

The Equality and Human Rights Commission
and Ofcom

Thinking outside the box:
supporting the television
broadcasting industry to
increase diversity



Equality and
Human Rights
Commission



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About this publication

What is the aim of this publication?

This publication provides guidance for the television broadcasting sector on what action can lawfully be taken to increase diversity in the industry. It aims to tackle some of the misunderstandings about what equality law prohibits and permits.

Who is it for?

People working in the television broadcasting sector including commissioners, programme-makers, independent production companies, directors, recruiters and lawyers. This guidance relates to England, Wales and Scotland, reflecting the EHRC's geographic remit and the fact that this work was launched in response to a direct request concerning the television industry.

In this guide, we use 'employees' to include apprentices, interims, agency workers and contractors or anyone under a contract personally to do work. Editorial commissioning decisions about what is, or is not, broadcast and the contents of television broadcasting services are not regulated by the Equality Act 2010. This is intended to safeguard the editorial independence of broadcasters and protects freedom of expression.

Why have the EHRC and Ofcom produced it?

The EHRC's statutory role is to provide authoritative guidance on equality and human rights law and help organisations understand what lawful steps they can take to promote fairness and diversity.

Ofcom's statutory duties include the promotion of equality of opportunity. This extends to employment and the development of training opportunities to support people from ethnic minorities and women to work in the television and radio broadcasting industries. It also has a duty to promote equality of opportunity for disabled people. Ofcom's remit extends in addition to Northern Ireland and

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encompasses the radio industry as well as television broadcasting. Ofcom will continue to work with those communities to improve equality of opportunity throughout the broadcasting sector in the whole of the UK.

A full explanation of equality law in the workplace can be found in the EHRC's *Employment Statutory Code of Practice*.

To find out how to obtain an EHRC publication in an alternative format, please contact: correspondence@equalityhumanrights.com

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Foreword

The UK is a global leader in television production. It is important the most talented people should see a job in broadcasting as a rewarding career choice if our creative sector is to continue to be among the best in the world.

Everyone wanting to pursue a career in broadcasting should have a fair and equal opportunity to do so, whatever their background. Yet the figures show some groups may be experiencing barriers – both in entering the industry and allowing them to progress once they are in.

Women and ethnic minorities are significantly underrepresented in executive roles, and the number of disabled people working in the industry is extremely low compared with the proportion in the working age population.

On-screen, presenters are less likely to be women over 55, and the portrayal of some people from ethnic minorities, disabled people and lesbian, gay, bisexual and transgender people does not always reflect the reality of the population being represented.

The television industry has long been aware of the need to increase diversity, both on- and off-screen. Not only because there is a business case that attracting the best, most diverse range of talent can lead to more effective decision makers, better productivity and ultimately better content and higher ratings, but also because of the unique role television broadcasting has in shaping and reflecting our society's values.

Many within the sector – including broadcasters, production companies, industry bodies such as the Creative Diversity Network, PACT and the trade unions – have for some time been making significant efforts and developing great initiatives to drive forward this issue. But what has emerged from meetings with these and other groups in the industry is that a lack of clarity – particularly about what they are permitted to do to increase diversity without falling foul of the law – is holding them back.

During extensive consultation across the industry, key issues and worries came up time and again – from the use of databases, to positive action schemes and reasonable adjustments. These are the issues covered in this guide.

This guide has been drawn up in the knowledge that many aspects of the way the sector operates are unique and require solutions which will work in that context. It is aimed at decision makers within the industry: independent production companies in particular, as well as broadcasters, talent suppliers and others, from production managers to legal and business affairs executives, directors and commissioning editors.

All through this guide are images showcasing some of the diverse talent already on British television, proving that broadcasters and producers can deliver fantastic content made by people from many different backgrounds. It's now a question of stepping up our efforts.

We all want to find the best talent across all communities, bringing new skills and perspectives that will help unlock economic and creative potential and make our television industry more diverse and ultimately richer as a result.

We hope that by removing the barriers that many have perceived as holding them back, this guidance will help us achieve this aim.

Lord Chris Holmes

Disability Commissioner at the Equality and Human Rights Commission [at the time of first publication]

Sharon White

Chief Executive at Ofcom

Part 1. Some basic principles of equality law

The underlying principle of the Equality Act 2010 (the Act) is that everyone should be treated fairly and have equal opportunities to fulfil their potential. This means that selecting people for jobs and roles must be on merit, demonstrated through fair and transparent criteria and procedures. The Act prohibits discrimination based on nine 'protected characteristics': age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. People sharing particular protected characteristics, such as older people, women or disabled people, are referred to in this guide as 'protected groups'.

Direct discrimination means treating a person worse than another person because of a protected characteristic. For example, not appointing someone because they are Black or gay.

Indirect discrimination may occur where an organisation applies a practice or rule which on the face of it treats everyone the same but in fact puts people with a particular protected characteristic at a disadvantage compared with others. For example, having a 'hard hats only on set' policy which could indirectly discriminate against Sikh men wearing turbans, or disabled employees wearing a scarf or hat following chemotherapy. This rule would be unlawful unless it could be objectively justified, for example, because the need to protect health and safety makes this approach essential and there is no suitable alternative

The Act protects everyone from discrimination – for example, men as well as women and heterosexual people as well as lesbians, bisexual people and gay men. For this reason, recruiting somebody on the basis of a protected characteristic is also generally outlawed by the Act. However, there are exceptions – for example, where having a particular protected characteristic is a genuine requirement of the job (an occupational requirement) and is justified. This includes the need for authenticity or realism in acting roles.

In addition, certain positive action measures are allowed. Positive action can be used to encourage and develop people in underrepresented or disadvantaged groups to come forward or to help them gain skills which will enable them to compete on merit on a level footing with others, with a view to widening the pool of applications so that the best talent can be engaged. There is also a specific form of positive action for use when making recruitment decisions – where candidates are of equal merit, it is possible in some circumstances to select a candidate from an underrepresented or disadvantaged protected group.

The exceptions relating to occupational requirements and the use of positive action are illustrated in the scenarios in Part 3 of this guide.

Increasing opportunities for disabled people

The Act treats disabled people differently from those with other protected characteristics. It is not unlawful to treat a disabled person more favourably than a non-disabled person because of their disability.

For example, it is lawful to treat disabled people more favourably in a recruitment process by operating a guaranteed interview scheme for those who identify themselves as disabled and meet the minimum criteria for the post.

Example:

A director notes that there are very few disabled actors on-screen (except when disability is integral to the part). She believes this means that the television programmes produced do not accurately present disabled people and may fail to attract them as viewers, and that talented disabled actors are being lost to the profession. She therefore decides to cast a certain proportion of disabled actors for each programme that she directs and guarantees an audition to any qualified disabled person applying for a part. This action is lawful.

Making reasonable adjustments

Employers have a legal duty to take reasonable steps to remove barriers that put disabled workers at a disadvantage compared with those who are not disabled, so they can do their work and apply for jobs in the same way as non-disabled people. This is the duty to make reasonable adjustments. Reasonable adjustments may involve amending practices or rules, changing physical features such as steps or

chairs, or providing additional aids such as an adapted keyboard or text to speech software.

Many effective and practicable adjustments for disabled people often involve little or no cost or disruption and it will often be reasonable to make them. Some factors to take into account when deciding what might be regarded as a reasonable step are:

- whether the step would be effective in preventing the disadvantage
- how practical is it and how much disruption it might cause
- the financial or other costs of making the adjustment, given the financial or other resources available
- whether financial assistance is available to make the adjustment, for example through the Government's Access to Work scheme

Example:

A presenter employed by an independent production company has a disability which requires her to take rest breaks every couple of hours. If she does not, she will be more likely to suffer a debilitating flare-up of her condition. The producer is concerned about the shooting schedule and decides that it would be fair for everyone to have a rule that there should be no rest breaks for any member of the team.

This may well be a failure to make reasonable adjustments for the presenter as it puts her at a substantial disadvantage (risk of exacerbation of her treatment and debilitation) compared to others who do not share her disability. However, if providing rest breaks would make the production unviable, this is likely to mean that this adjustment would not be reasonable so would not be legally required.

Using disability and health questions

You can only ask questions about disability and health during recruitment in specific circumstances. Such questions should be framed positively to establish whether reasonable adjustments are required during the recruitment process, to lessen or eliminate any barriers that an individual may experience, or to find out whether the job applicant will be able to carry out an intrinsic part of the job (once any reasonable adjustments have been made).

If having a particular impairment is an occupational requirement of the job, it is permissible to establish if the candidate has that impairment - for example, if a blind presenter is needed for a programme targeted at blind viewers. If this is the case,

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you may need to have an 'appropriate policy document' in place in line with data protection legislation.

Part 2. Overcoming the barriers to diversity

The industry itself has identified certain barriers to increasing diversity within the sector. Issues raised include a lack of adequate staff development and training; a lack of diversity monitoring at the programme and company level; and stereotyping or tokenism with some groups still being stereotyped into certain types of roles, programming and genres.

One of the key issues which came out during the development of this guide was the particular way the sector operates, with content often commissioned at short notice and the need to put together a team of production staff very quickly.

This has caused frustration at the lack of ability to recruit from outside a group of people already known to the producer, as it often means heads of production or other recruiters relying on tried and tested informal and word-of-mouth recruitment practices and a less diverse talent pool.

Avoid drawing solely on personal contacts and networks

Reliance on informal networks should generally be avoided or limited to occasions where it is strictly necessary. If you usually find a team by ringing round people you know or have used before and feel you can trust to deliver, and these people are predominantly White, or in a certain age group, or one gender, this practice may not only perpetuate a lack of diversity but might also amount to indirect discrimination against people with different protected characteristics, unless it can be justified.

For occasions when you have to recruit at speed, think about ways of broadening the pool of people you can draw from. Make new connections with a wider range of talented people, perhaps by tapping into other networks or inviting interest from new groups.

Reduce the use of unpaid internships

Another common barrier is the lack of proper apprenticeship schemes and instead, a reliance on low-pay or no-pay internships. While internships can provide valuable industry experience to those at the start of their career, the use of unpaid internships - widely regarded as bad practice - disadvantages those who do not have independent financial resources or support. Given the established links between socio-economic disadvantage and some ethnic minority groups and disabled people, this may rule out a higher proportion of potential interns from these groups and could amount to indirect discrimination. In addition, unpaid interns who are disabled cannot benefit from the Government's Access to Work scheme.

If having had an unpaid internship is treated as a plus point when reviewing CVs, this may in turn disproportionately disadvantage some protected groups.

Part 3 – Scenarios

The use of positive action

“I’d like to take positive action to promote diversity in my company or to make sure I meet the targets set by my commissioning broadcaster, but I’m not sure about the law and worried anything I do might be unlawful discrimination.”

It is not unlawful to take steps aimed at addressing disadvantage or underrepresentation experienced by people sharing particular protected characteristics.

Two forms of positive action are permitted under the Act: general positive action to increase the talent pool, and specific measures such as a tie-breaker provision at the final stage of recruitment.

Both are voluntary, not mandatory. Both are permitted where a company reasonably thinks that a protected group is underrepresented or faces disadvantage.

Some information or evidence will be required to show the existence of disadvantage or disproportionately low involvement– but not necessarily sophisticated statistical data or research. It may simply involve looking at the profiles of your contractors or making enquiries of others in the sector.

Positive action for encouragement and development

Positive action can be used to encourage applicants and develop the talent pool, provided it does not step over the boundary of treating a person more favourably during the process of recruiting or promoting staff because they have a protected characteristic. It can include, for example, reserving places for a protected group on training courses, targeting them for networking opportunities or providing mentoring and sponsor programmes aimed at increasing representation at a particular level or in a type of role.

There is no limit on the sort of action that can be taken, so long as it is outside the recruitment or promotion process, and provided it is reasonable to think that the

protected group is underrepresented or disadvantaged and the action is proportionate.

'Proportionate', in this context, in practice, means that the need for the action must be balanced against its impact on other protected groups, taking into account factors like:

- how long the underrepresentation has persisted
- the type of barriers experienced by the underrepresented group
- the success or failure of other remedial measures
- whether there are any alternative ways to address the underrepresentation which are less likely to disadvantage other protected groups

It is advisable to monitor and review the measures that are adopted to ensure they are effective in achieving their aim and that they remain proportionate.

Examples:

A casting agency has data showing that older women artists on its books receive fewer bookings than younger women and similarly aged men. The agency decides to increase the visibility of older female artists by displaying a higher proportion of their profiles in its marketing literature and on the homepage of its website.

An agency which provides sound and lighting engineers posts all of its work opportunities on a web-based bulletin board. The agency discovers that some of its female contractors with young children find it difficult to be posted on multi-day shoots far from home so it decides to also send an email detailing work within a particular geographical radius to its female contractors who have recently returned from having a baby.

A production company has employed very few people from ethnic minorities in the past decade. It establishes a paid internship scheme to provide experience and training for ethnic minority applicants aspiring to work in certain roles, so that they are able to compete on merit when roles become available.

Positive action in recruitment and promotion – the ‘tie-break provision’

“I understand that you can use a tie-break situation under positive action laws but not sure how that works in practice and how it could be applied practically in this sector. In reality, the way in which decisions are made is that this just wouldn’t work.”

In general, the Act does not allow an employer to treat a person more favourably during the recruitment or promotion process because they have a protected characteristic, unless that person is disabled (as outlined earlier in this guide).

The ‘tie-break provision’ is the only exception to this. Where there are two or more candidates who are as qualified as each other to be recruited or promoted, you can select a person because they are from a protected group which you reasonably think is underrepresented or disadvantaged.

When deciding whether candidates are as qualified as each other to be recruited or promoted, you should take into account their overall ability, competence and professional experience together with any relevant formal or academic qualifications, as well as any other qualities required to carry out the particular job. Where candidates have different but comparable skills, the focus should be on the specific requirements of the role.

Before considering whether to use the tiebreak provision, you will need up-to-date information which indicates the scale of underrepresentation, what other action has been taken to address it and any progress made.

You can avoid risk of challenge by unselected candidates by using and applying objective and clear recruitment criteria - for example, a competency-based process. Keep a record of how you assessed candidates and how you reached your decision.

At what stage can the tie-break provision be used?

The tie-break can be used at any stage of the recruitment or promotion process. This means that it can be used both at shortlist and selection stage. However, if used at the earlier recruitment stages, care should be taken that sufficient information is known about the candidates’ ability, competence, professional experience and formal qualifications to assess whether they are of equal merit. You will want to be clear whether and, if so, by what criteria an authentic determination of equal merit can be made from the information supplied by candidates. It is not lawful to adopt artificially low thresholds to allow more candidates into a tie-break position.

Example:

A production company producing a new current affairs programme advertises for a composer. The selection process includes a timed test (candidates are shown a 1 minute sequence from the documentary and given 20 minutes in which to compose, notate and record a short soundtrack to go under the sequence). The composition test is judged by two employees separately on the notation and recordings alone, without any other information about the candidate. When the marks are aggregated, two candidates, a man and a woman, score identically on this test. All the composers used by the company are currently female, so the company takes the lawful decision to select the male candidate.

Databases

“Databases with details of an individual’s personal characteristics, such as race or gender, would be really useful in helping us promote diversity but I’ve been told that holding and sharing this information would breach data protection legislation.”

It is lawful to hold a list or database which records individuals’ personal characteristics, from which you draw employees, freelancers or on-screen talent, as long as you have the individuals’ consent to be on the list or database.

The storage or processing of any data that enables a living person to be identified (‘personal data’) must be in line with data protection legislation and is regulated by the Information Commissioner’s Office (ICO). The [ICO has guidance on data protection](#).

‘Special category data’, which includes the protected characteristics under the Equality Act 2010 (apart from gender and age), has greater protections under data protection legislation and requires further safeguards when processing it.

You should notify individuals that a database is being compiled and explain the purposes for which it is to be used. If they consent to being part of the database it is best to invite them to provide equality information themselves by completing a monitoring form. You should obtain their explicit signed consent to their special category data being used. You should not use the data for other purposes and ensure you keep it up to date.

Great care must be taken with data relating to gender reassignment as it is a criminal offence to disclose data - even between individuals in the same organisation – that would identify an individual as holding or applying for a full or interim Gender

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Recognition Certificate, or would identify their prior gender, without their express consent.

Data protection also has to be considered when collecting data that will be used for positive action and diversity monitoring (see below). The [ICO has guidance on data protection](#).

Diversity monitoring

The purpose of collecting diversity information is to look for differences between groups, identify trends over periods of time, to investigate the reasons for these differences and to put suitable actions in place. Having diversity data can help you reach a decision on whether you take lawful positive action by showing whether there is underrepresentation or disadvantage. The data gathered to establish underrepresentation cannot be used for other purposes.

Project Diamond, run by CDN, is a cross-industry approach to monitoring on- and off-screen diversity. Alongside this initiative, individual organisations should continue to carry out monitoring throughout the employment cycle – from joining to leaving – for the reasons set out below.

Equality and diversity monitoring can help to:

- **build reputation** –the best performing organisations are those that invest most on promoting equality and diversity in their workforce
- **improve productivity** –valuing and supporting the diversity of people’s backgrounds and lifestyles is important in making the most of the contribution that they can bring to an organisation’s performance
- **recruit and retain the best** from the widest talent pool
- **signal the organisation’s understanding of and commitment to** creating a more inclusive work environment
- **identify and provide specific adjustments, training or interventions** to remove barriers faced by disabled people
- **identify and address any inequalities** in employment policies and practices, and
- **avoid risk** –compliance with the Equality Act 2010 avoids damaging and costly employment tribunals or negative publicity.

Occupational requirements

“I’m making a programme for a specific audience. Am I allowed to only target people from a particular background to fill that role or would I be unlawfully discriminating against people from other backgrounds?”

You can recruit a person with a particular protected characteristic where it is a genuine requirement of the job (an occupational requirement) and is justified. This includes the need for authenticity or realism in acting roles. It may also be relevant to other roles, though not usually to the casting of extras or minor roles on-screen.

Example:

A broadcasting company decides to commission a weekly programme targeted at people between the ages of 18 and 25. The commissioners want the presenters to be in or close to the same age group so that the target audience relate to them more easily. This requirement can probably be justified on the basis that it is a proportionate means of meeting the aim. So it would be lawful to select presenters around this age group.

The Rooney Rule

“I understand that in the US the Rooney Rule means you are allowed to guarantee places on a shortlist for ethnic minority candidates to help increase diversity. Does that apply in the UK as well?”

Under British law, places cannot be reserved on shortlists or guaranteed interviews offered to some people from certain protected groups (sometimes called the ‘Rooney Rule’ after the scheme running in the US), as this would unlawfully discriminate against others (unless the recruitment relates to a disabled person).

However, as explained earlier in this guide, you are able to take a wide range of positive action steps to encourage and develop people from protected groups to help them apply for roles on merit on a level footing, and you may be able to use the tie-break provision in recruitment and promotion.

Targets and quotas

“I’ve been set a contractual target of 20% ethnic minority production staff by my commissioning broadcaster. Is this lawful and how do I achieve it?”

The terms 'targets' and 'quotas' are sometimes used interchangeably. This guide views targets as a voluntary and positive commitment (which may be made publicly) to strive towards greater diversity and genuine inclusion. It is permissible to have targets for protected groups, backed by an open and fair recruitment process.

Quotas are generally legally-binding commitments to achieve set levels of participation by particular protected groups (for example, women, people from ethnic minorities) in the workplace, at board level or in public appointments.

Any steps taken in recruitment or promotion in order to fulfil a quota would run the risk of being unlawful if they went beyond the positive action permitted by the Act. Imposing a quota also risks having the direct or indirect effect of exerting pressure to take unlawful shortcuts to meet the quota. Running a competency-based recruitment process and keeping clear records would help demonstrate the actions that you have taken to ensure fairness to applicants and remain within the law.

You can impose a quota with sanctions if you wish to, as long as you make it clear that the company cannot act unlawfully to achieve the quota. This is because it is unlawful to instruct or induce another to discriminate. It is worth checking that your sanctions or penalties are not so punitive that they might force or induce companies to take unlawful shortcuts rather than using the lawful positive action outlined in this guide.

Procuring from diverse suppliers

"I'd like to increase the diversity of our suppliers. Can I limit my procurement of producers or other suppliers to those who meet particular diversity targets in their workforce and management/ownership?"

Equality and diversity can be encouraged through the procurement of services and commissioning by public and private companies. However, procurement law is a complex area requiring specialist advice.

There is potentially wide scope to include equality considerations in drafting the specifications for any contract, providing they are legal, non-discriminatory and underpinned by the business case and that they are capable of being verified, monitored, and evaluated. Properly done, this should help buy better outcomes and therefore achieve value for money, while helping to meet diversity objectives.

Examples:

A broadcaster is to commission a drama series. The broadcaster is concerned about the lack of diversity in programme making and in content and so the specification invites tenderers to demonstrate how they will increase the representation of underrepresented protected groups both in programme making and among on screen talent.

The broadcaster is able to require all tenderers for contracts to comply with the Equality Act as a contract condition (breach of which would lead to potential activation of early termination provisions and financial penalties), and monitor and report annually on their diversity statistics.

A broadcaster is concerned about the underrepresentation of on-screen and off-screen talent from certain ethnic minorities in many of its flagship programmes. It starts a commissioning process for a new current affairs programme and decides it will use the commissioning process to increase the levels of representation from ethnic minority groups.

It does this by including in the contract specification a requirement that the successful tenderer must aim for at least 15% of its off-screen and on-screen talent to be from ethnic minorities and that they comply with the Act in the performance of the contract. This is lawful as long as it does not lead to undue pressure on the producer to take unlawful steps, such as positive discrimination, to meet the criteria.

Ring-fenced or reserved funds

Commissioners may also ring-fence funds for production companies that are controlled by protected groups currently underrepresented in the industry, or that will guarantee that a proportion of its on-screen and off-screen talent will be from underrepresented groups. This is likely to encourage greater diversity in programme content as well as among workers and industry leaders.

Example:

A commercial broadcaster regularly commissions independent production companies to make factual programmes. A review of its commissioning practice over the previous five years reveals that there is little ethnic diversity in ownership, operation and staffing within the production companies with whom it mainly does business. It is concerned about this and considers that greater diversity could improve and innovate the content of its programmes and introduce greater on-screen diversity.

It therefore decides to ring-fence a proportion of the commissioning budget so that a certain annual spend will be allocated to production companies that meet certain diversity targets. These are that: (a) a specified proportion of the production company's senior staff should be from underrepresented ethnic minority groups, (b) a specified proportion of the on- and off-screen talent used on production of a commissioned programme should be from underrepresented ethnic minority groups. This is lawful as long as it does not lead to undue pressure on the producer to take unlawful steps, such as positive discrimination, to meet the criteria.

Contacts

This publication and related equality and human rights resources are available from the Commission's [website](#).

For advice, information or guidance on equality, discrimination or human rights issues, please contact the [Equality Advisory and Support Service](#), a free and independent service.

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Questions and comments regarding this publication may be addressed to: correspondence@equalityhumanrights.com. The Commission welcomes your feedback.

Alternative formats

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