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Research report 123

Exploring positive action  
as a tool to address  
under-representation in  
apprenticeships

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## Executive summary

Apprenticeships are an important route into work, offering paid employment, on-the-job training and a qualification. The UK, Scottish and Welsh governments have all set targets to increase the number of apprenticeships and recognised the need to increase the diversity of those starting, participating in and completing apprenticeships.

With the drive towards increasing diversity within apprenticeships, there is a need for employers, governments and policy makers to consider the tools that are available to address long-standing under-representation. This report seeks to evaluate the use of positive action to address under-representation of female apprentices in gender-segregated sectors, and disabled people and ethnic minorities in apprenticeships more broadly.

### Under-representation in apprenticeships

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Women are well represented in apprenticeships across England, Scotland and Wales, but are under-represented in better paid industries and over-represented in poorer paid industries (a contributing factor to the gender pay gap).

For example, figures for construction, planning and the built environment show a stark disparity. In England, women made up only 5% of starts in 2017/18. In Scotland, men made up 99% of starts in the 'construction and related' grouping in 2017/18. In Wales, although women made up 60% of apprenticeships in 2017/18, they made up only 4% of those on construction programmes and 8% of those on engineering programmes.

In contrast, women are over-represented in apprenticeships in poorly paid sectors, such as hairdressing and early years care. For example, women made up 94% of all apprenticeship starts in child development and wellbeing in England in 2017/18.

In England in 2017/18, white people made up 87.2% of apprenticeship starts, as well as 89.3% of all starts aged 16–24. Yet figures from the 2011 census for England and

Wales show that 81.7% of the population of England and Wales aged 15–24 is white.

In Scotland, only 1.9% of those starting modern apprenticeships (MAs) identified as being from an ethnic minority group in 2017/18.<sup>1</sup> This can be compared to a target population (16–24) of around 6% ethnic minority representation. In Wales, there has been a fairly steady level of ethnic minority representation in apprenticeships of around 3% since 2008 – around half that of the target population of 16–24 year olds from ethnic minority groups.

In England in 2017/18, 11.2% (42,230) of apprenticeship starts were those with learning difficulties and/or disabilities and/or health problems; among those aged 16–24, the figure was higher at 12.6%. In Scotland in 2017/18, the proportion of MA starts self-identifying as having an impairment, health condition or learning difficulty was 11.3%, very close to the expected proportion. In Wales in 2017/18, 1.6% of those on apprenticeship programmes had a disability, though this is certainly in part the result of the different definition of disability data for apprenticeships, which did not include learning difficulties.<sup>2</sup>

In the UK as a whole, data from the Family Resources Survey shows that 19% of working-age adults are disabled; this may suggest that disabled people are under-represented in apprenticeships. However, in view of the differences in the way data is calculated, including the absence of learning difficulty figures in Wales and younger people being over-represented in apprenticeships, further evidence is required to demonstrate this is the case.

The introduction of the Equality Act 2010 permitted organisations to introduce positive action measures to tackle disadvantage and under-representation experienced by protected groups. These provisions were specifically designed to address the under-representation seen in apprenticeships and in employment generally. Indeed, the explanatory notes clearly state that the intention of the legislation is to allow all positive action, which is permitted by European law.<sup>3</sup> This research looks at the extent to which positive action is being used as a tool to address under-representation in apprenticeships.

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<sup>1</sup> Mixed or multiple; Asian; African; Caribbean or Black; and other ethnic group.

<sup>2</sup> As shown in Welsh Government (2019a), when learning difficulties were included, the figure rose to 5.3%.

<sup>3</sup> [Equality Act 2010 explanatory notes, paragraphs 517 and 521](#)

## Evidence of the use of positive action

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Two forms of positive action are permitted under the Equality Act 2010: general positive action, which might include reserving places for a protected group on training courses or providing mentoring for a particular group to increase their representation at senior levels; and positive action that specifically relates to recruitment and promotion, also known as the ‘tie-break provision’. Here an employer can take an individual’s protected characteristic into account in recruitment or promotion.

This research found some encouraging examples of employers, agencies and government using the positive action measures permitted by the act to tackle under-representation in apprenticeships. However, while there are a number of examples of positive action in relation to gender, there are far fewer in relation to race and disability. There is no evidence of the formal use of the tie-break provision in relation to apprenticeships. Equally, there is little research exploring employer and sector perceptions towards the use of positive action in this area, and little practical evaluation of the use of positive action in apprenticeships or in wider employment.

As part of this research, employers, sector bodies, and policy, academic and government experts considered the reasons why positive action is under used in apprenticeships, and generally in employment.

The group identified employers’ lack of awareness and/or confidence to implement effective positive action measures as the main obstacle to its use. It was also felt that:

- the boundaries of positive action, as compared to positive discrimination, should be clearer
- a lack of understanding of the tie-break provision means that employers often link it to positive discrimination and are therefore reticent about using it for fear of legal liability and straying into ‘reverse discrimination’
- more effective and strategic promotion of positive action is necessary to encourage its greater use and realise the impact it could have on under-representation in apprenticeships and in wider employment.



## Recommendations

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Positive action is an important additional tool to address disadvantage and tackle under-representation. Yet its limited use to date has meant that the groups identified in this research continue to be under-represented, with the disparities particularly large for women in gender-segregated sectors. Coordinated action is needed to support and encourage greater use of positive action effectively to address enduring disparities.

At the Equality and Human Rights Commission (EHRC) we will be looking at how existing information on positive action can best be supplemented to support employer knowledge and confidence in using it. In addition, to encourage greater use of positive action, we recommend that:

- Governments across Great Britain hold apprenticeship providers to account, including through funding mechanisms, by requiring them to set and meet targets for improved participation by under-represented groups, and to use positive action provisions to meet these. Managed well, targets are an effective means of ensuring leadership focus on under-representation data.
- Governments across Great Britain use public procurement to advance equality of opportunity and promote greater use of positive action. Procurement accounts for about a third of public spending in the UK. This purchasing power can be used as a way to advance equality and achieve wider social benefits, including the use of positive action.
- Employers monitor recruitment, retention and progression by ethnicity, disability and gender, and use positive action to address any disparities. Employers are often unaware of or lack understanding as to why positive action is necessary in the first place. Knowing more about their workforce will help employers understand where groups may be at a disadvantage or under-represented, and establish a strong evidence base for taking action.
- Sector bodies, such as employer-led organisations and professional bodies, promote the use of positive action in apprenticeships while at the EHRC we act as an information and guidance provider on positive action.

# 1. Methodology

## 1.1 Context

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This report has been commissioned by the Equality and Human Rights Commission ('the Commission') and provides a review of the existing evidence on the use of positive action as a tool to address under-representation of ethnic minority groups, disabled people and women in gender-segregated apprenticeships in England, Scotland and Wales. The report also sets out the findings of a roundtable discussion ('the roundtable') held with academic, government and policy experts in this area in March 2018 (see chapter 5). The author has worked in partnership with the Young Women's Trust (YWT) (together 'the partners') to link the review and roundtable discussion with an ancillary research project carried out by the University of Chester and YWT into the use of positive action in apprenticeships in gender-segregated sectors in England ('the YWT positive action project') (see chapter 4).

## 1.2 Review methodology

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In preparing this review, a desk-based approach has been applied, focusing on analysis, synthesis and theoretical development of the issues. Analysis has also been informed by the findings of the YWT positive action project (see chapter 4). Beyond this, consideration has been given to publicly accessible historical, legal and official documentation. In particular, work has focused on identifying existing theoretical and limited empirical research, government documentation and sector-relevant data.

The partners have drawn on their disciplinary expertise, networks and knowledge of relevant literatures, which have been developed further during this project. However, the collaborative nature of the project, informed by discussions and papers from the roundtable, has ensured that the report reflects a conversation between wider stakeholders, enabling an exploration of perspectives and solutions in relation to positive action that have previously been inaccessible.

### 1.3 Roundtable discussion

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The roundtable (see chapter 5) was held on 14 March 2018 in London. Academics, government representatives, sector bodies, and employers with expertise and interest in the area of apprenticeships and/or positive action in England, Scotland and Wales were invited to attend. The group explored the use of positive action as a tool to address under-representation of protected groups in apprenticeships in Great Britain and the barriers to adoption that employers perceive.

## 2. Background context to apprenticeships and under-representation

The following sets out a very brief contextual background in relation to apprenticeships and under-representation in England, Scotland and Wales.

### 2.1 Apprenticeships

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#### **General**

Essentially, apprenticeships are paid employment that provides both on-the-job and off-the-job training. Over the last three decades, strategy and policy around work-based training has undergone significant development in Great Britain. Between 2010 and 2015, the UK Government invested significant funds in line with a commitment to increase the number of apprenticeships to 500,000 per year by 2020 (Powell and Phelan, 2018; HM Government, 2015b). This was largely in response to the recommendations made in the Leitch Review of Skills final report in 2006, in which Lord Leitch recommended a ‘radical change right across the skills spectrum’ to address the embedded skills deficit in the UK (Leitch, 2006, p. 2).

Skills policy is a devolved issue and the operation of apprenticeships is distinct between England, Scotland and Wales. The Apprenticeships, Skills, Children and Learning Act 2009 (ASCLA 2009) provides for apprenticeships in England and Wales. This act creates a distinction between an ‘apprenticeship agreement’ and a traditional contract of apprenticeship, which is governed by common law. Where an arrangement does not comply with the requirements of the act, then it will by default amount to a traditional contract of apprenticeship. However, an apprentice is an employee, whether the arrangement is an apprenticeship agreement under ASCLA 2009 or a traditional apprenticeship (although there is a difference in how termination of the contract prior to expiry of its term is treated, with a traditional apprenticeship

attracting enhanced protection against redundancy and early termination). In Scotland, ASCLA 2009 does not apply and therefore the common law definition of apprenticeship, with enhanced protection, prevails.

In December 2015, the UK Government published 'English apprenticeships: our 2020 vision (HM Government, 2015a) and announced a target of 3 million apprenticeship starts in England by 2020. Anyone over the age of 16, living in England and not already in full-time education, can apply for an apprenticeship subject to meeting the relevant entry requirements dictated by the particular sector and job (HM Government, 2018a). New apprenticeships are referred to as 'starts' and the completion of an apprenticeship is labelled an 'achievement' (Powell and Phelan, 2018). At the end of their apprenticeship contract, apprentices will receive a recognised national qualification ranging from level 2 (intermediate) to level 7 (degree level) (HM Government, 2017). Two different types of scheme that ensure the quality of apprenticeship programmes (that is, standards and frameworks) exist in England at present. Apprenticeship standards were introduced to replace frameworks in 2014 and, as such, frameworks are in the process of being phased out (Powell, 2017). In England, there are 397 new standards approved for delivery and another 189 in development (Institute for Apprenticeships, 2019).

In May 2016, the Institute for Apprenticeships was established under the Enterprise Act 2016 with a remit for ensuring high-quality apprenticeship standards in England (Powell, 2017). In April 2017, an apprenticeship levy (applying across the UK) was introduced, requiring all employers with a pay bill of over £3 million per year to pay a contribution to meet apprenticeship funding.<sup>4</sup> The detail in relation to the application of the levy differs across Scotland, England and Wales (HM Government, 2016d).

Alongside the introduction of the new apprenticeship standards and the apprenticeship levy, the government has introduced 'trailblazers'. These are self-selecting groups of employers (in which sector, trade and professional bodies can be involved, but not lead) that are responsible for developing the new standards in England (Institute for Apprenticeships, 2018). Apprenticeship participation gradually increased between 2011/12 and 2016/17, in line with the government's commitment on this. In 2016/17, 912,200 people were participating in an apprenticeship in England, up by 12,800 people from 2015/16. However, in 2016/17 there was a decrease in those commencing apprenticeships in England, down 14,480 from the previous year to 494,880. This trend continued into 2017/18 with an annual fall of

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<sup>4</sup> 0.5% of the value of the employer's pay bill, less an allowance of £15,000 per annum.

119,120 apprenticeship starts, representing a decrease of 24.1% (Department for Education, 2018). This reduction in starts is likely to correspond to the funding changes introduced in 2017. People over 25 accounted for 41% of apprenticeship starts in 2017/18 (Department for Education, 2018).

The Scottish Government is committed to increasing apprenticeship starts to 30,000 by 2020 (Skills Development Scotland, 2017a). In Scotland, modern apprenticeships (MAs) provide individuals with the opportunity to secure industry-recognised qualifications at a range of vocational qualification levels while in employment. MAs are aimed at those aged 16 and above, and potential trainees need to be employed to enrol on an MA programme. While the Scottish Government develops policy in relation to vocational training, it is Skills Development Scotland that delivers the MA programme and sets levels for, and provides, funding. Sector skills councils and sector skills bodies develop suitable and appropriate content for frameworks in their specific sector, and certify the final MA award. The focus of MAs is set out each year in a letter of guidance from the Scottish Government (Swinney, 2017-18). In 2016/17, the guidance letter stated that the MA scheme in Scotland delivers 'against our dual aims of supporting economic growth and providing real employment opportunities for young people' (Swinney, 2017-18). There are over 80 MA frameworks that have been developed by sector skills councils in consultation with their industry (Skills Development Scotland, undated). In 2017/18, there were 27,145 MA starts in Scotland and 70% of these were for people aged 16–24 (Skills Development Scotland, 2018). Since 2012 there has been a steady increase in MA starts in Scotland. In addition to MAs, foundation and graduate level apprenticeships are also available. The former provide young people with the opportunity to commence work-based learning while at school, enabling them to complete elements of an MA alongside their other studies. Graduate-level apprenticeships provide work-based learning opportunities up to master's degree level (Scottish Qualifications Authority, undated).

In Wales, any employer registered with the Welsh apprenticeship programme can take on an apprentice. The Welsh Government funds this programme with support from the European Social Fund. Anyone over 16, living in Wales and not in full-time education, can apply, and will work towards a work-based qualification (that will be at least level 2) from the Credit and Qualifications Framework for Wales (Welsh Government, 2017). The Welsh Government delivers its apprenticeship programme via the Welsh apprenticeship provider network (Business Wales, undated) and its economic action plan underpins it. While the apprenticeship levy applies in Wales,

the Welsh Government has no plans to introduce a digital voucher system as seen in England. Apprenticeship delivery and funding will continue to be prioritised based on the needs of the economy and employers (Business Wales, undated). The Welsh Government has a commitment to reach 100,000 quality apprenticeships for all ages as part of its delivery priorities for 2016–22 (Welsh Government, 2017), and, in particular, to increase the number of higher apprenticeships in science, technology, engineering and professional routes to meet the needs of the economy (Business Wales, undated). There are currently no quantifiable targets to address the under-representation of the groups highlighted in this report. There are over 120 apprenticeship frameworks in Wales across the range of industries and the success rates are consistently over 80% (Welsh Government, 2017). Between 2011 and 2016, there were around 116,000 apprenticeship starts in Wales (Meechan, 2017). The number of apprenticeship starts is increasing; in 2017/18, there were 31,360 starts, compared with only 24,115 in 2016/17. Moreover, in 2017/18, there were 58,665 apprenticeship programmes in Wales, an increase of nearly 10,000 programmes since 2016/17 (Welsh Government, 2019b).<sup>5</sup>

## 2.2 Apprenticeships and under-representation

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### Background context

As part of the wider UK Government commitment to the growth of apprenticeships, there is also a commitment to increase the diversity of those commencing, participating in and completing apprenticeships (HM Government, 2015a). As stated in the 2020 vision: 'Making apprenticeships accessible to the widest possible range of people will not only benefit many individuals, but will help to grow apprenticeships in a way that helps businesses draw on diverse skills and talents' (HM Government, 2015a, p. 38).

As part of this commitment to diversity, in 2017 the Department for Education launched the Apprenticeship Diversity Champions Network (ADCN) in England (initially chaired by Nus Ghani MP, who was succeeded by Helen Grant MP). The network comprises employers who have come together to champion apprenticeships and diversity and encourage those from under-represented groups to consider apprenticeships (HM Government, 2018b). The government is committed to using

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<sup>5</sup> It should be noted that this figure may involve some double counting, and does not completely reflect individual participation as it is based on learning programmes and some learners may undertake more than one programme during the course of the year.

the ADCN to focus on the under-representation of ethnic minority and disabled apprentices across sectors, and to champion the representation of women in apprenticeships in industries where improvement is needed (including science, technology, engineering and mathematics (STEM) apprenticeships) (HM Government, 2017). Equally, the government is committed to implementing the recommendations of an independent taskforce led by Paul Maynard MP (HM Government, 2016a) to improve access to apprenticeships for disabled people and/or those with learning difficulties (HM Government, 2016b). The House of Commons Sub-Committee on Education, Skills and the Economy (2017), as part of its evaluation of apprenticeship changes in England, made it clear that while it welcomed the government's commitment to widening participation, it felt that there was more that could be done to facilitate this. In particular, it recommended that the government examine further measures to make apprenticeships more accessible to all, including changes to benefits rules, subsidised transport and direct financial support, as well as increased access to good quality careers advice (2017, p. 13).

A similar commitment to equality and diversity can be seen in relation to MAs in Scotland. Much of the work to increase representation and address disadvantage in this context has been triggered by work undertaken by the Commission in Scotland (in particular, see: Sosenko and Netto, 2013; Sosenko, 2013; Danson *et al.*, 2013), and the Commission for Developing Scotland's Young Workforce final report (Wood, 2014) and the Scottish Government's response to it (Scottish Government, 2014). These set out key recommendations in relation to disability, ethnicity, sex and care leavers. To implement these recommendations, Skills Development Scotland produced a five-year equalities action plan in 2015 (Skills Development Scotland, 2015). It set out a clear action plan driving forward equality of participation within MAs in Scotland. This included a commitment to increasing the employment rate for young disabled people to reflect the population average by 2021; reducing to 60% the percentage of MA frameworks where the balance between men and women is 75:25 or worse by 2021; increasing the number of MA starts from ethnic minority communities to equal their population share by 2021; and improving the number of care leavers who successfully take up an MA. This plan was updated in 2017 (Skills Development Scotland, 2017a).

In Wales, since 2016, the Welsh Government has funded the appointment of a work-based learning equality and diversity champion at the National Training Federation for Wales. This role involves assisting employers to plan and implement strategies for increasing apprenticeship opportunities for ethnic minority individuals and



disabled people. It also involves promoting equality for women in gender-segregated sectors (National Training Federation for Wales, undated).

In 2018, the Economy, Infrastructure and Skills Committee of the National Assembly for Wales (National Assembly for Wales, 2018) made a number of relevant recommendations for the Welsh Government in this area. In particular, it highlighted tackling the wider prejudices and conventions regarding gender and careers as key. It also recommended the production of a clear, disabled person-specific action plan to address the under-representation of disabled people in apprenticeships, and the creation of a competitive hardship fund for apprentices on the lowest pay levels or the introduction of other financial concessions. To take this work forward, the Welsh Government launched 'Inclusive apprenticeships: disability action plan for apprenticeships 2018–21' in December 2018 (Welsh Government, 2018c).

In parallel to governmental and policy development in this area, there has been an emerging critical dialogue on diversity and equality considerations in relation to apprenticeships. Some of this has developed from wider work carried out by the Equal Opportunities Commission (EOC) and its successor, the Equality and Human Rights Commission (the Commission). Almost 15 years ago, the EOC launched a general formal investigation into gender segregation and uneven patterns of participation across five occupational areas in which there were considered to be skill shortages; these were construction, engineering, plumbing, information and communication technology, and childcare. The wider dialogue on apprenticeships and the importance of mainstreaming equality and diversity in this area has recognised not only the moral but the economic and business case for increasing diversity across apprenticeships. Much of this work has focused on gender-segregated apprenticeships. However, there are pockets of work in relation to race, age and disability, as well as social mobility. Improved data collection in relation to apprenticeships has meant that in recent years it is somewhat easier to analyse trends regarding particular equality groups (age, sex, ethnicity and disability). There is little exploratory work around diversity in apprenticeships in relation to other protected characteristics, such as sexual orientation and religion or belief, and this reflects the data gaps in these areas noted above (Sosenko and Netto, 2013).

It should be noted that the implications of age in relation to apprenticeships is an important issue. As apprenticeships have opened up to older people, this has led to concern around the way in which employers have utilised the scheme to rebadge poor quality training for older workers (Lanning, 2016). However, this will not be discussed in this report due to the complexity of the political, legal and academic

discourse concerning the use of positive action to overcome disadvantage and/or under-representation in relation to age (see further: Ofsted, 2015; CIPD, 2016; Fuller *et al.*, 2015; Raikes, 2015; Kirkby, 2015). Equally, while there is significant discourse around social mobility and the implications of this for apprenticeships, this falls outside the remit of the EA 2010<sup>6</sup> and therefore is beyond the discussion of positive action as framed by that legislation within this report (see further: CIPD, 2016; Gambin and Hogarth, 2014; Raikes, 2015; Kirkby, 2015; Social Mobility and Child Poverty Commission, 2016; Scottish Government, 2014).

## Gender

The broadening of apprenticeships beyond traditionally covered sectors (for example within the public sector) has led to an increase in female representation in recent years, and, on the face of it, greater parity between women and men in apprenticeships across England, Scotland and Wales. However, this seeming improvement disguises the fact that women remain under-represented in those sectors recognised to be more 'valuable' and 'lucrative' (Raikes, 2015). Arguably, there is an ideological link between women and unpaid domestic tasks that is reflected in the undervaluing of the jobs in which women are over-represented (Campbell *et al.*, 2011; Grimshaw and Rubery, 2007). Unsurprisingly, the over-representation of male apprentices in certain sectors is a reflection of the occupational segregation that exists within the labour market more generally (see, for example, Campbell *et al.*, 2011; Fuller *et al.*, 2005). Science, engineering, manufacturing and technology (SET), information and communications technology (ICT) and construction have traditionally and continue to be dominated by men (Miller *et al.*, 2005; Fuller and Unwin, 2013; Fuller *et al.*, 2015; Newton and Williams, 2013). This segregation is only likely to increase in light of cuts to public sector employment, which has generally been considered more accessible to women and in which the gender balance has traditionally been more equal (Fuller and Unwin, 2013).

In England in 2017/18 there were 184,240 female apprenticeship starts compared with 191,520 male apprenticeship starts; men thus made up a slight majority (51.0%)

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<sup>6</sup> Although it should be noted that the Scottish Government is currently pressing ahead with the introduction of the socio-economic duty (which was never implemented by the UK Government under the Equality Act 2010), and the Fairer Scotland Duty, Part 1 of the Equality Act 2010 came into force in Scotland on 1 April 2018. This places a legal responsibility on particular public bodies in Scotland actively to consider ('pay due regard' to) how they can reduce inequalities of outcome caused by socio-economic disadvantage.

of all apprenticeship starts (Department for Education, 2018). Between 2010/11 and 2016/17, the majority of starts were by women; the change in 2017/18 was because female starts decreased between 2016/17 and 2017/18 to a greater extent than male starts in all three broad age groups (under 19, 19–24, and 25 and over), in percentage terms. Overall, the number of female starts fell by 30.3% and the number of male starts by 16.9%. The gender difference was particularly pronounced for the 25 and over age group when male starts fell by 44% and female starts by 56% (Powell and Phelan, 2018; HM Government, 2018c; Department for Education, 2018). When broken down further, it can be seen that 69.2% of all starts in 2017/18 were in four subject areas, with over half in the top two areas (business administration and law: 111,100; health, public services and care: 88,320; engineering and manufacturing technologies: 58,890; retail and commercial enterprise: 54,160). The first two of these areas are dominated by women (they made up 94% of all apprenticeship starts in child development and wellbeing, for example) and they made up the majority of starts (52.3%) in the fourth. However, just 7.4% of engineering and manufacturing technologies apprenticeship starts were female, and this percentage has actually fallen slightly from 2016/17 (8.0%). When other sectors are considered, the gender disparity is equally stark. For example, in relation to construction, planning and the built environment, there were 21,610 male apprentice starts in 2017/18 compared with just 1,060 female starts (Department for Education, 2018). Less striking, but still of note, is information and communication technology (ICT), in which there were 15,080 male starts compared to just 3,400 female starts in 2017/18. While women formed the majority of starts in advanced and higher apprenticeships overall, they formed an even lower proportion of advanced and higher apprenticeships in engineering and manufacturing technologies (6.3%) than in this sector overall. Equally, this disparity can also be seen more generally across sectors in relation to the gender pay gap, with young female apprentices receiving just £6.67 an hour compared with £7.25 for their male counterparts (Young Women's Trust, 2017).

In Scotland in 2017/18, the breakdown of MA starts was 61% male to 39% female, with a slight decrease in female starts from 2016/17. This trend had continued for the five years up to 2017/18. MA expansion in Scotland is mainly related to the STEM and construction sectors. As can be seen in England, these areas show marked gender segregation and this therefore can account for the disparity between women and men in overall starts in Scotland (Skills Development Scotland, 2018). In 2017/18 in Scotland, men made up 99% of starts in the 'construction and related' occupational grouping and in 'other manufacture', while women accounted for 84%

of starts in the 'sports, health and social care' grouping. Excluding frameworks with a small number of starts from the calculation, 69% of the remaining MA frameworks had a gender balance of 75:25 or worse in 2017/18. The achievement rates for males and females in 2017/18 were very similar (77% for females compared with 78% for males) (Skills Development Scotland, 2018).

In Wales, women made up 60.4% of the 58,665 apprenticeships in 2017/18. However, in line with figures from England, women made up only 3.8% of those in construction apprenticeships and 7.8% of those in engineering apprenticeships. In comparison, in healthcare and public services, there were 4,035 male apprentices compared with 18,320 females (Welsh Government, 2019b).<sup>7</sup>

There is a recognition that these segregated sectors need to increase female representation to meet the skills shortages (Fuller and Unwin, 2013) that are only likely to grow with the UK's exit from the European Union (CIPD, 2017). A report by the Women and Work Commission in 2009 estimated that up to £23bn could be added to the UK economy by removing barriers to women working in traditional male roles within the labour market (Women and Work Commission, 2009, p. 6).

The consequences of gender segregation in apprenticeships formed the core of the work commissioned from the Institute for Employment Studies (IES) by the EOC, and carried out by Linda Miller and IES research colleagues in five occupational areas in which there were skills shortages (see 'Background context' above). Their 2004 study found that apprenticeships were extremely segregated with four out of five areas (construction, plumbing, engineering and ICT) being heavily male-dominated (Miller *et al.*, 2004). The 2005 follow-up study for the EOC found evidence of discrimination on the basis of gender in the recruitment of apprentices (Miller *et al.*, 2005). This study also found that the attitudes of both employers and the young people themselves potentially perpetuated embedded stereotypical views about gendered participation in certain sectors. Later work has supported the finding that occupational segregation in apprenticeships can have serious negative consequences for the progression of female apprentices (Campbell *et al.*, 2011; Fuller and Unwin, 2013; Social Mobility and Child Poverty Commission, 2016). Importantly, the wider evidence (while patchy) suggests that pay rates for apprenticeships in areas in which females dominate tend to be lower than in those areas in which males dominate (Miller *et al.*, 2004; Kirkby, 2015; Young Women's

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<sup>7</sup> Again, as noted in footnote 4, this figure may involve some double counting and does not completely reflect individual participation as it is based on learning programmes and some learners may undertake more than one programme during the course of the year.

Trust, 2015; Social Mobility and Child Poverty Commission, 2016; TUC, 2008; Newton and Williams, 2013). Equally, the 2017 Young Women's Trust survey of apprenticeships found that there may well be wider disadvantage faced beyond representation; for example, female apprentices are more likely to be employed part-time than their male counterparts (21% compared with 14%) (Young Women's Trust, 2017).

### **Ethnic minority groups**

Traditionally the diversity focus in relation to apprenticeships has been on the sectoral under-representation of women and the negative consequences of this in terms of female progression and pay as well as the impact on the skills shortages that the UK faces in relevant areas. More recently however, increasing attention has turned to ethnic minority representation in apprenticeships (Newton and Williams, 2013; HM Government, 2015a; Hughes, 2015).

In England in 2017/18, white people made up 87.2% of apprenticeship starts as well as 89.3% of all starts aged 16–24 (Department for Education, 2018). There was a gradual increase in ethnic minority apprenticeship starts in England between 2011/12 and 2015/16 (from 51,350 to 55,310 per year) before a sharp decrease to 42,230 starts (23.6%) in 2017/18. The number of white starts fell even more sharply (by 106,500 or 24.5%) between 2016/17 and 2017/18 (Powell and Phelan, 2018; Department for Education, 2018). Figures from the 2011 census show that 81.7% of the population of England and Wales aged 15–24 were white.

In Scotland in 2017/18, the number of MA starts of those identifying as being from a 'mixed or multiple' ethnic group, Asian, African, Caribbean or black, or other ethnic minority group was just 1.9% (508 starts). This can be compared with a target population (16–24) statistic of around 6% ethnic minority representation (Scotland's Census, 2011). The number of ethnic minority starts increased by 62 from 2016/17 to 2017/18 and the proportion of ethnic minority starts has increased each year since 2012/13 (Skills Development Scotland, 2018c). The achievement rate for ethnic minority groups for 2016/17 in Scotland was 73% compared with a higher rate of 78% for those self-identifying as 'White' (Skills Development Scotland, 2017a).

In Wales, there has been a fairly steady ethnic minority representation in apprenticeships of around 3% since 2008, which again does not reflect the population diversity in Wales, which is around double this for the target population (ages 16–24) (Nomis, 2011; EHRC, 2016; Protheroe, 2017). This trend continued in

2017/18, with 97% of those on apprenticeship programmes self-defining as 'White' (Welsh Government, 2019a).

The UK Government's 2020 vision (HM Government, 2015a, p. 38) sets out a commitment to increase the proportion of ethnic minority apprentices in England by 20% by 2020. It was stated that this would be achieved by engaging with ethnic minority groups to understand the barriers to apprenticeships and by providing targeted information and support. In England, the new Apprenticeship Diversity Champions Network (ADCN) has been tasked with achieving this objective.

In Scotland, following work by the Commission (EHRC, 2016) and the final report of the Commission for Developing Scotland's Young Workforce by Sir Ian Wood (Wood, 2014), there has been a drive by Skills Development Scotland (and its partners) to promote the full range of MAs to young people from ethnic minority communities. The Wood report recommended that a strategy aimed at promoting apprenticeships to ethnic minority young people be put in place and that relevant targets be set. These have subsequently been implemented by Skills Development Scotland in its equalities action plan (Skills Development Scotland, 2015). The action plan sets a target to increase the number of MA starts from ethnic minority communities to reflect the population share by 2021, and this is being implemented via a series of annual incremental targets. For 2017/18, the target is 3% of all MA starts (Skills Development Scotland, 2015).

Of note in Wales is the report on barriers to apprenticeship by Welsh education and training inspectorate Estyn (Estyn, 2014). Estyn found that while young people more generally suffered from a lack of information about opportunities around apprenticeships in Wales, ethnic minority learners may experience additional difficulties as employers may have a limited understanding of differing cultural needs (Estyn, 2014, p. 5). The report also pointed to the lack of ethnic minority role models and perceived discrimination, which may result in a barrier to apprenticeship (Estyn, 2014, p. 3).

Many commentators have argued that the focus should be on recruiting more ethnic minority apprentices and addressing the low success rates in recruitment (Robertson, 2017; Newton and Williams, 2013), rather than focusing on attracting more applicants overall. For example, while 38% of the applicants for apprenticeships in 2015/16 were from ethnic minority groups, they made up just 17.2% of apprentices taken on that year (Robertson, 2017). In evidence given to the All Party Parliamentary Group on Apprenticeships (APPG) in 2017, Business in The

Community (BiTC) highlighted that to address this disparity between application and uptake, the key stages of the apprenticeship recruitment process needed to be tracked more effectively, with adequate data collected at each stage (APPG, 2017). Similarly, ethnic minority apprentices have a lower probability of completing their apprenticeship (Gambin and Hogarth, 2016; Hughes, 2015; Newton and Williams, 2013; Sosenko and Netto, 2013).

Targets and policy in relation to ethnic minority representation in apprenticeships have also been criticised as homogenising and not recognising differing needs and representation of particular racial groups. For example, Safaraz Ali (chair of the BAME Apprenticeship Alliance) has pointed out that the proportion of black/African/Caribbean/black British people participating in apprenticeships reflects these groups' representation within the wider population, while British Asians are significantly under-represented in apprenticeships (Ali, 2017).

Equally, disadvantage experienced by people with more than one protected characteristic, particularly in relation to ethnicity and gender, should not be ignored. The evidence collected from the Young Women's Trust survey (2017) found that a quarter of the ethnic minority apprentices surveyed stated they were employed for 10 hours or fewer per week, double the proportion of white apprentices. Equally, the average number of hours of formal training that ethnic minority apprentices state they receive is over an hour less per week than that received by their white counterparts. Moreover, only a third rate the quality of this training as very good compared to half of white apprentices surveyed (Young Women's Trust, 2017).

## **Disability**

In recent years, there has also been an emerging focus on the need to increase the representation of disabled people (including people with learning difficulties) within apprenticeships. In England in 2017/18, 11.2% (42,230) of apprenticeship starts were those with learning difficulties and/or disabilities and/or health problems; among those aged 16–24, the figure was higher at 12.6%, while only 9.3% of starts aged 25 and over had learning difficulties and/or disabilities and/or health problems (Department for Education, 2018). This represented a significant decrease (17.1%) from 2016/17 in the number of disabled apprenticeship starts, when the equivalent figure was 50,930 and reversed the trend since 2011/12 of the number of starts with learning difficulties and/or disabilities and/or health problems increasing. However, the proportion of starts with learning difficulties and/or disabilities and/or health

problems increased between 2016/17 and 2017/18 from 10.2% to 11.2% (Powell and Phelan, 2018; Department for Education, 2018).

In Scotland in 2017/18, the proportion of MA starts self-identifying as having an impairment, health condition or learning difficulty was 11.3%, representing an increase from 2016/17 equivalent to 776 starts. This was very similar to the percentage of the population in Scotland who identify as disabled (Skills Development Scotland, 2018). It may be that this increase is in part attributable to an increase in disclosure, with the new disability disclosure question (rather than an increase in numbers) together with wider targeted initiatives (see below) implemented by Skills Development Scotland as a result of its equality action plan (Skills Development Scotland, 2018c). In 2017/18, the achievement rate of MAs with a disability was 68% compared with the general 79% rate for those without. This again represented an increase from 2016/17 (65% achievement rate for MAs with a disability) (Skills Development Scotland, 2018).

In Wales, around 915 (1.6%) of those on apprenticeship programmes in 2017/18 had a disability (Welsh Government, 2019a). However, it should be noted that learning difficulties are not included within the definition of 'disability' for the purposes of the data collected. This can be contrasted with a 22.5% representation of people of working age in Wales who have a disability (Protheroe, 2017). Indeed, as shown in Welsh Government (2018), when learning difficulties were included, the figure rose to 5.3%.

As we have seen in relation to ethnicity and gender, there has been a similar UK Government drive in England towards increasing the representation of disabled apprentices in recent years. In its 2020 vision statement, the government stated that the overwhelming majority of disabled young people, or those with with special educational needs, are capable of sustainable, paid employment, and that for some an apprenticeship would be the best route to this. As part of this commitment, reference was made to additional funding for adjustments to the workplace (HM Government, 2015a, p. 35). This responded to an earlier call to increase the support and information young disabled people receive to access apprenticeships (Haywood *et al.*, 2009). The government has also committed to implementing all 14 recommendations from the taskforce (led by Paul Maynard MP) it commissioned to explore how access to apprenticeships can be improved for those with learning difficulties or disabilities (HM Government, 2016a). Equally, as part of the ADCN's remit, there is a focus on encouraging more disabled people to enter apprenticeships and for employers to increase representation in this area (HM Government, 2018b).



Similarly, the Wood report in Scotland recommended that careers advice and work experience should be prioritised for young disabled people and that funding levels for MA training providers should be reviewed and adjusted to reflect the cost of providing additional support (Wood, 2014, p. 14). In response to this, Skills Development Scotland has set a target to increase the employment rate for young disabled people in MAs to reflect the population average by 2021 (Skills Development Scotland, 2015).

The Estyn report on barriers to apprenticeship (Estyn, 2014) recognised that some elements of apprenticeship training in Wales are not flexible enough for potential learners, and that this may discourage applications from disabled people (Estyn, 2014, p. 8). Equally, in its 2018 report, the Economy, Infrastructure and Skills Committee of the National Assembly for Wales recommended that a clear, disabled person-specific action plan be produced to address the under-representation of disabled people in apprenticeships (National Assembly for Wales, 2018). This is currently being taken forward by the Welsh Government (Welsh Government, 2018c).

## 3. Positive action

To achieve the aims of increasing diversity within apprenticeships (see chapter 2), there is a need for employers, governments and other agencies to consider the tools that are available to effectively address significant levels of under-representation and disadvantage. Positive action is specifically designed to do this. This chapter considers the theoretical and legal framework around positive action before summarising some notable applications in relation to apprenticeships in England, Scotland and Wales.

### 3.1 Introduction

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Professor of human rights law Colm O’Cinneide defines positive action as the ‘use of special measures to assist members of disadvantaged groups in overcoming the obstacles and discrimination they face in contemporary society’ (O’Cinneide, 2009, p. 279). Since 2010, the Equality Act 2010 (EA 2010) has set out the legal framework for positive action in relation to protected characteristics in the UK (under sections 158 and 159 of EA 2010). The provisions of the EA 2010 are permissive rather than mandatory, and while employers have felt largely comfortable in using the low-level ‘outreach’ mechanisms of section 158, they have largely ignored the ‘tie-break’ provisions contained in section 159 (see section 3.4 below) (Davies and Robison, 2016; Manfredi, 2017).

### 3.2 Defining positive action

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There is an emerging discussion around the meaning and boundaries of positive action in the UK (see, for instance: O’Cinneide, 2009; Rees, 2001; Noon, 2010; Barmes, 2009; Fredman, 1997; Selanec and Senden, 2013; Khaitan, 2015; Johns *et al.*, 2014; Robison and Burrows, 2006; Davies and Robison, 2016). The term ‘positive action’ is often confused with ‘positive discrimination’. In distinguishing the two concepts, most commentators accept that the former involves the use of special

measures to redress disadvantage to achieve equality of opportunity. The latter moves towards seeking to achieve 'equality of outcome' by recognising the inherent disadvantage faced by those with a particular characteristic and therefore the characteristic becomes a legitimate criterion for evaluating individuals in any formal decision making, such as job interviews (Davies and Robison, 2016). Some authors (such as Noon, 2010; Johns *et al.*, 2014) have called for a reconsideration of positive discrimination as a viable policy intervention in the UK. However, the legislation and case law of the European Union (see section 3.3) has thus far limited the use of positive discrimination by member states as a valid means of addressing historic disadvantage and under-representation.

If defined in broad terms, positive action may go beyond the need for preferential treatment and include any measure beyond basic anti-discrimination provision. This would include any neutral measures whose effects are such as to remove existing barriers to equality as long as the goal is to ensure equality (De Vos, 2007). More subtly, there are those such as Selanec and Senden who have argued that those neutral measures that are consciously designed with a clear intent to benefit protected groups should be included within the definition of 'positive action', to the extent that they contribute to the removal of relevant barriers to real-life equality (Selanec and Senden, 2013, p. 6). Arguably, however, the provision of neutral measures could be said to be a form of anti-discrimination provision aimed at mitigating indirect discrimination rather than positive action *per se*. In contrast, a narrow definition of positive action requires some form of preferential treatment intended to benefit members of a disadvantaged or under-represented group (Fredman, 1997; Selanec and Senden, 2013).

Attempts to define positive action have often involved attempting to categorise different types of initiative (see, for instance: McCrudden, 1986; Selanec and Senden, 2013). Others have criticised attempts to artificially constrain the definition in this way (Khaitan, 2015; Barmes, 2009). The categorisation set out by Selanec and Senden (2013, pp. 4–5) has much to commend it for clarity and comprehension. They explore a narrow definition of positive action in terms of 'preference' involving benefits for a protected group, and distinguish a number of types of preference that exist in practice but may overlap:

- absolute preference: certain benefits are reserved exclusively for the under-represented group
- strong preference: advantage to under-represented group who satisfy some minimum eligibility criteria

- tie-break preference: under-represented group advantaged when they are equally qualified or equally deserving of benefit
- flexible preference: group advantages overridden by some other socially valuable reason (for example, single parenthood, health)
- weak preference: protected characteristic to be one of various criteria for selection, each of which is of more or less equal weight.

While an absolute preference (as defined above) arguably falls within the definition of 'positive discrimination', the other categories may more comfortably fit within the term 'positive action'.

The previous law around positive action in Great Britain (excepting disability and the explicit preferential provisions in the Sex Discrimination (Election Candidates) Act 2002) easily fell within a conceptualisation of 'positive action' rather than 'positive discrimination'. However, the recent law contained within the EA 2010 arguably no longer comfortably sits within a traditional definition of positive action (Davies and Robison, 2016; Johns *et al.*, 2014, p. 110).

### 3.3 The European framework

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As with much equality law in England, Scotland and Wales, EU legislation and case law have informed and dictated a lot of the legal development of 'positive action' under the EA 2010. While there was no European Economic Community law definition of positive action, Article 141 (4) EC Treaty and Article 2(4) of Directive 76/207/EEC (Equal treatment of men and women) permitted positive action measures in the employment field in relation to gender.

This was developed in Article 3 of the Recast Directive (2006/54/EC consolidating Directives 76/207/EEC and 2002/73/EC and implementing the formula now set out in Article 157(4) of the Treaty on the Functioning of the European Union, which states:

'With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.'

This was largely reflected in Article 5 of the Race Directive and Article 7(1) of the Framework Employment Directive (2000/78/EC) in relation to religion or belief, disability, age and sexual orientation.

EU law has permitted rather than required positive action. Over the last three decades, EU case law has provided some more detail on how far this permission extends. While not the first time the European Court of Justice (ECJ) dealt with positive action, it is the *Kalanke* case that established the basic approach of the court in this area. The ECJ found that measures that gave an absolute and automatic employment preference to female candidates (who were equally qualified as men) in sectors in which women were under-represented, went further than that permitted by EU legislation. Two years later, the ECJ softened the severity of *Kalanke* in *Marschall*. Here the ECJ found that preferential treatment when female candidates for promotion were equally as qualified as male candidates (in sectors where they were under-represented) could be permitted under EU law where there was a so-called 'savings clause' in place. This clause allowed the employer to override the gender preference for some other reason of social policy, and therefore unlike the *Kalanke* situation, it did not guarantee absolute and unconditional priority for women. One of the fundamental difficulties with the ECJ approach has been the requirement for equal qualifications for a preference to be applied. In *Abrahamsson*, the measures in question gave preference in a recruitment process to candidates belonging to an under-represented sex when they were 'sufficiently qualified'. The only requirement was that the difference between the merits of the candidates was not so great as to result in a breach of the requirement of objectivity in selection. The ECJ found that the measure was not permitted on the basis that the evaluation process was not sufficiently objective and that the measure did not include the *Marschall* 'savings clause'. This potentially leaves open the opportunity to engage in a broad definition of 'equally qualified', such that a preference can be used for an 'equally qualified' woman even if she cannot demonstrate traditionally expected qualifications due to embedded disadvantage, but is able to show skills and talents demonstrating potential (Selanec and Senden, 2013).

Connolly (2011) summarises the basic framework for the use of positive action as set out by EU case law, namely: there must be under-representation; the woman must be 'equally qualified' to the man; and there must be a 'savings clause' (as per the *Kalanke/Marschall* distinction) such that an objective assessment of all criteria specific to the individual candidates should be considered.

In spite of the development of EU case law, it would appear that a consistent approach by member states to positive action is lacking. The European Commission's Network of Legal Experts in the Field of General Equality carried out a general survey of positive action provisions across member states (McCrudden, 2005). Positive action was rarely seen as a social or political priority. Equally, while most states included some reference to permissive rather than mandatory provision for positive action, there was little attempt to evaluate practice and efficacy in this area. In particular, the UK's response stated that 'there was little systematic research of how far [positive action] provisions, which in all cases are voluntary, have been taken up in practice by employers and others' (McCrudden, 2005, p. 62).

Of course, any exploration of an overarching EU framework now has to consider the implications of the UK leaving the EU. While the positive action provisions are now fairly well embedded into domestic legislation, it may be that the UK (when no longer strictly bound by the framework provided by EU law) could adopt a more robust or 'radical' approach towards positive action that embraces 'equality of outcome' through the use of preferential treatment (see Manfredi, 2017). However, the UK could choose to maintain the current legislative framework or, in light of employer reticence towards use of the 'tie-break' (see section 3.4), the current government may consider that section 159 should be re-evaluated in light of its commitment towards breaking down unnecessary legislation in relation to employment.

### 3.4 The Equality Act 2010

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During the consultation on the Equality Act 2010 (EA 2010), the Independent Review of the Enforcement of UK Anti-Discrimination Legislation (led by Hepple *et al.*, 2000) recommended that legislation in relation to positive action be broadened to meet the framework developed by EU legislation and case law. Thus the positive action provision of the EA 2010 (emphasised in the explanatory notes to the act, paras. 511–21), 'extends what is possible to the extent permitted by European law'. As seen above (section 3.3), EU law continues to be framed in terms of positive action and does not permit positive discrimination and (subject to some discussion around section 159 of the act), this is largely reflected in the EA 2010. Contrary to earlier legislation, section 158 extends the circumstances when positive action measures can be taken beyond the employment and training context, to include, for example, initiatives in relation to the exercise of public functions.

The general provisions in relation to 'positive action' are set out under section 158 of the EA 2010. This section specifies positive action initiative thresholds that are permitted when an employer 'reasonably thinks that:

- persons who share a protected characteristic suffer a disadvantage connected to the characteristic
- persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
- participation in an activity by persons who share a protected characteristic is disproportionately low'.

In particular, where an employer identifies a need to tackle disadvantage or under-representation or to meet different needs, their knowledge of their workforce profile, or of comparable employers in the sector, or of the picture nationally, will be sufficient, without sophisticated statistical proof (EHRC, 2011, para. 12.14). If this threshold is met, according to EA 2010 section 158(2), the employer will be permitted to take action that has the aim of overcoming or minimising the disadvantage, meeting differing needs, or enabling or encouraging participation of under-represented groups, but only so far as such measures are 'proportionate'. The act's explanatory notes state that in determining 'proportionality', account should be taken of the seriousness of the disadvantage, the extent of the needs or under-representation, and whether there might be other ways in which the intended aims might be achieved (explanatory notes, para. 512).

Positive action in relation to recruitment and promotion is covered under section 159 of the EA 2010. This is often referred to as the 'tie-break' provision. Section 159(5) narrowly defines 'recruitment' as referring specifically to the offer of employment (or equivalent). In accordance with section 159, an employer can take an individual's protected characteristic into account with the following requirements:

- The candidate is 'as qualified as' another candidate to be recruited or promoted (section 159(4)(a)).
- The employer 'reasonably thinks' that the protected group is at a disadvantage or is under-represented (section 159(1)).
- The action is taken with the aim of enabling or encouraging protected groups to overcome or minimise the disadvantage or participate in that activity (section 159(2)).
- The action is a proportionate means of achieving those aims (section 159(4)(c)).

- The employer does not have a policy of automatically treating persons in the protected group more favourably in connection with recruitment or promotion (section 159(4)(b)).

The Government Equalities Office (GEO) guidance (GEO, 2011) advises employers to establish a set of criteria against which candidates will be assessed when applying for a job. These should include: a candidate's overall ability; competence and professional experience, together with any relevant formal or academic qualifications; any other qualities required to carry out the particular job. Where two candidates are 'as qualified as' each other in respect of these criteria, and subject to the wider requirements of section 159 having been met, then an employer is permitted to take a candidate's protected characteristic into account as the 'deciding factor' in determining who is offered the position or promotion.

It is worth noting here that the term 'as qualified as' should be distinguished from 'equally qualified', which had been rejected during the Equality Bill's progress through Parliament since the legislators did not want the provisions to be 'solely about the equality of qualifications per se' (Hansard, 2010a, b). While useful, it should be recognised that simply seeking to ensure 'numerical equality' is insufficient if not accompanied by equality of opportunity (Fredman, 1997, p. 599), and indeed is likely to fall short of the strict limitations (such as proportionality) imposed by section 159 of the EA 2010. In particular, use of section 159 should not exist in a vacuum, but rather should be used in conjunction with preparatory supportive measures permitted by section 158.

There is very little domestic case law interpreting and defining the scope and breadth of the legislation around positive action in the UK. The few cases that touch on this issue have until recently largely related to pre-EA 2010 legislation. In *Hughes v London Borough of Hackney [1988]*, the employment tribunal (ET) ruled that Hackney had discriminated unlawfully under the Race Relations Act 1976 when it had created a number of apprenticeships specifically for ethnic minority candidates. A more nuanced approach to positive action was taken in the later case of *R (Kaur) v Ealing London Borough Council [2008]*. Here the high court stated that the positive action provisions of the Race Relations Act 1976 should not be seen as an exception to the legislation since it was an important principle of equality that 'not only must like cases be treated alike but that unlike cases must be treated differently' (Lord Justice Moses, para. 51). More recently, there have been two interesting low level judgements exploring the application of section 158 and 159 EA 2010. In the case of *R (on the application of Z and others) v (1) Hackney London Borough Council (2)*



*Agudas Israel Housing Association [2019]*, the High Court found that the AIHA's conduct in primarily allocating social housing properties to the Orthodox Jewish community was rendered lawful (in precluding members not of that community from access to such housing) by reason of section 158 EA 2010. In particular the court found that the evidence demonstrated disadvantage and particular need in the Orthodox Jewish community for property that would accommodate substantially larger families and that would significantly reduce the particular intensified risk to such families of eviction from overcrowded families. Similarly, the court concluded that AIHA's arrangements were proportionate under section 158 and did not amount to a blanket policy. In the same month, a less favourable ET decision on positive action in *Furlong v The Chief Constable of Cheshire Police [2019]* considered the application of section 159 EA 2010. The ET found that as a white, heterosexual man Mr Furlong had been directly discriminated against on the grounds of sexual orientation, sex and race under section 13 of the EA 2010. The respondents unsuccessfully relied on section 159 EA 2010 to justify the application of the 'tie-break' in favour of LGBT, women and those from ethnic minorities within their recruitment process. Whilst the tribunal accepted that there was an evidence based underrepresentation of these groups within the Force, the respondent could not show that the application of the 'tie-break' had been applied to those 'as qualified as' under section 159(4)(a). Indeed, a low threshold as part of the recruitment process had meant that substantial numbers of candidates had been deemed equal when they clearly were not in order for a preference to be applied in favour of those from the underrepresented communities. Interestingly, the tribunal commented that the result of the particular application of positive action in this situation could have a 'knock on effect of discontentment and disillusionment [which] may lead to a lack of confidence in the ability of appointees to the role of police officer and the organisation in general' (para. 134). Similarly, the tribunal found that a blanket application of section 159 in this situation was not proportionate in the circumstances.

### **3.5 Positive action, the Public Sector Equality Duty (PSED) and public sector procurement**

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While, the positive action provisions of the EA 2010 are permissive only, it has been argued that the link with the Public Sector Equality Duty (PSED) encourages a more proactive approach. Arguably, the similarities between the wording of the PSED and the provisions of section 158 mean that public sector employers are required at least

to consider introducing positive action initiatives beyond eradicating discrimination (Davies and Robison, 2016). In particular, section 149(1)(b) of the EA 2010 requires public authorities to exercise their functions with due regard to the need to advance equality of opportunity between persons who share a relevant characteristic and persons who do not share it. This involves having due regard to the need to take steps to meet the needs of those who share a protected characteristic that are different from the needs of those who do not share it, and encourage those who share a protected characteristic to participate in public life or in any other activity in which participation by such people is disproportionately low. As stated in the UK response to the European Commission's Network of Legal Experts, 'it is likely in future that Section 149 may be relied on to push public authorities into utilizing their powers under Sections 158 and 159 of the Equality Act 2010 and, possibly, exerting pressure on private sector contractors to do likewise' (McColgan, 2013, p. 229). In Scotland, the link between positive action and the PSED was explored in the Scottish Parliament's Equality Opportunities Committee (now the Equalities and Human Rights Committee) report in 2016. In particular, in evidence to the committee, Chris Oswald (EHRC) stated: 'We would say that positive action fits within the public sector duty ... That represents a significant amount of purchasing power and significant players in the employment labour market' (Equal Opportunities Committee, 2016, p. 26).

In an employment/apprenticeship context, the link between the PSED, positive action and public sector procurement is becoming increasingly evident. As explored by McCrudden (2004) there is an emerging focus on the use of public procurement to achieve 'social outcomes'. In particular, (as explored in the work for the Commission carried out by Danson *et al.*, 2013), public authorities, in meeting the requirements of the PSED, should influence the recruitment process in requiring that any successful contractor fulfils the requirements of the PSED (as spelt out in the procurement process). If the link between the PSED and positive action provisions of the EA 2010 is extended to its logical conclusion, then this may also mean that the public procurement process should additionally provide for (or at least encourage) the use of positive action within any contract conditions.

### **3.6 Use of positive action**

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There are many examples (see section 3.7) of employers that have demonstrated a commitment to utilising the positive action measures permitted by section 158 of the

EA 2010 in relation to apprenticeships and beyond in those sectors in which minority groups and women are under-represented. Unfortunately, there is little practical evaluation of this (McCrudden, 2005) (exceptionally, see: Davies and Robison, 2016; Davies *et al.*, 2016; and the YWT positive action project, see chapter 4). Evidence of the use of the section 159 'tie-break' is more limited. This is in spite of the legislation being drafted to try and avoid, as Baroness Thornton put it, 'the chilling effect on the willingness of employers to use positive action measures' (Hansard, 2010a). The limited evidence that exists points to unwillingness from employers to use section 159. Utilising Noon's (2010) identified objections to the use of preferential treatment for under-represented groups in recruitment (including arguments of reverse discrimination, tokenism and undermining meritocracy), Manfredi (2017) has challenged these objections to using section 159 in the context of gender and higher education. In particular, there is a growing body of work that emphasises that achieving substantive equality (that is, recognising the extent to which opportunities are determined by historical and social status and disadvantage) necessitates the use of selective and proportionate preferential treatment in recruitment and employment (Fredman, 1997; Idris, 2009; Manfredi, 2017).

The development of positive action legislation in the UK has often been based on limited quantitative analysis, anecdotal evidence provided during the consultation processes, and wide-ranging theoretical exploration. It is therefore argued that positive action as a social phenomenon cannot be assessed without an evaluation of the ground-level perceptions towards positive action of those responsible for recruitment and promotion practice in the UK (Davies and Robison, 2016).

### **3.7 Practical examples of use of positive action in apprenticeships**

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While there is little evidence of the widespread use of positive action measures under section 159, in recent years examples of low-level outreach activities (permitted by section 158) aimed at improving under-representation and disadvantage of protected groups have been extensive, particularly in relation to gender (Davies and Robison, 2016). The following provides a brief summary of some of the more notable examples of positive action initiatives carried out in relation to apprenticeships in England, Scotland and Wales. The summary below does not in any way present a definitive narrative of the work being carried out in this area but is the result of personal awareness and desk-based research.

Equally important to note is that a conceptual framework has been used to categorise the included initiatives as 'positive action'. In particular, 'positive action' has been defined as the use of a 'preference' (see section 3.2) in an attempt to address under-representation of the relevant protected groups. Initiatives that more properly may be termed 'inclusive provision' and/or anti-discrimination policies and procedures have not been included. It should also be noted that in relation to disability, measures that may involve a 'preference' are often better categorised as a 'reasonable adjustment' in light of the duty under section 20 of the EA 2010 rather than as positive action per se. Equally, it should be remembered that treating a disabled person more favourably would not amount to direct discrimination under section 13 of the EA 2010. In this way, it may be that employer fears around reverse discrimination in relation to disability are alleviated.

In recent years, there has been an increase in the call for employers (particularly in gender-segregated sectors) to use positive action in an attempt to improve the representation of women in apprenticeships. For example, in 2016, Kate Morris, the director of strategic planning at infrastructure firm AECOM, put out a call for the use of 'positive action' to address the significant gender imbalance in apprenticeships in the engineering industry (Arnes, 2016). Ms Morris stressed the need for the use of such initiatives due to the embedded and persistent under-representation undermining UK efforts to build a more diverse workforce. In relation to disability, the taskforce led by Paul Maynard called for the use of supporting measures to be put in place to address the barriers to apprenticeships faced by disabled people and/or those with learning difficulties (HM Government, 2016a). In 2015, Sue Husband, the director of the National Apprenticeship Service, called for positive action to address ethnic minority under-representation in apprenticeships, including targeted mentoring and support for, and events aimed at, ethnic minority candidates (Husband, 2015). Equally, a number of wider reports have called for the use of positive action to be used to mitigate gender segregation and ethnic minority under-representation in apprenticeships (see: Miller *et al.*, 2004; Newton and Williams, 2013). In particular, the Young Women's Trust (2016) called for the use of positive action in relation to gender-segregated apprenticeships and provided tips on the type of positive action that could be used, including female-only work experience and open days, female networks and mentoring.

## Sector body and government activity around positive action

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Much of the push towards the use of positive action in relation to apprenticeships has come from sector bodies and/or government. Of note is the 2017 apprenticeship toolkit developed by WISE (Women in Science and Engineering), Semta (the Science, Engineering and Manufacturing Technologies Alliance) and ICE (the Institution of Civil Engineers) (WISE, undated). This builds on earlier work carried out by WISE in partnership with the UK Resource Centre for Women in Science, Engineering and Technology (UKRC) on improving diversity in apprenticeships (WISE, 2012). This toolkit encourages a life cycle approach towards increasing the representation of females in STEM apprenticeships, looking at initiatives that can be used to 'attract, engage, support and retain' women in this area. While the toolkit does refer to 'positive action', and many of the suggestions would fall within the conceptual definition adopted here, it also includes wider good practice around inclusivity and anti-discrimination. The toolkit also includes a number of employer case studies exploring how positive action has been used in practice. Similarly, the Women's Engineering Society (WES) has produced guidance for employers on how to attract more girls into engineering apprenticeships (WES, 2017). This includes setting targets for gender equality, ensuring shortlists include at least one woman, and offering gender-equal work experience placements.

Similarly, specific organisations have developed work around promoting the use of positive action targeting ethnic minority under-representation in apprenticeships. For example, the BAME Apprenticeship Alliance (BAME Apprenticeship Alliance, 2018) is an organisation that has an aim of promoting diversity within apprenticeships. As part of this work, it established the Asian Apprenticeship Awards in 2016 to celebrate and reward ethnic minority success in apprenticeships (see Ali, 2017).

In relation to disability, the 'Into apprenticeships' guide produced by Disability Rights UK provides targeted guidance and support for disabled people who are considering undertaking an apprenticeship (Disability Rights UK, 2017). Equally, the Access to Work government scheme provides additional support (including financial support) to enable those in employment (including an apprenticeship) to get the help needed when this would not be covered by reasonable adjustments (HM Government, 2018b). Similarly, funding reforms introduced in 2017 will encourage employers to support disabled people to access apprenticeships and, in particular, provide extra funding for disabled apprentices who require extra learning support (HM Government, 2016d).

Other initiatives deal with the need to promote diversity and address under-representation more generally across a range of characteristics. As a response to its commitment to increase diversity in apprenticeships in England by 2020, the UK Government has established the Apprenticeship Diversity Champions Network (ADCN) (see chapter 2); its remit is to ‘champion apprenticeships in BAME communities’ as well as encourage more disabled people and women into apprenticeships (HM Government, undated). As yet the ADCN does not appear to have developed or suggested any specific positive action initiatives. In parallel with this, the Department for Education has inaugurated an apprenticeship diversity advisory group of policy experts to provide input and advice on government policy development in this area. In February 2018, the Department for Education announced the ‘5 Cities Project’, which will see the National Apprenticeship Service working with partners in Greater Manchester, London, Bristol, Birmingham and Leicester to promote the take-up of apprenticeships among under-represented groups, including ethnic minority groups and those from disadvantaged backgrounds (HM Government, 2018d). The Learning and Work Institute, as part of its employer toolkit, encourages employers to use outreach, mentoring and targeted training programmes for people with learning difficulties and/or disabilities, those from ethnic minority groups and women in gender-segregated sectors (Learning and Work Institute, undated). In particular, the toolkit includes case studies of successfully implemented employer positive action measures.

In Scotland, there has been some work involving the use of positive action to address under-representation in apprenticeships. Equate Scotland, (established in 2006 and based in Edinburgh Napier University), is the national expert in gender equality throughout the STEM sectors. It rolls out positive action initiatives targeted at girls, including in relation to apprenticeships in STEM areas. Of particular note is its ‘Training the trainer for mentoring female modern apprentices’ initiative, which focuses on gendered perspectives to mentoring and covers issues experienced by female MAs in male-dominated environments (Equate Scotland, 2018). Similarly, organisations such as the Scottish Women’s Budget Group have highlighted issues of gender segregation in the workforce and in modern apprenticeships in recent years. Skills Development Scotland (SDS) has also sought to engage in a series of positive action initiatives in relation to gender, ethnicity and disability as part of its equalities action plan for MAs. This includes working in partnership with others to focus on increasing engagement with female ethnic minority communities. It also responds to targets set for increasing the numbers of disabled and ethnic minority apprentices as well as reducing to 60% by 2021 the number of MA frameworks

where the balance between men and women is worse than 75:25 (Skills Development Scotland, 2015). SDS has also established an equality advisory group made up of a number of organisations, such as BEMIS (Black and Ethnic Minority Infrastructure in Scotland), Close the Gap and Engender, which work together to promote, among other things, diversity in apprenticeships in Scotland. Similarly, in partnership with the Scottish Training Federation, SDS is developing specific employer incentives for under-represented groups. It also rolled out its Equality Challenge Fund and Employer's Equality Action Fund to support projects that will assist in bringing more women, disabled people, care leavers and those from ethnic minority communities into apprenticeships (Skills Development Scotland, 2017b).

In Wales, since 2016 the Welsh Government has funded the appointment of a work-based learning equality and diversity champion at the National Training Federation for Wales. The role involves assisting employers to plan and implement strategies for increasing apprenticeship opportunities for ethnic minority individuals and disabled people. It also involves promoting equality for women in gender-segregated sectors (National Training Federation Wales, undated). Other initiatives across Wales include work by Chwarae Teg (a charity supporting Welsh businesses to strengthen understanding of issues affecting women's progression in the workplace). In particular, its work around ensuring quality apprenticeships for all has involved a number of targeted initiatives aimed at addressing gender imbalances in segregated sectors. For example, the Not Just for Boys jobs fair in 2015 run by Chwarae Teg, Kier Construction, Careers Wales and Jobcentre Plus was aimed at promoting non-traditional careers to young women (Chwarae Teg, 2015).

## Employer use of positive action

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There is some evidence of employers using low-level positive action initiatives as a means of addressing under-representation in apprenticeships. Often these initiatives appear to be driven by good practice recommendations and guidance provided by sector bodies (see Davies and Robison, 2016). Much of the guidance and encouragement provided by sector bodies and organisations in relation to positive action include good practice case studies of initiatives successfully implemented by employers (see for example, WISE, undated; Disability Rights UK, 2017; Equate Scotland, 2018). However, while there are significant examples of positive action in relation to women, once the wider evidence is sifted for 'inclusive', 'general anti-discrimination measures' and 'reasonable adjustments in relation to disability',

preference-based positive action initiatives are far fewer than might initially be expected in relation to ethnicity and disability.

Some notable examples of positive action in relation to women and gender-segregated apprenticeships include:

- **EDF Energy** has designed a number of programmes targeted at young women that help showcase the benefits of STEM subjects as a career. For example, EDF's Pretty Curious STEM Studio events challenge girls creatively, giving them the opportunity to explore and experience career possibilities available by pursuing STEM subjects at school (EDF Energy, 2018). At a recruitment level, a number of initiatives (such as showcasing female apprenticeships through case studies and imagery and developing new interview question banks) have led to an increase in female apprenticeship hires from 8% in 2015 to 21% in 2016 (WISE, undated).
- **Jaguar Landrover** has run a number of female specific schemes to seek to recruit higher numbers of women into apprenticeships. For example, the Young Women in the Know initiative targets female applicants and gives them a week of experience in the business prior to the assessment centre process. The number of female apprentices in Jaguar Landrover has increased each year, rising from 19% in 2015 to 22% in 2016 (WISE, undated).<sup>8</sup>
- **Barclays** has developed the Barclays Women's Initiative Network, which provides a channel for all women in Barclays to have their voices heard, receive mentoring and influence the direction of the organisation. It is also considering whether to implement female-only traineeships to encourage more women to apply for a Barclay's apprenticeship (Young Women's Trust, 2017).
- **BAE Systems** tracks diversity and inclusion statistics throughout the recruitment process and has implemented a range of initiatives aimed at increasing gender representation. In particular, BAE Systems ensures that there is an equal gender split in the A-level scholarships it provides and also in work experience placements. In addition, it provides female-only placements for groups of young women (Young Women's Trust, 2017).

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<sup>8</sup> This example is no longer available on the WISE website.



- **Network Rail** allocates a female apprentice development manager to female apprentices to provide pastoral support and guidance and also has a well-developed women's network called Inspire (Young Women's Trust, 2017).
- **Balfour Beatty** runs work experience and pre-apprenticeship programmes for young women and seeks to recruit directly from these programmes onto its apprenticeship scheme. Equally, it provides specific scholarships to young female students and has set targets for the recruitment of women onto its apprenticeship and graduate schemes. In particular, in 2016 it was aiming to have a 20% female intake of apprentices by 2017, 30% by 2020 and gender parity by 2025 (Young Women's Trust, 2017).

The determination of what amounts to a positive action initiative in relation to disability is more complex. Specifically, it is often unclear whether measures aimed at addressing disadvantage and under-representation amount to positive action or should more accurately be termed 'reasonable adjustments'. Equally, it is important not to homogenise disability and recognise that robust and effective positive action and 'reasonable adjustments' require an in-depth understanding of the particular impairment. However, there are a number of positive initiatives (albeit arguably not technically positive action) being rolled out by employers in this area:

- The **Enable** programme rolled out by Shropshire Council supports disabled people and/or those with mental health conditions to find employment. It provides a programme of supported internships with a view to encouraging disabled people to apply for an apprenticeship. It also provides coaching and mentoring as well as working with potential employers to develop an understanding of need to ensure a successful apprenticeship experience (Learning and Work Institute, undated).
- The **Civil Service fast track apprenticeship programme** actively encourages and supports disabled candidates to apply. As part of its commitment to following the national Disability Confident (HM Government, 2014) principles (aimed at removing barriers to disabled people in employment), it operates a 'guaranteed interview scheme', which means that if an individual is disabled they are not required to undertake the timed verbal and numerical reasoning tests as part of the assessment process (HM Government, 2016c).

In light of government targets to increase ethnic minority representation in apprenticeships, there has been some evidence of emerging positive action initiatives in this area. For example:

- Supported by Skills Development Scotland Equalities Action Fund, **Building Futures** (Skills Development Scotland, 2017b) is a female-run community interest company in the construction sector focusing on house renovations. Based in Glasgow, the company has a particular focus on young women from ethnic minority backgrounds. It runs practical workshops, arranges industry visits and provides mentoring for young women to apply for apprenticeship opportunities.
- **Barclays** runs various positive action initiatives targeted at ethnic minority groups to promote apprenticeships to those living in ethnically diverse areas. This has included engaging in outreach activities with disadvantaged communities, including ethnic minority groups, to promote apprenticeship opportunities. In the four years to 2017, 43% of the 3,000 apprentices it took on came from an ethnic minority background (Business in the Community, 2017a).
- **Capgemini** has rolled out numerous positive action initiatives aimed at improving its ethnic minority and gender representation in apprenticeships. In particular, during 2015/16 it focused on promoting visible ethnic minority role models and partnered with Bright Network (which connects graduates with employers, and has a 39% ethnic minority membership) to target students. In 2016, Capgemini's percentage of ethnic minority graduate and apprentice hires increased to 36% after remaining at just under 30% for several years (Business in the Community, 2017b).

## 4. The Young Women's Trust positive action project

This chapter summarises the work carried out by the author and the Young Women's Trust (YWT) to address the knowledge deficit on the use of positive action in relation to apprenticeships in sectors in which women are under-represented. The emerging themes of the project (together with the preceding theoretical review) provided the foundations for discussion at the roundtable event (see chapter 5).

### 4.1 Introduction

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In 2017, following the 2016 YWT report on apprenticeships (Young Women's Trust, 2016) and a small scoping study carried out by the author and a colleague (Davies and Robison, 2016), the University of Chester partnered with the YWT to undertake a 12-month project looking at the attitudes towards, and use of, positive action aimed at addressing gender inequality in engineering, ICT and construction apprenticeships in England.

Data was collected through seven focus groups involving employers, sector bodies and apprentices. Relevant questions were included in broad surveys of employers and apprentices carried out by the YWT in 2017. In addition, between September 2017 and January 2018, a series of in-depth, semi-structured interviews were conducted with employers, sector bodies and apprentices.

Throughout the project, a steering group drawn from a representative body of stakeholders acted as a critical friend. Findings from data collected from employers, sector bodies and apprentices were reported in June 2018.

## 4.2 Findings

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- There is an embedded and overwhelming lack of awareness and consistency in relation to definitions of positive action. Often positive action is seen as a synonymous term for anti-discrimination policies and procedures or wider inclusive provision.
- There is a fundamental confusion between positive action and positive discrimination. Even those who are able to make the distinction between legality in relation to the two terms are unclear how the two differ in theory or in practice.
- Beyond conceptual understandings, there is a lack of clarity around the law and even, in some cases, a lack of awareness of the law. While most research participants are aware of the general provisions of the EA 2010 in relation to anti-discrimination provisions, there is far less awareness of the way in which the legislation provides for positive action.
- Where there is an awareness of the conceptual and legislative foundations of positive action, organisations such as Women in Science and Engineering (WISE) and the Young Women's Trust (YWT) are seen as key to informing and developing this awareness.
- There is a perception that the main issues in relation to disadvantage and under-representation exist at the 'ground level' and that we are seeing a faster pace of change in relation to the representation of women in those positions that require a higher level of education (such as management and the higher levels of engineering).
- The larger employers appear to be enthusiastic about using positive action as a tool to address under-representation of women. Indeed, there are many examples of good practice being promoted by sector bodies and implemented by large organisations. The moral and business case for diversity is a key driver for the use of positive action. The data suggests that the main resistance appears to be among small and medium-sized enterprises (SMEs), and the evidence of a lack of awareness and/or reluctance to use positive action is largely seen here.
- There is a keen awareness that the isolated use of positive action is ineffective and that a 'life cycle' approach is absolutely vital. Therefore, there

is a recognition that positive action needs to be considered and robustly applied at all levels, from primary and secondary education through to apprenticeships, recruitment and promotion. It also needs to be supported by clear anti-discrimination policies in the workplace to ensure that women are retained in the sectors in which there exists embedded gender disparity.

- There is very little awareness of the detail of the ‘tie-break’ provisions of the EA 2010 in relation to positive action (section 159, EA 2010). Those that are aware are often confused and perceive this to involve discrediting merit. Once the ‘tie-break’ provision was explained to them, respondents had varying responses to this. Most had reservations about how the ‘tie-break’, and in particular the requirement to have two candidates ‘as qualified as’ each other, could be implemented in practice. Others felt that it could not be effectively applied without wider positive action measures being put in place to support this at a much earlier stage in the ‘life cycle’ to ensure an appropriate selection pool of qualified women.

### 4.3 Increasing engagement

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Participants in the YWT positive action project were overwhelmingly positive about the general use of positive action (beyond the ‘tie-break’). The following points highlight areas, identified in the project, to further improve and promote the use of positive action in apprenticeships:

- Greater clarification of the law and supporting guidance is required.
- The apprenticeship levy should be used to drive targets and promote the use of positive action to meet these targets.
- The law should be expanded to promote the use of more robust and extensive positive action. Some respondents felt that quotas in some situations may be relevant and should be explored further. Equally, some felt that a form of private sector duty in the relevant sectors may be appropriate.
- The directed use of procurement is required to persuade SMEs to increase diversity and female representation in the relevant sectors. It was felt by many that the procurement process could provide a driver to encourage, and indeed require, the use of positive action by SMEs in segregated sectors.

- Kite marks should be established to recognise commitment towards the use of appropriate and robust positive action.
- Sector bodies (such as the Construction Industry Training Board) and other organisations should have a more joined-up central role to play in encouraging and supporting the use of positive action.

## 5. Roundtable discussion

On 14 March 2018, an invited group of experts from across employment, policy, academia and government came together for a roundtable event to discuss positive action in relation to apprenticeships in England, Scotland and Wales. Participants worked in groups on specific questions about the use of positive action as a tool to address under-representation in apprenticeships in sectors in which women are under-represented, and in relation to ethnic minority and disabled people. The roundtable began with a series of presentations from expert representatives from England, Scotland and Wales.

### 5.1 Themes for discussion

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A discussion followed, based on the theoretical context around positive action in apprenticeships (chapters 2 and 3) and the emerging findings from the YWT positive action project (chapter 4). This discussion looked at the following themes.

#### **Terminology**

- What is positive action?
- Does positive action have to involve a 'preference'?
- Does the existing legislation under the Equality Act 2010 (EA 2010) sufficiently define positive action?

#### **Efficacy and obstacles**

- To what extent is positive action an effective tool to address under-representation in apprenticeships?
- Is a commitment to inclusivity and adherence to anti-discrimination legislation sufficient to address under-representation in apprenticeships without the need for positive action?
- What are the main obstacles to the use of positive action in apprenticeships? Can these obstacles be overcome?

### **Exploration of forms of positive action**

- What forms of positive action would be most effective in addressing under-representation in relation to gender in apprenticeships?
- What forms of positive action would be most effective in addressing under-representation in relation to ethnicity in apprenticeships?
- What forms of positive action would be most effective in addressing under-representation in relation to disability in apprenticeships?
- To what extent is the 'tie-break' (section 159 of the EA 2010) a useful tool to address under-representation in apprenticeships?
- Would the imposition of quotas (although currently recognised to be beyond the permissive legislative framework) be an effective means of addressing under-representation in apprenticeships?
- Is it possible or useful for positive action to be used as a tool to address under-representation in relation to the wider protected characteristics (such as sexual orientation and religion or belief)?

### **The legislative framework**

- Should the law provide for mandatory positive action provision?
- Should the law around positive action be reviewed or amended?
- Is it possible to link permissive positive action with the Public Sector Equality Duty in the EA 2010?

### **Promoting the use of positive action**

- Is it possible or useful to use the procurement process to persuade or force SMEs to use positive action in apprenticeships?
- Are there distinct considerations to be applied in relation to Scotland, England and Wales when considering the use or promotion of positive action?
- Explore the ideas for engagement on positive action (see section 4.3). How useful or practical are such suggestions?
- What more should be done to encourage the use of positive action in apprenticeships, and by whom?



## Terminology

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Participants felt that there was an issue with the lack of a consistent definition of positive action. Most participants felt that defining and limiting positive action as requiring a 'preference' was unhelpful. It was noted that the EA 2010 does not limit by requiring a 'preference'-based approach towards special measures. It was felt that the Selanec and Senden (2013) wider conceptual description was preferred, whereby the term positive action could be used to refer to any measure that intentionally and consequentially benefits women/disabled people/ethnic minority groups by meeting a particular need, mitigating a disadvantage, or resolving an under-representation. This would therefore mean that action that may be termed 'inclusive practice' – such as introducing 'blind CVs' into recruitment (see below) – could properly be termed 'positive action,' since its consequence is to redress imbalance and disadvantage and benefit protected groups. Therefore, some participants considered that positive action would be better defined as requiring some advantage (rather than preference). Equally, it was considered that the focus on 'preference'-based measures could lead to the alienation of other people, and resentment from wider critics as well as from those female apprentices who may benefit from such provision.

It was felt that the focus on preference might also perpetuate the confusion that participants subjectively and anecdotally reported as existing around the distinction between 'positive action' and 'positive discrimination'. The lack of clarity and assimilation of the two terms by many employers was felt to increase reluctance to use such measures for fear of 'reverse discrimination' and discrediting merit. In this regard, it was widely felt that there needed to be a consistent definition of the boundaries of positive action compared with positive discrimination, and this needed to be effectively and widely disseminated to employers and beyond. Some participants felt that the vague coverage provided by the EA 2010 (particularly via sections 158 and 159) was satisfactory, but that specific guidance should be used to provide necessary clarification. Others felt that the EA 2010 was unnecessarily broad and that a more specific legislative definition of positive action was required. Importantly, participants unanimously considered that a consistent definition (whether in legislation or wider guidance) was required to avoid conceptual confusion. It was also felt that it was important to ensure that this definition be promoted in a more robust and systematic way, which may involve engaging the media in a more effective manner.

Some participants expressed appreciation of the ‘proportionality’ requirement deriving from the EU framework and implemented into sections 158 and 159 of the EA 2010 (see chapter 3). However, it was noted that there was a lack of awareness of what a ‘proportionate’ approach required. It was considered that this lack of awareness in relation to ‘proportionality’ was a particular issue for SMEs. A lack of understanding in this regard may lead employers to be more risk averse and avoid engaging in positive action on the basis it is easier to avoid than use inappropriately. Once again, participants considered there needed to be more robust, consistent and widely promoted guidance around the use of ‘proportionality’.

Other issues raised around terminology, included a concern that the existing legislation encouraged employers to focus on individual protected characteristics. Concern was expressed that such a blinkered approach may result in important intersectional disadvantage, need and under-representation being ignored. Similarly, the lack of a socio-economic duty (in England and Wales at least) meant that employers might be dissuaded from engaging in positive action in this regard due to a lack of a permissive legislative framework. In theory, however, it could be argued that the lack of a specific positive action framework around socio-economic status (SES) within the EA 2010 removes the legislative limitations seen in relation to the specified protected characteristics. This could therefore encourage more robust, extensive engagement with positive action in relation to SES without fear of legal liability.

## **Efficacy and obstacles**

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Most participants considered that positive action was theoretically an effective tool to address disadvantage and under-representation in relation to apprenticeships and beyond. However, almost all participants felt that in its existing form (under the EA 2010) positive action lacks efficacy, and the obstacles impacting on use have resulted in a tool that lacks impact, or worse, creates resentment and detracts from its core purpose. Some of these issues of efficacy are centered on the lack of consistent definition of positive action as well as a lack of awareness and engagement (see above). However, participants also reflected on wider efficacy issues. Some participants reflected that positive action in practice often appears to result in little impact on under-representation or disadvantage. Thus, in spite of the use of positive action measures in relation to apprenticeships, representation of

ethnic minorities, disabled people and women in gender-segregated areas continues to be embedded with little positive movement.

It was felt that the lack of positive effect might derive from inadequate use of relevant measures. In particular, it was considered there was a lack of real commitment towards using robust positive action, and also too much scope for lip-service tokenistic measures within the current framework. This lack of obvious impact arguably perpetuates reticence to use it, as employers are not willing to commit resources to measures that appear to offer little gain.

Equally, it was noted that a standardised approach towards positive action measures that relies on mirroring initiatives implemented by others is less likely to be effective, since the employer will not have tailored this to meet the particular need in their own organisation. Similarly, surface and reactionary knee-jerk responses to targets, resulting in little impact on statistical under-representation, may well further affect employer perceptions of efficacy. Having said this, some participants felt that there is a place for standardised/case study-based guidance, as it can have a 'nudge effect' on the confidence of those employers who may otherwise be reticent to use positive action. However, 'toolkit' approaches are often too heavily focused on employers rather than educators and careers advisers. Others felt that positive action as permitted by UK law might not be sufficient to meet the enormity of the challenge the labour market is facing in relation to under-representation and segregation. It was also noted that it is often very difficult to evaluate the impact and efficacy of low-level positive action initiatives, and as such they may be perceived as failing.

The need for a holistic life cycle approach to positive action (see further: Miller *et al.*, 2004; WISE, 2014; Gatsby Charitable Foundation, 2010; Nuffield Foundation, 2012; Ofsted, 2011) was recognised, together with the use of a wider equality, diversity and inclusion agenda, to create an environment in which individual positive action measures can be used effectively. Nevertheless, one group of participants felt that it was important not to be dissuaded from engaging in individual, isolated, positive action measures for fear of not being able to 'fix' the broader picture. It was considered that some attempt at effective use is preferable to no use.

The considered obstacles to effective use are numerous. As noted above in relation to terminology, participants felt that the lack of consistent adequate guidance or a code of practice means that employers lack awareness and/or confidence to implement effective positive action measures. Often this low confidence is based on a fear of legal liability, which can arise from a conceptual confusion between positive

action and positive discrimination. It was also felt that employers are often unaware of or lack understanding as to why positive action is necessary in the first place. There was a perceived lack of buy-in and understanding across communities and organisations as to the rationale and benefits of using positive action. The lack of robust evaluation of positive action measures in practice, together with a dearth of best practice disclosure in this area, was felt to contribute to this lack of understanding and awareness.

Other obstacles centre on the difficulty in collecting and obtaining robust evidence to support implementation of positive action measures. Equally (particularly in relation to SMEs), the cost and resource commitment of developing robust positive action is often prohibitive, particularly without external guidance and support. This has been further exacerbated by the lack of funding and consequent disappearance of those organisations that have previously supported smaller employers to engage in positive action. Even when resources are not an issue, the lack of a 'leadership will', plus 'status quo bias', often mean that employers perceive little benefit in attempting to use positive action, particularly when balanced against an increasingly risk-averse environment.

Participants also explored the obstacles to efficacy faced by employers in relation to measures targeted at specific protected characteristics. Some considered that employers appear to have more difficulty with implementing positive action relating to ethnic minority under-representation. It was felt that, for many employers, racial disparity is not a comfortable conversation and therefore an initial surface response may be to deny that a problem exists. Participants also felt that in relation to disability the conversation and engagement are dominated by the need to carry out 'reasonable adjustments' rather than 'positive action' per se. Employers appear to have a good understanding of the law and practical responses around adjustments. They therefore tend to focus on disadvantage rather than seeking to use preference-based action to address under-representation. Similarly, some participants felt that there is a lack of recognition of impairment range within the umbrella category of 'disability', and a risk of homogenising approaches towards positive action.

There was some debate about whether positive action measures to address disadvantage and under-representation in relation to wider protected characteristics (such as sexual orientation and religion or belief) would be effective. It was felt that the main obstacle was the lack of robust data collection in these areas. Consequently, the formulation of robust and proportionate positive action may be more difficult. Participants also felt that too broad a focus on promoting positive

action in these wider areas may well lead to a lack of prioritisation in the core areas of ethnicity, gender and disability.

## Exploration of forms of positive action

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It was generally felt that low-level outreach initiatives focusing on encouraging under-represented groups to apply for apprenticeships are useful. However, there was concern that including ‘encouraging words’ – for example in adverts – has become overly standardised and tokenistic, and increasingly lacks efficacy. Such use may also suggest an employer is trying too hard to resolve an embedded problem within their particular organisation. Similarly, some participants expressed the view that applicants may feel like they are being targeted as a ‘token’ to enable the employer to increase representation of a particular group.

Similar attitudes towards targeted mentoring were expressed. It was felt that inter-group mentoring might lead to a perpetuation of disadvantage. For example, it was considered by some that female-to-female mentoring could be criticised as attempting to ‘fix’ the person rather than ‘fix’ the system. Equally, there was concern that inter-group mentoring could lead to a ‘closing down’ of system knowledge and networks, rather than opening them up to potentially enable those from disadvantaged groups to access and progress within the labour market. It was considered that inclusive rather than targeted mentoring (in accordance with a wider definition of positive action) is more effective at creating change.

While there may be some limited support for the introduction of quotas in particular contexts of embedded under-representation, the existing law largely prohibits such action. A couple of participants pointed to potential learning from Scandinavian and Scottish approaches to quotas in particular contexts. Some felt that quotas enable critical mass to increase quickly, helping beneficiaries to progress into leadership positions and change the system from within. This potentially leads to sustainable access and progression for traditionally disadvantaged and under-represented groups. In this regard, it was questioned whether applying quotas at the apprenticeship level is useful or relevant in this context. Rather, it was considered that placing a quota to change critical mass at leadership level is more relevant to embed systemic change. More broadly, concern was expressed that quotas are a blunt instrument and result in disproportionate consequences for other disadvantaged groups. Participants felt more comfortable with the use of targets as opposed to quotas. Targets were viewed as an effective means of ensuring

leadership focus on under-representation data, thus encouraging the development of effective measures to address this. However, care is required to ensure that imposing priority targets in certain areas does not detract from other areas of embedded disadvantage.

Participants focused on the use of the 'tie-break' under section 159 EA 2010 and debated the lack of its use across the three nations. It was generally considered that a lack of understanding of the tie-break means that employers link it to positive discrimination and are therefore reticent to use it for fear of legal liability based on 'reverse discrimination'. Employers perceive the lower-level measures to be a more user-friendly and safer approach to positive action. Equally, participants considered that potential beneficiaries might have concerns regarding use of the tie-break for fear of it being applied tokenistically, discrediting merit. The criteria of section 159 were also questioned due to the rarity of circumstances in which an employer might deem two candidates to be 'as qualified as' each other. Some participants considered that section 159 would be better framed as 'sufficiently qualified' rather than 'as qualified as', since this would potentially enable employers to recruit from under-represented groups on the basis of potential rather than experience. However, one participant expressed concern that this would encourage employers to pay less to employ a person from a disadvantaged group on the basis they are 'less qualified'. In turn this could further perpetuate the pay gap. A number of participants felt that the tie-break would continue to be underused by employers unless public bodies demonstrate leadership and utilise section 159 in their own employment contexts.

## The legislative framework

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All the participants felt that the legislative framework around positive action in the EA 2010 lacks clarity and therefore contributes to a lack of confidence and use by employers. However, participants differed in their attitude towards the necessity of legislative change. Some participants felt that a commitment to progress and resolving under-representation and disadvantage requires the law to mandate rather than permit positive action. It was considered that there would have to be sufficient guidance, support and incentives in place to support and encourage employers to utilise a mandatory positive action tool. However, others considered that the law requires clarification but that it is not relevant or useful to mandate such action, particularly in light of existing confusion and inconsistency of use. Some considered that the law could provide more direction in providing for use of positive action while

not going so far as to mandate. However, most participants supported attempts to strengthen the link between the Public Sector Equality Duty (under section 149 of the EA 2010) and positive action. This was felt to be a means of ensuring the use of positive action via the procurement process (see below). However, it was recognised that a re-evaluation of the PSED is required to make the links more explicit.

## Promotion of positive action

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Participants considered that more effective and strategic promotion of positive action is necessary to ensure its use and consequent impact on under-representation in apprenticeships. In addition to the need to ensure more robust guidance on the use of positive action, it is necessary to consider under-representation in apprenticeships more holistically. It was felt that apprenticeships sit within a complex life cycle, and when seeking to provide clarity and guidance it is necessary to engage with a range of stakeholders, including: early years practitioners; schools; colleges; careers advisers; parents; employers; training providers; leaders; government; and sector bodies. In particular, it was considered vital to encourage and support the use of positive action measures in education to ensure a solid foundation from which to push representation through the entire life cycle. Equally, some participants felt that training providers should be viewed as the gateway to apprenticeships, and as such were a vital hub for supporting coaching, recruitment and advice. Consequently, focusing support and promotion of positive action measures at this gateway level is more likely to have a beneficial impact, thus encouraging wider use. Other participants considered that more partnership working between employers and training providers is necessary to develop collaborative positive action measures and ensure effective use.

Participants recognised that when engaging employers in the use of positive action, the crucial focus should be on SMEs. In particular, the exacting resource challenges that SMEs face in implementing positive action was emphasised. It was suggested that a system of collaborative cost sharing to introduce measures might assist some SMEs in particular sectors. Equally, larger employers may be able to assist SMEs in developing initiatives to reduce resource concerns. It was suggested that successful examples of positive action are often linked to the provision of particular funding. In this regard, it was considered that government or sector body grants or funding could be used to support honest, open and transparent employer (in particular SME) engagement in using positive action to address under-representation. It was also

proposed that easier access to data and training for SMEs should be facilitated to enable more effective implementation of positive action measures. This training should be free at the point of delivery to support use. There is also a need to provide more robust and accessible data on under-representation at a sectoral level in relation to apprenticeships to enable intersectional analysis and address all protected characteristics.

Participants felt that the apprenticeship levy could provide an opportunity for government-led promotion of the use of positive action. However, this would only be relevant to those who are able to make use of the levy. Many participants referred to the use of public sector procurement as a tool to advance the use of positive action. Participants considered that the PSED already requires public bodies to have 'due regard' to the use of positive action to redress under-representation. This then links to public sector procurement (see chapter 3). Although, the duty in relation to procurement is specific in Scotland, it was felt that the general duty is broad enough to provide for this. However, it was considered that existing lack of understanding of the link between procurement, the PSED and positive action in practice means that this is as yet largely unexplored in England and Wales. Similarly, participants expressed caution and the need for any guidance in this regard to consider different approaches to procurement across sectors and locations. Concern was also expressed that SMEs may argue that a requirement to engage in positive action via procurement obligations will effectively cut them out of public sector contracts due to the inevitable additional resource obligations. Therefore, it was felt that the resource burden on SMEs should be recognised and absorbed as far as possible via the procurement process.



## 6. Conclusions

Apprenticeships are an important route into work, offering paid employment, on-the-job training and a qualification. The UK, Scottish and Welsh governments have all set targets to increase the number of apprenticeships and, with the additional drive towards increasing diversity within apprenticeships, there is a need for employers, governments and policy makers to consider the tools that are available to address under-representation.

Positive action is just such a tool. It has a specific purpose of addressing disadvantage and under-representation, yet our research shows limited use. When it is used, it is the broader general positive action provisions that are used most, and then primarily to address the under-representation of women in certain sectors. Positive action steps to address the under-representation and disadvantage faced by disabled people and ethnic minorities in apprenticeships are far fewer, with no evidence of the formal use of the tie-break provision in relation to apprenticeships.

Employers' lack of awareness and/or confidence to implement effective positive action measures is identified in the research as one of the main obstacles to its use. A lack of understanding of the tie-break provision, and linking it to positive discrimination, also means that employers are reticent to use it for fear of legal liability.

This report concludes with recommendations calling for coordinated action to support and encourage greater use of positive action and to fully realise the potential of it as an effective tool. At the Equality and Human Rights Commission we will be looking at how existing information on positive action can best be supplemented to support employer knowledge and confidence in using it. In addition, to encourage greater use of positive action, we recommend that:

- Governments across Great Britain hold apprenticeship providers to account, including through funding mechanisms, by requiring them to set and meet targets for improved participation by under-represented groups, and to use positive action provisions to meet these targets. Managed well, targets are an effective means of ensuring leadership focus on under-representation data.

- Governments across Great Britain use public procurement to advance equality of opportunity and promote greater use of positive action. Procurement accounts for about a third of public spending in the UK. This purchasing power can be used as a way to advance equality and achieve wider social benefits, including the use of positive action.
- Employers monitor recruitment, retention and progression by ethnicity, disability and gender, and use positive action to address any disparities. Employers are often unaware of or lack understanding as to why positive action is necessary in the first place. Knowing more about their workforce will help employers understand where groups may be at a disadvantage or under-represented and establish a strong evidence base for taking action.
- Sector bodies, such as employer-led organisations and professional bodies, promote the use of positive action in apprenticeships, while the EHRC acts as an information and guidance provider on positive action.

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# Appendix A: Reading lists

## 1. Apprenticeships (general)

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