THE RACE FOR EQUALITY, BUT HOW DO WE REMOVE THE HURDLES?

Affirmative Action Lessons for the UK from Canada

by

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ABSTRACT

The new Equality Bill in the UK attempts to bring domestic law regarding positive action into line with EU norms. The author addresses two key criticisms of the provisions, namely: a) that they allow positive discrimination; and b) that they will be ineffective in practice. It is argued that the first criticism is misconceived; preference of a minority candidate where they are equally as qualified as a male candidate simply recognises that equality is not about treating everybody the same, but having a relevant reason for treating them differently. The second criticism is more compelling. The author recommends that the UK make the transition to a systemic model and impose positive duties on employers in a similar vein to that which has developed in Canada. However, a delicate equilibrium must be achieved; special treatment of women and minorities regardless of merit is not conducive to a society that values diversity.
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“There is in this area the opportunity to do much good, but also the risk of doing much harm.” ¹

Introduction

In her address to the House of Commons, Harriet Harman, the UK Minister for Women and Equality, announced that “The [Equality] Bill and package of measures...represent a radical shift in our approach to fighting unfairness and breathes fresh life into our equality agenda.”² The age-old question is: how do we eliminate discrimination in an attempt to achieve “equality”? The individual-complaints model, which requires victims of discrimination to bring legal proceedings, allowing only for a case by case remedy, is particularly limited and inadequate for tackling discrimination at the macro level. Therefore, a more pro-active approach is often favoured. The Equality Bill not only brings together existing anti-discrimination legislation in the UK into a single Act, but it also introduces greater scope for employers to take positive action at the recruitment stage, if they so wish.

Harriet Harman’s positive action proposal - very limited in its extent - allows an employer to prefer an equally qualified female or racialised candidate over a male candidate at the recruitment or promotion stage without being at risk of a discrimination suit. She emphasised that “If you have got two equally qualified candidates, you might actually want to have the woman because she is a woman. Now at the moment, if you choose her because she is a woman, you could face a sex discrimination case. So this says to employers, if you want to...diversify your workforce...if you have got equally-qualified

candidates, you can choose the one from the group that is under-represented.” In other words, Harriet Harman is endorsing a specific type of affirmative action measure.

The problems that developed in America as a result of slavery triggered the civil rights revolution of the 1960s and gave birth to the idea of ‘affirmative action’. With regards to employment, the term refers to pro-active policies designed to eliminate discriminatory employment barriers and increase the participation rates of women and minorities in the workforce. However, the US slip into what Glazer calls “hard affirmative action” has led to an international misconception of affirmative action as largely related to rigid quotas that allow for preferential treatment regardless of merit. Therefore, ‘affirmative action’ has unfortunately become an all-embracing label encapsulating both good and bad policy initiatives.

Harriet Harman’s proposals were met with vociferous criticism by those who considered the proposals to be a commendation of ‘positive discrimination’. However, it seems that they have been largely misunderstood; preferential treatment regardless of merit is not the objective of the positive action measures in the Equality Bill. Rather, the initiative was simply intended to clarify UK law and bring it into line with the EU approach to this subject. The preference of an equally qualified female, for example, is not unlawful discrimination, but rather differential treatment based upon a relevant reason.

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5 Nathan Glazer, “Affirmative Action and ‘Race’ Relations: ‘Affirmative Action’ as a Model for Europe”, in Erna Appelt & Monika Jarosch (eds.), Combating Racial Discrimination: Affirmative Action as a Model for Europe (Oxford: Berg, 2000) 137, at 141. He explains that, in the 1960s, government enforcement agencies realised the problem of underrepresentation in the absence of evidence of direct discrimination. In order to increase numbers the federal government began to require employers to set goals or targets using ‘soft affirmative action’ policies. He states: “once one sets a target, a goal, a number so and so many...by such and such date one has what we might call ‘hard’ affirmative action...hard goals were added on to the soft policies...”. This is what made affirmative action in the US so controversial. In my view, this slip to ‘hard affirmative action’ is what Judge Rosalie Abella sought to avoid by coining the term ‘employment equity’. She states that: “Ultimately, it matters little whether in Canada we call this process employment equity or affirmative action, so long as we understand that what we mean by both terms are employment practices designed to eliminate discriminatory barriers and to provide in a meaningful way equitable opportunities in employment.” See Canada Royal Commission On Equality in Employment, Rosalie Silberman Abella (Commissioner), Report of the Commission on Equality in Employment, (Ottawa: Supply and Services Canada 1984-85.) [‘the Abella Report’], 7.
In fact, it is contended that the Equality Bill needs to go further still if it wants to produce real results in its attempt to eliminate discrimination.\(^6\) In this respect the UK can learn from the imposition of positive duties on employers under the Employment Equity Act in Canada. However, given the real risks of further institutionalising race or gender differences, any legislation on this issue must achieve a delicate equilibrium.

This paper will focus upon race and gender discrimination. Whilst other characteristics, such as disability, sexual orientation and age, are also in need of attention, they carry their own separate, distinct and complex problems which are beyond the scope of this paper. Furthermore, the longevity of race and gender discrimination indicates that greater efforts still need to be made in these areas. Therefore, race and gender seem to be an appropriate entry point into this issue.

I will begin by contextualising Harriet Harman’s proposals for the Equality Bill in order to identify the problem and the surrounding issues. There are two main criticisms, one theoretical and one practical. In the second chapter I will set out the UK backdrop and the current standpoint of the European Court of Justice (‘ECJ’). The UK currently endorses so-called ‘positive action’ measures, which target the pre-selection stage of employment and in-house training. The ECJ, however, allows for the hiring of a woman over a man so long as it is not automatic and unconditional, and everything else is equal. Harriet Harman’s proposals, embodied in the Equality Bill, essentially bring UK law in line with the approach of the ECJ.

The third chapter will then attempt to address the theoretical objection to the positive action provisions of the Equality Bill by clarifying the theoretical confusion in this area. It is important to recognise and untangle the different conceptual issues at stake in making affirmative action decisions. In particular the varying notions of ‘equality’ will be discussed, the definition of discrimination will

\(^6\) See c.2 and the conclusion, below.
be set out, and the distinction between an individual complaints model (focusing on anti-discrimination) and a systemic model (that promotes affirmative action measures) will be addressed. It will be seen that the Equality Bill offers a step in the right direction but it fails to provide a systemic attack on discrimination.

In the fourth chapter I will move on to discuss how anti-discrimination law has developed in Canada, from a reactive individualistic approach to a pro-active systemic approach. This is exemplified by the federal Employment Equity Act (‘EEA’). The fifth chapter will address what I perceive to be the problems with the EEA, namely its reliance on numerical goals, as opposed to using numbers simply as indicators. In theory, the Employment Equity Act offers the right tools for redressing underrepresentation in the workplace. However, I argue that underrepresentation, in becoming the key theme of the legislation, is taken too far and risks sacrificing merit in an effort to reach targets/goals/quotas, however one wishes to call it.

The positive action provisions of the Equality Bill should be commended. Furthermore, the Bill would benefit from some inclusion of employment equity principles in order to clarify, refine and supplement non-discrimination policy. Greater encouragement of ‘positive action’, in terms of requiring employers to review and monitor their workforce and implement and carry out innovative plans to widen the candidate pool (as opposed to simply suggesting this as a worthwhile initiative) would also be welcomed. However, any form of ‘reverse/positive discrimination’, on the basis of irrelevant reasons, during selection or promotion, should be avoided.

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7 Employment Equity Act 1995 (R.S.C. 1995, c.44) [EEA]
Chapter 1: The Equality Bill

‘Framework for a Fairer Future’ – Impetus for Change

A single framework for discrimination law in the UK has been a long time coming. At present there are “nine major pieces of discrimination legislation, around 100 statutory instruments setting out connected rules and regulations and more than 2,500 pages of guidance and statutory codes of practice.”

In the White Paper, “Framework for a Fairer Future – The Equality Bill”, the purpose of the Equality Bill was stated to be “to strengthen protection, advance equality and declutter the law.”

Harriet Harman’s Aim

Equality of opportunities lies at the foundation of the Equality Bill “to ensure everyone has a fair chance in life.” Harriet Harman states: “The Bill will promote fairness and equality of opportunity; tackle disadvantage and discrimination; and modernise and strengthen our law to make it fit for the challenges that our society faces today and in the future.”

With regards to the positive action measures the key concern is with opening up the possibility for employers to make their organisations more representative of society, if they so wish. Harriet Harman argued that “we need to make further progress on fairness and that’s why we will legislate to give more scope for employers, if they want to increase the number of women or black or Asian employees, to take positive action.”

In order to achieve these aims an extension of the scope of “positive action” was proposed so that “all other things being equal, employers can take steps to recruit under-represented groups to [their]
organisations or develop talent within under-represented groups in [their] workforce.”

The crux of the proposal is clearly stated: “The Bill will extend positive action so that employers can take underrepresentation into account when selecting between two equally qualified candidates.”

Provisions for voluntarily fast-tracking and selecting recruits from disadvantaged groups are contained in the Bill in the hope that workforce diversity will be improved and the community will be better reflected.

The government response to the consultation paper endorses the decision “to broaden the range of voluntary positive action measures which can be taken by employers or service providers to the full extent allowed by European law.” It states that: “employers, where they feel it is appropriate, will be able to take underrepresentation into account when selecting for appointment or promotion between two equally qualified candidates. However, making decisions irrespective of merit (i.e. quotas) or having an automatic policy of favouring those from underrepresented groups will remain unlawful.”

Further, it considers positive action to be a “balancing measure”; it “does not permit under-represented groups to be given favourable treatment regardless of merit. What it does is to allow targeted measures to prevent or compensate for disadvantage or to meet special needs, so that people from disadvantaged groups can compete on equal terms. This is distinct from “positive discrimination”, which disregards merit and is generally unlawful.”

The UK is thus attempting to make a similar transition to a systemic approach to discrimination as Canada has done, in order to rectify already-existing inequalities at the macro level. Under the Equality Bill employers will have greater scope to voluntarily promote equality in the workplace.

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14 Ibid. at 27.
16 Ibid.
17 Ibid. at 61.
18 See c.4, below.
Positive Action Provisions under the Equality Bill

Part 11 of the proposed Equality Bill is entitled “Advancement of Equality”. It sets out the forms of positive action that are regarded as legitimate. Section 152 reflects the current law in that it permits the use of proportionate positive action measures, such as encouragement and training, which are targeted at members of particular groups where they suffer a disadvantage connected to a protected characteristic, have different needs to those that do not have that characteristic, or are under-represented in a particular activity. However, it is broader than the current law in that it applies in relation to all protected characteristics.

Section 153 on the other hand is a much bolder move. It authorises an employer to take a protected characteristic into account at the selection/promotion stage when people bearing that characteristic are at a disadvantage or under-represented in the workforce, but only where the candidates are equally qualified. In taking the characteristic into account the employer is able to favour the member of a disadvantaged group. However, in line with the ECJ’s rulings, the employer is prohibited from having a policy of automatic preference in those circumstances.

On their face, these provisions are merely permissive and do not impose any positive duties on employers. Under s.153, for example, where two candidates are equally qualified the employer is not required to give the position to the less privileged member. The law simply stipulates that taking the protected characteristic and/or underrepresentation into account, in order to tilt the balance in favour of one candidate over the other, will not constitute discrimination, thus is not prohibited by the Act. In fact, this allowance will also apply to historically advantaged groups where their representation in certain positions is low.

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19 See c.2, below.
The Debate: Affirmative Action vs. Reverse Discrimination

The Confederation of British Industry (‘CBI’), the Trades Union Congress (‘TUC’) and the Equality and Human Rights Commission (‘EHRC’) are amongst those who back the positive action proposals, recognising the value of diversity in the workforce.\(^{21}\) Supporters of the proposals acknowledge that even if members from disadvantaged groups make it to the interview stage, unintentional institutionalised discrimination may exist, which prevents them from getting the job. Covert discriminatory practices exist which prevent minority group members from achieving real equality with white men. Furthermore, Harriet Harman emphasised that the provisions would, for example, help the police who can be more effective if they reflect the composition of the communities they serve.

Critics of the positive action proposals argue that they endorse ‘positive discrimination’; in other words preferential treatment that disregards merit.\(^{22}\) The argument runs: preferring women over men constitutes discrimination against men, and all forms of discrimination should be prohibited. Shadow Minister for Women, Theresa May, has said that the proposal “confuses government’s message” by allowing discrimination in certain circumstances.\(^{23}\) However, it is contended that this criticism is misconceived.\(^{24}\)

A somewhat different criticism, voiced by David Frost, director general of the British Chambers of Commerce is that businesses will not make use of the positive action provisions.\(^{25}\) This is a much more convincing criticism given the voluntary nature of the provisions. If the business is inclined to choose the man over the woman they will continue to do so despite the positive action provisions in

\(^{21}\) See Framework for a Fairer Future, supra note 8, at 27.

\(^{22}\) See Government Response, supra note 15, at 61.

\(^{23}\) BBC News, supra note 2, article.

\(^{24}\) See c.3, below.

\(^{25}\) Drury, supra note 3.
the Equality Bill. This paper will address each of these criticisms in turn, but first the current position in the UK and EU needs to be set out.

Chapter 2: ‘Positive Action’ in Europe

Terminology

Positive action is often used interchangeably with affirmative action in North America, but it has a very different meaning in the UK; it is essentially a subset of affirmative action, i.e. it is limited in its extent. The UK Home Office introduced the term in its guide to the Race Relations Act 1976 but withheld a definition. Taylor defines ‘positive action’ as “a range of measures which employers can lawfully take to encourage and train people from underrepresented [groups] in order to help them overcome disadvantages in competing with other applicants. However, selection for interviews and jobs must be based on judgements of individuals’ ability to carry out the work required.” Positive action can be used at both the entry level and in relation to internal promotion procedures as long as selection is purely merit based. This is essentially what McCrudden terms ‘outreach programmes’ and Glazer calls ‘soft affirmative action’.

26 It is worth noting that the difficulties in deciding when two candidates are “equally qualified” may discourage employers from utilising the provisions because of the risks involved in making the wrong determination. It is unclear what “taking underrepresentation into account” actually means. Does it mean that underrepresentation can be one of the factors thrown into the mix when assessing the ‘qualifications’ of the candidates? Or, does it mean that candidates are first considered on individual merit, and then other factors, including underrepresentation, are to be considered? Or does it mean that all else being equal – qualifications, individual merit and all other factors – underrepresentation can be used to tilt the balance in favour of the woman? The extent of this progress rests upon the variation in play. The latter, for example, may make the provisions largely redundant since all other things are rarely ever equal. This is largely beyond the scope of this paper. However, it is important to recognise that employers need to be given clear and unambiguous guidance on the weight to be given to underrepresentation and past disadvantage in these circumstances in order for the provisions to be effective.


29 See infra notes 83 and 84.
Current UK Legislation and Codes of Practice

Anti-discrimination law in the UK has traditionally been symmetrical – it applies to men just as much as it applies to women, for example.  

However, elements of positive action are evident in both the Sex Discrimination Act 1975 (‗SDA‘) and the Race Relations Act 1976 (‗RRA‘). Section 48 of the SDA and s.38 of the RRA are in similar terms. Both Acts allow employers to afford access to training facilities to women and persons of a particular race, as well as to encourage these groups to take advantage of opportunities for doing particular work where such people are under-represented in the workforce. Welsh et al. identify three types of lawful positive action measures: a) encouragement measures; b) pre-entry training; and c) in-service training. The rationale underlying these provisions is recognition of the need to level the playing field so that all candidates can compete on equal terms.

In addition to the statutory provisions, the Commission for Racial Equality (‘CRE’) and the Equal Opportunities Commission (‘EOC’) issue Codes of Practice (‘the Codes’). The Codes set out in-depth guidelines on equality of opportunity and good employment practices. The Codes encourage employers to: draw up an equal opportunities policy and put it into practice; train workers on the equal opportunities policy; monitor workers and applicants to determine the composition of the workforce and measure performance, progress or change; review work practices, including job specifications, selection criteria and processes, application forms and methods of job advertisement. However, the Codes by themselves do not impose any legal obligations. Failure to comply does not open an employer up to legal proceedings; it can only be used as admissible evidence through which an adverse inference may be drawn. Therefore, anti-discrimination law in the UK still relies on a

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32 Note that these bodies have now been merged into a single Equality and Human Rights Commission by virtue of the Equality Act 2006.
complaint-based mechanism, rather than attempting a systemic approach. The problem with this type of model in Britain is illustrated by the comments on countries in the 2008 OECD Employment Outlook where it states that:

...only 45% of British citizens claim to know their rights, should they be a victim of discrimination. This lack of public awareness constitutes a strong barrier to the effective enforcement of legal rules, since discrimination can be investigated, proved and sanctioned, only if individuals deprived of their rights are willing to take legal actions.\textsuperscript{34}

Positive action in the UK is clearly limited to recruitment and training and prohibits any form of preferential treatment. However, as Taylor acknowledges: “Positive action only offers one alternative route to compensate for previous discrimination: it provides a way of dealing with the consequences of discrimination rather than dealing with the causes.”\textsuperscript{35} Some would argue that there is a link between the consequences of discrimination and the causes; by tackling the consequences in an abrasive way you inevitably attack the causes.\textsuperscript{36} However, positive action as we know it in the UK is not capable of eliminating the causes of discrimination. Therefore, the question this paper addresses is whether the UK should indeed be drawing a line at all, and, if so, where the line should be drawn.

\subsection*{EU Directives}

In Europe there is a hierarchy of Directives\textsuperscript{37} addressing the different protected groups.\textsuperscript{38} Directive 2006/54/EC recently unified all former measures aimed at gender equality.\textsuperscript{39} It endorses mechanisms

\textsuperscript{34} Organisation for Economic Co-operation and Development (OECD), 2008 Employment Outlook, Notes on Countries, online: Organisation for Economic Co-operation and Development <http://www.oecd.org/dataoecd/33/55/40912642.pdf>
\textsuperscript{35} Taylor, supra note 28, at 171.
\textsuperscript{36} See the discussion of the logic behind the \textit{Action Travail} case at 37, below.
put in place to promote equal opportunity for men and women and in particular those that remove existing inequalities which affect women’s opportunities. Art.3 of Directive 2006/54/EC, specifically referring to positive action, states that “Member States may maintain or adopt measures within the meaning of Article 141(4) of the [EC] Treaty with a view to ensuring full equality in practice between men and women in working life.” [Emphasis added.] Measures within art.141(4) of the EC Treaty are those providing for “specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”

The most prominent of the former measures on the equal treatment of men and women was art.2(4) of Directive 76/207; the only provision in relation to positive action for almost two decades. It provided that the principle of non-discrimination was “without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities...”. This was supplemented by non-binding ‘soft law’, Council Recommendation (EEC) 84/635 on the promotion of positive action for women, whereby Member States were encouraged to adopt a parallel positive action policy designed to eliminate existing inequalities, which arise from “social attitudes, behaviour and structures”, affecting women in working life. Unsurprisingly this gave rise to questions concerning the ambit of these provisions.

More recently, Directive 2000/43/EC was established implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘the Race Directive’). Art.5 addresses positive action. It states that: “with a view to ensuring full equality in practice, the principle of equal

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treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.” [Emphasis added.] All of these measures, it will be noted, do not impose positive duties or require the implementation of positive action measures; rather they permit such measures as exceptions to the non-discrimination principle without defining the ambit of permission.

Rulings of the ECJ

Under art.234 (ex art.177) of the EC Treaty national judges are able to refer any question regarding the validity or interpretation of Community law to the European Court of Justice for a preliminary ruling. The art.234 mechanism enables national courts to seek guidance from the ECJ before making a definitive ruling. In other words, the courts of the Members States get the final word. The ECJ has no power to enforce its rulings against Member States. Nevertheless, in practice, the rulings of the ECJ tend to be accepted by the referring court and, moreover, have developed some precedential worth. The ECJ, in addition to interpreting the law, often gives an indication of the compatibility of the national measure with EC law, although technically it does not have the power to do so under art.234, which only confers an interpretive function.

The ECJ got its first stab at the legitimacy of affirmative action measures in 1995 in the case of Kalanke. The case concerned a German rule which offered preferential treatment to female civil servants with regards to appointment and promotion when they were equally qualified with a male candidate and under-represented in the workforce. The logic behind the measure was to promote equal opportunities for women in terms of access to employment. Although discriminatory with regards to strict formal equality, the priority rule sought to reduce actual inequalities by giving women a chance at the job. This in turn was intended to improve the ability of women to compete on

43 This is a mandatory procedure for courts of last resort: EC Treaty, supra note 40, at art. 234, para.3.
45 See c.3, below.
an equal footing with men in the labour market and pursue a career on that basis. The ECJ was asked to decide whether the rule was within the ambit of the derogation from the principle of equal treatment in art.2(4) of the Directive.\textsuperscript{46} It decided in the negative. A-G Tesauro argued that such a rule amounted to a substitution of equality of opportunity with equality in representation (or, in other words, group equality). This ran contrary to the individual right to equality set out in the Directive which was thought to be primary. Accordingly, it was held that national rules that offered women ‘automatic and unconditional’ priority exceeded the promotion of equal opportunities and overstepped the art.2(4) boundaries.

The decision stirred up a lot of debate in the EU and was followed up in 1997 in the case of Marschall, which concerned a similar priority rule for female teachers in Germany.\textsuperscript{47} However, the rule this time contained a savings clause allowing for male candidates to be selected where there were ‘reasons specific to the individual [that] tilt[ed] the balance in his favour.’ In this case the ECJ recognised that there are prejudices and stereotypes concerning the role and capacities of women in working life, meaning “the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.”\textsuperscript{48} Priority rules operate to counteract the prejudices and stereotypes that hinder the ability of women to excel in employment. Once again, the logic appears to be that giving women the chance to prove themselves addresses the attitudinal problem of stereotyping. Therefore, national measures which give a specific advantage to women in order to improve their ability to compete in the labour market on an equal footing with men were held to be legitimate and within art.2(4).

However, there had to be a guarantee to equally qualified men that there would be an objective assessment which would take account of all criteria specific to each candidate, male and female, in

\textsuperscript{46} Directive 76/207, supra note 41.
\textsuperscript{47} Helmut Marschall v. Land Nordrhein-Westfalen, C-409/95 [1997] ECR I-6363
\textsuperscript{48} Ibid. at paras.29-30.
their individual case. This way the decision ensures that the special characteristics of each are considered and the priority afforded to women is overridden where one or more of those criteria point in favour of the male. Absolute and unconditional priority for women was held to be beyond the art.2(4) derogation from the principle of equal treatment of men and women. Despite these safeguards, one might question which factors will make up the objective assessment since many of them may well be indirectly discriminatory in nature.\(^{49}\)

Whilst taking past disadvantage into account, this decision essentially aims at striking a balance between individual and group equality. It recognises that group equality is not always paramount, but rather affirmative action is context-specific. Differential treatment requires a relevant and justifiable reason in the circumstances.

Wentholt argues that the problem with the ECJ’s decisions in Kalanke and Marschall is that the court retains a formal approach, seeing the provisions as exceptions to the general principle of equality and, in line with practice, interpreting the exceptions narrowly.\(^{50}\) In this sense affirmative action constitutes an infringement of the individual right to be treated equally. He argues that a substantive approach should include affirmative action as a component of the principle of equality, rather than as an exception, thereby forcing the establishment of group equality as a result. Such an interpretation, however, is not surprising given that art.2(4) was framed as an exception, as opposed to a justified form of differentiated treatment. Mulder on the other hand does not criticise the use of exceptions, but only the tendency of the courts to interpret exceptions narrowly.\(^{51}\) In my opinion affirmative action should be an exception; one needs to make a value judgement on whether the characteristic in

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question is relevant in any given case; whether in that specific case equality requires differential
treatment based on a relevant reason. Despite these criticisms, the ECJ has reaffirmed the line of
reasoning in Marschall and emphasised its commitment to substantive equality.

In the case of Re Badeck et al., the Court assessed an extensive catalogue of positive action measures
and explained which will be considered to be within the principle of equal treatment.\textsuperscript{52} It seems that
compulsory preferences will be frowned upon. However, programmes that give women priority as a
last resort in order to advance equality are acceptable. The ECJ, accordingly adheres to equality of
opportunity in allowing positive action measures but adopts a restrictive approach.

This is further illustrated in the case of Abrahamsson whereby the Court clarified that Directive
76/207 and art.141(4) of the EC Treaty precludes national legislation under which a sufficiently
qualified candidate from the underrepresented sex must be chosen in preference to a person of the
opposite sex who would have been appointed otherwise.\textsuperscript{53} However, it confirmed that the candidate
from the underrepresented sex may be granted preference over a competitor of the opposite sex,
provided “the candidates possess equivalent or substantially equivalent merits, where the candidatures
are subjected to an objective assessment which takes account of the specific personal situations of all
the candidates.”\textsuperscript{54} The case is important because it is the first time the ECJ has had to interpret the
scope of art.141(4) of the Treaty. In doing so, the Court stuck by its reasoning in the Marschall
decision, meaning the restrictions to the use of positive action measures still exist.

Furthermore, in interpreting art.141(4), the ECJ not only highlighted the importance of substantive
equality for “reducing \textit{de facto} inequalities that may arise in society”,\textsuperscript{55} but also emphasised the
necessity to observe the principle of proportionality in adopting positive action measures. It states

\begin{footnotesize}
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\item \textsuperscript{52} \textit{Re Badeck and Others}, C-158/97 [2000] ECR I-1875.
\item \textsuperscript{53} Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist, C-407/98 [2000] ECR I-5539 [Abrahamsson]
\item \textsuperscript{54} \textit{Ibid.} at para.62
\item \textsuperscript{55} \textit{Ibid.} at para.48
\end{itemize}
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that “it cannot be inferred [from art.141(4) EC] that it allows a selection method of the kind at issue...which appears, on any view, to be disproportionate to the aim pursued.”

This means that special measures taken by Member States must: a) serve a lawful purpose, namely the elimination or reduction of actual instances of inequality that exist in the real world; b) be appropriate and necessary for the attainment of this goal; and c) not go beyond what is necessary to attain it.

*Lommers* also emphasised the importance of proportionality. In that case, the Dutch Ministry of agriculture set up a scheme-reserving subsidised nursery places for working mothers in an attempt to tackle extensive underrepresentation of women by facilitating the pursuit and advancement of their careers. Male officials were permitted access to the scheme in cases of emergency, to be decided by the Director. The ECJ ruled in favour of the scheme provided that the exception allowed men, who looked after their children by themselves, access on the same basis as their female counterparts.

The scheme satisfied the proportionality principle as it a) was set up to tackle underrepresentation of women in the workforce, thus had a legitimate aim; b) was appropriate and necessary in that a proven insufficiency of suitable and affordable nursery facilities was considered more likely to have an adverse impact on female officials than male officials, thus inducing working mothers to give up their jobs; and c) did not excessively interfere with the individual right to equal treatment provided working fathers were also granted access.

Therefore, it seems that the ECJ, despite taking a tough stance initially, has, to a certain extent, relaxed its approach to priority rules and is endorsing a more substantive understanding of equality, albeit within clearly specified confines. This is essentially the lead Harriet Harman followed in the

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56 Abrahamsson, supra note 53, at 55
58 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij*, C-476/99 [2002] ECR I-2891. See also *Serge Brihêche v Ministre de l’Intérieur, Ministre de l’Éducation nationale and Ministre de la Justice*, C-319/03 [2004] ECR I-8807. Note that the case is somewhat different in that it concerns the reservation of certain work benefits for females, as opposed to the reservation of employment places.
59 *Lommers, ibid.* at paras.39-50.
positive action proposals in the Equality Bill. With this background in mind we can now address the criticisms directed at the Equality Bill; one theoretical and one practical.

Chapter 3: Theoretical Framework – Clearing up the Theoretical Confusion

“Equality”

A word oft-used but little understood. The complexities of the concept make it difficult for one to put their finger on exactly what it stands for. Dworkin distinguishes between: a) the right to equal treatment and b) the right to be treated as an equal. He states that:

The first is the right to equal treatment, which is the right to an equal distribution of some opportunity or resource or burden... The second is the right to treatment as an equal, which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else... the right to treatment as an equal is fundamental and, the right to equal treatment, derivative.\(^6^0\)

In my view, this analysis by Dworkin is important as it encapsulates not only an individual complaints model but also an opportunity for affirmative action. The right to be treated with equal concern and respect as anyone else pinpoints the wrong in discrimination, namely differential treatment of individuals for irrelevant reasons. The definition notes how equal treatment, in distributive terms, should stem from treatment as an equal. However, past discrimination upsetting treatment as an equal has led to inequities in the distribution of benefits and opportunities. Therefore, in order to rectify the situation, measures have to go further than simply ensuring treatment as an equal; in other words the equal distribution of benefits also has to be addressed in order to fix already-existing inequalities, thus an opening for affirmative action policies exists.

The distinction between formal and substantive equality is highly relevant to any consideration of affirmative action. Strict formal equality, or treating like cases alike, sees consistent treatment across

groups as key; certain traits or characteristics should be considered irrelevant. However, this concept of equality, when applied in an imprudent way, fails to achieve real equality. Past imprudence in the application of formal equality, such as the acceptance of equally bad treatment (i.e. “levelling down”), has caused the concept to develop an aura of notoriety and inadequacy. For example, comparing the absence from work of men to that of women in pregnancy cases is foolish, as is the equal subjection of men and women to offensive and obscene remarks by a military training officer. This type of thinking arose as a result of the view that anti-discrimination laws must always adhere to symmetry; discrimination against men or white people on the grounds of their gender or race is just as harmful as discrimination against women or members of minority groups. Fredman argues that “the symmetrical assumption itself depends on prior acceptance of three of the basic liberal tenets which pervade the legal framework: individualism, formal justice, and state neutrality.” In a utopian society such an approach would be uncontroversial. However, we do not live in a utopian society. A closer look at the shortcomings of these three principles illustrates the fact that a strict compliance to symmetry misses the fundamental problems of discrimination.

Firstly, individualism is ignorant of the fact that members of disadvantaged groups have historically been denied the opportunity of obtaining the relevant qualifications. Secondly, formal justice fails to account for already-existing disadvantages. This is also true of state neutrality. As Fredman points out, “an apparently neutral criterion, applied equally to two individuals, can in fact exacerbate inequality because its neutrality disguises a bias towards the social or group attributes of one of them.” For example, seniority rules put women at a disadvantage because they are more likely to have taken career breaks to raise children and/or to have worked part-time; and education requirements hinder black people because of insufficient schooling opportunities in the past. As

65 Fredman, (2001), supra note 61, at 155
Martin Luther King highlighted in his famous ‘I Have a Dream’ speech “...if a man is entered at the starting line in a race three hundred years after another man, he would have to perform some impossible feat in order to catch up with his fellow runner.”\(^\text{66}\) Whilst a step in the right direction, equal access to social, economic and political benefits, is not sufficient to improve the position of women and racial minorities in society.

Furthermore, equality provisions are directed at each and every individual of society. However, non-discrimination laws are a sub-set of equality; they are aimed at protecting citizens of historically disadvantaged groups from differential treatment on the basis of their race or sex, i.e. on the basis of irrelevant reasons. However, in order to level the playing field past disadvantages need to be taken into account. Therefore, there is no reason why the law’s approach to discrimination should maintain symmetry. In other words, the goal of substantive equality supplements formal equality where necessary in order to achieve real equality. Had formal equality been applied sensibly in the first place it would not have been necessary to distinguish between substantive and formal equality. Historical disadvantages are what differentiate people with protected characteristics from those of privileged groups; historically disadvantaged groups are not the same case when treating like cases alike. However, the failure to identify this reality has provoked the formulation of a concept of ‘substantive equality’. In Canada, the Supreme Court has fully endorsed the idea that, in order to achieve equality, differentiation in treatment may well be necessary.\(^\text{67}\) As Bernard Williams contends, equality is not about treating people the same, but about having a valid/relevant reason for treating people differently.\(^\text{68}\) The existence of a set of relevant reasons operates at the core of this thesis.

Substantive equality recognises the necessity for differential treatment. Fair equality of opportunity requires an element of correction for already-existing disadvantages.\textsuperscript{69} In other words, group differences need to be taken into account in order to rectify pre-existing disadvantages. Fredman breaks the concept of substantive equality down further still, recognising two conceptually different understandings: a) equality of opportunity and b) equality of results.\textsuperscript{70} Equality of opportunity is concerned with equalising the starting points. It aims to level the playing field by giving everybody an equal chance of gaining the relevant qualifications. This requires a consideration of what is necessary to ensure “equal chances”. Fredman refers to Williams who recognises both a procedural and substantive element to equality of opportunity.\textsuperscript{71} In a procedural sense, equality of opportunity requires the removal of discriminatory barriers, whereas substantively it requires special measures, such as education and training, to ensure people genuinely have an equal chance of satisfying selection criteria.

Equality of results on the other hand focuses on the end point in an attempt to achieve redistributive justice. In a strong sense, equality of results sees underrepresentation as discrimination in itself and requires an equal outcome, whereas weak equality of results recognises it as an indicator of possible discrimination.

The Abella Report, Canada’s first attempt to tackle the problem of discrimination at the macro level, defines equality in employment in the sense that “no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructions.”\textsuperscript{72} In this sense, inherent ability is classified as a relevant reason for treating people differently, whereas those related to sex or race are irrelevant reasons. It goes on to say “to treat everyone the same may be to

\textsuperscript{71} Fredman, supra note 70, at 20-21.
\textsuperscript{72} The Abella Report, supra note 5, at 3.
offend the notion of equality”, thus recognising substantive notions of equality. Substantive equality is fundamental, but formal ways of thinking are often inadvertently reverted to.

Despite the confusion over the substance of equality, it may be fair to say that equality is not a static concept; methods to achieve it must constantly evolve in order to meet its needs and it may even involve context-specific considerations.\textsuperscript{73} The Abella Report recognises this task: “Equality is...a process of constant and flexible examination, of vigilant introspection, and of aggressive open-mindedness.”\textsuperscript{74} The set of relevant reasons for treating people differently are likely to oscillate over time and the law must be able to cope with this.

\textbf{“Discrimination”}

Whereas equality requires treating people differently for relevant reasons, discrimination concerns the differential treatment of people for irrelevant reasons related to sex or race, for example. This type of behaviour is unacceptable and unjustifiable. The Abella Report defines discrimination in this context as “practices or attitudes that have, whether by design or impact, the effect of limiting an individual’s or group’s right to the opportunities generally available because of attributed rather than actual characteristics.”\textsuperscript{75} Although the distinctions have become largely redundant in Canada,\textsuperscript{76} the law still recognise different types of individual discrimination in the UK. Direct Discrimination consists of treating someone less favourably because of their race or sex. Intention is a central aspect of this type of discrimination. Prohibiting it is the least controversial and has become increasingly rare as the law in this area has progressed. The second type of discrimination, indirect discrimination or adverse effect discrimination, considers the impact of a facially neutral rule or policy. If a rule disproportionately affects one group over another then it is discriminatory. Melissa Williams notes


\textsuperscript{74} Abella Report, \textit{supra} note 5, at 1

\textsuperscript{75} Abella Report, \textit{supra} note 5, at 2.

\textsuperscript{76} See \textit{Meiorin} at 33, n.110, below.
that indirect discrimination is a subset of structural or systemic discrimination; a term that has been around in Canada since the 1980s, bearing its head most prominently in the Action Travail case.

The Ontario Human Rights Commission defines ‘systemic discrimination’ as “patterns of behaviour, policies or practices that are part of the structures of an organization, and which create or perpetuate disadvantage for [women and] racialized persons.” It refers to the type of discrimination that is inadvertently embedded in an employer’s systems. Melissa Williams emphasises the fact that “acknowledging the existence of structural discrimination means acknowledging that unjust inequalities exist, but that blame for their existence cannot be assigned to any specific, identifiable individuals.” This is the thrust of a systemic approach to discrimination; it is active rather than reactive; it does not wait for an individual complaint to be brought. The problem is bigger than individuals and needs to be addressed, not only at the micro-level, but also at the macro-level. In my view, a systemic approach to discrimination – both individual and systemic – has two aspects: 1) the removal of barriers; and 2) strategies that require the giving of special treatment to minority groups. The latter type of policy can be further broken down into a) strategies that focus on opportunities; and b) those that focus on outcomes/results. All of these fall within the rubric of “affirmative action”, but they are conceptually very different.

“Affirmative Action”

‘Affirmative action’ comes in a variety of forms. McCrudden states that “Affirmative action is the term used in the United States to refer to actions taken to identify and replace discriminatory employment practices, and to develop practices which result in greater inclusion and participation in

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80 Williams, supra note 77, at 65.
81 I adhere to the current literature on affirmative action in describing it this way, but it is arguable that the first type of strategy, the removal of barriers, should not fall under the heading "affirmative action", but rather anti-discrimination measures, for the reasons I set out below.
the workforce of women and minorities.”

Glazer makes the distinction between ‘soft’ and ‘hard’ affirmative action policies; “the former relate to reaching out, advertising, training and preparing minority members, whereas the latter are aimed at achieving certain numerical goals.”

McCrudden eloquently sets out five potential types of affirmative action which is very useful for present purposes. Firstly, eradicating discrimination refers to “identifying and replacing discriminatory practices”. McCrudden refers to this type as being the only one to have been acknowledged in the UK. In my opinion, this type of ‘affirmative action’ is unquestionably good policy; discriminatory practices constitute indirect discrimination and are unlawful per se. There is a difference between a) law aimed at eradicating discrimination and b) measures that go further by stipulating a special concern or preference. The elimination of discriminatory barriers reflects the procedural aspect of equality of opportunities. The logic of these policies is that race or sex should be considered irrelevant to the employment process; thus, the characteristics are not directly used in any way. Such policies essentially aim to achieve that which the individual complaints model could achieve on a much slower timescale and in a resource burdensome way. Other affirmative action policies either directly or indirectly use sex or race in the distribution of benefits in order to increase the participation of women and minorities; participation rates being the main concern with the eradication of prejudices as a hoped for consequence. These policies are more risky as they are often considered ‘reverse/positive discrimination.’

McCrudden’s second type of affirmative action are facially neutral but purposefully inclusionary policies which include criteria that do not identify or use group membership as a necessary condition but stipulate as relevant conditions certain things that are more likely to apply to members from

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83 Glazer, supra note 5, at 141.
84 Christopher McCrudden, supra note 82, at 223-225. Although the paper refers specifically to ‘positive action’ it seems that for McCrudden ‘affirmative action’ and ‘positive action’ are one and the same.
85 Ibid., at 223.
disadvantaged groups, for example unemployment or living in a particular geographical area. Thus, certain characteristics are indirectly used in the employment process. The final three types of affirmative action that McCrudden identifies directly use group membership in distributing benefits. The third type, outreach programmes, are those policies aimed at bringing certain employment opportunities to the attention of women/minorities, encouraging them to apply, and training them up in order for them to compete for the job on merit. This recognise equality of opportunity as a fundamental objective of affirmative action.

Preferential treatment is identified by McCrudden as the fourth type of affirmative action, which finds its force in the view that, even where everything else is equal, women and minorities do not have an equal chance of being hired because of already-existing prejudices and stereotypes. Williams emphasises the variation of policies within this type of affirmative action and further argues that many forms “involve little or no trade-off between the principle of merit and the goal of equality.” She sets out three types of preferential treatment: 1) the ‘other things being equal’ rule; 2) the high threshold of qualification rule, whereby the woman or minority candidate is chosen over a male or white candidate with marginally better qualifications; and 3) the minimum threshold of qualification rule, whereby the woman or minority member is hired over a male or a white person who has significantly better qualifications. In my view, the ‘other things being equal’ rule is the only type that does not require the merit principle to be compromised in any way. Furthermore, it does not require an employer to justify its decision. The decision could essentially be made by tossing a coin because, as far as qualifications go, no one candidate is more deserving than the other. Of course, whether the characteristic is thrown into the mix at the outset or only considered at the end, and whether it is merely a relevant consideration or indeed the sole consideration, add to the varieties of preferential treatment.

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86 See AG Jacobs opinion in Marschall, supra note 47 at para.30.
87 Williams, supra note 77, at 73.
Fifth and finally, McCrudden identifies ‘redefining merit’ as a type of affirmative action. This type of policy he says “alters substantially the qualifications which are necessary to do the job by including race [or] gender...as a relevant “qualification” in order to be able to do the job properly.”

This is best explained by example. Police or social workers of a certain sex or race may be better able to operate in particular geographic areas or circumstances by connecting and communicating with the public to a greater extent than members of another sex or race. In other words, being of a particular race or sex gives rise to a relevant reason for differentiated treatment, namely greater efficiency.

Broadly speaking, affirmative action policies can be broken down into two types: a) those that act to break down discriminatory obstacles; and b) policies giving special/preferential treatment to one group over another. There is no real debate about the first of these strategies. However, the second type sometimes comes into conflict with the merit principle and, thus, these types of strategies are criticised for positively discriminating against the interests of the privileged group.

The Merit Principle

The merit principle has long been a fundamental topic of discussion in relation to the employment process and the law on discrimination. Given that scarce resources are a reality, competition is commonplace. There needs to be some rule of distribution in place in order to award jobs in a logical and informed way. Some contend that the merit principle is based on efficiency arguments whilst others view it as a moral principle based on ‘just deserts’. Goldman adopts the latter; he considers the merit principle to be the fundamental rule underpinning non-discrimination. He contends that:

The most plausible reason why first order discriminatory practices are unjust is that they exclude individuals from social benefits or opportunities for benefits on grounds of unalterable characteristics unrelated to performance. Such practices would not be seriously unjust unless there were a rule that created rights to positions violated by the practices. But if such rights exist for minority-group members, then...they must also exist for white males who satisfy the criteria stipulated by the rule.  

88 McCrudden, supra note 82, at 225.
McCruden identifies five possible meanings of merit: a) ‘merit as the absence of...’; b) general ‘common sense’ merit; c) strict job-relatedness; d) merit as the capacity to produce particular job-related results; and e) merit as the capacity to produce beneficial results for the organisation. I am primarily concerned with b), c) and d) for present purposes. The general ‘common sense’ model of merit requires qualities that are generally valuable in society. Fallon introduces a relevance criterion to this model in the sense that it requires the “possession of qualities that are thought to be of general value and are reasonably likely to prove useful in carrying out a specific function.” In terms of the distribution of jobs, there needs to be a general connection between the selection criteria and the requirements of the job. The appeal of this conception is that it attempts to identify “‘objective’ or ‘neutral’ elements which can form the basis of judgment”. The third model of strict job relatedness requires a greater “closeness of fit” between the selection criteria and ‘the job’. Adverse effects discrimination builds upon this model in that employers must show that certain rules and criterion are strictly job related, thus “narrowing the area of discretion within which the employer will be able to put into effect discriminatory animus.” This requires a very strict and clear idea of what the job entails. The fourth model, on the other hand, sees ‘the job’ as part of the bigger picture. McCrudden states:

...the fourth model tends to take a much broader view of what ‘the job’ consists of and is much more sympathetic to a view which includes within the idea of the job those features which assist in carrying it out rather than just those which are necessary in order to carry it out. So, for example, social and humanistic features of the job (such as good service delivery, acting as an effective ‘role model’ and customer satisfaction) could be considered within the concept of the job...

This raises the question as to when race or sex can constitute a feature that justifies awarding the job on that basis. Only in very rare circumstances will race or sex be a justifiable qualification for a job; only rarely will it constitute a relevant reason for preference. For example, acting as a role model,

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91 Ibid. at 558.
92 Ibid. at 555.
93 Ibid. at 561.
94 Ibid. at 562.
bridging the gap between the police and the community, and assisting communication may all be relevant reasons for taking race or sex into consideration when awarding jobs. As McCrudden points out, if race is relevant then “it is neither wrong nor arbitrary to treat it as a merit.” 95 It follows from this that you can only treat race or sex as meritorious in and of itself where it is relevant to the job. However, although race or sex may not be independently valuable, these characteristics can be viewed as “a proxy for another feature which the employer wishes to incorporate within her workforce” 96 under the fourth model.

In other words, race or sex may give rise to a related relevant reason for preference that is legitimate. In addition to the examples given above, certain lifestyle situations, such as a high achiever from a disadvantaged background who had to work throughout college, or a single mother juggling family life and children, may illustrate greater dedication and willingness to succeed.

Four threads can be drawn from this analysis which weave together to construct the underlying elements of this thesis. Firstly, there must be some rule in place in order to distribute scarce resources. In my view, the merit principle not only rewards hard work and achievements, but also provides the greatest gains for society as a whole; therefore, it is likely to gain public support. 97 Goldman argues that the “rule for hiring the competent meets our strongest criterion for acceptability: it could be rationally willed by all actual members of society.” 98 The merit principle may not be perfect but at least it provides a rational, predictable and clear method of awarding jobs; it by far beats random selection. 99 Secondly, for the merit principle itself to be non-discriminatory, there must be

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95 McCrudden (1998), supra note 90, at 565.
96 Ibid. at 566.
97 Goldman, supra note 89, at 28-29.
98 Ibid. at 29.
99 I recognise that there are many objections to the use of the merit principle, including a) the egalitarian position that it is morally arbitrary (see Goldman, supra note 89 at 41 et seq.) b) the libertarian position that corporations should have the freedom to select who they want (see Goldman, supra note 89 at 35-41) and c) that it may include some subjectivity; that merit itself may be infused with gender or race assumptions (see Fredman, supra note 64, at 381). However, fundamental inequalities cannot be solved by placing the responsibility on employers by regulating the hiring process. If we are to take substantive equality seriously we must acknowledge the fact that these inequalities require long term governmental
equality of opportunity first; merit is the corollary of equality of opportunity. This highlights the importance of outreach programmes. Thirdly, for the merit principle to be effective the employment process must be absent of discriminatory barriers. Job specifications and work practices must be reviewed in order to ensure that only relevant qualifications are considered. Then, and only then, can every candidate be subjected to the same rules and criterion (which should ultimately be the goal when it comes to selection or promotion in order to avoid random or arbitrary decisions). As Goldman points out, “Once a rule for rewarding competence is adopted, it would be unjust not to reward those who satisfy its criteria.” In this sense “...the most competent individuals have *prima facie* rights to positions.” This brings me to the final thread, where two people are equally qualified for a position the merit principle is in no way compromised. *Prima facie* rights can be overridden by other, more compelling, factors.

‘All other things being equal’ preferential treatment, such as that endorsed in the Equality Bill, does not compromise the merit principle in the same way that goals and quotas do. Instead it recognises that people from disadvantaged groups have an additional dimension they can bring to the table, such as acting as a role model for younger generations or providing a bridge when it comes to policing or social work. In this sense they have more to offer than members of historically privileged groups. Their race or gender, whilst not being the reason in itself, gives rise to a relevant reason for preferring them in these circumstances. Decision-making in this situation should first consider strict job related criterion. Where this is equal, what McCrudden calls “social and humanistic features of the job” should then be weighed into the mix; thus leaving scope for sex or race to tip the balance in favour of the previously disadvantaged candidate.

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strategies directed at such things as education, for example. So long as discriminatory hiring practices are addressed, the merit principle remains an appropriate and acceptable rule for selection.

100 Goldman, *supra* note 89, at 27.
101 Ibid. at 34.
102 In this sense, McCrudden’s third model of merit is in play, with the scope for model four factors to be considered where relevant and necessary.
Summary of Concepts:

In summary, formal equality requires equal treatment regardless of race or sex, and substantive equality requires differential treatment where a relevant and justifiable reason exists. Not all differential treatment constitutes discrimination. However, discrimination exists when people are treated less favourably as a result of their race or sex; in other words, the difference in treatment occurs on the basis of an irrelevant and arbitrary reason.

A systemic approach to discrimination (i.e. at the macro-level) can be split into different types of affirmative action strategies. Firstly, policies aimed at eliminating discriminatory barriers focus on the procedural aspect of equality of opportunities. They are aimed at eliminating employment barriers in the same way as the individual complaints system, but do so on a much broader scale in order to achieve faster results. They also have the benefit of spreading the burden across employers and raising employer awareness of the problem. Under these policies race or gender is considered irrelevant. Secondly, all those initiatives that directly or indirectly use a protected characteristic in order to afford positive special treatment to disadvantaged groups are substantive by nature. Some of these strategies focus on equality of opportunities, such as positive action/outreach programmes, whereas others have equality of results as their goal, such as preferential treatment at the selection stage.

The merit principle, albeit imperfect, offers a logical and rational method of awarding limited job opportunities. It encourages hard work and social contribution, thus providing the most benefits for the employer, the employee and the society as a whole. However, the efficiency of the merit principle rests upon equality of opportunity and the elimination of discriminatory barriers at the selection stage.
Essentially, this is what should operate at the core of the fight against discrimination and the race for equality. A concept of merit that recognises a broader notion of what ‘the job’ entails allows for the introduction of other factors, such as race and/or gender, where they give rise to a relevant reason for preferring one candidate over another; thus, titling the balance in favour of one candidate where qualifications are equal. Note that, equality of results, although a useful indicator plays no part in this substantive scheme.

In theory, the positive action provisions of the Equality Bill offer a step in the right direction. However, the voluntary and permissive nature of the proposals and the Codes of Practice run the risk that such positive steps will be ignored by employers - the practical criticism of the Equality Bill - and individuals will maintain the burden of bringing complaints. To a certain extent, the UK can learn from Canada, who recognised the inadequacies of an individual complaints model over 25 years ago.

**Chapter 4: Canada’s Approach**

**Developments in Canada**

Canada has certainly taken the non-static nature of “equality” seriously, progressing from the most basic form of human rights protection focusing on direct discrimination to a theory of substantive equality, systemic discrimination and employment equity. Four methods for promoting equality have been established: a) the prohibition of discriminatory treatment; b) the enactment of specific employment equity legislation at the federal level; c) the use of administrative policy, such as the Federal Contractors Program; and d) collective agreement provisions. This paper is concerned only

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103 This section draws upon Charlene Hawkins, “What conception of discrimination arises out of the Abella Report? How is it different or more ambitious than that which has been evident in the case law? Does it amount to Affirmative Action? If not, why not?” written for Course: Discrimination Law: Equality in the Private Sector (Faculty of Law, University of Toronto, 2008), unpublished.

with the first two of these methods. In order to appreciate Canada’s current stance on affirmative action it is important to map this progression from principles of non-discrimination to the promotion of diversity and equality.

The Charter and Human Rights Legislation

Legislation prohibiting discrimination on protected grounds exists both at the federal level – the Canadian Human Rights Act – and at the provincial level, with every province having their own human rights code. Furthermore, the right to equal treatment free from discrimination was constitutionally embodied in 1982 in s.15 of the Canadian Charter of Rights and Freedoms. Not only do these provisions prohibit discrimination, but they also allow for the use of special measures to promote equality. Despite these enactments, no definition of discrimination has ever been established, leading to a confused understanding of what discrimination actually means.

Individual Complaints Model

Traditionally, anti-discrimination law saw discrimination as caused by prejudices, with the result that the intention of the discriminator was paramount. This type of understanding gives rise to a corrective justice model. It sees redress to victims subjected to ill-behaviour as its primary purpose, with the resultant factor that blame must be assigned to specific and identifiable individuals. Thus, an individual complaints model was thought to correct the ills of discrimination. However, even within this micro level, the concept of discrimination has undergone a gradual transformation.

Direct Discrimination

Initially direct discrimination was recognised as the only behaviour which attracted liability. Adjudicators looked only for categorical and conscious behaviour; i.e. the exclusion of “all and only”

members of a particular group. This was indicative of the notion that prejudice was the wrong associated with discrimination; thus, endorsing a very narrow conception of discrimination.\textsuperscript{107} Such an understanding failed to make any headway in capturing that which the Codes intended, namely the elimination of disadvantage and the full and free participation of each and every individual in society.

**Indirect Discrimination**

The concept of discrimination gradually evolved to include unintentional discrimination which had as its central focus the impact of facially neutral rules. The turning point came in the case of *O’Malley*.\textsuperscript{108} In that case a rule applied equally to all employees, namely the requirement to work Friday nights and some Saturdays, nevertheless had a greater impact on the complainant because of her religion. McIntyre J stated that:

“The Code aims at the removal of discrimination... The main approach...is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person, or group of persons, obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.”\textsuperscript{109}

McIntyre’s emphasis on redress highlights the role of corrective justice in the individual-complaints model. The case recognises that the harmful effects of discrimination extend beyond cases of intention and bigots. Also, by identifying the rules that perpetuate discrimination and insisting on their removal, adverse effects discrimination exhibits an element of distributive justice. Although it still relied on individual victims of discrimination as a means of tackling the problem, discrimination essentially advanced from focusing upon an intentional, isolated, discriminatory act to the removal of rules, or, in other words, attacking systems. This type of systemic approach opened up the possibility of addressing group injustices, as well as individual injustices.


\textsuperscript{108} *H.R.C & Theresa O’Malley (Vincent) v Simpsons-Sears* [1985] 2 S.C.R. 536 [O’Malley].

\textsuperscript{109} *O’Malley*, supra note 108, at para.12.
“The Goal of Transformation”

The next step in the evolution came in the case of Meiorin where the court essentially abolished the distinction between direct and indirect discrimination.\(^\text{110}\) It was recognised that the conventional analysis led to different remedies depending on whether the standard was directly discriminatory or one that had an adverse effect. The failure to justify the former as a ‘bona fide occupational requirement’ meant the standard would be struck down in its entirety. However, a neutral rule that had an adverse effect on a particular individual only required an employer to show a rational connection between the rule and performance of the job, and that the claimant could not be further accommodated without the employer experiencing undue hardship. The standard remained in effect. Therefore, the classification of a rule as “neutral” allowed its legitimacy to go without question; “the focus shifts to whether the individual claimant can be accommodated, and the formal standard itself always remains intact”.\(^\text{111}\) Thus, the conventional analysis was thought to be unsatisfactory because it essentially legitimises systemic discrimination. It entails an “allowance” rather than an “acceptance” of characteristics; “it does not challenge the imbalances of power, or the discourses of dominance”.\(^\text{112}\)

Day and Brodsky point out that:

Accommodation, conceived in [the conventional] way, appears to be rooted in the formal model of equality. As a formula, different treatment for “different” people is merely the flipside of like treatment for likes. Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed...\(^\text{113}\) [Emphasis added.]

The Court acknowledged that:

Interpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality... [The conventional] analysis prevents the Court from rigorously assessing a standard which, in the course of regulating entry to a male-dominated occupation, adversely affects women as a group... the complex web of seemingly neutral, systemic barriers to traditionally male-dominated occupations remains beyond the reach of the law. The right to be free from discrimination is

\(^\text{110}\) BC (Public Service Employee Relations Commission) v BCGSEU (Meiorin) [1999] 3 S.C.R. 3 [Meiorin].

\(^\text{111}\) Ibid. at para.40.


\(^\text{113}\) Ibid. at 462.
reduced to a question of whether the “mainstream” can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination receives the law’s approval. This cannot be right.\footnote{Meiorin, supra note 110, at para.42.}

In other words, the distinction between direct and adverse effect discrimination and the remedies that followed meant that members of certain groups were being treated differently in order to comply with the ‘norm’. The ‘norm’ itself was not and could not be challenged where the rule in place was ‘neutral’. Therefore, the remedy given required differential treatment based on an irrelevant reason (namely the protected characteristic) in that particular case. The scope of the remedies meant individual complainants were accommodated and the particular discriminatory effects they experienced alleviated, but the rule remained in place as a hurdle for the next worker who happened to bear that characteristic. Instead, the system should be altered so that it is not discriminatory in the first place, and every worker is treated with equal concern and respect regardless of their race or sex. Therefore, the court put in place a unified approach which abolished the distinction between direct discrimination and adverse effects discrimination and required employers to take differences into account when setting the workplace standards.

The emphasis on attacking systems as a vital and necessary element of anti-discrimination policies is highly important for any attempt at affirmative action. It indicates that although redistributive justice may be a legitimate goal,\footnote{Gardner argues that: “the fact that otherwise indirectly discriminatory processes may be 'justified' indicates that what is at stake is not a harm, but a redistributive goal which must be balanced against some other interests which citizens are at liberty to pursue.”\footnote{This is based on the UK approach whereby there is no defence to direct discrimination. In Canada, given that both direct discrimination and indirect discrimination can be defended in much the same way following Meiorin it would seem on Gardner’s analysis that the whole of discrimination law rests on the goal of redistribution. See Gardner, supra note 106, at 5.} This is based on the UK approach whereby there is no defence to direct discrimination. In Canada, given that both direct discrimination and indirect discrimination can be defended in much the same way following Meiorin it would seem on Gardner’s analysis that the whole of discrimination law rests on the goal of redistribution. See Gardner, supra note 106, at 5.} equal representation is not, and should not be the sole consideration or used as an end in itself because it risks simple assimilation with the ‘norm’.\footnote{See Fredman (2001), supra note 61, at 165; and Fredman, supra note 70, at 20.} However, one of the clearly identifiable shortcomings of the individual complaints system, perfectly illustrated by this case, is that it cannot bring about large scale changes. It can only help the situation progress on a case
by case basis, and it requires somebody to have suffered each time in order to do so. However, whether or not the problem will fix itself over time is questionable and leaving it to do so is thought to be unsatisfactory.

**Mid-way Systemic Model: Employment Equity Remedies in the Courts**

Although fundamental, individual remedies do not address group inequalities. In the Report of the Canadian Human Rights Act Review Panel, Gérard La Forest recognised that “though adverse effect was a powerful device for analysing whether a policy had a discriminatory effect on individuals contrary to the purpose of the Act, it was not a comprehensive concept of discrimination.” The systemic approach is thought to fill this gap.

The tribunals began to utilise their powers and take advantage of the permissive provisions under human rights legislation to put in place positive policies and special programmes in order to overcome discriminatory employment practices. This progress emphasises a commitment to redistributive justice as supplemental to corrective justice. The most far-reaching remedy yet was imposed in the case of *Action Travail des Femmes v. Canadian National Rail*.

The case concerned an action brought by the public interest pressure group, Action Travail, alleging that Canadian National Railways (‘CNR’) was guilty of discriminatory hiring and promotion practices. Essentially, CNR had allowed and fostered a stereotypical view about the role of women in the workforce. The Supreme Court of Canada stated that:

...systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of natural forces...

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118 *Action Travail*, *supra* note 78.
119 *Ibid.* at para.34.
The Court went further and stated that “to combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged.”¹²⁰ [Emphasis added.]

The Court, therefore, approved the first part of the Tribunal’s order putting in place a number of permanent measures for the neutralisation of current policies and practices in an effort to address “negative practices”. With respect to “negative attitudes”, the court approved the second part of the order – an employment quota stipulating that one woman had to be hired for every four non-traditional positions filled, until 13% of the blue collar jobs on the railway were occupied by women. CNR were also ordered to submit quarterly reports to the Commission and to modify advertising policies and selection procedures. It was held that: “The dominant purpose remained to improve the employment situation for women at CN in the future.”¹²¹

In discussing the theoretical underpinnings of employment equity schemes, Chief Justice Dickson refers to the case comment of Professors Greschner and Norman on the majority judgment of the Federal Court of Appeal below. They argue that employment equity programmes try to “break the causal links between past inequalities suffered by a group and future perpetuation of the inequalities.”¹²² They go on to say “the presence of women will help break down generally the notion that such work is man’s work and more specifically, will help change the practices within that workplace which resulted in the past discrimination against women.”¹²³ Chief Justice Dickson is clearly conscious of the need to eliminate stereotypes in making his judgment. He says systemic discrimination

...is compounded by the attitudes of managers and co-workers who accept stereotyped visions of the skills and “proper role” of the affected group, visions which lead to the firmly held conviction that members of that group are incapable of doing a particular

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¹²⁰ Action Travail, supra note 78, at para.34.
¹²¹ Ibid. at para.46.
¹²² Ibid. at para.39.
¹²³ Ibid.
job, even when that conclusion is objectively false. An employment equity program, such as the one ordered by the Tribunal in the present case, is designed to break a continuing cycle of systemic discrimination.\(^{124}\)

The logic behind the decision was three-fold.\(^{125}\) Firstly, it was held that “by countering the cumulative effects of systemic discrimination, such a program renders further discrimination pointless...a mandatory employment equity scheme places women in the unit despite the discriminatory intent of the foreman.”\(^{126}\) Secondly, it was thought that giving people the opportunity to prove they could do the job would correct attitudes by disproving misconceived stereotypes. The Court stated:

...by placing members of the group that had previously been excluded into the heart of the workplace and by allowing them to prove ability on the job, the employment equity scheme addresses the attitudinal problem of stereotyping....It will become more and more difficult to ascribe characteristics to an individual by reference to the stereotypical characteristics ascribed to all women.\(^{127}\)

Thirdly, the Chief Justice held that the employment equity scheme would create a “critical mass” of the previously excluded group in the workforce with the effect that it would: a) eliminate the problems of ‘tokenism’; b) mean that women would not be placed on the periphery of management concern; c) effectively remedy systemic inequities in the hiring process; and d) reduce the stigma related to the desire of women to work in blue collar jobs. “Once a “critical mass” of the previously excluded group has been created in the work force, there is a significant chance for the continuing self-correction of the system.”\(^{128}\) All of these reasons seem to be an indirect way of addressing male attitudes towards women.

However, although such an approach may operate to undermine the truth in stereotypes, it does not necessarily follow that it will also destroy attitudes. In relation to the necessity of an employment (as opposed to a hiring) quota, the Court acknowledged that the “evidence revealed that there was a high

\(^{124}\) Action Travail, supra note 78, at para.40.

\(^{125}\) Ibid, at paras.41–44.

\(^{126}\) Ibid. at para.41.

\(^{127}\) Ibid. at para.42.

\(^{128}\) Ibid. at para.43.
level of publicly expressed male antipathy towards women... As well, many male workers and supervisors saw any female worker in a non-traditional job as an upsetting phenomenon and as a “job thief”. Given this finding, endorsing an employment quota, whereby women can be hired for the sole purpose of complying with the order, is more likely to further exacerbate the problem than solve it. Such an approach will strengthen the view that women are “job thieves”, thus leading to increased resentment and polarisation within the workforce and consequential hostility towards women. It is not sufficient to force representation in the hope that the problem will go away and leave women to suffer during the transition. Women do not stand a chance at proving themselves if they have a black mark next to their name at the outset. Instead attitudes need to be addressed more directly through training, etc. First, discriminatory barriers need to be removed. Then women need to be seen to be achieving jobs through merit, rather than because of a quota obligation, in order to be respected once in the workforce. There are other, less abrasive, ways available to alter systems, break down stereotypes, change attitudes and increase representation in the workforce.

More recently, in the case of NCARR v Health Canada, a racial minority advocacy group made a complaint of systemic discrimination against Health Canada alleging discriminatory practices with regards to management positions; i.e. a glass ceiling was in place. The Canadian Human Rights Tribunal, after being satisfied that underrepresentation existed, ordered the implementation of a long and detailed ‘special corrective measures program’ relying on the power conferred to it under s.53(2)a) of the Canadian Human Rights Act to “redress the practice or to prevent the same or a similar practice from occurring in future”. The programme included ‘permanent corrective measures’ such as training for selection boards on interviewing techniques for bias-free selection; the use of diverse selection boards; training for managers and human resource personnel on strategies to recruit, promote and retain visible minorities; and the use of workshops to promote a diverse workforce. It also included ‘temporary corrective measures’ such as numerical goals within specified time frames;

129 Action Travail, supra note 78, at para.46.
measures to ensure visible minorities obtain requisite job qualifications; special reporting measures; targeted advertising; outreach recruitment sources; mentoring programmes; training programmes; annual performance assessments; and monitoring requirements. This follows the same type of approach endorsed in Action Travail.

Under this model the onus still remains on the disadvantaged individual to bring the claim and affect change. The use of advocacy groups was just a way of spreading the burden among individuals and groups in order to bring about a greater impact. As Ventura points out “even if the individual is prepared to launch a multitude of complaints and expend the energy, time and effort needed to see each through to the end, the fact is that by the time these are redressed (even with an efficient complaints system) the job will be gone.”

**Systemic Model**

The recognition of adverse effect discrimination opened up the possibility of a full systemic approach, outside of the complaints procedure, that focuses on the macro level (i.e. group injustices). A systemic approach: a) is primarily concerned with groups rather than individuals; b) is “preventative rather than remedial”; c) focuses on the effects of a policy rather than on the motivations that gave rise to it; and d) is “active rather than reactive”. Affirmative action is considered to be remedial in the challenge to overcome systemic discrimination. This understanding prompted further investigation of possible policy responses and, thus, the impetus for the Abella Report and the enactment of the Employment Equity Act. Abella’s insistence on the elimination of discriminatory barriers is in essence a commitment to the first aspect of affirmative action, the removal of barriers. To this extent, the progress made by the Commission should be applauded. The emphasis on special measures, on

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the other hand, is better seen in the EEA itself. It will be seen that the Act heavily relies on numerical goals and does not set out any clear provisions for the introduction of training and encouragement initiatives (i.e. outreach programmes) as a means to achieving representative numbers.

Two Avenues for Affirmative Action in Canada

The validity of affirmative action is constitutionally entrenched in the Canadian Charter of Rights and Freedoms and further endorsed in the Canadian Human Rights Act. In terms of the Charter, whilst s.15(1) is more generally the equality clause, s.15(2) is specifically concerned with discrimination. It stipulates that any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups does not amount to discrimination. The Canadian Human Rights Act makes similar provision for special programs under s.16, as does the Ontario Human Rights Code under s.14. Like many of the US instruments and the UK legislation, these provisions are simply permissive and do not prescribe the use of ‘special programs’ (i.e. affirmative action measures).

The strength of the Charter and Human Rights Legislation lies in the breadth of its permissiveness. They do not impose positive obligations on the government or employers to work towards achieving equality. However, Canada took a bold step in 1986 by introducing the federal Employment Equity Act, setting out specific obligations on employers to remedy underrepresentation in their workplace. The legislation effectively shifts the onus of eliminating discrimination on to employers, rather than waiting for individuals to effect change on a case-by-case basis. The Act, however, only applies to ‘private sector employers’ defined as those employers employing 100 or more employees on or in

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134 As Ventura points out, the effective screening of complaints by members of non-disadvantaged groups by human rights commissions in Canada mean that there are very few cases addressing the affirmative action provisions of human rights legislation. This is also true of the Charter, with the Courts acting as the ‘black box’. See Ventura, supra note 131, at 127.
135 R.S.C 1985, c.23 (2nd Sup). The Act was amended in 1995; supra note 7.
connection with a federal work. Therefore, the extent of protection is severely limited to those employees in federal jurisdiction. In 2003-2004, this amounted to just over 5% of Canadian employees (and less than 1% of Canadian employers).

Employer Obligations Under the Employment Equity Act 1995

The purpose of the Act, set out in s.2, is to “achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment...by giving effect to the principle that employment equity...requires special measures and the accommodation of differences.” It imposes basic obligations on employers to “implement employment equity” by reviewing their work systems, policies and practices with a view to identifying and eliminating discriminatory barriers. It also insists on the use of positive policies and practices, and the making of reasonable accommodations so as to “ensure that persons in designated groups achieve a degree of representation in each occupational group...” Employers are not required to take measures that would cause undue hardship, hire or promote under-qualified people, or create new positions to meet the objectives of the Act.

Sections 9 and 10 give detail to the employers’ obligations. The employer has a duty to collect information and conduct an analysis of the workforce to determine the degree of underrepresentation of the protected groups in each occupational category. Additionally, the employer must conduct a

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137 EEA, supra note 7, s.3.
139 EEA, supra note 7, s.5(a).
140 Ibid. s.5(b).
141 Ibid. s.6.
142 Ibid. s.9(a).
review of employment systems, policies and practices to identify employment barriers. In order to meet the objectives of the Act the employer is obliged to prepare a detailed employment equity plan setting out the positive policies and practices (in terms of hiring, training, promotion and retention, accommodation, and the elimination of employment barriers) that are to be instituted and timetables for their realisation. Constant references to “in order to correct the underrepresentation” and “increase the representation” emphasise the role that statistics play under the EEA.

Chapter 5: The Good, the Bad and the Ugly: The problems with the EEA

Elements of Employment Equity

Employment equity has been the force behind Canadian policy initiatives in this area for the last 25 years. The imposition of positive legal duties on employers to review and monitor their workforce should be applauded, but other aspects overstep the mark. Ventura highlights the features of the NCARR decision that are useful for employment equity purposes. These are:

...statistics serve as an indicator of a problem and are useful for designing a remedy; specific aspects of the employment systems which pose barriers must be identified and characterised; stories from individuals bring life to the data and demonstrate the bias; a comprehensive remedy is needed in order to break the cycle of discrimination and to reach a critical mass of the underrepresented group in a reasonable time.

Ultimately I agree with all of these elements. However, I disagree with the use of numerical goals to bring about the change as this may evade the need to eliminate discriminatory structures and undermine merit.

143 EEA, supra note 7, s.9(b).
144 Ibid. s.10.
145 Ibid. s.10(a).
146 Ibid. ss.10(d) and (e).
147 Ventura, supra note 131, at 128-129.
The Role of Statistics

McCrudden identifies three ways in which statistics can be utilised. Firstly, they can be used as a diagnostic tool to indicate that discrimination exists. Secondly, they can be used as a benchmark for success in order to judge the employer’s progress. Thirdly, they can constitute the ends in themselves.

The third use of statistics relates to highly controversial quota systems and is used in conjunction with preferential treatment policies. Similarly, the second type is also dangerous in that setting goals and timetables can easily slip into quotas as people get carried away with the end result and lose track of the fundamental issues at stake, namely neutralising the systems and structures in place. As McCrudden points out: “despite the distinctions apparent from these examples, one of the most commonly expressed fears about goals and timetables is that, though conceptually different from quotas, they become translated into quotas in practice: the means become the end. It would be unrealistic to suppose that this would never occur.”

This is aptly demonstrated by the American experience. Although the reporting of statistics was initially intended as a means of identifying unlawful labour patterns, the frustration of government agencies meant that the logical step from such identification was the imposition of numerical remedies to rectify the under-utilisation of women and minorities. Therefore, it is important to recognise this risk and delineate the limits of the use of numerical standards.

The Use of Statistics in the EEA

The Abella Report offered a promising explanation of the role of statistics. Early on in the report it stated that “it is important to look at the results of a system. In these results one may find evidence

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149 Ibid. at 228.
150 See e.g. Teamsters v United States, 431 U.S. 324 (1977); Hazelwood School District v United States, 433 U.S. 299 (1977). A statistical imbalance gives rise to a rebuttable presumption that discriminatory practices are operative in that specific workplace. It is then up to the employer to displace the inference of discrimination.
that barriers which are inequitable impede individual opportunity. These results are by no means conclusive evidence of inequity, but they are an effective signal that further examination is warranted…” [Emphasis added.] This suggests the use of statistics as a diagnostic tool. However, although underrepresentation may have been intended as a simple trigger under the EEA, a reading of the Act strongly indicates that it has instead become the main theme and an end in itself. For example, s.10(d) provides that the employer must prepare an employment equity plan that:

…where underrepresentation has been identified by the analysis, establishes short term numerical goals for the hiring and promotion of persons in designated groups in order to increase the representation in each occupational group in the workforce in which underrepresentation has been identified and sets out measures to be taken in each year to meet those goals. [Emphasis added.]

Provisions of this kind push the boundaries of the distinction between goals and quotas to its limits. Indeed, Martin argues that “employment equity” only really means quotas. It is clear from the requirements of the annual report set out in s.18 of the Act that numbers are the essential element and are really what is being monitored; not systems. This is also illustrated in the Abella Report in the summary of recommendations, which states that “results, not systems, should be reviewed initially. If the results are found to be unreasonably low…the enforcement agency would determine whether or not the results reflect discriminatory practices.” It suggests that alarm bells will only ring where underrepresentation persists. This again shifts the focus on to numbers and encourages employers to take a quota-based approach, although not explicitly so. Despite the rhetoric, there is no real impetus to change underlying discriminatory structures as long as reports are submitted annually and the numbers satisfy the enforcement agency so as not to attract attention. This, in turn, has the potential to undermine the merit principle.

152 The Abella Report, supra note 5, at 2.
154 Abella Report, supra note 5, at 255-256.
Furthermore, the failure of the EEA to refer to outreach programmes to aid and encourage applicants from disadvantaged groups further supports the idea that the means are less important than the ends. The insistence upon numerical goals suggests that underrepresentation is not used as a mere indicator of discrimination. The EEA sets up the right apparatus for bringing about a change in systems, but its over-emphasis on the end result and its eagerness to achieve redistributive justice essentially obfuscates the key issue; it encourages employers to skip a step in the process in order to meet their obligations on the surface. It is foolish to think this will not happen. In order to meet quotas or goals the temptation is to allow sex or race to trump all other factors. Therefore, the EEA presents the right tools, but utilises them in the wrong way. It is contended that it would be preferable if the words “...establishes short term numerical goals for the hiring and promotion of persons in designated groups in order to increase the representation...” in s.10(d) EEA instead read “...establishes a method for the comprehensive review of work practices and selection procedures and the implementation of outreach programmes providing for special treatment of persons in designated groups in order to attempt to increase the representation...”. In other words, there should be a greater focus on the means available to level the playing field, rather than on the need to redress an imbalance of numbers.

The Problem with Quotas and Preferential Treatment: Pitfalls of the EEA

As was established in the third chapter, equality is not about treating everybody the same; differences in treatment and special programmes may be required to achieve equality. However, although increased representation is praiseworthy, equal representation is not the epitome of equality and it should not be strived for at all costs. There are three separate but related criticisms of quota/goal-based systems that are paramount to this analysis.

Firstly, focusing on a redistributive aim by utilising numbers as an end in itself has its own limitations. As Fredman points out, the problem with simply relying on redistributive justice to do the work is that
it does not provide the engine for the removal of underlying discriminatory structures.\textsuperscript{155} In a similar respect to the argument with regards to accommodation in \textit{Meiorin} above, improving the representation of women and minorities does not guarantee the elimination of discriminatory practices as it does not demand a re-examination of existing systems. Besides, numbers may only have improved by forcing women and minorities to conform to the ‘norm’. This type of assimilationist approach should not be applauded.\textsuperscript{156} As Fredman argues “positive duties, to be truly effective, must do more than change the colour or gender make-up of existing structures but also reshape them.”\textsuperscript{157} In my opinion, re-shaping structures should be the aim of legislation in this area, and redistributive justice is derivative. Removal of prejudices and the promotion of diversity are paramount. These objectives are undermined if there is too much reliance on underrepresentation in terms of goals and timetables.

Secondly, in terms of our definition of equality, jumping to quotas or anything that may slip into quotas means the problem becomes the answer; irrelevant reasons, such as gender and race, are used to form the basis of differential treatment. Just like women and minorities were once denied the job because of sex or race, they are now being offered the job because of sex or race and white men now become the victims. Such an approach still leaves certain groups feeling neglected by the system and, thus, does nothing with regards to addressing societal attitudes. This type of treatment can legitimately be called “reverse discrimination”.

Thirdly, allowing irrelevant reasons to infiltrate the hiring process threatens the merit aspect of a ‘relevant reasons’ based approach. Merit is a key relevant reason that provides certainty, predictability and the greatest gains for society as a whole. Merit must remain the governing principle if we are to continue to respect individual equality in our efforts to achieve group equality. The

\textsuperscript{155} Fredman (2001), \textit{supra} note 61, at 165.
\textsuperscript{156} Sandra Fredman, \textit{supra} note 70, at 20.
\textsuperscript{157} Fredman (2001), \textit{supra} note 61, at 165.
temptation to allow goals to trump merit in order to avoid ramifications is real. However, in order to drive equality home and avoid further polarisation and resentment, each and every individual member of society must have an equal shot at employment and must not feel that they have been denied an opportunity simply because of an immutable characteristic unrelated to the job. In this sense, soft affirmative action measures aimed at equality of opportunity, such as encouragement and training, are simply an attempt to cure the foundations of merit. White males must not be under the impression that women are “job thieves” because they are lesser qualified but were nevertheless awarded the job in order to meet a numerical goal. Instead, women and racialised candidates should be seen to be achieving the job through hard work and dedication, rather than simply as an opportunity for them to prove themselves. The UK can learn from these mistakes. In order to avoid the criticisms related to quotas, the UK should steer clear of numerical goals.

**Conclusion: What Should the UK do? Recommendations for the Equality Bill**

Systemic discrimination undeniably exists. Affirmative action is an all-embracing label covering both good and bad policy initiatives aimed at addressing the systemic problem at the macro level. It can be broken down into three categories: 1) the elimination of discriminatory barriers; 2) special treatment strategies that a) focus on equality of opportunity and b) those that focus on equality of results or, in other words, equal representation.

At present the UK operates on the basis of a symmetrical, individual complaints model when it comes to anti-discrimination laws. Within this system there is very little scope for positive action, except at the pre-selection stage. The EU, however, sustains an equal opportunity policy, illustrated by art.2(4) of Directive 76/207, art.141(4) EC Treaty and the ECJ jurisprudence. This represents a thicker understanding of equality, recognising that even when men and women have equal access, the reality is that women will often fall at the final furlong due to sub-conscious, entrenched stereotypes.
Therefore, the ECJ has legitimised the operation of priority rules where two candidates are equally qualified, provided that they are not automatic and unconditional and each candidate is objectively assessed first. By introducing s.153 of the Equality Bill, the UK is attempting to bring domestic law in line with EU norms.

Critics of Harriet Harman’s positive action proposals in the Equality Bill argued that, by enacting the Bill, the UK would effectively commend and endorse ‘positive discrimination’; in other words, allow for white men to be discriminated against in an attempt to increase the participation rates of women and minorities whilst jeopardising merit. However, this is misconceived. Many of the criticisms of affirmative action are unfounded because of the analytical mess that exists in this area. In order to see the wood through the trees one must first untangle the branches. This paper has sought to clarify the theoretical considerations at play in the race for equality.

Real equality accepts the necessity of differentiated treatment where a relevant reason exists. This does not amount to discrimination. The preference of one equally qualified individual over another in these circumstances is not arbitrary. Instead, it recognises that a broader set of factors are at play, which give rise to a set of relevant reasons for tilting the balance in favour of one of the candidates. Past discrimination, effective role models and more efficient communication are all examples of what may constitute a relevant reason in these circumstances. Such an approach achieves a delicate equilibrium between individual justice and group justice. Requiring the candidates to be equally qualified and objectively assessed before the priority rule kicks in upholds the merit principle and ensures that white males, for example, are not unjustly denied the job. More importantly, however, it also recognises the problems of underrepresentation, which are indicative of systemic discrimination, and attempts to redress it rather than push it under the carpet. In order to achieve real equality systemic discrimination must be eliminated and this sometimes requires preferences to be made in favour of the disadvantaged group.
Therefore, the Equality Bill offers the right sentiments but it does not go far enough. The voluntary nature of the provisions means that the UK is still left with an individual complaints system which is inadequate for attacking discrimination on a systemic level. In this sense the UK can learn from Canada.

Canada embarked on this journey twenty five years ago with the introduction of employment equity. A survey of employers covered by the Employment Equity Act revealed that the implementation of the Act was what started them on the road to employment equity. Furthermore, Jain has set out some of the benefits of employment equity legislation which include sensitising employers to the changing demographics of Canada and encouraging them to design new and innovative plans to overcome the problem. The question is: how far should the UK go?

On this question the EEA should be applauded for its attempt at imposing positive obligations on employers, albeit only on a small minority, namely federal employers. In essence, the UK has this kind of structure in place under the Codes of Practice. However, not being legally binding, the Codes fail to provide a compelling mechanism for driving equality home. As Jain, Sloane, and Horwitz point out, “a real challenge is for organisations to move from a compliance mindset to one of commitment to the spirit of valuing a diverse workforce and respect for the individual.” The issue of voluntariness was addressed in the Abella report where it states: “Given the seriousness and apparent intractability of employment discrimination, it is unrealistic and somewhat ingenuous to rely on there being sufficient public goodwill to fuel a voluntary program.”

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160 Jain, Sloane, Horwitz, supra note 104, at 208.
161 Abella Report, supra note 5, at 197.
Therefore, it is recommended that either the Codes of Practice be given legal force or the Equality Bill be amended to include a focus upon the following two aspects: a) the elimination of discriminatory barriers; and b) the implementation of outreach programmes. McCrudden argues that “Employers should be encouraged to consider it necessary to review regularly the action taken to eradicate unlawful discrimination, assess the effectiveness of the steps taken, and consider what more needs to be done to achieve the objective.”  

In my view, encouragement is insufficient. Positive obligations need to be imposed on all employers requiring (rather than requesting) them to: monitor their workforce; identify areas of underrepresentation and investigate the possible reasons for underrepresentation; review work practices, job specifications, selection criteria and selection procedures; and adequately train both interviewers and other workers on the value of diversity in the workplace in an effort to actively encourage the removal of discriminatory barriers. The advantages of such an approach are that it raises employers’ awareness to the problem, spreads and shifts the burden of bringing about change on to employers rather than relying on individual complainants to bear the onus and will help to change attitudes within the workforce. This in turn will have a spill-over effect on society as a whole.

Furthermore, where underrepresentation has been identified, employers should be legally obliged to carry out outreach programmes according to their size and resources, with tax break incentives. In addition, they should be encouraged to have a rule in place similar to the one in Marschall that prescribes the hiring of the candidate from a disadvantaged group in preference to another, equally qualified candidate where an objective assessment of each determines that the two are indistinguishable.

However, the line must be drawn there; the EEA’s fixation on underrepresentation ventures too far into equality of results. The UK must avoid hard affirmative action in the form of quotas and

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162 McCrudden (1986), supra note 82, at 223.
numerical goals. These types of policy initiatives not only fail to ensure that discriminatory structures are dismantled, but also provide scope for irrelevant reasons - race and gender - to filter into the employment selection process at the risk of compromising individual merit. This is arbitrary and unjustifiable. It is best avoided by using underrepresentation as an informal indicator of the existence of a discriminatory practice rather than as a formal target.

Legislation along these lines would bring greater attention to the problem and encourage open-mindedness both within the workplace and in society as a whole. As Jain, Sloane and Horwitz point out: “There are limits to which constitutional and legislative enactment can change behaviour, attitudes and values. They remain critical, however, in reflecting the values, norms, and behavioural expectations that a society aspires to and that it seeks to implement through legal institutions and statutory and fair practice adherence.”\(^{163}\) Therefore, the Equality Bill has the potential to be the engine that drives equality home, but it has to be ready to take on that responsibility.

\(^{163}\) Jain, Sloane, Horwitz, supra note 104, at 221.
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