditure over the last few decades. The disadvantaged groups appear to be filling

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[103] ibid.
[104] V. K. Verma, 'Affirmative Action (Positive Discrimination)' (2008) *LBS* Journal of Management & Research.
[105] Deshpande (n 93).
[106] ibid.
[107] Verma (n 104).
[108] Deshpande (n 93).

the lower level reserved jobs. However, the jobs reserved in the upper levels of employment largely remain unfilled.[109] People from disadvantaged groups often do not have the capabilities to perform upper level jobs, and quotas do nothing to change this. 'Positive action' measures, on the other hand, can provide disadvantaged people with the capabilities they need, by offering them training opportunities for example. The quota system in India does not provide for training. There is no monitoring, no accountability to fill the reserved jobs, and no penalties. There is a Commission of some description; however, it has not been proactive in enforcing the quotas. The only way to enforce the quota system is through a writ under Articles 32 and 226 of the Indian Constitution. This is problematic, as a writ application is generally too expensive for a potential claimant, and also the judiciary is dominated by the previous upper castes.[110]

In the EU, there has been some debate over whether the use of quotas in employment is legal.[111] Three German cases illustrate the developments in the European Court of Justice (ECJ). In *Kalanke v Freie Hansestadt Bremen,*[112] the ECJ adopted a strictly formal approach, and held that a quota system, which allowed automatic preference in employment of women over men, was incompatible with Article 2(4) of the Equal Treatment Directive.[113] Two years later, in *Marschall v Land Nordrhein-Westfalen,*[114] the ECJ held that a similar quota system was consistent with EU law, provided that the measure included a 'saving clause' to balance any disproportionate disadvantages to male candidates.[115] *Badeck v Hessischer Ministerprasident,*[116]confirmed the principle in *Marschall,* as the ECJ upheld a system of 'flexible result quotas'.[117] EU law generally prohibits positive discrimination, but quotas are a special kind of positive discrimination permitted by EU law.[118]

In addition to Germany, a number of other EU member states including the Netherlands, Norway, and Sweden use quotas to increase representation of disadvantaged groups in their workforces, and some of these have been very

[109] ibid.
[110] ibid.
[111] Dagmar Schiek, 'Positive Action before the European Court of Justice – New Conceptions of Equality in Community Law? From *Kalanke* and *Marschall* to *Badeck*' (2000) 16(3) The International Journal of Comparative Labour Law and Industrial Relations 251.
[112] Case C-450/93, *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.
[113] Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions[1976] OJ L 39/40; Catherine Barnard and Tamara Hervey, 'Softening the Approach to Quotas: Positive Action after *Marschall*' (1998) 20(3) Journal of Social Welfare and Family Law 333.
[114] Case C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363.
[115] Anke J. Stock, 'Affirmative Action: A German Perspective on the Promotion of Women's Rights with Regard to Employment' (2006) 33(1) Journal of Law and Society 59.
[116] Case C-158/97, *Badeck v Hessischer Ministerprasident* [2000] ECR I-1875.
[117] Daniela Caruso, 'Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives' (2003) 44(2) Harvard International Law Journal 331.
[118] Employment Equality Directive 2000/78; Lisa Waddington and Mark Bell, 'Exploring the Boundaries of Positive Action under EU Law: A Search for Conceptual Clarity' (2011) 48 Common Market Law Review 1503.

successful.[119] These quotas have mainly been imposed in the public sector, however, and there appears to be a lack of political will to extend them to the private sector.[120] Quotas are, evidently, controversial positive discrimination measures.[121] The US abolished the use of affirmative action in government contracts, as it was deemed to have led to quotas, and yet EU law allows them, and several member states have adopted this positive discrimination approach. A quota system in Britain was abolished in 1996.[122] This illustrates Britain's resistance to mandatory proactive measures. The European Commission recently approved, however, a proposal for a mandatory quota, which aims to allow for forty per cent of non-executive directors on the boards of listed companies to be women.[123] If the European Council of Ministers approves the plans, Britain may have no choice but to implement quotas.[124] What can be learned from the experiences in the US and India, is that if the EU does impose mandatory quotas on Britain, the quotas must be effectively regulated, monitored, and enforced, in order to achieve the desired results, and that the principle of merit should still be adhered to in the recruitment/selection decision-making process, in order to avoid detrimental effects on non-disadvantaged groups.

Positive discrimination proactive measures, such as quotas, are much more successful in breaking down systemic inequalities, and increasing representation of disadvantaged groups in a workforce, than the complaints-led system. This is evidenced by the lack of success in Britain of increasing representation of disadvantaged groups (the statistics have not changed in the last few decades) compared to the significantly increased employment experienced by disadvantaged groups in the US and India. However, positive discrimination is very controversial. Positive action measures are less controversial. These have been adopted in a number of jurisdictions.

3.3 Statutory Duties in Canada and South Africa

Canada and South Africa have adopted proactive measures in the form of statutory duties. These duties are 'mandatory', as they are codified in legislation. However, they are not 'mandatory' in the positive discrimination sense. The statutory duties in these jurisdictions are compulsory. However, they do not go as far as setting targets as to the percentage of candidates to be recruited from under-represented groups. They are regarded as positive action provisions.

In Canada, women, people with disabilities aboriginal people, and other minorities, are thought to be disadvantaged. They are under-represented within the workforce,

[119] Idris (n 16); Caruso (n 117).
[120] Stock (n 115).
[121] ibid.
[122] Godwin (n 76).
[123] Lucy Money, 'One, two, three, four...' (2012/2013) Employers Law 12.
[124] ibid.

and often receive lower rates of pay.[125] Canadian equality legislation was previously complaints-led. This system was found to be limited so a proactive approach, including voluntary positive action measures, was adopted instead.[126] The Abella Commission Report, *Equality in Employment,* found however, that these voluntary measures, on the part of employers, were ineffective in reducing the inequalities faced by the disadvantaged groups.[127] Canadian law now includes mandatory positive action provisions.[128]

The Employment Equity Act 1995 places obligations on employers to remedy under-representation of disadvantaged groups within their workforces.[129] Under the Act, employers with more than 100 employees are required to review their workforces to determine the degree of representation of disadvantaged groups, and also to review all employment policies and procedures.[130] They must draw up an employment equity plan, specifying goals and timetables for implementation,[131] and file annual reports with the appropriate government body.[132] The Canadian Human Rights Commission (CHRC) receives copies of all reports, and it is authorised to conduct audits of each employer.[133] In cases of non-compliance, the Commission can request a written undertaking from the employer, and if that fails, the Commission can issue directions.[134] If an employer ignores the Commission's directions, the case can be referred to the Employment Equity Review Tribunal.[135] Fines of up to $50,000 can be imposed on employers.[136]

Statistics show that there has been an increase in women's representation in recent decades. In 2004, fifty eight per cent of women were in employment, an increase of 16 per cent since 1976.[137] This undoubtedly signals progress in the right direction; however, it is slow progress, and the other disadvantaged groups have not experienced

[125] Penny Hartin and Phillip C. Wright, 'Equal Opportunities International Canadian Perspectives on Employment Equity' (1994) 13 Equal Opportunities International 12.
[126] Mary Cornish, 'Employment and Pay Equity in Canada--Success Brings Both Attacks and New Initiatives' (1996) 22 Can-USLJ 265.
[127]Hartin and Wright (n 125).
[128] Cornish (n 126).
[129] Nicole Busby, 'Affirmative Action in Women's Employment: Lessons from Canada' (2006) 33 Journal of Law and Society, 42.
[130] Employment Equity Act 1995, s 9.
[131] ibid s 10.
[132] ibid s 18; Nicole Busby (n 129).
[133] Employment Equity Act 1995 (n 130) s 23.
[134] ibid s 25.
[135] ibid s 28; Busby (n 129).
[136] Employment Equity Act 1995 (n 130) s 36; Harish C. Jain, Frank Horwitz, Christa L. Wilkin, 'Employment equity in Canada and South Africa: a comparative review' (2012) 23 The International Journal of Human Resource Management 1.
[137] Stephanie Bernstein, Marie-Josée Dupuis, Guylaine Vallée, 'Beyond Formal Equality: Closing the Gender Gap in a Changing Labour Market–A Study of Legislative Solutions Adopted in Canada' (2009) 15 The Journal of Legislative Studies 481.

the same increases in representation.[138] A number of problems can be identified with the Canadian legislation, which might explain why the progress has been slow. Canadian law has two streams: federal law and provincial law. The 1995 Employment Equity Act only applies to employers whose activities fall under federal jurisdiction.[139] This poses a problem, as eighty eight per cent of Canada's workforce falls under provincial jurisdiction, and most of Canada's provinces do not have alternative employment equity legislation in place.[140] Where provinces do have such legislation in place, it can be limited in scope; such as in Quebec, where the legislation only covers public bodies.[141] If the 1995 Act applied to all employers, there may have been more success.

Another problem with Canadian employment equity relates to enforcement. The legislation does not provide the CHRC with a clearly defined role, and as the standards used by the Commission are not specifically outlined within the legislation, employers can easily challenge the Commission's directions and referrals to the Employment Equity Review Tribunal.[142] There is also a problem with the Commission's resources. They are unable to carry out effective monitoring and auditing of all employers covered by the legislation, due to a lack of investment in the resources they require.[143] The CHRC needs a clearly defined role as well as adequate resources to be able to enforce employment equity legislation.[144]

South African employment equality law is largely modelled on Canadian law. The features of the South African Employment Equity Act 55 of 1998 are very similar to Canada's 1995 Act.[145] The South African Act includes mandatory positive action measures which aim to redress disadvantages in employment resulting from past discrimination during a period of apartheid, which involved widespread segregation and inequality for certain groups.[146] The Act defines the disadvantaged groups as being black people, women and people with disabilities,[147] and it aims to ensure that suitably qualified people from these groups are equally represented in the South African workforce.[148] The Act covers both public and private sector employers.[149] The Act does not appear to provide a threshold regarding the number of employees an

[138] Harish C. Jain, Frank Horwitz and Christa L. Wilkin, 'Employment Equity in Canada and South Africa: A Comparative Review' (2012) 23(1) The International Journal of Human Resource Management 1.
[139] Bernstein et al. (n 137).
[140] Busby (n 129).
[141] Bernstein et al. (n 137).
[142] Busby (n 129).
[143] ibid; Jain et al. (n 138).
[144] Busby (n 129).
[145] Jain et al. (n 138).
[146] Saras Jadwanth, 'Affirmative action in a transformative context: the South African experience' (2003) 36 Conn L Rev 725..
[147] Employment Equity Act 55 of 1998, s 1.
[148] ibid s 15; Jadwanth (n 146).
[149] Jadwanth (n 146).

organisation must have; however, it does say that employers that run 'small businesses' will not be obligated to adopt positive action measures under the Act.[150]

Under the South African Act, employers are required to conduct analyses regarding the representation in their workforces,[151] prepare an employment equity plan,[152] and submit annual reports to the Commission of Employment Equity, and the Department of Labour.[153] When employers fail to comply with the positive action requirements, labour inspectors can request written undertakings[154] and issue compliance orders[155] which the Department of Labour can enforce through the courts, resulting in fines[156] for infringing employers.[157] It is difficult to determine from the literature whether the legislation has resulted in an overall increase in the representation of disadvantaged groups; however, progress towards equality is thought to be slow.[158] Black people and women are still largely recruited at lower levels, whereas white able-bodied males are mainly recruited into top and middle-management.[159] Following the apartheid, it is likely that the disadvantaged groups will not have the skills necessary to perform higher level jobs. South African employers could remedy this by taking specific positive action to give members of disadvantaged groups the capabilities they need, for example, by providing training opportunities.

It is noted that the damage done by apartheid will take some time to redress.[160] However, a number of issues in the employment equity legislation can be identified which will hinder its success. Firstly, the South African Act is ambiguous in parts (such as defining employers as those which do not run 'small businesses'), and it fails to provide employers with clear guidelines as to what they must do to comply with the provision.[161] There also appears to be a problem with enforcement. The roles of the Employment Equity Commission and the Department of Labour are unclear, and hence they fail to properly audit and monitor employers.[162] It appears, however, that these monitoring bodies are allocated insufficient financial and human resources to perform their roles effectively.[163] In addition, it is thought that the eventual sanction of a fine being imposed by the courts is an ineffective means of enforcement, as many businesses are in a position to pay such fines easily.[164]

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[150] Grete S Bosch, 'Restitution or discrimination? Lessons on Affirmative Action from South African Employment Law' (2007) 1 WEB Journal of Current Legal Issues.
[151] Employment Equity Act 55 of 1998 (n 147) s 19.
[152] ibid, s 20.
[153] ibid, s 21; Bosch (n 150); Jadwanth (n 146).
[154] Employment Equity Act 55 of 1998 (n 147), s 36.
[155] ibid, s 37.
[156] ibid. s 50.
[157] Jain et al. (n 136); Saras Jadwanth (n 146).
[158] Jain et al. (n 136).
[159] ibid.
[160] ibid.
[161] Bosch (n 150).
[162] Jain et al. (n 136).
[163] Jadwanth (n 146).
[164] Bosch (n 150).

Evidently, mandatory positive action measures have achieved some success in Canada and South Africa (more success than the complaints-led model in Britain), but the potential of the legislation in these jurisdictions is hindered by a number of problems, including the scope of the legislation; vague provisions and unclear guidelines for employers; undefined roles and lack of resources for the enforcement authorities, and ineffective sanctions. Similar to Canada and South Africa, Northern Ireland has adopted proactive measures in the form of statutory duties. The mandatory positive action provisions in the Northern Irish legislation have, however, proved to be more successful.

3.4 The Northern Irish Approach

In Northern Ireland, Catholics have been under-represented in the workforce compared to Protestants for several decades, with the Catholic unemployment rate being up to 2.6 times that of Protestants.[165] It is thought that Catholics have been excluded from work by discriminatory practices rooted in religion-based segregation.[166] The Fair Employment (Northern Ireland) Act 1989 aimed to achieve fair participation in employment by remedying this under-representation, and promoting religious integration within workplaces via mandatory positive action obligations placed on employers.[167] The previous 1976 legislation, which did not require any significant positive action from employers (the measures were voluntary in nature) had been unsuccessful.[168] The Fair Employment and Treatment Order 1998 (FETO) consolidated and replaced the 1976 and 1989 Acts. The practices required of employers in Northern Ireland are much the same as in Canada. Employers are required to register with the enforcement agency;[169] review their workforce and employment practices every three years;[170] create a plan to remedy any under-representation, including goals and timetables, and submit annual monitoring reports to the Equality Commission for Northern Ireland (ECNI).[171] The ECNI also has similar powers to the Commission in Canada. It can monitor employers, make recommendations as to how positive action should be taken, investigate employers,[172] request written undertakings,[173] serve notices containing directions on non-complaint

[165] Christopher McCrudden, Robert Ford and Anthony Heath, 'Legal Regulation of Affirmative Action in Northern Ireland: An Empirical Assessment' (2004) 24 Oxford Journal of Legal Studies 363.
[166] Editorial Team European Roma Rights Center, 'Equality Policies: Examples of Good Practice Outside Central and South Eastern Europe' (2007) European Roma Rights Center-Research Papers 59.
[167] McCrudden et al. (n 165).
[168] Muttarak et al. (n 92).
[169] Fair Employment and Treatment (Northern Ireland) Order 1998, s 48.
[170] ibid s 55.
[171] ibid s 52; Christopher McCrudden, 'Affirmative Action and Fair Participation: Interpreting the Fair Employment Act 1989' (1992) 21(3) Industrial Law Journal 170.
[172] Fair Employment and Treatment (Northern Ireland) Order 1998 (n 169) s 11.
[173] ibid s 12.

employers,[174] and refer cases to the Fair Employment Tribunal,[175] which can impose fines on employers of up to £40,000.[176]

The mandatory positive action measures in Northern Ireland have been successful in redressing under-representation of Catholics in the workforce.[177] In 1990, Catholic employees constituted 34.9 per cent of the monitored workforce, which was 5.1 percent less than the estimated 40 per cent who were available for work.[178] By 2010, Catholics represented 45.9 per cent of the monitored workforce. This is a 37 per cent increase since the monitoring began, and it is very close to the percentage of Catholics that are available for work.[179] The statutory positive action duties in Northern Ireland have been more successful than those in Canada and South Africa. A number of reasons may explain this.

Firstly, the Fair Employment and Treatment Order 1998 applies to all public and private sector employers with more than ten employees.[180] The scope is much wider than in Canada, for example, where employment equity legislation only applies to employers under federal jurisdiction, and public sector employers in some of the provinces. The amount of employees an organisation must have is also much lower in Northern Ireland than in Canada, thus further extending the scope of the Northern Irish legislation. Secondly, in Northern Ireland, the legislation is clear, and guidelines regarding the positive action provisions are published and distributed to employers by the Commission.[181] This contrasts with South Africa, for example, where the legislation is ambiguous in parts, and no guidelines are issued to employers.

A third difference between Northern Ireland and Canada/South Africa is that in addition to its monitoring and investigatory powers, the Commission in Northern Ireland is able to reach positive action agreements with employers, which include 'review of progress' clauses, so that Commission officers can liaise with employers to ensure that agreed positive action measures are in place, and that progress is being made towards fair participation in their workforces.[182] The Commission uses the results of an employer's triennial reviews to decide whether to work towards an

[174] ibid s 14.
[175] ibid s 16.
[176] ibid s 17; McCrudden (n 171).
[177] Editorial Team European Roma Rights Center (n 166); Muttarak et al. (n 92); McCrudden et al. (n 165).
[178] Anon, 'How vigilance keeps bias out of workplace: As the Equality Commission publishes its annual report, Chief Commissioner Bob Collins argues that fair employment measures are still relevant today' *Belfast Telegraph* (Belfast, 7 December) 2010.
[179] Russell R.T, 'Fair Employment in Northern Ireland: the decades of change (1990 – 2010)' (*Northern Ireland Assembly,* 2012) <http://www.niassembly.gov.uk/Documents/RaISe/Publications/2012/general/12112.pdf> accessed 8 April 2013.
[180] Fair Employment and Treatment (Northern Ireland) Order 1998 (n 169) s 48; Muttarak et al. (n 92).
[181] Editorial Team European Roma Rights Center (n 166).
[182] Evelyn Ellis, 'The Fair Employment (Northern Ireland) legislation of 1989' (1990) Summer, Public Law 161; McCrudden et al. (n 165).

agreement with them.[183] There are three kinds of agreements possible between the Commission and employers: voluntary agreements, negotiated with Commission officers; formal agreements, approved by the Commission's Board, and legally enforceable agreements, which are backed by sanctions, under Article 13 FETO.[184] In practice, the majority of agreements have been voluntarily entered into by employers. The Commission will generally only attempt a legally enforceable agreement when it is unable to negotiate a satisfactory voluntary agreement with an employer.[185] It has been suggested that the willingness of employers to enter into voluntary agreements could be due to fear of the possible sanctions in legally enforceable agreements.[186] It was found that by the year 2000, Catholic representation in firms which had entered into agreements was greater than in those that had not.[187] Further research by Anthony Heath et al. in 2009 confirmed the success of Commission agreements in achieving fair employment.[188] Positive action measures aimed at improving under-representation are more successful in firms which the Commission regularly liaises with under an agreement than in firms which simply review their workforces, and submit annual reports etc.[189] The Northern Irish Commission appears to have much more involvement in the positive action practices of employers than the Commissions in Canada and South Africa, and this could explain the differences in success.

A fourth possible reason why Northern Ireland has been more successful in combating under-representation is that in Northern Ireland, annual monitoring reports, which identify employers by name, are published and made available to the general public. These reports detail the number of Catholics and Protestants in the employer's workforce.[190] This 'naming and shaming' strategy could also explain employers' willingness to enter into voluntary agreements, so that they can (with the Commission's involvement) more effectively combat under-representation within their workforces.[191] This policy does not exist in Canada or South Africa, which again could explain the difference in levels of success. John Braithwaite has argued that in some cases, the power of persuasion can be an effective tool with which to achieve compliance to regulation.[192] The naming and shaming device in Northern Ireland could be regarded as the Commission 'persuading' employers to comply. By publishing annual monitoring reports, the Commission is appealing to the good will, or better nature of those employers who are failing to take the necessary positive action, to increase representation of Catholics within their workforces. The

[183] Muttarak et al. (n 92).
[184] ibid.
[185] ibid.
[186] Fredman (n 54).
[187] McCrudden et al. (n 165).
[188] Hepple (n 34) 153.
[189] Muttarak et al. (n 92).
[190] ibid.
[191] ibid.
[192] John Braithwaite, *To punish or persuade: The enforcement of coal mine safety* (SUNY Press 1985) 94-118.

Commission is giving offending employers a warning, and a second chance to comply, before it progresses to the disciplinary stage.[193] It has been noted that in South Africa, the punishment of employers with fines is regarded as an ineffective tool with which to achieve compliance, as employers can often easily pay the fines. It is suggested that the power of persuasion, used by the Northern Irish Commission in their naming and shaming policy, is a more effective means to achieving compliance from employers than relying on an employer's fear of potential punishment. Sanctions should still be available as a backup, but persuasion should be attempted first.[194]

A final factor which may explain why the Northern Irish positive action measures have been more successful than those in Canada and South Africa, relates to Commission resources. It is not possible to determine each of the Commission's budgets from the literature. However, considering the fact that the Northern Irish Commission carries out functions over and above those of the Canadian and South African Commissions, such as publishing and distributing guidelines to employers, drawing up and maintaining agreements with employers, and publishing annual monitoring reports, suggests that the Northern Irish Commission has more resources than the Canadian and South African Commissions; since the carrying out of such tasks requires sufficient financial and human resources. The Commissions in Canada and South Africa seemingly do not have adequate resources to conduct even their basic functions of monitoring and auditing etc., so it is unlikely that they would be able to carry out these additional, seemingly beneficial functions performed by the Northern Irish Commission. The lack of resources allocated to the Canadian and South African Commissions prevents them from successfully enforcing their positive action legislation, in contrast to the Northern Irish Commission, which has been more successful.

The success in Northern Ireland shows that proactive positive action measures can be extremely effective in breaking down systemic equality issues within a workforce, much more effective than the complaints-led system in Britain. Over two decades in Northern Ireland, Catholics have become equally represented in the workforce. In Britain, there has been no change in the representation of disadvantaged groups over the last three decades. It is recognised that Northern Ireland has a different kind of discrimination problem to Britain (religion-based segregation). However, there is no reason why the Northern Irish substantive approach to equality could not be adopted in Britain. Britain already has the necessary organisations in place (the EHRC and the Tribunal Service), and there is nothing about the Northern Irish institutional arrangements which are unique to Northern Ireland. There have been small steps in Britain over the years to move towards a substantive approach. However, as will be discussed in the next section, these have been unsuccessful.

[193] ibid.
[194] ibid.

4 POSITIVE ACTION IN BRITAIN

4.1 Pre-Equality Act Positive Action

As already discussed, British legislation has traditionally adopted a formal approach to equality, and the system for dealing with discrimination has always been a reactive, complaints-led system. However, a look back over the history of British equality legislation shows that there have been positive action provisions in existence for many years. These could be regarded as small steps towards substantive equality, but in practice, they have proved to be unsuccessful. The Sex Discrimination Act 1975 (SDA)[195] and the Race Relations Act 1976 (RRA)[196] allowed employers (both in encouraging individuals to take advantage of opportunities, and also in the provision of training) to favour a person on the basis of his/her sex or race, where under-representation of that particular sex or race could be identified in their workforce in the past twelve months.[197] These provisions gave employers the power to take positive action, although there was no obligation to use that power. It would be used entirely voluntarily (unlike in Northern Ireland, where the positive action provisions impose mandatory duties on employers). The *Cambridge Review* found that the positive action provisions in the SDA and RRA were ineffective and little used.[198] Employment Equality Regulations[199] from EU law widened the scope of positive action in Britain. They provided similar positive action provisions to the SDA and RRA for a number of other protected characteristics. These regulations were less restrictive than the provisions in the SDA and RRA, as they did not include a requirement of under-representation in the past twelve months. There was still no obligation for employers to use them, however, and they still only applied to training and the encouragement of individuals to take up opportunities.[200] The British legislature (until recently) failed to take advantage of EU law, which permitted member states to introduce positive action provisions, which would allow employers to favour a person from a disadvantaged group, in decisions about appointments and promotions.[201] Although again, such provisions would still not necessarily have imposed an obligation on employers to use positive action (such as in Northern Ireland); they would have merely provided a power, not an obligation.

There was also a distinct lack of clarity in the law's positive action provisions. Employers who wanted to use the positive action provisions were confused by what

[195] Sex Discrimination Act 1975, ss 47-48.
[196] Race Relations Act 1976, ss 37-38.
[197] James Hand, Bernard Davis, Pat Feast, 'Unification, simplification, amplification? An analysis of aspects of the British Equality Act 2010' (2012) 38 Commonwealth Law Bulletin 509.
[198] Hepple (n 34) 128.
[199] Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661, Employment Equality (Age) Regulations 2006 implementing Council Directive 2000/78/EC, SI 2006/1031.
[200] James Hand, 'A decade of change in British discrimination law: positive steps forward?' (2008) 34 Commonwealth Law Bulletin 595.
[201] Hand et al. (n 197) 525; Case C-409/95 (n114); Case C-158/97 (n 116).

was legally permissible, and what was not.[202] In 2006, the Avon and Somerset Constabulary introduced a positive action campaign, to recruit officers which reflected the diversity in the communities they served. They were advised that the campaign may have breached the SDA and RRA. They had attempted to be proactive in achieving equality, but in turn, may have been guilty of discrimination.[203] In 2007, the *Equalities Review* reported that employers were frustrated with equality legislation, as some of them actually wanted to be proactive towards achieving an equal workforce, but the constraints within the existing positive action provisions made this difficult.[204] The lack of clarity and the constraints within the positive action provisions made them ineffective, and subsequently they were little used by employers.

4.2 Recommendation for mandatory employer duties

In the Cambridge Review, Hepple had recommended the adoption of statutory duties similar to those in Northern Ireland, Canada and South Africa. He recognised that Britain had continuing problems of under-representation of disadvantaged groups, and unequal pay for women.[205] He reported that the 'voluntary' approach to positive action, along with the complaints-led formal equality model, was ineffective at breaking down systemic inequalities within the British workforce.[206] He proposed a system of mandatory employer duties under the substantive equality approach. Employers with more than ten employees in both the public and private sectors would be required to conduct reviews once every three years, to identify any issues of under-representation, or unequal pay within their workforces. Similarly to the Northern Irish, Canadian and South African approaches, employers would be required to draw up employment equity, or pay equity plans (or both if necessary) to address any issues found, and those who were non-compliant would be subject to Commission notices, and possible sanctions at an employment tribunal.[207]

As mentioned above, the recommendations from the Cambridge Review made their way into a Private Member's Bill, and eventually became part of the Equality Bill in 2009. The Bill was heavily scrutinised by the House of Commons over one year, but was then rushed through the House of Lords with little debate. Lord Lester was keen to ensure that the Bill was passed before the looming general election.[208] Subsequently, however, many clauses fell without scrutiny from the House of Lords. The clause relating to mandatory reviews was one of them.[209] The main objection to

[202] Lizzie (n 41).
[203] ibid.
[204] ibid.
[205] Hepple et al. (n 8).
[206] ibid.
[207] ibid.
[208] Hepple (n 33) 14.
[209] Hand et al. (n 197).

mandatory reviews was that they would be costly and time-consuming, and in a time of recession, this would be very burdensome on businesses.[210]

There is never a *good* time to impose new requirements on businesses. There will always be some objection or another, and requirements will always seem burdensome when they are first introduced. Achieving equality should not be seen however, as an inconvenience that can be delayed until a more suitable time. Asking employers to conduct reviews of their workforce once every three years, and if necessary, to take steps to remedy any issues of systemic discrimination, can hardly be regarded as overly costly or time-consuming. It is also questionable as to why a requirement regarding equality should be regarded as any more burdensome on businesses than other requirements, such as completing tax returns, or abiding by health and safety regulations. The reviews involved in health and safety regulations have been described as 'box-ticking' exercises of no real value.[211] However, it has been proven that where these reviews are well designed, they can achieve valuable, positive outcomes, such as fewer accidents, less threat of legal action, lower employee absence and turnover rates, and reduced costs.[212] Equality reviews may also initially be regarded as burdensome exercises. However, as has been seen in Northern Ireland, mandatory positive action reviews have helped to achieve successful results of equal employment of the previously under-represented Catholics. In addition to achieving the goal of equality in workforces, a number of other benefits can be experienced by employers. Taking positive action can result in a more diverse workforce, with a wider range of skills and experience, which can respond well to changes, better understand the needs of a wider range of customers/clients, provide a better quality of service, and which is more productive.[213] There are great benefits to mandatory positive action measures which outweigh any burden on businesses.

4.3 Positive Action in the Equality Act 2010

Although the Government refused to allow mandatory reviews to be part of the Equality Act 2010, Part 11 of the Act ('advancement of equality') does include several positive action provisions. Section 158 relates to positive action in general, as it is applicable to all people, not just employers. It brings together, and extends, the positive action provisions provided by the old framework of legislation, and it is applicable to all nine protected characteristics.[214] In the employment context however,

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[210] HC Deb 11 May 2009, col 568.
[211] Nikki Bell, Nick Vaughan, Jane Hopkinson, 'Factors Influencing the Implementation of RPE Programmes in the Workplace' (*Health and Safety Laboratory*, 2010) <http://www.hse.gov.uk/research/rrpdf/rr798.pdf> accessed 17 April 2013.
[212] Health and Safety Executive, 'Benefits and costs' <http://www.hse.gov.uk/leadership/benefits.htm> accessed 11 April 2013.
[213] Equality and Human Rights Commission, 'Equality Act 2010 Code of Practice: Employment Statutory Code of Practice' 2011) <http://www.equalityhumanrights.com/uploaded_files/EqualityAct/employercode.pdf> accessed 19 April 2013; McHarg and Nicolson (n 47).
[214] Hand et al. (n 197) 524.

under section 158, if an employer reasonably believes that people who share a protected characteristic (such as race, sex or disability) suffer a disadvantage in relation to that characteristic, or that they have a different set of needs to others, or where there is under-representation of people with a particular characteristic in a certain activity, they are permitted to take action to deal with any of these issues, provided that it is proportionate as a means of remedying these issues.[215] The Act's explanatory notes advise that for positive action to be proportionate, it must be appropriate to remedying the particular issue. Employers must consider such things as 'the seriousness of the relevant disadvantage; the extremity of need or under-representation, and the availability of other means of countering them'.[216] Section 158 could be used by an employer to, for example, offer training, mentoring or bursaries to under-represented groups, or to increase a woman's wage to remedy a gender pay gap without being accused of unfair treatment, or discrimination.[217] This is a useful provision as it remedies the issues experienced by the Avon and Somerset Constabulary by allowing those employers who want to be proactive in achieving equality to do so without being accused of discrimination. The provision provides greater clarity, removes the constraints of the previous provisions (there is now no requirement for under-representation to have been identified in the last 12 months), and widens the scope of positive action to nine protected characteristics.

Section 159 of the 2010 Equality Act is a brand new concept which finally takes advantage of the discretion in EU law allowing positive action measures in recruitment and promotion.[218] Under section 159, when an employer is involved in the recruitment or promotion of employees, they are permitted to favour a candidate with a protected characteristic over another candidate without that characteristic, if they reasonably believe that people who share that characteristic, either suffer a disadvantage in relation to that characteristic, or are under-represented within their workforce.[219] This provision is conditional however, in that the candidate with the protected characteristic must be equally qualified compared with the other candidate; the employer should not have a general policy of treating people with protected characteristics more favourably, and the action taken must be a proportionate means of remedying the disadvantage suffered, or the under-representation in the workforce.[220] This provision provides employers with an extra mechanism with which to achieve equality in their workforces.

Sections 158 and 159 have the potential to be valuable instruments with which to break down systemic inequalities within the British workforce; increasing the representation of disadvantaged groups and remedying the gender pay gap. The

[215] Equality Act 2010, s 158; Hand et al. (n 197) 524.
[216] Equality Act 2010 (n 215) c.15 – Explanatory Notes, para 512.
[217] Jackie Cuneen, 'Positively Negative?' (2011) March *Employers Law* 14-15.
[218] Hand et al. (n 197) 525.
[219] Equality Act 2010 (n 215) s 159; Jackie Cuneen (n 217).
[220] ibid.

problem is that there are no mandatory requirements for employers to use them. The use of the provisions is entirely voluntary, just like in the old framework of British equality laws. Voluntary positive action provisions in both Canada and Northern Ireland proved to be unsuccessful, and sections 158 and 159 will (on their own) be unsuccessful too. The new framework under the Equality Act lacks all of the elements that have made the Northern Irish approach successful. British employers are not required to review their workforces or employment practices; they are not required to create positive action plans, and they are not required to submit annual reports to the EHRC. Unlike the Northern Irish Commission, the EHRC does not have the power to monitor employers regarding positive action; it cannot request undertakings from, or serve notices on, employers who fail to take positive action towards achieving equality; is unable to reach positive action agreements with employers, and is not permitted to 'name and shame' offending employers. Employment tribunals in Britain also do not have the powers of the Northern Irish tribunals to impose fines on employers who do not, where necessary, take positive action. Sections 158 and 159 will be unsuccessful without mandatory employer duties to use them, and enforcement from the EHRC and the Tribunal Service.

The only proactive measure in the Equality Act 2010 that could possibly be regarded as 'mandatory' is the public sector equality duty under section 149. 'Duty' suggests that it is a mandatory requirement; however, its likely effectiveness is questionable. Under section 149, when exercising its functions (including its role as an employer), a public authority must 'have "due regard" to the need to eliminate discrimination', and also 'advance equality of opportunity' and 'foster good relations' between people who share a protected characteristic, and people who do not.[221] The duty covers public bodies and private bodies exercising public functions ('public functions' being those as described in the Human Rights Act 1998). Private bodies exercising purely private functions are not subject to the duty. The experiences in Canada and Northern Ireland, when compared, highlight that employment equality legislation needs to apply to employers across both the public and the private sector in order to be successful. In Canada, the legislation does not cover a large percentage of the workforce, and this hinders its success. In Britain, over 80 per cent of the workforce is employed in the private sector, so it is unlikely that a 'public sector' equality duty will be sufficient to achieve the equality goal.[222] The duty would need to apply to both public and private sector employers, like the duties in Northern Ireland.

However, it is not only the scope of the duty which is an issue. Its strength is also a concern, as it does not appear to impose any 'mandatory' requirements on public authorities. Under the duty, the public authority need only have 'due regard' to the need to combat discrimination. The wording suggests that it would be sufficient for

[221] Equality Act 2010 (n 215) s 149.
[222] Hepple (n 33) 22.

the authority to give consideration to the need to take action, but then do nothing. The requirement to have 'due regard' gives the authority wide discretion to decide (once it has considered the equality impact) whether to take action at all.[223] Again, as has been seen in Northern Ireland and Canada, duties must be strictly 'mandatory' in order to achieve results.

4.4 British Employers – Reactions to Positive Action

The Equality Act 2010 has, as has been discussed, provided positive action provisions which employers have the option of using when making decisions regarding equality. There are likely to be varying reactions from employers. Some will welcome the provisions, and others will not.[224] It is up to them whether they choose to use them. Some employers will view the provisions as providing clarity to a complex area of the law, and also as a mechanism which allows them to be flexible in their actions.[225] The positive action provisions will assist employers who are really committed to achieving equality, as it will be easier for them to use positive measures without being accused of discrimination.[226]

Other employers will likely object to the positive action provisions because they want to protect the principle of merit. Such employers say that the principle of merit must be preserved, in order to motivate employees and keep productivity high.[227] They also argue that candidates want to be given a job, or a promotion, on their merits, rather than being labelled as someone who was selected because they belong to a disadvantaged group.[228] There is, however, no quantifiable evidence to suggest that disadvantaged groups would object to positive action.[229] It is also argued by Noon that even if positive action *does* make disadvantaged groups feel stigmatised for a period, this is a better alternative to the continuing disadvantage that they will suffer if proactive measures are not taken to tackle under-representation.[230]

Another concern relates to the effect of positive action on non-disadvantaged groups where the merit principle is disregarded.[231] It is understandable why employers have this concern, given the experience in the US, where merit was disregarded and non-disadvantaged groups suffered detrimental effects. In Northern Ireland, however, employers are required to have regard to the principle of merit under the positive

[223] Fredman and Spencer (n 26) 600; Hepple (n 33) 19.
[224] Cuneen (n 217).
[225] Burrows (n 17) 6.
[226] Dianah Worman, Tom Hadley, Jackie Cuneen, 'Have Your Say... Positive Action Provision' (2011) Feb *Employers Law* 11.
[227] Kate Hilpern, 'A Question of Positive Motives' (2007) Oct *Employers Law* 12-13.
[228] Daniel Thomas, 'First Among Equals?' (2010) June *Employers Law* 12-13; Worman et al. (n 226).
[229] Noon (n 78).
[230] ibid.
[231] Hilpern (n 227).

action scheme,[232] and in Northern Ireland, equality in the workforce has been achieved without such detrimental effects.[233] Section 159 Equality Act 2010 requires that candidates be equally qualified before any consideration can be made of protected characteristics, so there is no reason for British employers to object to positive action based on this concern.

Another objection from employers regarding the positive action provisions, and their reluctance to use them is likely to stem from a fear of discrimination claims from unsuccessful candidates.[234] It is noted that affirmative action in the US brought about much litigation from aggrieved members of non-disadvantaged groups.[235] The affirmative action programme was, however, the result of an Executive Order rather than a statutory provision (like sections 158 and 159 Equality Act). Executive Orders in the US are generally documents from the President to executive branch officials, instructing them on how to carry out their duties. They are not ratified by Congress; they can be challenged by the public, and they can be (and have been) struck down by the courts.[236] In comparison, sections 158 and 159 are cemented in statute; they have been consented to by Parliament, and they are much less vulnerable to challenge. Although sections 158 and 159 do not expressly state that those who use them will be immune from litigation, they do imply that, provided an employer can demonstrate that they have complied with the requirements set out in the provisions, they will be safe from potential discrimination claims from aggrieved candidates.[237] The US affirmative action Executive Order contained no implicit immunity from suit. It should also be noted that as the US approach disregarded the principle of merit, there would have been more reason for unsuccessful candidates to complain than there will be under the Equality Act, where an unsuccessful candidate will only lose out to an equally qualified person.

Another concern about the positive action provisions from employers is that positive action, either is, or will lead to 'positive discrimination'. The Government has tried to reassure employers that the positive action provisions are not the same as positive discrimination.[238] Section 159 also clearly makes positive discrimination unlawful, by stating that employers must not have a policy of automatically treating people with protected characteristics more favourably than others. There are a number of reasons why employers will object to positive action; however, as has been demonstrated,

[232] Equality Commission for Northern Ireland, 'Fair Employment in Northern Ireland: Code of Practice' <http://www.equalityni.org/archive/pdf/fecopfinalwebversion@09.07.pdf> accessed 29 April 2013.
[233] McCrudden et al. (n 165).
[234] Ed, 'Equality Bill' (2009) 16(3) Health & Safety at Work 8; Worman et al. (n 226).
[235] Douglas-Scott (n 96).
[236] Todd F. Gaziano, 'The Use and Abuse of Executive Orders and other Presidential Directives' (*The Heritage Foundation*, 2001) <http://www.heritage.org/research/reports/2001/02/the-use-and-abuse-of-executive-orders-and-other-presidential-directives> accessed 14 April 2013.
[237] Money (n 123).
[238] Cuneen (n 217).

these can be overcome, and they are no justification for failing to take positive action. As has been discussed, positive action under the substantive equality approach is needed to address systemic issues of inequality within the British workforce. Maintaining the current individual complaints-led model will not address these issues.

5 THE WAY FORWARD FOR BRITISH EQUALITY LAW

It is acknowledged that the complaints model should undoubtedly still play a part within the British system, as individuals still need a process by which to complain about discrimination they may experience. It has been demonstrated, however, that the current model of anti-discrimination in Britain, which is 'led' by complaints under the formal equality approach, is incapable of redressing past discrimination suffered by disadvantaged groups. It is only geared to compensate individual victims of discrimination, and, as has been seen, this happens only rarely. Under the current system there has been little progress towards achieving equality over the past few decades. The complaints-led system fails to address deep-rooted systemic issues of inequality within the British workforce, and it is only by addressing these issues that equality will be achieved.

The substantive equality approach is capable of breaking down these systemic issues, and it can 'lead' the way to equality. This has been proven by the experience in Northern Ireland, where a proactive approach towards fair employment has resulted in equal representation of a previously under-represented group. The positive action provisions provided by the Equality Act 2010 are an improvement upon the positive measures provided under the old framework of equality legislation, and they have the potential to be valuable instruments with which to break down systemic equality issues within the British workforce. However, as there is no statutory duty for employers to use them, they will be unsuccessful in achieving the equality goal.

Commentators on equality criticise the British framework, but they fail to suggest an alternative. It is suggested here that the British Government should learn from the experiences in Canada and Northern Ireland, and bypass the voluntary positive action stage. It should commit to the substantive equality approach, and incorporate mandatory positive action provisions into the Equality Act 2010. As the Northern Irish statutory duties have achieved successful results, the British legislature should model the mandatory provisions on the Northern Irish legislation. Part 11, chapter 1 of the 2010 Act, which includes section 149 ('public sector equality duty') should be replaced by a framework of provisions like those in Northern Ireland, imposing mandatory duties on employers with more than ten employees in both the public and private sectors. Sections 158 and 159 should be maintained, and employers should use these provisions to help them achieve the objectives in their positive action plans. The EHRC should be provided with the same powers given to the Northern Irish Commission regarding monitoring, requesting undertakings, and serving notices on employers. The EHRC should also be able to 'persuade' employers to comply, like the Northern Irish Commission, by 'naming and shaming' those who fail to take necessary positive action. The EHRC should also have the ability of the Northern

Irish Commission, to enter into agreements with employers. The Employment Tribunal Service in Britain should continue in its role as an adjudicator for individual discrimination complaints. However, it should also have the power, like the Northern Irish Tribunal Service, to impose fines on employers for failing to comply with positive action duties should the EHRC's persuasion tactics fail.

It is acknowledged that some employers may be reluctant at first, and may have concerns about mandatory positive action provisions. The success in Northern Ireland should be used to highlight the benefits of positive action, and to encourage employers to get on board. The process might seem burdensome to businesses initially, but any new requirement will seem this way at first. It is evident, however, in Northern Ireland that businesses increasingly enter into voluntary agreements with the Commission, so perhaps businesses in Britain will not be as resistant as has been thought.

The reality of the situation is, however, that until the British Government gets behind the goal of equality, and shows real commitment towards achieving it, there will be no redress of past discrimination experienced by disadvantaged groups, and no changes in the statistics. On the one hand, the Government looks to be supportive of the equality goal by enacting the Equality Act 2010, and providing positive action provisions for employers to use. On the other hand, however, it continues to reduce the EHRC's budget, take away its powers, and refuses to impose obligations on employers to act. Equality within the British workforce will only be achieved once the Government gives serious consideration to the currently flawed equality framework and institutional arrangements.